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RESOLVING THE TRADE AND ENVIRONMENT DEBATE: IN SEARCH OF A NEUTRAL FORUM AND NEUTRAL PRINCIPLES

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INTRODUCTION

The clash between international trade regulation and environmental protection has come to the forefront of international public interest in recent years, fueled in large part by the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), and some recent trade challenges, most notably the Tuna/Dolphin GATT dispute settlement proceeding. In each of these trade matters, trade rules or interpretations of them are being expanded in ways that threaten the viability of environmental regulations. Moreover, these trade developments are part of a trend in which the international trade regime is reaching out to subject environmental regulations to its rules and processes. Not surprisingly, the environmental community has expressed outrage at seeing its hard-fought gains threatened by expanding trade rules.

The environmental community's outrage stems from the fact that existing trade rules and processes are not well suited to the nature of environmental problems and regulations. Professor John Jackson acknowledges that there is an imperfect fit, at best, between the trade regime and environmental protections. Thus, he recognizes that if the trade regime is to determine the vitality of environmental measures, extensive changes must be made both to the governing trade rules and to the processes by which such rules are developed and implemented.

Professor Jackson's solution, however, is to accept the preeminence of the trade regime and to make relatively minor adaptations to it over time to make it more hospitable to environmental regulations. In the meantime, existing and anticipated environmental regulations will be subjected to the trade regime, and accordingly may be undermined or derailed by the trade rules. Ultimately, the adaptations that are made to the trade system, assuming there are any, will likely not go far enough toward ensuring the viability of much-needed environmental regulation. For these reasons, allowing the trade system to subsume environmental matters within its purview, in the hope that the trade system will adapt itself to be more hospitable to such matters in the future, is an unacceptable course of action.

The trade and environment debate should begin with the fundamental question—which Professor Jackson and many others associated with the trade world assume away—of whether the trade regime should be the

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preeminent system to which environmental protections are subordinated.¹ In addressing this question, the issue of process is key. For that reason, this article begins by describing the normal context in which environmental measures are adopted and implemented, and how the trade system offends the notions of fair play that are the norm in that arena. Next, this article discusses how existing trade rules and processes are stacked against effective solutions to environmental problems. As a result of the biases inherent in trade processes and rules against environmental measures, the preeminence of the trade system over environmental regulations cannot be accepted, even with the promise of the types of modifications suggested by Professor Jackson. Instead, conflicts between trade and the environment must be resolved in a neutral forum that is composed of both trade and environmental government officials, and that has meaningful input from environmental organizations.

I. THE UNDERPINNINGS OF SUCCESSFUL ENVIRONMENTAL REGULATION: INFORMATION, OPENNESS, AND PUBLIC INPUT

An open regulatory system is essential to the development of effective environmental regulations because such regulations are generally adopted in response to scientific evidence of a problem and a public demand for action. Moreover, historically few powerful economic interests with access to governmental decisionmakers have had a stake in promoting effective environmental solutions. To the contrary, such vested interests have often had a very strong interest in thwarting such solutions, and have had the economic and political power to have that effect. Yet, closed regulatory systems tend to allow such economic interests to influence the process, while keeping out environmental and other interests that lack economic clout. As a result, environmental advocates have been most successful in forging effective solutions to environmental problems in open systems in which they have had (1) the ability to amass scientific evidence of the existence and nature of the problem, and (2) access to the decisionmaking process.

The United States' system ensures the requisite openness and access through several means. The public is guaranteed access to vast stores of

1. The assumption that environmental regulations are subject to the trade regime's control pervades the GATT Secretariat's recent analysis of the intersection of trade and the environment, see GENERAL AGREEMENT ON TARIFFS AND TRADE SECRETARIAT, TRADE AND THE ENVIRONMENT (1992) (advance copy) [hereinafter GATT SECRETARIAT], as well as the GATT Working Group on Environmental Measures and International Trade, whose first tasks are to review trade restraints in international environmental agreements and to consider transparency of national environmental laws with trade effects. GATT to Focus on Trade Environment Link, GATT Focus, Oct. 1991, at 1. The predictable opposition by the environmental community to this assumption has been misinterpreted as being driven by isolationism or by a desire to have an ineffective world trade system. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1252 (1992). To the contrary, the environmental community objects to having its hard-won gains lost in a system that has been developed by, and is answerable to, the economic concerns that often have fought against those gains in the original forum.

government information through the largely open and accountable lawmaking process, through requirements that agency regulations and determinations, as well as their rationales, be publicly available,² through the Freedom of Information Act, and through the open meeting requirements of the Government in the Sunshine Act. The lawmaking process is an open one, with the capacity to amass volumes of information through congressional hearings, research, and reports. Administrative rulemaking and adjudicatory proceedings, which likewise develop extensive factual records, are a matter of public record, as are court proceedings and decisions.³ The Freedom of Information Act enables the public to obtain information from federal agencies, unless its release will cause the types of harm specified in the Act's exemptions to disclosure,⁴ and the Government in the Sunshine Act requires multiheaded agencies to hold their meetings in public.⁵ These procedural guarantees, particularly the Freedom of Information Act, ensure that the public has access to final actions of agencies and the bases for such actions, even where the actions involve international issues and proceedings.

The public is provided access to decisionmaking processes through various means. First, through contacts with congressional representatives, their staffs, or other congressional offices, the public can obtain information about what actions are being proposed in Congress and can provide input into the lawmaking process. Because of the prominence that environmental issues have in the public's mind, many legislators are receptive to overtures by environmentalists to seek solutions to specific environmental problems. An interested legislator can obtain information from federal agencies about the nature of a particular problem and the actions being taken or considered to address it. Legislators can hold hearings to obtain additional information from federal agencies or outside experts. They can also introduce legislation to forge solutions or to curb undesirable federal actions.

Second, under the Administrative Procedure Act, the public is provided notice of proposed regulations and an opportunity to submit comments, which must be considered by agency decisionmakers in developing their final regulations.⁶ These rights extend to environmental matters with international implications. For example, the Environmental Protection Agency sought public comment on its proposed rule implementing the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).⁷

Third, environmentalists may participate in agency adjudicatory proceedings and court proceedings by intervening and assuming party status in the proceeding or by submitting *amicus curiae* briefs laying out their views. While direct participation rights are obviously preferable, environmental

2. Freedom of Information Act, 5 U.S.C. § 552(a)(1)-(2) (1988).

3. Administrative Procedure Act §§ 3-7, 5 U.S.C. §§ 553-557 (1988).

4. 5 U.S.C. § 552.

5. 5 U.S.C. § 552b.

6. 5 U.S.C. § 553.

7. 53 Fed. Reg. 30,566 (1988).

advocates may also submit expert opinions and other scientific evidence to the parties to the proceeding. The parties may then submit the information to the tribunal in support of their position. Because the underlying proceedings are public, interested outsiders can learn enough about the proceeding to make a meaningful contribution through these means.

Fourth, not only do these access rights enable environmentalists to obtain information and to participate in decisionmaking processes, but there are also safeguards against the undue, secret influence of countervailing interests. Notions of fair play, embodied in constitutional protections, as well as in ethics and conflict of interest laws, guard against government decisionmakers having a direct, financial stake in the outcome of a proceeding over which they have control.⁸ Courts and most agencies also have rules that prohibit secret, *ex parte* contacts. In addition, the Federal Advisory Committee Act establishes openness and balance requirements for federal advisory committees, which in addition to requiring open meetings and records also prohibit advisory committees from representing only one point of view on the issues before them or from being unduly influenced by special interests.⁹

It is against this backdrop of access to information and to government decisionmaking processes that environmentalists have had some, though obviously not complete, success in forging solutions to environmental problems. It is also because of public access to normal decisionmaking processes that recent Administrations and industry advocates have sought to move their access and influence underground. Vice President Quayle's Council on Competitiveness (Council) is the epitome of this effort. This body, which is nearly identical in function and method of operation to its predecessor, then-Vice President Bush's Task Force on Regulatory Relief (Task Force), provides an avenue for industry input into the regulatory process behind closed doors. Because the Council refuses to comply with the Freedom of Information Act or public rulemaking procedures, it facilitates the type of secret, *ex parte* contacts that are otherwise prohibited or sharply curtailed.¹⁰ This refusal also deprives the public of information regarding which entities are making overtures to the Council and about what actions are being taken in response. The Council and the Task Force have been receptive to such industry input and have often delayed and derailed regulatory initiatives that federal agencies had decided to pursue on the basis of public input and public rulemaking processes.¹¹ On the domestic level, the Council and

8. 28 U.S.C. § 455 (1988); 18 U.S.C. §§ 205, 207, 208 (1988); Ethics in Government Act of 1978, 5 U.S.C. §§ 401-408 (1988).

9. 5 U.S.C. app. §§ 5, 10 (1988).

10. Public Citizen has challenged the Task Force's refusal to comply with the Freedom of Information Act. A district court ruled that the Task Force is an agency subject to the Freedom of Information Act, but that ruling is on appeal. *Meyer v. Bush*, No. 92-5029, 1991 U.S. Dist. LEXIS 13626 (D.D.C. Sept. 30, 1991).

11. PUBLIC CITIZEN, *RISKING AMERICA'S HEALTH & SAFETY: GEORGE BUSH & THE TASK FORCE ON REGULATORY RELIEF* (1988); PUBLIC CITIZEN & OMB WATCH, *ALL THE VICE*

the Task Force violate the principles of openness and access that have been the bread and butter of the environmental community. The result almost uniformly has been weaker environmental regulations that have been much longer in coming than they otherwise would have been.

The trade system, both in terms of its international operations and the way in which the United States participates in it, is at odds with these principles of openness and access. Thus, the public is shut out of international trade negotiations by the secrecy that pervades the negotiating process. International trade negotiations are conducted in a far more secret manner than international environmental negotiations, where drafts and alternative positions are discussed openly, presumably because national leaders recognize that they need to mobilize support for environmental solutions and that publicity is one way to do so. If the intersection between trade and the environment is resolved in trade negotiations, the public will be kept in the dark until the result is announced.

The NAFTA negotiations are illustrative. During the negotiations, the countries refused to make public any draft agreements or summaries of the status of the negotiations. When a draft text was leaked, the official reaction was to deny the accuracy of the draft in light of subsequent negotiations, rather than to include the public in the debate over its terms.¹² Moreover, even after the United States Trade Representative and her counterparts from Mexico and Canada reached a final agreement on the NAFTA on August 12, 1992, the Bush Administration refused to provide the public with the terms of that agreement.¹³ All that was made public in August 1992 was a summary of the NAFTA prepared by the negotiators for public release and the Administration's press materials.¹⁴ In this way, the Administration was able to present the NAFTA in the best possible light without enabling anyone to analyze it and present a differing, more critical viewpoint. Ordinary principles of openness normally guard against this type of one-sided presentation of proposed actions.

One means by which environmental information about governmental actions is generated and made public, including information about inter-

PRESIDENT'S MEN: HOW THE QUAYLE COUNCIL ON COMPETITIVENESS UNDERMINES HEALTH, SAFETY & ENVIRONMENTAL PROGRAMS (1991).

12. *EC Negotiators Attack U.S. GATT Offer Exempting Key Sectors in Service Talks*, 9 Int'l Trade Rep. (BNA) 516 (Mar. 25, 1992).

13. Letter from the Office of the United States Trade Representative to Public Citizen (Aug. 19, 1992) (on file with author). In response to Public Citizen's Freedom of Information Act request for the terms of the NAFTA, the office released the negotiators' summary and refused to release any further details. Letter from Public Citizen to the Office of the United States Trade Representative (Aug. 17, 1992) (on file with author). See also *Sen. Moynihan Says NAFTA Text Should Be Provided to Public*, 9 Int'l Trade Rep. (BNA) 1416 (Aug. 19, 1992); *Gephardt Urges Bush to Reveal Details of Proposed North American Trade Pact*, 9 Int'l Trade Rep. (BNA) 1567 (Sept. 2, 1992).

14. Governments of Canada, the United Mexican States, and the United States of America, Description of the Proposed NAFTA (Aug. 12, 1992) (on file with author); White House Fact Sheet: The North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1424 (Aug. 12, 1992).

national agreements, is through the preparation of environmental impact statements. Such statements must contain an analysis of the environmental effects of proposed actions and their alternatives.¹⁵ They are generally prepared in a draft form, which is circulated to the public for comment.¹⁶ The final statement, which responds to such comments, is then made available to the public along with the final decision.¹⁷ Federal agencies have generally prepared environmental impact statements on international environmental agreements before the submission of the agreements to Congress for approval.¹⁸

This is not the case with trade agreements. Neither the Office of the United States Trade Representative (Office), nor its predecessor, has ever prepared an environmental impact statement on a trade agreement. In litigation over the Office's refusal to prepare such statements on the Uruguay Round and NAFTA, the Office made it clear that it has no intention of ever doing so.¹⁹

While the environmental community is largely shut out of trade negotiations, there is an elaborate system of industry advisory committees that have access to information during the negotiations and that provide input to the United States' negotiators.²⁰ Until recently, none of these committees had any representatives from the environmental community, and even after the United States Trade Representative succumbed to political pressure to appoint some environmentalists to its committees, only five of the more than thirty such committees have any environmental representation.²¹ The Office takes the position that no such representation is legally required on the other committees and, therefore, it has refused to make any additional

15. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1988).

16. 40 C.F.R. §§ 1502-1503 (1988).

17. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.9(b), 1503.4, 1506.9 (1991).

18. *See, e.g.*, U.S. DEP'T OF COMMERCE, ENVIRONMENTAL IMPACT STATEMENT ON RENEGOTIATION OF INTERIM CONVENTION ON CONSERVATION OF NORTH PACIFIC FUR SEALS (1976); U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT ON AGREEMENT BETWEEN THE UNITED STATES & CANADA FOR THE CONSERVATION OF MIGRATORY CARIBOU & THEIR ENVIRONMENT (1980); U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT ON CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS (1979); U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT ON NEGOTIATION OF AN INTERNATIONAL REGIME FOR ANTARCTIC MINERAL RESOURCES (undated); U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT ON RATIFICATION OF CONVENTION ON PREVENTION OF MARINE POLLUTION BY DUMPING WASTES AND OTHER MATTER (1973); U.S. DEP'T OF STATE & EPA, ENVIRONMENTAL IMPACT STATEMENT ON INCINERATION OF WASTES AT SEA UNDER THE 1972 OCEAN DUMPING CONVENTION (1979).

19. Defendants' Statement of Material Facts Not in Dispute ¶ 2, *Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139, 140-41 (D.D.C.) (No. 91-1916), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992) (dismissing case on ground that there was no jurisdiction in absence of final trade agreement). A second case has been filed, challenging the Office's failure to prepare an environmental impact statement on the NAFTA. *Public Citizen v. Office of the United States Trade Representative*, No. 92-2102-CRR (D.D.C. filed Sept. 15, 1992).

20. 19 U.S.C. § 2155 (1988).

21. Membership Rosters from the Office of the U.S. Trade Representative and the U.S. Department of Commerce (on file with author). These committees have over 800 members.

appointments.²² The few environmental representatives that have been appointed are sworn to secrecy and cannot share what they learn on the committees with others in their own organizations or in the environmental community. Moreover, virtually all of the meetings of these advisory committees are held in secret and their records are uniformly withheld from the public.²³

Before an international agreement becomes binding on the United States, it must be approved by Congress.²⁴ International environmental agreements are subject to congressional hearings and full congressional debate before Congress decides whether to approve them. In contrast, trade agreements are subject to fast-track procedures that sharply limit congressional hearings and debate, require a congressional "yes" or "no" vote on the agreement and the implementing legislation as they are submitted by the Administration (meaning that no amendments are permitted), and require a vote within a short time (fewer than sixty to ninety legislative days) after the agreement and its implementing legislation are submitted to Congress.²⁵

The international trade system continues to be closed after a trade agreement is put into effect. The GATT dispute settlement process is illustrative. When a contracting party to the GATT lodges a trade challenge with the GATT Secretariat, GATT rules and informal procedures cloak that dispute in secrecy until the GATT Council adopts the determination of the GATT dispute settlement panel.²⁶ At that time, the panel's decision is made public. The parties to the dispute then generally make their submissions available to the public as well, although they tend not to make their adversary's submissions available without obtaining the submitter's consent.²⁷ However, transcripts of the panel's proceedings are not made public, even after the passage of time.²⁸ While this secrecy is mandated not by the

22. Letter from Joshua Bolten, General Counsel, Office of the U.S. Trade Representative to Public Citizen (Feb. 3, 1992) (on file with author).

23. *E.g.*, 57 Fed. Reg. 39,270-71 (1992).

24. U.S. CONST. art. I, § 8; 19 U.S.C. §§ 2191 (b)(1), 2903(a)(1)(C) (1988).

25. 19 U.S.C. § 2191(c)-(g).

26. GATT Office of Legal Affairs, Suggested Working Procedures, ¶¶ 2-3 (on file with author) [hereinafter GATT Working Procedures].

27. In *Public Citizen v. Office of the United States Trade Representative*, No. 92-656-GAG (D.D.C. filed Mar. 18, 1992), the Office has described and defended its practice of requiring the consent of its adversaries before making their submission public. The Office has allowed for deviations from its general policy upon the agreement of the parties to the dispute, which is what happened with respect to the submissions to the GATT panel in *Report of the GATT Panel, United States—Measures Affecting Alcoholic and Malt Beverages* (Feb. 7, 1992). In response to numerous requests for the panel report, and Public Citizen's Freedom of Information Act request seeking the United States' submissions to the panel, the Office refused to release these documents until it reached an agreement with Canada to do so. That agreement came before the GATT Council considered adopting the panel report. See *Understanding Regarding Notification, Consultation, Dispute Settlement & Surveillance*, para. 15, GATT Doc. L/4907 (Nov. 28, 1979), BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISSD] 26th Supp. 210, 213.

28. GATT Working Procedures, *supra* note 26, ¶ 3.

GATT itself, but by practice, it would be required to an even greater extent by the actual text of the NAFTA.²⁹

The United States has extended this secrecy to its own submissions, even though nothing in the GATT requires it do so. Thus, the United States refuses to make its submissions to GATT panels available to the public until after the GATT Council adopts the panel's report. In the Tuna/Dolphin case, this secrecy prevented the public from scrutinizing, until after the culmination of the proceeding, whether the United States was mounting a vigorous defense of a key environmental law that was the product of open, democratic processes domestically, but which the Administration refused to implement until ordered to do so by a court.³⁰

As Professor Jackson points out, these rules of secrecy are often honored in the breach.³¹ Thus, the parties to a dispute may choose to publicize their position for political reasons. Moreover, panel decisions are distributed to all GATT contracting parties before the Council decides whether to adopt them. Leaks at this stage, which are not uncommon, facilitate biased depictions of the dispute and the panel's actions. In several recent disputes, the Office of the United States Trade Representative has been able to present its gloss on the dispute before the public or the press could obtain a copy of the panel decision and evaluate it for itself. This type of spin control for political advantage would be prevented by contemporaneous public availability of official submissions to, and reports from, panel proceedings.³²

The GATT dispute settlement proceedings are closed in another significant respect. Under GATT procedures, nongovernmental organizations are not permitted to participate in the proceedings. Moreover, the panels are comprised of three (and sometimes five) trade experts who are generally well educated in, and supportive of, the GATT system, but lacking in environmental expertise. As such, where a dispute concerns an environmental matter, there is often a need for scientific expertise that the panel does not have. However, there is no mechanism for GATT panels to obtain such technical assistance. As a result, such assistance thus far has been provided on an ad hoc basis at best.³³ Moreover, because the proceedings are

29. North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., art. 2012(1), available in LEXIS, GENFED-EXTRA Database; WL, NAFTA Database (awaiting ratification as this article went to press) [hereinafter NAFTA].

30. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). In *Public Citizen v. Office of the United States Trade Representative*, No. 92-656-GAG (D.D.C. filed Mar. 18, 1992), Public Citizen is challenging the Office's refusal to make public its submissions to GATT panels at the time that they are submitted to the panel.

31. Jackson, *supra* note 1, at 1255.

32. Affidavits of Lori Wallach & Robert Housman, *Public Citizen v. Office of the United States Trade Representative*, No. 92-656-GAG (D.D.C. filed Mar. 18, 1992).

33. The World Health Organization presented testimony on the health basis for cigarette regulation in the panel proceedings leading to General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on Thai Restrictions on Importation of and Internal Taxes

conducted in secret, and presumably most countries are like the United States and do not make their submissions publicly available during the proceedings, environmentalists are unable to provide information to those governments that are parties to the dispute or to the tribunal. Such information might assist the parties and tribunal in obtaining a better understanding of the environmental issues. Because there is no procedure for environmentalists to share information that pertains to a dispute, the GATT dispute settlement system is poorly suited to resolving disputes over environmental regulations.

Aside from trade negotiations and dispute settlement, another disturbing development in the Uruguay Round of the GATT and NAFTA negotiations is the role proposed for the Codex Alimentarius Commission (Codex), a body administered jointly by two United Nations organizations, the World Health Organization and the Food and Agriculture Organization. In the food safety sections of the 1991 draft GATT agreement, and the NAFTA, food safety standards established by Codex would be presumed not to impose unfair trade barriers, while food safety standards providing greater public health protection than a Codex standard would have to meet certain other requirements in order to pass muster.³⁴

The process by which Codex establishes food safety standards has historically been closed to public health advocates and environmentalists. Thus, government delegates have participated in Codex proceedings, with the assistance of industry representatives, but until recently with no assistance from the health or environmental community. Codex meetings at which standards are debated and adopted are held in secret, and no record of the proceedings is made public. Draft Codex standards are not made available to the public until well into the process, and there is no mechanism for the public to provide input directly into the Codex process. Instead, a public health organization must persuade a governmental participant to submit its position to Codex. When Codex obtains input from Codex-established expert bodies, for example, on pesticide residue standards, that advice is also developed in secret, but with extensive input from industry. Moreover, there are no safeguards to ensure that the expert bodies are balanced in terms of their perspectives on the issues, and that the participants do not have undue ties to industry.

The process by which the United States formulates its position on, and participates in, Codex matters is also contrary to normal principles of

on Cigarettes, 30 I.L.M. 1122 (1991) [hereinafter Thailand Cigarette Panel Report], while no outside experts or interests presented evidence in General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna/Dolphin Panel Report]. It may be more than a coincidence that the Thailand Cigarette Panel recognized Thailand's right to regulate cigarette sales and promotion for public health reasons, while the Tuna/Dolphin Panel found the tuna import restrictions to be impermissible.

34. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]; NAFTA, *supra* note 29, art. 755.

openness and access. As a general rule, the United States' positions on Codex standards have been developed by governmental officials without the type of public participation that is required when comparable domestic standards are developed. In other words, there is no public notice of the proposed standards and no institutionalized opportunity for public comment. Instead, the principal avenue for outside participation in the development of Codex standards has been the advisory processes established by the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA). In the past, the agencies have solicited outside advice in two stages. First, they have solicited advice from industry advisors on the positions to be taken by the United States at an upcoming Codex meeting. They have done this by providing industry representatives with the agenda for upcoming Codex meetings, a draft United States' position, and background documents on the matters on the agenda. The agencies have thereafter convened a meeting (or meetings) of the industry representatives for the purpose of obtaining their advice on the U.S. positions. Second, the agencies have invited a group of industry advisors to accompany the United States' delegation to the Codex meeting. These advisors have advised the delegation on matters that have arisen during the course of the meeting. The agencies have not (1) provided public notice of the committees' meetings; (2) opened the committees' meetings to the general public; (3) made the United States' position and background documents and the advisors' responses available to the public; and (4) ensured that the committees had a balanced representation. Indeed, until recently, the Codex advisory committees have been composed exclusively of industry representatives, ranging from chewing gum manufacturers to the chocolate industry.³⁵ These industry-dominated committees that exert their influence on government decision-makers behind closed doors run counter to the open processes by which domestic food safety standards are developed.³⁶

As this discussion demonstrates, the clash between trade and the environment is as much a product of process as of substance. If the trade system operated more openly and provided more avenues for public input, then there might be less opposition to having it dictate the viability of environmental regulations. Of course, in a more open system, the rules and

35. TOM HILLIARD & PUBLIC CITIZEN'S CONGRESS WATCH, TRADE ADVISORY COMMITTEES: PRIVILEGED ACCESS FOR POLLUTERS (1991) (describing domination of Codex advisory committees by industry); Mark Ritchie, *GATT, Agriculture and the Environment: The U.S. Double Zero Plan*, 20 *ECOLOGIST* 214, 217 (Nov./Dec. 1990).

36. The Federal Advisory Committee Act (FACA) was designed to prevent industry domination of advisory committees. See H.R. REP. No. 1017, 92d Cong., 2d Sess. 6 (1972). Public Citizen has objected to this violation of the FACA. See Letters from Public Citizen to the FDA & USDA (Dec. 16, 1991) (on file with author). In response, the FDA, USDA and the Environmental Protection Agency (EPA) have begun to evaluate the process of United States' participation in Codex. See 57 Fed. Reg. 29,462 (1992) (announcing public forum and seeking public comments on Codex process). Also in response to public pressure, the agencies have begun to invite consumer and environmental organizations to participate in the Codex process, although this participation has not yet been institutionalized or otherwise ensured.

interpretations would likely be much more hospitable to environmental regulations. Environmentalists are unwilling to place the future of both domestic and international environmental regulation in the hands of a system which allows privileged access to economic interests that oppose such measures, denies comparable access to environmentalists, has few mechanisms to obtain adequate environmental and health expertise for its rules and decisions, and is virtually certain to delay needed actions for years and possibly decades, until it can adapt itself to the task at hand.

II. THE TRADE SYSTEM EMBRACES RULES THAT THWART EFFECTIVE SOLUTIONS TO ENVIRONMENTAL PROBLEMS

The environmental community's objections to subjecting environmental regulations to the trade regime stem not solely from the processes by which trade rules are adopted and implemented, but also from the incompatibility of existing and proposed trade rules with effective solutions to pressing environmental problems. This incompatibility derives both from the divergent goals and philosophies of the two regimes and from the particular precepts that are embodied in existing and proposed trade rules.

Forty-five years ago, few, if any, of the drafters of the GATT could have envisioned the types of environmental problems that plague the world today or the nature of regulatory solutions to such problems that currently exist or are being developed at the international, national, and local levels. As a result, the GATT was not drafted with these types of problems and regulatory solutions in mind. Instead, it was designed to address international economic problems that were largely divorced in most people's minds from health and environmental considerations. The first decades under the GATT continued this focus on tariffs and other strictly economic measures. It is in this context of economic regulation, with little thought given to health and environmental regimes, that the GATT rules, interpretations, and dispute settlement procedures evolved.

When GATT negotiations and trade challenges began to focus in recent years on health and environmental measures such as nontariff trade barriers, it was from a trade perspective that viewed such measures with great suspicion and even hostility. As Professor Jackson states, "[a]ll too often during the past decade, it has appeared that the trade policy specialists have feared the incursion of environmental policies on their terrain (partly because the environmental policies can be so easily used as an excuse for protectionism) . . ."³⁷

The trade experts tend to view health and environmental measures that restrict trade as undesirable because they impede trade, regardless of the particular reasons for, and context of, the measures. From the trade perspective, the goal in negotiations and trade disputes is to curtail such measures or, where that is not possible, to limit them to the bare minimum

37. Jackson, *supra* note 1, at 1235.

necessary to serve what the trade world deems are legitimate purposes and through what the trade world concludes are acceptable means.³⁸

This goal derives from the general philosophy behind the trade regime—that a free market economy will make the world better off. While this philosophy has historically been couched in terms of economic well-being, it has more recently become the rallying cry for free traders seeking to defend the expansion of the trade system into the environmental arena. Thus, the argument goes, trade liberalization will make countries better able to afford costly environmental protections.³⁹ This argument ignores the fact that the trade rules promote certain behaviors that are harmful to the environment and stand in the way of government actions to curtail such behaviors. As a result, the issue is not limited to the effectiveness of government actions to rectify environmental problems, which would be enhanced by the availability of more government resources for that purpose. Rather, the focus should be first and foremost on understanding the types of environmentally harmful behaviors that will be promoted by the trade system and the solutions that will be prohibited by it.

A. *The Trade Rules Do Not Account For Environmental Externalities*

Under the international trade system, the societal costs of the environmental impacts and of the consumption of natural resources are not borne by the producer, and are thus not reflected in market prices. In economic terms, the costs of these impacts are said to be “externalized.” While it is possible that the trade regime could require the internalization of such external costs of production, the current trade system makes no such accommodation. As a result, pollution and other environmentally harmful by-products of market behavior are permitted without any market adjustments, and government actions taken to curtail or account for such externalities are often considered restraints of trade.⁴⁰

The trade system could be redesigned to encourage the full accounting or internalization of such costs by attributing the societal costs of pollution to the polluting activity.⁴¹ A government’s failure to regulate the activity so that market prices reflect these costs would be an impermissible government subsidy that would be actionable under the GATT. An importing country

38. *See id.* at 1228, 1231.

39. GATT SECRETARIAT, *supra* note 1, at 1, 6; Jackson, *supra* note 1, at 1228, 1255-56.

40. Aside from the general problem of externalities, the terms of recent trade agreements create specific incentives for environmentally harmful behavior. For example, the United States-Canada Free Trade Agreement insulates government subsidies for oil and gas exploration and development from attack under the Agreement, but affords no such protection to subsidies and other programs designed to encourage energy efficiency and conservation. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., art. 906, 27 I.L.M. 293, 344 [hereinafter FTA]. The NAFTA contains identical provisions. NAFTA, *supra* note 29, art. 608(2).

41. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE POLLUTER PAYS PRINCIPLE: DEFINITION ANALYSIS IMPLEMENTATION (1975).

could then impose countervailing duties on imports from that country, equivalent to those adverse environmental impacts. This type of system would eliminate the competitive advantage that otherwise accompanies weak environmental regulation. It would therefore obviate the need for trade restrictive measures to protect domestic industries that internalize such costs from competition from industries that do not.⁴²

Since the trade system currently does not require the internalization of environmental impacts, and is not moving towards doing so in the near future, it penalizes industries that internalize such costs and leaves governments no effective means to combat any competitive disadvantage faced by industries that bear such costs.⁴³ Thus, if a country wants to maintain tough pollution control standards and still preserve its competitiveness, it must either subsidize the costs of complying with such standards or establish import tariffs to ensure that imports from other countries without comparable standards do not gain an unfair competitive advantage. However, the GATT prohibitions on government subsidies and differential import tariffs do not permit these adjustments. The GATT prohibition on discrimination between like products based on a variation in the method of production also stands in the way of market corrections for differing degrees of internalization of the environmental costs of production.

Similarly, the current trade system is hostile towards efforts to promote sustainable development, in large part because the consumption of natural resources is not factored into market prices. As a result, the means by which governments may promote sustainable development, for example, subsidies or other protections for domestic industries that use sustainable development practices or import restrictions on products produced through unsustainable means, are trade restrictions that run afoul of the GATT.

The most effective reform of the existing trade system would be to require the internalization of environmental costs.⁴⁴ If this reform were made, countries would have less need to resort to trade restrictive measures. However, in the absence of this reform, a whole series of lesser reforms is essential. Thus, government subsidies that promote environmentally beneficial behavior should not be actionable under the GATT. Furthermore, trade measures in the form of import tariffs or other import restrictions

42. It may be necessary to provide some funding for environmental regulation in developing countries to ease the transition to a system that internalizes all costs of production.

43. The disparities in environmental regulation between Mexico and the United States have given rise to serious concerns that the NAFTA will cause industries to relocate to Mexico in order to evade more stringent U.S. standards. Indeed, in a General Accounting Office survey, 78% of wood furniture manufacturing operations that relocated from the Los Angeles area to Mexico identified California's stringent air pollution control standards as a major factor in their decision to relocate. U.S. GENERAL ACCOUNTING OFFICE, *U.S.-MEXICO TRADE: SOME U.S. WOOD FURNITURE FIRMS RELOCATED FROM LOS ANGELES AREA TO MEXICO* 4 (1991).

44. Developing countries have a legitimate objection to reform that would internalize environmental costs because developed countries obtained a competitive advantage over time by externalizing environmental costs. For this reason, it may be necessary to provide financial assistance to developing countries in meeting the demands of this reform.

that penalize environmentally harmful production processes should be permitted.

The existing trade regime does not embrace the concept of internalization, nor is it likely to do so. However, the trade and environment debate must necessarily confront this issue. If it is ignored or assumed away, the trade system will never be able to command full legitimacy as the system that should resolve conflicts between trade and the environment. The only way to resolve this issue in a way that has a chance of satisfying, or at least appeasing, advocates of the various points of view is to ensure that it is fully debated and resolved on an even playing field. Because the trade system has already staked out its position, it is far from neutral and therefore cannot be the forum for debating and resolving this issue.

B. The Trade System Discounts Unilateral Environmental Actions

Another significant issue in the trade and environment debate is the extent to which one country, or a group of countries, may impose restraints on trade to address an environmental problem outside their borders. Again, the trade regime is not neutral on this issue, but instead views unilateral environmental actions as suspect. Thus, in the Tuna/Dolphin dispute, the GATT panel concluded that cooperative international arrangements should be pursued before trade restrictions may be imposed.⁴⁵ Similarly, the Uruguay Round and the NAFTA food safety provisions make it clear that countries may not restrict trade in order to protect health or life outside their borders.⁴⁶

This prohibition on the extraterritorial reach of environmental regulations is devastating because many environmental problems extend behind national borders. Where an industrial activity in one country produces environmental damage in another, the recipient of the harm may seek to curb the behavior causing that harm. Canada's attempt to compel the United States to take action to lessen acid rain provides a case in point. To be effective, most such efforts would need to focus on production processes, rather than final products, and thus they would discriminate against like products in violation of the GATT. However, if the trade system ties Canada's hands, then free trade in acid rain is assured. In other words, United States industries are permitted to externalize the environmental cost of production at Canada's expense. Canada should be able to correct the flaws in the market that derive from the U.S. market's failure to require the internalization of these costs.

The market's imperfections are exacerbated with respect to the global commons, such as the atmosphere and the global climate, that are shared by all. Significant disincentives stand in the way of national regulation because of the problems presented by holdouts (those refusing to cooperate)

45. Tuna/Dolphin Panel Report, *supra* note 33, paras. 6.2-3, at 1622-23.

46. Dunkel Draft, *supra* note 34, § L, at L.1-.74; NAFTA, *supra* note 29, art. 754(1).

and free-riders (those refusing to share the costs of regulation). In the face of the externalization of the environmental costs of production, countries may forgo regulations that protect the global commons in order to gain a competitive advantage.

Extraterritorial regulation by countries willing to take the lead in such regulation may shift the balance and force other countries to follow suit. It also may be the only way to obtain any degree of cooperation among countries willing to act. For example, the Montreal Protocol imposes different trade restriction on developed and developing countries, and it restricts trade not only in Chlorofluorocarbon (CFC) products but also in products produced through processes that utilize CFCs.⁴⁷ These trade restrictions extend to trade with nonparties, as well as parties, to the Montreal Protocol. Without incentives for developing countries and provisions preventing nonparties from picking up the slack in CFC trade and gaining a competitive advantage from retaining CFC processes and products, the Montreal Protocol would neither gain wide support, nor lead to effective solutions.

Extraterritorial regulation is also critical in protecting endangered and threatened species. Although there are many international conventions protecting endangered species, the enforcement mechanisms are generally ineffective or nonexistent. Thus, the Convention on International Trade in Endangered Species (CITES)⁴⁸ allows any country to enter a reservation to a change in the list of protected species and thereby to exempt itself from the Convention with respect to that species. Various United States laws impose trade bans on such species, and sometimes also on trade in products caught by methods that threaten such species, in order to give teeth to CITES and other international conventions and to place political pressure on the offending countries. Without this tool, economic self-interest will be left unchecked and perpetuate the cycle of endangerment.⁴⁹

Even where a resource is located within the territorial boundaries of a country, such as a rain forest or an elephant herd, depletion of that resource has consequences for the international environment, for example, by contributing to global warming or threatening to extinguish a species or reduce biodiversity. A ban on imports of tropical hardwood or elephant ivory products may be the most effective way to prevent deforestation of rain forests or elephant extinction.

Given that actions must be taken at critical points to prevent environmental problems from worsening or becoming irreversible, extraterritorial environmental regulation is an important, if not an essential, tool. This is

47. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, art. 4, 26 I.L.M. 1550, 1554-55 (entered into force Jan. 1, 1989).

48. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

49. Threatened trade sanctions have been identified as the reason why Japan phased out imports of hawksbill turtle shells, and as causing other countries to change shrimping practices to protect sea turtles. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICT AND OPPORTUNITIES 75 (1992) [hereinafter OTA REPORT].

also why it is sometimes necessary for countries to adopt such measures before an international consensus emerges. Requiring an international consensus is likely to lead to lowest common denominator solutions because environmental costs are externalized in the absence of some corrective action and because of holdout and free-rider problems. To make matters worse, even a lowest common denominator solution may be long in coming in the absence of some pressure from extraterritorial regulation. Given the need to take swift action in response to many environmental problems, many people feel that there is an overriding need to move ahead of the existing international consensus.

Even if environmental trade restrictions are limited to those supported by some sort of international consensus, there are likely to be disagreements as to when an international consensus has emerged. Staking out a rather extreme position, the trade system has exhibited extreme reluctance to acknowledge any international consensus on trade-restrictive environmental measures. Thus, the Montreal Protocol and CITES command substantial international support, yet further action in the form of a waiver is necessary before GATT will recognize them. Similarly, even though the Organisation for Economic Cooperation and Development (OECD) endorsed the polluter pays principle in 1972, the trade world does not recognize that principle as a valid international consensus. Moreover, where there is an international consensus as to the existence of a problem and the need for a trade-restrictive remedy, the trade world may still refuse to accept the legitimacy of that remedy either because it is not mandated by the letter of an international agreement, as in the case of a CITES reservation, or because it is not the least restrictive way to address the problem.⁵⁰

The extent to which unilateral trade restrictions may be imposed for environmental purposes is a burning issue in the trade and the environment debate. The trade regime has already come out against unilateral, extraterritorial environmental measures. For this reason, it is not a neutral forum in which to air and resolve this issue.

C. *GATT's Health And Natural Resources Exceptions Thwart Needed Environmental Regulation*

The clash between the trade system and environmental regulation could be alleviated if the trade rules contained exceptions to their prohibitions on trade restraints for environmental regulations. The GATT, in fact, contains two exceptions that could, in theory, serve this purpose: an exception for measures that are "necessary to protect human, animal or plant life or health . . ." ⁵¹ and another for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . ." ⁵²

50. See NAFTA, *supra* note 29, art. 104(1).

51. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(b), 61 Stat. A11, A61, 55 U.N.T.S. 187, 262 [hereinafter GATT].

52. *Id.* art. XX(g), 61 Stat. at A61, 55 U.N.T.S. at 262.

These exceptions have been construed in such a way that they do not afford sufficient protection to necessary environmental regulations, which is not surprising given that they have been interpreted and implemented in closed trade processes by trade, not environmental or public health, experts who tend to view environmental regulations as inherently protectionist.⁵³ Especially troubling is the fact that the trade world will determine whether a particular measure serves legitimate health or environmental goals, and whether it does so through acceptable means.

In the Uruguay Round, elaborate standards are being developed to distinguish between legitimate and illegitimate food safety and technical standards. Under these provisions, certain international standards (that often are often not the most protective of health or the environment) would be deemed to be legitimate.⁵⁴ Standards that provide more protection to public health or the environment would need to pass muster under a sound science test. As stated in the latest Uruguay Round draft, a country maintaining such a food safety standard would need to show that there is a scientific justification for the standard and that it is not maintained in the face of contrary scientific evidence.⁵⁵ The draft also spells out other requirements for such standards, such as that food safety standards must be based on risk-benefit analyses and that technical standards must be performance, rather than design or product, standards.⁵⁶

The notion of a country being forced to present the scientific justification for its actions to a GATT dispute settlement panel that lacks scientific expertise is troubling, particularly because there is rarely *certain* scientific evidence. In the face of scientific uncertainty of an environmental problem and the likelihood that it will worsen significantly unless prompt action is taken, many governments will decide to take action based on their political assessment of the situation and risks. One illustration of this proposition is provided by the Delaney Clauses of the Federal Food, Drug and Cosmetic Act, which prohibit the introduction of certain carcinogens into foods.⁵⁷ These prohibitions were adopted by Congress more than thirty years ago, based on its policy deter-

53. The health and natural resources exceptions to the GATT's prohibitions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *Id.* art. XX; 61 Stat. at A60-61, 55 U.N.T.S. at 262.

54. Dunkel Draft, *supra* note 34, § L, paras. 9-10, at L.37; *id.* § G, para. 2.4, at G.3.

55. *Id.* § L, para. 6, at L.36; *id.* § L, para. 11, at L.37; *id.* § L, para. 20, at L.38. It would not be enough that a country adopted a measure in response to consumer demands in the face of lack of scientific certainty, which was one of the defenses offered for the European Community's ban on hormone-treated beef. *Id.* § L, at L.35; OTA REPORT, *supra* note 48, at 86-87.

While a country may maintain a more protective standard if it consistently affords one higher level of protection, that degree of consistency is difficult to achieve in practice. Dunkel Draft, *supra* note 34, § L, para. 11, at L.37; *id.* § L, para. 20, at L.38.

56. *Id.* § L, paras. 16-18, 20, at L.38; *id.* § G, para. 2.8, at G.3.

57. 21 U.S.C. §§ 348(c)(3)(A), 376(b)(2)(B) (1988).

mination that cancer-causing substances should not be added to the food supply. Science as we know it today had little to do with that decision. Indeed, industry advocates argue that the Delaney Clauses are outmoded, while consumer and public health advocates continue to support them.

The other significant limitation imposed by trade rules on health and environmental standards is the requirement that such standards must use the available means that are least restrictive to trade.⁵⁸ However, as a general rule, the most effective solutions to environmental problems will be more restrictive to trade than the less effective alternatives. For example, it could almost always be argued that it is less restrictive to trade to require disclosures of the adverse health or environmental effects of a product than it would be to ban the product, but a ban is unquestionably a more effective environmental solution.

By mandating the use of alternatives that are the least restrictive to trade, the trade system is stacked against effective environmental regulation. Thus, if a country seeks to create incentives for reusable containers by taxing disposable containers and, to a lesser extent, recyclable ones, it could open itself up to a trade challenge, particularly if it has already shifted its own use to reusable containers. The tax, though nondiscriminatory on its face, would be viewed as protectionist because it favors the domestic industry that uses the more environmentally friendly containers. The measure would also be subject to scrutiny under the GATT for a determination of whether the taxes are disproportional to the environmental harm caused by the disposable and recyclable containers, respectively. And of course, trade experts who tend to see protectionism in virtually all environmental regulations would determine whether the measure employed the least restrictive means of achieving a legitimate goal.

Existing trade rules against which health and environmental standards are measured are, like the trade system's failure to internalize environmental costs, and its presumptions against unilateral measures, stacked against effective health and environmental regulations. Especially in light of the processes for developing and implementing these rules, they are far from neutral. As such, they are an inappropriate backdrop or starting point for the debate over when health and environmental measures may impose restrictions on trade.

III. THE TRADE AND ENVIRONMENT DEBATE MUST BE RESOLVED IN A NEUTRAL FORM

Because the current trade regime does not embody the polluter pays principle and other environmentally friendly concepts, world trade rules will

58. *Report of the GATT Panel, United States—Section 337 of the Tariff Act of 1930*, para. 5.26, GATT Doc. L/6439 (Nov. 7, 1989), BISD 36th Supp. 345, 392-93; Thailand Cigarette Panel Report, *supra* note 33; Tuna/Dolphin Panel Report, *supra* note 33, at 1623; *Report of the GATT Panel, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, para. 4.6, GATT Doc. L/6268 (Mar. 22, 1988), BISD 35th Supp. 98, 114; see also Dunkel Draft, *supra* note 34, § L, para. 6, at L.36; *id.* § L, para. 21, at L.39.

allow environmental problems to worsen as a normal consequence of market activity. The promise (or hope) that trade liberalization will enable countries to spend more on environmental protection in the future, even if correct, means that problems will worsen and solutions will be postponed until increased wealth occurs from expanded trade and it trickles down to environmental containment or cleanup. Needless to say, the hope that more money possibly may be spent on environmental protection at some time in the future, with market incentives encouraging environmentally harmful behavior in the meantime, offers little solace to environmentalists working for environmental solutions today to problems that cannot wait. Instead, environmentalists often are seeking government intervention or some other correction of market incentives to curtail or lessen environmental harms caused by such market externalities.

It is heartening that it is no longer just environmentalists who recognize that the trade system must be adapted to ensure the viability of at least some environmental measures. However, the GATT has demonstrated that it is poorly suited to being the body that decides how trade and environmental goals will be reconciled. After all, the GATT has as its objective the promotion of international trade, without any corresponding mandate to protect the environment or other competing goals. Thus, it is not surprising that the GATT Secretariat has indicated that environmental measures should rarely, if ever, be permitted to restrict trade.⁵⁹ Moreover, as discussed above, some of the most fundamental GATT rules preclude many effective environmental regulations, and the GATT is unlikely to support changes in these rules. Finally, the GATT processes of negotiation and dispute settlement shut out proponents of the environmental side of the trade and environment debate.

Nonetheless, the Uruguay Round is seeking to expand the impact of the GATT on health and environmental standards. It is counterproductive for the trade system to reach out to encompass more and more environmental matters before the trade and environment debate is satisfactorily resolved. By doing so, it is promising more heated clashes that undermine its credibility.

The priorities and processes of the trade and environmental worlds clash far too much for one to accept subservience to the other. Just as the trade community wants to keep this debate within the trade system, so too the environmental community is unwilling to place its stake in the trade world. Before one system is subsumed within the other, the intersection between trade and the environment must be fully explored and delineated.

It is simply unacceptable to assume the preeminence of the trade regime and work toward piecemeal modifications of its terms. Such a scenario, even with the meager adaptations suggested by Professor Jackson, would offer too little too late to preserve existing, and promote future, environmental regulations. Thus, GATT waivers for certain specified international

59. See generally GATT SECRETARIAT, *supra* note 1.

environmental agreements (and possibly only for parts of them) would still leave in place the obstacles to future agreements that are posed by the trade system. Similarly, establishing minimum environmental regulations, the violation of which could form the basis of countervailing duties, fuels a lowest common denominator approach that still penalizes countries with more stringent environmental regulations. And of course, while these modifications are being developed, the trade system will be jeopardizing countless health and environmental measures.

Neither proponents of the trade system nor environmental advocates will trust solutions that are devised by a system that does not have as its principal goals the promotion of their respective interests. This distrust is compounded by the trade regime because the system denies environmental advocates access to information about, and the right to participate in, the development, interpretation, and implementation of its standards. A mechanism must be developed that will ensure direct participation of all affected interests. The OECD has recognized the importance of bringing together all interested parties in its trade and environment discussions, which include both trade and environmental governmental officials, as well as nongovernmental environmental organizations.⁶⁰ While it is essential to bring these divergent interests together in any resolution of the trade and environment debate, the OECD cannot be the ultimate forum because it represents developed countries only, and developing countries are, like environmental advocates, unlikely to accord legitimacy to decisions reached in their absence. The only viable way to proceed is to establish a neutral forum that has not prejudged the issues and that has direct participation by both trade and environmental governmental officials and nongovernmental organizations

60. OTA REPORT, *supra* note 49, at 19.