Introduction and Overview

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Just a few weeks prior to the start of the next millennium, ministers and heads of government from the 134 member governments of the World Trade Organization (WTO) will meet in Seattle to decide the agenda for future multilateral trade negotiations. Given the increasing attention paid to the WTO by many environmentalists, and the ongoing debate over the apparent conflict in trade and environment policy, it is clear that trade and environment issues will loom large at the Seattle meeting. How governments choose to deal with these issues will have important implications for both trade policy and environment policy well into the twenty-first century.

The issues raised in this debate are complex and touch on some of the most fundamental aspects of WTO concepts, principles, and rules. The complexity is further increased owing to the diversity of views and the number of stakeholders involved. Although all parties assign a fundamental priority to the protection of the environment, the perceived role of the WTO in achieving these objectives differs greatly across groups. Reaching agreement on significant changes in rules and practices will not be an easy task in an organization where decisions are adopted on the basis of consensus.

Many environmentalists, for example, are of the view that the WTO rules—and trade liberalization generally—accelerate unsustainable consumption and production patterns that cause resource depletion, loss of species, and other environmental degradation. They argue that WTO

rules constrain domestic legislators from protecting the environment by using trade measures to enforce environmental standards internationally. The inability in the WTO to discriminate between products on the basis of how they were produced runs contrary to the objectives of many environmentalists. Some environmental non-governmental organizations (NGOs) perceive the WTO as an instrument of globalization that is non-transparent and unaccountable to the public at large.

For their part, many developing countries are deeply suspicious of what could follow from changing the WTO rules and processes to meet the concerns of environmentalists. Restricting trade on the basis of how goods are produced for export, for example, may mean poorer countries being obliged to adopt standards applied by their developed counterparts in their own production processes. These standards may not be appropriate in the sense of reflecting the development priorities of the countries producing the goods, their resource endowments, or their available technology. In addition, it is feared that, although such policies may well be construed with good intentions in mind, they might also fall captive to protectionist interests. Further, if standards relating to the environment are accepted as a basis for trade discrimination in the WTO, why not other standards that relate to production methods such as labour standards?

On the other hand, many in the trade community (developed and developing countries alike) argue that the General Agreement on Tariffs and Trade (GATT)—and now the World Trade Organization—has been successful over the past half-century at doing what it has been clearly mandated to do. The WTO has two primary objectives: first, progressively to remove trade restrictions and distortions that protect uncompetitive producers and deny consumers the possibility to purchase goods and services at the most competitive international prices; secondly, to maintain the open and liberal multilateral trading system based on non-discriminatory rules as a means to ensure predictability and stability in world trade. They point to the fact that more than 6 trillion dollars worth of goods are traded according to WTO rules and almost 2 trillion dollars of world services. This figure represents 26 per cent of the world total output and is projected to increase to 45 per cent by 2010. Through eight rounds of trade-liberalizing negotiations, tariffs on industrial goods have been reduced from 45 per cent in 1947 to an average of

approximately 4 per cent today. International trade increased at a rate faster than economic growth by an average 2 per cent per annum between 1948 and 1997,[1] leading to higher standards of living and levels of employment and greater prosperity in many countries. The argument continues that trade liberalization is not a cause of environmental degradation, but rather a source of increased real resources that can be directed at the national level towards effective environmental management policies.

Although WTO rules (and those of GATT prior to it) may have brought stability and predictability to the world trading system, the sorts of objections raised by the environmental community, as well as the concerns of developing countries in addressing them, cannot be ignored. The challenge is how to deal with these concerns without severely damaging the credibility and usefulness of the WTO and the carefully negotiated Uruguay Round Agreements based on non-discrimination. Conducting international trade according to rules—rather than commercial or political power—is accepted by all WTO members to be one of its most important characteristics.

Not only is accommodating the perceptions of the role of the WTO held by the stakeholders complex, so too are the issues that are the subject of the trade and environment debate. In recent years much of the discussion has centred on the possibility of there being a natural, or in-built, potential for conflict between trade policy and policies relating to the environment. The numerous examples include: higher environmental standards in an importing country than an exporting country leading to a loss of international competitiveness; a lowering of environmental standards to gain international competitiveness; compensatory border adjustment measures to offset environmentally driven taxes or subsidies conflicting with trade rules; trade liberalization and economic growth leading to resource depletion and environmental degradation; cross-border pollution or damage to the global commons, with trade sanctions as retaliatory measures; disguised protection, with domestic standards tailored to discriminate against imports; and conflicting obligations in multilateral environment agreements and trade agreements. To these can be added: health concerns and the future WTO legitimacy of measures to restrict trade where standards differ across countries (e.g. with respect to trade in products derived from genetically modified

organisms); the role of precaution in the justification of these differing standards; the extent to which labelling products according to the process used to produce them provides a solution; and whether or not such labelling is in fact WTO legal.

WTO members recognized some time ago the complexity of the relationship between trade policy and environment policy. As a result of discussions that coincided with the later stages of the Uruguay Round, a Committee on Trade and Environment (CTE) was established by the WTO General Council in January 1995. The CTE terms of reference are far-reaching and indicate an early concern on the part of WTO members with ensuring that WTO rules are consistent with, and supportive of, environmental policies. The CTE reported to the first biennial meeting of the Ministerial Conference, and its work and terms of reference were reviewed in the light of its recommendations. This report was heavily negotiated, forwarded to ministers, and adopted in Singapore in December 1996. Although the work as described in the report has been comprehensive and addressed many of the complex issues described above, it has fallen short of fulfilling the expectations of those who saw it as a means to resolve the issues of concern of environmentalists. The work of this committee provides a reference point for the current thinking in the WTO. It is described in some detail in Appendix I.

The motivation behind this book is the belief that, for a variety of reasons, there is now a window of opportunity to move the debate on trade and environment forward. First, the WTO Seattle Ministerial Meeting in December 1999 will provide the opportunity for serious consideration of the issues to be addressed in whatever form the multilateral negotiations take in the year 2000. Secondly, a great deal of groundwork has been done in the WTO, by environmental NGOs, by various international organizations (e.g. the UN Conference on Trade and Development, the UN Environment Programme, the Organization for Economic Cooperation and Development), and elsewhere to introduce change if thought necessary. Comprehensive proposals on most of the major issues have been discussed at length in the WTO and many are described in the report of the CTE to ministers in Singapore. Thirdly, a great deal of work is already under way in the regular bodies of the WTO, such as the General Council and the Dispute Settlement Body, addressing many of the concerns of the environmental community.

These include increasing the transparency of WTO operations, accelerating the derestriction of documentation, and intensifying the contact between the WTO and public interest groups.

Also of considerable importance is the apparent political awareness in the industrialized countries that something needs to be done to build public support for future negotiations in the WTO, and possibly for a new round of multilateral trade negotiations. The United States President, in his message to the 1999 WTO High Level Symposium on Trade and Environment, emphasized the need to strengthen environmental protection; to ensure that trade rules support national policies providing for high levels of environmental protection and effective enforcement; and to achieve greater inclusiveness and transparency in WTO proceedings. In its communiqué from the 1999 meeting in Cologne, the G-8 urged WTO members to "fully take account of environmental considerations in the next round" and to clarify the relationship between key multilateral environmental agreements and principles and WTO rules.

Expressions of political will from the leaders of the industrial countries, however, are not enough to set a process of change in motion. As will be argued by some of the authors of the following chapters, many of the proposals related to trade and environment put forward by developed countries have lacked sensitivity to the needs of developing countries. They frequently do not pay due regard to core principles, such as: common, but differentiated, responsibility; the right to development; or even the right to basic human needs such as food, health, and education that developed countries take for granted. In other words, they do not respond to the concerns of developing countries. In a consensus-based organization where two-thirds of the membership comprises developing countries, their concerns cannot be ignored.

The intention of this book is to provide a constructive input into future WTO negotiations by elaborating the concerns of both developing countries and environmentalists. The intention is also to raise the awareness of a number of the key issues that will have to be addressed in any future negotiations. Meeting this objective has provided the chapters with a strong policy orientation. The contributors have been drawn from academia, government, and civil society, and each is a leading authority in his or her particular field. In providing the substantive chapters of this book, the contributors have been asked to utilize their wealth of knowledge

and experience in an effort to provide clear policy recommendations that will be useful within the framework of future WTO negotiations.

The book contains 11 chapters. The first chapter is a visionary overview by Rubens Ricupero of some of the principal considerations in the trade and environment debate. The next three chapters describe the various viewpoints on trade, environment, and the WTO of two groups of stakeholders—developing countries and environmental NGOs. Chapter 5 describes and comments on the WTO dispute settlement process, considered by many to be the heart of the WTO, and a key element in most of the policy chapters that follow. Each of the following chapters addresses a specific issue that will be central for any future multilateral trade negotiations that bear on trade and the environment.

Chapter 2, by Magda Shahin, examines trade and environment issues from the perspective of a developing country negotiator with considerable experience in how the debate has evolved in the WTO. The author raises many of the questions and expresses many of the concerns voiced by developing countries. She poses the question of whether developed countries are genuinely concerned over social and environmental issues at the international level or, rather, is it hegemonic and commercial interests that are the real motivators. Is linking trade to environment a justified concern with honest environmental goals or are additional protection measures at play? Irrespective of the answer to this question, the author draws attention to the difficulties of developing countries in dealing with the complex issues, given their resource constraints, poor information flows, and lack of scientific knowledge.

The author elaborates the position of many developing countries on specific topics addressed in the WTO; for example, the relationship between the provisions of the multilateral trading system and trade measures pursuant to multilateral environmental agreements (MEAs) , and the relationship between environmental measures and the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS). She also addresses market access issues and the concerns that have been expressed by many developing countries over the effect that eco-labelling schemes could have on their access to developed countries' markets. She cautions that multilateral environmental regimes and measures that go beyond a country's own borders, for the sake of protecting the environment, are "a flagrant violation of WTO rules and regulations, which do not allow for

extra-territorial measures." Today "we see growing concern by environmental groups at the national level forcing the issue of *national sovereignty* against the country's obligations to abide by WTO judgements."

In much of this chapter, a common theme is a concern over changing WTO rules to permit the regulation of trade on the basis of processes and production methods (e.g. with respect to the use of eco-labelling schemes) rather than on the characteristics of the products themselves. Justifying discrimination between "like products" and making market access for exports conditional on complying with production standards "would upset the entire trading system and would have devastating effects, in particular on developing country exports." This is a statement of the importance ascribed by developing countries in general to avoiding any discrimination in trade according to the manner in which exports are produced. In this sense, developing countries are not "natural allies" for those environmental NGOs that are critical of the WTO for not permitting discrimination according to production methods (e.g. on the basis of life-cycle analysis).

In fact, this concern emerges as a key issue not only in this chapter but in many other parts of the book—with respect to, for example, the accommodation of MEAs by the WTO, the use of unilateral measures to impose certain standards in other countries, revising the WTO exceptions provisions to accommodate environmental concerns, justifying standards on the grounds of protection of the environment, eco-labelling schemes based on acceptable methods of production, and many others. In offering advice to developing countries, the author states that they have to remain firm on their positions on trade and environment in regard to changing of the rules; "such a move would only serve as a prelude to the integration of the 'social clause' in the WTO, which has wider implications for developing countries and should be of more serious concern." Maintaining the consensus-based nature of the WTO and maintaining control over policy in the hands of its members (as against, for example, the Appellate Body deciding policy through litigation) are also important themes that express the concerns of many developing countries.

In chapter 3, Veena Jha and René Vossenaar point out that most developing countries are strongly resisting the inclusion of trade and environment in future trade negotiations and acknowledge that there may be sound reasons for them to oppose broad WTO negotiations

based on environmental considerations. They add that developing countries may have good strategic reasons for opposing the inclusion of environment in the build-up to the Seattle Ministerial Conference. However, the authors also argue that it may be difficult for developing countries to sustain their opposition to addressing the environment in future WTO negotiations. Therefore, the authors provide the elements of an initiative by the Secretary-General of UNCTAD to promote a "Positive Agenda" as an alternative approach to future trade and environment negotiations. Although the authors warn that the potential for consensus between developing countries may be limited, they suggest that such a positive agenda should promote, at least, the principle of common, but differentiated, responsibility and the closer integration of developing countries into the global economy.

Before outlining the elements of the agenda, the authors present what they consider to be the legitimate apprehensions of developing countries with respect to the WTO debate on trade and the environment. The authors assess the costs and benefits of engaging in discussions on trade and environment, and find that there is scope within the current framework to accommodate the concerns of developing countries. The approach adopted by the authors is to identify the points of entry for developing countries into a debate that they characterize as having been polarized so far.

It is not surprising that there is a considerable concordance of view with the previous chapter, particularly in identifying issues of concern to developing countries. Although a number of concerns are addressed, the authors assign priority to: accommodation, through a change in WTO rules, of trade measures taken pursuant to multilateral environmental agreements; accommodation of trade measures based on non-product-related production methods on environmental grounds, particularly in the context of eco-labelling; and greater scope for the use of the precautionary principle. All these issues are taken up in some detail in later chapters.

The authors also address an issue raised on a number of occasions in later chapters of the book, particularly the chapter by Daniel Esty: the pressure exerted by the non-governmental community for greater access to the WTO processes; for example, to its dispute settlement mechanism through the submission of *amicus briefs.* The authors note that civil

society—both non-governmental organizations and the business community—can play an important role in promoting a balanced trade and environment agenda. They flag, however, one of the reasons for resistance on the part of developing countries to proposals to open the WTO to greater participation from public interest groups. A number of proposals "that may be labelled under the heading 'transparency,' such as the those facilitating the submission of *amicus curae* briefs to dispute settlement panels, could, in practice, accentuate certain imbalances . . . because NGOs in the South have fewer financial resources to avail themselves of such opportunities." In the preceding chapter Magda Shahin expressed the same reserve but rather in the context of maintaining the intergovernmental character of the WTO and its tradition of being an organization where policy is decided by the member governments alone.

In chapter 4, Daniel Esty presents the view of many non-governmental organizations: broadly speaking, it is in the interests of the WTO itself to be more receptive to NGO views and involvement. In so doing, however, he first acknowledges the important role the WTO has to play as a facilitator of economic interdependence, but notes that, if the WTO is to play its role effectively, it must be seen as having legitimacy, authoritativeness, and a commitment to fairness. "Absent these virtues, decisions that emanate from the WTO will not be accepted as part of the process of global decision-making." To achieve this, the author considers it necessary for the WTO to become better connected to the non-governmental organizations that represent the diverse strands of global civil society.

The author proceeds to elaborate how the WTO could increase its legitimacy by demonstrating that it has genuine connections to the citizens of the world and that its decisions reflect the will of the public at large. In this respect, non-governmental organizations represent an important mechanism by which the WTO can reach out to citizens and build the requisite bridge to global civil society. The WTO could increase its authoritativeness through increased inputs from NGOs that have in-house analytical and technical skills and whose "*raison d'être* is to sharpen thinking about policy issues." They also provide an "important oversight and audit mechanism"—they can "act as watchdogs on national governments and report on whether they are fulfilling their WTO obligations." In the view of the author, fairness can be enhanced through

providing opportunities for the public to submit views to the dispute settlement process in the form of *amicus briefs* and to observe how outcomes are reached in the dispute process.

The author is aware that his case for the WTO to have broader links with non-governmental organizations will be challenged. He therefore sets about stating the points of resistance (some of which were raised in chapters 2 and 3), and offers his rebuttals. In short, his conclusion is that some of these arguments "represent little more than traditional trade community cant. Other concerns have a more serious foundation. But none of the claims bears up under scrutiny."

In chapter 5, William Davey makes the important observation that it would "make little sense to spend years negotiating the detailed rules in international trade agreements if those rules could be ignored." In the commercial world, security and predictability are viewed as fundamental prerequisites to conducting business internationally. For this reason a system of rule enforcement is necessary. Because the same WTO dispute settlement process is common to the enforcement of all its agreements, it is not surprising that it is referred to on numerous occasions in the following chapters.

The author describes the WTO dispute settlement process by outlining its four basic phases: consultations, the panel process, the appellate process, and the surveillance of implementation. He points to the fact that the WTO dispute settlement process differs in important ways from that of GATT. In particular, automaticity comes from the new rules under the Dispute Settlement Understanding (DSU) on the adoption of decisions taken in the WTO. The DSU also offers a more structured approach, with stricter timetables and greater surveillance to ensure that the panel or Appellate Body rulings are implemented. In the view of the author, the WTO dispute settlement system has operated well; WTO members have made extensive use of the system, suggesting that they have confidence in it.

Faced with the challenge of greater transparency for WTO operations, the author draws attention to the fact that "panel and Appellate Body reports (and all other WTO documents relating to specific disputes) are issued as unrestricted documents and placed on the WTO website immediately after their distribution to members." There have, however, been proposals, particularly by non-governmental organizations, that

the WTO dispute settlement proceedings be open to the public, that submissions be made public, and that non-parties be permitted to file "friend-of-the-court" submissions to panels. As argued by Esty in chapter 4, the credibility of the system would be much enhanced if it were more open and that openness would have no significant disadvantages. A similar concern is expressed in chapter 5. In addressing these concerns, the author reminds readers that "some members view the WTO system as exclusively intergovernmental in nature and hesitate to open it to non-governments. In their view, if a non-governmental organization wants to make an argument to a panel, it should convince one of the parties to make it and, if no party makes the argument, those members would view that as evidence that the argument is not meritorious."

The author discusses the ongoing review of the DSU, the principal concern of developing countries being the resource difficulty that many of them face when they participate in the dispute settlement system. The DSU addresses this problem by requiring the WTO Secretariat to provide legal assistance to such countries and by conducting training courses that either include or are exclusively focused on dispute settlement. The author considers the best hope for a significant improvement in dealing with inadequate developing country resources to be the proposed Advisory Centre on WTO law, which would be an international intergovernmental organization providing legal assistance to developing countries in respect of WTO matters.

Chapters 6 to 11 address a number of areas that are highly relevant for future WTO negotiations. What they all have in common is that they bear directly on important issues in the area of trade and environment. In chapter 6, David Schorr addresses one of the most discussed topics in the Committee on Trade and Environment; namely, the manner in which the removal of trade restrictions and distortions can lead to a "win–win" outcome. The first win comes from the fact that the removal of certain trade restrictions in developed countries will be beneficial to the environment of those countries themselves. The second win follows if the products facing the trade restrictions and distortions are of current or potential export interest to developing countries. In a win–win scenario, improvement of the environment in developing countries coincides with export expansion in developing countries. In this chapter, the author presents the results of his research on a particular case-study that repre-

sents a potential win–win scenario: the removal of government subsidies to fisheries. A particularly interesting feature of this chapter is that it demonstrates that it is possible to find areas where there is potential for WTO rules to be used positively to deal directly with environmental problems.

According to estimates cited by the author, 60 per cent of the world's fisheries are overexploited or already exploited at maximum rates, largely because there are "too many fishing boats chasing too few fish." His answer to the question of what keeps so many fishing boats afloat as fish stocks shrink is "huge government payments that promote excess harvesting capacity and reward unsustainable fishing practices." The link with the WTO is that many of these subsidies are "administered in open violation of existing international trade rules [and] constitute a profound failure of both economic and environmental policy." Removing these distortions would be beneficial for the preservation and building up of fish stocks worldwide. As far as developing countries are concerned, fish and fish products are an important export item for them as they account for over one half of world trade in these products and represent a large net export-earner for developing countries collectively.

The author describes the nature and extent of the subsidies paid to the fisheries sector as well as the relevant WTO obligations with respect to what is prohibited by WTO rules, what is actionable under the WTO, and what is non actionable. In his view, the Subsidies Agreement appears to create significant opportunities for challenges to fishery subsidies, although substantial questions about the legal limits on such challenges remain.

The broader question is whether there is a role for the WTO in addressing the problem in the case of fisheries. He concludes that "there are good reasons to contemplate a more direct role for the WTO on the fishery subsidies issue. First, fishery subsidies do cause trade distortions . . . The WTO has experience with handling subsidies-related disputes and with negotiating subsidies disciplines (e.g. the Agriculture Agreement). The operations of the WTO Subsidies Committee (including oversight of the notification process) could also provide the seed of a structure for a fuller notification and monitoring system on fishery subsidies. Finally, the WTO system offers a ready-made process for binding dispute resolution and a plausible context for negotiations to forge new fishery sub-

sidies rules." The author, however, cautions that the WTO does not hold all the solutions. It is clear that several classes of important fishery subsidies appear "unlikely" to be disciplined under these rules, whereas some environmentally beneficial subsidies remain subject to attack.

One of the principal obstacles to developing countries in accessing the markets of developed countries is meeting the required standards for their exports. Thus, chapters 7, 8, and 9 all deal with mandatory and voluntary standards to protect the environment and health. The two key agreements covering standards under the WTO are the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). Within both of these agreements, an attempt has been made to strike a balance between the sovereign right of members to adopt legitimate standards to protect to their citizenry and the adoption of standards that serve as unnecessary obstacles to trade. Striking the right balance is the difficult task that confronts trade officials when interpreting and enforcing the two agreements. The standards provided for under the agreements and their relationship to the legitimacy of WTO labelling are also an issue of considerable importance, particularly for developing countries whose market access could depend upon the status of these requirements.

In chapter 7, Steve Charnovitz analyses what promises to be one of the most important WTO agreements in coming years, namely, the Sanitary and Phytosanitary (SPS) Agreement. This is particularly the case for developing countries, and the author notes that there are surely "numerous questionable SPS barriers that impede exports to industrial countries." He expresses some surprise that so far there has been no SPS litigation involving a developing country. In his view, this is certainly related to the complexity of the subject-matter and the "complicated" nature of dispute settlement when it comes to SPS matters. He observes that rich countries "with large governmental legal staffs that are repeat litigants will have the advantage in SPS adjudication."

The author sets about explaining the SPS Agreement against the backdrop of three cases that have been dealt with by WTO panels: the complaint by the United States and Canada against a European Commission ban (begun in 1989) on the importation of meat produced with growth hormones; the complaint by Canada against an Australian ban (begun in 1975) on the importation of uncooked salmon; and a com-

plaint by the United States about a Japanese phytosanitary measure (begun in 1950) that banned imports of apples, cherries, nectarines, and walnuts potentially infested with coddling moth.

The author explains the SPS rules in terms of seven disciplines. First, any SPS measure is to be based on scientific principles. Second, governments are to ensure that their SPS measures are based on risk assessment. Third, distinctions in the levels of health protection are not to result in disguised restrictions on international trade. Fourth, SPS measures are not to be more trade-restrictive than required to achieve their appropriate level of protection. Fifth, SPS measures are to be based on international standards. Sixth, an importer is to accept an exporter's SPS measure as equivalent to its own if it achieves the level of protection. Finally, the WTO is to be notified of regulations and affected governments must be allowed to make comments.

As in other chapters, the author finds a flaw in an otherwise "reasonable" dispute settlement process—its secretive, closed nature. His view is that it "seems contradictory for governments to make sanitary decisions with open, transparent procedures and then have them reviewed at the WTO behind closed doors." Although this problem is common to all WTO dispute settlement, in his view it is perhaps most acute in the area of health and environment. He notes that "not only are panel sessions closed, but panels so far have been unwilling to entertain *amicus curiae* briefs submitted by non-governmental organizations. For example, when an NGO submitted an *amicus* brief to the *Hormones* panel, it was rejected by the WTO Secretariat."

The author considers that there are at least three controversial issues that should be addressed in any future WTO negotiations. The first is the highly intrusive regulatory consistency requirement, which provided the grounds on which the defendants in both the Australian *Salmon* and the Japanese *Agricultural Products* lost their cases. Second is the precautionary principle. The use of the precautionary principle is increasing under international law and has become the basis for environmental protection in several multilateral agreements such as the Biodiversity and Climate Change Conventions. The principle remains highly theoretical, however, because no practical implementation guidelines have been established. Several key questions in regard to its practical application remain unanswered. These questions include the definition of "irreversible

damage," the level of certainty necessary to justify action, and the issue of how to balance costs against potential damage. The third issue raised in chapter 7 relates to product labelling. This transcends both the SPS and the TBT agreements and is dealt with, more comprehensively, in the chapters by Arthur Appleton and Doaa Abdel Motaal.

With respect to improving the accessibility of developing countries and the protection offered to them by the SPS Agreement, the author is sceptical of the progress being made. Despite a recognition in the March 1999 report of the SPS Committee, the author believes that the Committee has made very little progress on enhancing technical assistance to developing countries, particularly with regard to human resource development, national capacity-building, and the transfer of technology and information. Consequently, the author proposes that, in Seattle or any subsequent negotiations, the Committee could be invigorated by giving it a broader mandate and authorizing more coordination with external agencies. The author concludes by noting that, although high SPS standards are needed throughout the world, "it is in developing countries that the regulatory regimes are weakest. By working with those countries to implement international food safety standards, the WTO could reduce potential barriers to food exports by those countries."

In chapter 8, Arthur Appleton examines eco-labelling schemes, the goal of which is to discriminate against products that are perceived to be less environmentally sound. Although the overall goal of eco-labelling schemes—using market forces to improve the environment—is laudable, the author analyses why they are of both systemic and commercial concern to developing countries. From a commercial perspective, producers in developing countries lack the resources and political expertise to influence the development of foreign labelling criteria. Also, developed countries may formulate eco-labelling criteria on the basis of conditions in their own countries that are not appropriate for developing countries. Further, wage considerations, regulatory requirements, and the enforcement of regulations are often viewed as sources of comparative advantage. Labelling schemes that alert consumers to serious discrepancies in the above may disadvantage developing countries and be based on what can be very subjective factors.

From a systemic perspective, the author introduces one of the "most controversial trade issues" which has been a recurring theme in this

book; namely, "whether a WTO member should be permitted to apply its trade policy to influence the selection of manufacturing processes in other countries." He notes that WTO members have little problem with the idea that a particular state can regulate production processes within its own jurisdiction, or that a member can establish performance-related environmental standards applicable to products within its own jurisdiction. Controversies arise when a member seeks to apply its laws to influence production processes and methods outside its jurisdiction.

The relevance of this issue relates to the fact that certain environmental labelling schemes provide a means of discriminating between products by informing consumers when production methods do not meet particular environmental, labour, or other criteria. From the trade law perspective, this issue is intertwined with the "like product" distinction made in WTO agreements that restrict the right of importers to discriminate between and among foreign and domestic like products on the basis of how they were produced. The result has been that "processes and production methods" that cannot be detected in the final product are not relevant in making a like product determination. The author provides a comprehensive legal analysis of the consistency or otherwise of eco-labelling schemes with key GATT provisions, such as most-favoured-nation treatment, national treatment, and limitations on the use of quantitative restrictions, as well as the Technical Barriers to Trade Agreement.

In the view of the author, whereas from an environmental or labour perspective the disregard for the manner in which a product was produced may be subject to criticism, from the trade perspective it is justified on the grounds that differentiating between goods based on production methods would increase trade barriers and result in increased trade discrimination. Developing countries have been particularly adamant in opposing trade restrictions based on production methods out of fear that they would lose economically.

However, the author notes that, although the policy considerations presented above are serious, at this point there is little evidence to suggest that eco-labelling schemes have significantly altered consumer buying habits or manufacturing practices. Instead, fears concerning labelling schemes currently appear exaggerated. He concludes from this that, from the developing country perspective, the strong opposition in

many quarters to labelling schemes may be a strategic decision. By keeping the attention of the trade community focused on eco-labelling, other more important issues, such as the internalization of environmental externalities and labour-related labelling, have been kept off the agenda.

In chapter 9, Doaa Abdel Motaal outlines the manner in which eco-labelling has been discussed in the Committee on Trade and Environment (CTE) and the Committee on Technical Barriers to Trade (CTBT) and, as such, provides insights into the extent to which there can be different interpretations on the part of various delegations of key WTO terminology. In the CTE, eco-labelling has been examined within the broader context of all product-related environmental requirements, and in the CTBT within the context of the Agreement on Technical Barriers to Trade (TBT).

The author identifies two main questions that have been raised by WTO members. The first concerns the coverage of the TBT Agreement; some members have questioned the extent to which the Agreement covers eco-labelling schemes. The second concerns the consistency of eco-labels with the provisions of the TBT Agreement. What has been discussed with respect to both these viewpoints has been the extent to which such schemes differentiate between products on grounds that are accepted by the WTO; namely, the manner in which the goods were produced.

The author points to a number of arguments to support the avoidance of differentiation on the basis of production methods. The first relates to the preservation of territorial sovereignty, because preventing discrimination on the basis of production methods is to prevent intervention from the outside in rule-setting within national boundaries. The author notes that it is "precisely because the WTO is able to offer such security to its members that its membership has expanded to the size it is today." The second is that avoiding differentiation based on production methods "allows countries to set standards (environmental or otherwise) that are appropriate for their level of development"; it "allows countries to trade their developmental needs against their needs for environmental protection in a manner that is consistent with how they themselves value these needs (and not on the basis of how others value them for them)." Finally, "differences in environmental absorptive capacities, priorities and problems

in different parts of the world can be taken into account" through providing for different production processes.

The author notes that, although it is "often stated that a North–South divide characterizes trade and environment discussions in the WTO . . . [n]umerous standpoints have been taken in the CTE on the extent to which eco-labels are covered by and are consistent with WTO rules . . . Although it may be argued that there is a distinctly Southern perspective in the CTE on this issue, it cannot be stated that a distinctly Northern viewpoint has emerged." Among the views that have emerged in the WTO are that: eco-labels are both covered by and consistent with the TBT Agreement; they are not covered by the TBT Agreement but scope needs to be created for them; they are not covered by the TBT Agreement and creating scope for them could endanger the trading system; and they are inconsistent with the TBT Agreement and should not find any accommodation within the WTO system.

In chapter 10, James Cameron examines the Precautionary Principle and its importance and relevance with respect to trade agreements. He identifies the principle as "part of a system of rules designed to guide human behaviour towards the ideal of an environmentally sustainable economy. Fundamentally, it provides the philosophical authority to take public policy or regulatory decisions in the face of scientific uncertainty." The author notes that the "precautionary principle began to appear in international legal instruments only in the 1980s, but it has since experienced what has been called a meteoric rise in international law." He describes it as a statement of commonsense, "with utility in balancing the competing concerns of economic development against limited environmental resources. The economics of globalization continue to place ever-increasing demands on resources while increasing the efficiency of their use. This essential paradox, together with well-organized opposition to trade liberalization from the environment lobby, has informed the search for balance between trade and environment policy."

This chapter details a brief history of the principle, as evidenced in the usage of explicit precautionary language in law. It then analyses in some detail the core concepts inherent in the precautionary principle and examines the status of the principle in international law. It discusses a number of procedural aspects of implementing the principle, and finally

reviews the precautionary principle in international trade situations, specifically those within or related to the WTO.

The author recognizes that the principle is an "elusive concept," and therefore has questionable status in international law, or "at present . . . is not a term of art." However, the precautionary principle "does have a conceptual core"; it reflects "a lack of certainty about the cause-and-effect relationships or the possible extent of a particular environmental harm. If there is no uncertainty about the environmental risks of a situation, then the measure is preventative, not precautionary. In the face of uncertainty, however, the precautionary principle allows . . . for the state to act in an effort to mitigate the risks. Put best, 'the precautionary principle stipulates that where the environmental risks being run by regulatory inaction are in some way uncertain but non-negligible, regulatory inaction is unjustified'."

According to the author, the WTO has already adopted sustainable development—and the notion of the precautionary principle—as an orientation for trade liberalization. He draws attention in this respect to the Preamble to the Agreement Establishing the WTO, which refers to "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." The importance of the precautionary principle for international trade agreements is also underscored by the fact that it is directly relevant for two WTO agreements: the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. At issue with respect to these agreements is the extent to which measures can be taken to restrain trade in the absence of scientific evidence, a consideration also taken up by Steve Charnovitz in relation to the SPS Agreement. Additionally, the exceptions provisions of GATT can be informed by the principle, and the author outlines its significance in some of the most controversial WTO dispute settlement cases. The author also draws attention to the extent to which the precautionary principle has become an important principle for some of the most important multilateral environment agreements, some of which are identified by Duncan Brack in the following chapter as being potentially inconsistent with WTO rules.

In chapter 11, Duncan Brack examines the key issues in the debate over how best to reconcile the two objectives of environmental protection and trade liberalization as they emerge in two bodies of international law—that found in multilateral environmental agreements (MEAs) and those of the multilateral trading system overseen by the WTO. Trade liberalization and environmental protection may both be desirable objectives, but the legal regimes that govern them are developing largely in isolation. In the view of the author, "a failure to resolve the *potential* conflict between them can lead only to actual conflict, undermining both. The time to act is now." This chapter summarizes the key issues at stake, examines various options for the resolution of the debate, and concludes that a new WTO Agreement on MEAs would provide the optimal solution.

The view of the author is that "the biggest danger in this debate is that no political impetus will be given to it and nothing will in the end be resolved. It is entirely possible to argue, for example, that most MEAs do not contain trade provisions, that there has never been a WTO dispute involving an MEA, and that recent panel and Appellate Body findings have shown that the WTO is sensitive to the environmental imperative; therefore, no action is required." Also, the authors of both chapters 2 and 3 elaborated the misgivings of a number of WTO members with respect to modifying WTO rules to accommodate inconsistent WTO measures as contained in MEAs.

The author is of the view that inaction in this important area "would be a profound mistake. MEAs are growing in number, in scope and in importance, matching the growing evidence of global environmental degradation. In some cases they will need to impact international trade if they are to be implemented effectively." The author considers that there have already been too many instances of multilateral trading system incompatibility arguments "being used as weapons in MEA negotiations to retard their development."

Nearly 200 MEAs now exist, with memberships varying from a relatively small group to about 170 countries—which means in effect the whole world. The main global MEAs include: the 1973 Convention on International Trade in Endangered Species (CITES); the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the 1989 Basel Convention on the Control of Transboundary Movements of Haz-

ardous Wastes; the 1992 Rio agreements (the Framework Convention on Climate Change, the Convention on Biological Diversity, and the Convention to Combat Desertification). Others agreed recently, but not yet in force, include the 1997 Kyoto Protocol on climate change and the 1998 Rotterdam Convention on hazardous chemicals in international trade. There are also draft MEAs still under negotiation, including the convention on the control of persistent organic pollutants, and the Biosafety Protocol to the Biodiversity Convention.

The author poses the question of whether the use of trade measures in these MEAs against WTO members be regarded as an infringement of WTO rights. The author concludes that "there is a *potential* for conflict"; for example, WTO members are not permitted to discriminate between traded "like products" produced by other WTO members, or between domestic and international "like products," yet CITES, the Montreal Protocol, and the Basel Convention discriminate between countries on the basis of their environmental performance, requiring parties to restrict trade to a greater extent with non-parties than they do with parties.

The author examines various possible routes to resolving the issue and concludes that the "distinctly preferable" route is to create a new WTO side agreement. The advantage is that "it avoids attempting to amend existing rules, with probable implications for a wide range of topics; it creates a very clear set of rules which would apply only to MEAs (i.e. which would not encourage further unilateral actions); and it is probably easier to negotiate." The author elaborates on the content of such a WTO side agreement to accommodate MEAs in the WTO context.

Note

1. These data are drawn from http://www.wto.org/wto/anniv/intro.htm.

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