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**Institutionalizing the Balance :  
Trade Objectives and Environmental Concerns :  
towards New Institutional Authority.**

**by**

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I dedicate this thesis to Hope for my brother.



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## ABSTRACT

*The interrelationship between trade objectives and environmental concerns lies at the heart of this research. After describing different trade regimes and environmental protection agreements, and offering the general framework of international law in which the trade-environment-development debate takes place, this thesis elaborates on the structures of international institutional authority that have been created through these trade regimes, environmental protection agreements and development organizations. A review of the existing international organizations will show us their strong points, usefulness and weaknesses, and will bring us to the statement of the necessity of new institutional authority in order to more effectively address the trade-environment-development issues at stake. On the one hand, the idea of a newly created Global Environmental Institution would highly improve the institutional potential in this debate, but is likely not a realistic option in the international arena of today. On the other hand, the option of institutional improvement and betterment of the existing international structures is more realistically feasible, and possibly the only way to achieve New Institutional Authority in the area of trade and environment today.*

## SOMMAIRE

*Au coeur de ce mémoire se trouve l'étroite relation entre les objectifs de commerce et les intérêts de l'environnement. Après l'analyse de plusieurs régimes internationaux de commerce et de plusieurs conventions de protection de l'environnement, et après la description du cadre général de Droit International dans lequel se poursuit le débat sur le commerce, l'environnement et le développement, ce mémoire s'adresse plus profondément aux structures d'autorité institutionnelle internationale qui ont été créées par ces régimes internationaux de commerce, ces conventions de protection de l'environnement et ces organisations de développement.*

*La revue des organisations internationales existantes nous montrera leurs points forts, leurs utilités ainsi que leurs faiblesses, et nous amènera à constater la nécessité d'une nouvelle autorité institutionnelle pour adresser plus efficacement les intérêts du commerce, de la protection de l'environnement et du développement. D'un côté, l'idée de créer une nouvelle Institution de l'Environnement Globale augmenterait profondément les possibilités institutionnelles dans ce débat, mais cette option n'est probablement pas très réaliste dans le domaine international d'aujourd'hui. De l'autre côté, l'idée d'améliorer et de rendre plus efficaces les structures internationales existantes est certes plus faisable et réaliste, et s'avance vraisemblablement comme, à l'ère actuelle, la seule façon pour accéder à la Nouvelle Autorité Institutionnelle dans les domaines du commerce et de l'environnement.*

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## INTRODUCTION.

This thesis constitutes an analytical exercise in the potential of coordination and convergence of two of the most basic concerns and goals of the increasing interdependent and multilateral society of today, namely environmental protection objectives on the one hand, and international trade objectives - such as the move towards liberalization and integration of economies - on the other. During the past decades, both concerns have generated a large number of international (bilateral, regional or multilateral) legal instruments, such as regional and global trade liberalization schemes on the one side of the spectrum, and an increasingly important number of multilateral agreements to protect the environment (signed with authority apart from the trade regimes) on the spectrum's other side.

My research will focus on the often-difficult balancing of these concerns. After drawing a historical evolution of the emergence of both objectives, and showing how and why environmental concerns have moved into various trade agreements, the same way as trade instruments have found their place into international environmental protection agreements, it will particularly analyze the record and efforts of various international organizations (such as trade institutions, environmental protection regimes, the UN structure, and development banks) in dealing with trade and environment concerns.

As the research continues, it will become clear that there is an important need to further integrate and balance environmental protection concerns into

international institutional structures, such as trade regimes, structural development banks and other development agencies (for instance the United Nations Development Programme). This need has been conceptualized through the notion of Sustainable Development, an often-debated term considering not only the present development needs but also the preservation of the globe's development potential for future generations. This concept provides for a middle-way between extreme development and trade pressures, and the extreme sacrifice of development and trade interests to the environment. Sustainable Development provides for the needed paradigm with which the above-mentioned existing international structures will be scrutinized.

The disparate and sometimes even colliding interests of these different institutional structures and their different generating concerns leads us to the central question of my research, namely what body - if any - of international law, and what institution(s) can and should preside over these fundamental concerns of trade, environment and development. Should there be an international body overlooking these different concepts and objectives, these often-opposed protagonist interests? A positive answer would lead us to further questions, such as which role this institution could play, which functions this institution could fulfill, and on what level the institution should be placed? Moreover, what would be its place vis-à-vis the already existing institutions that deal with trade, environment or development questions?

In fact, a new international institution could be constituted as a *chapeau*, an overarching body which could coordinate both objectives : a Global Environmental Institution could provide for a forum of ongoing negotiations to

address global environmental problems, an international laboratory for the coordination of policies, development of legal norms and baseline environmental obligations, supervision of their implementation and the generation of community pressure on recalcitrant nations. Such an institution could counterbalance GATT/WTO's international stature, and could work with the trade regimes to establish a functional division of responsibilities where trade and environment intersect. Moreover, it could provide a coordinated approach towards technical and financial development assistance (cooperating closely with the global and regional development institutions), and serve as a general *umbrella institution* for the growing number of international environmental agreements.<sup>1</sup> Finally, it could provide the authority to focus on the development and implementation of new values, such as sustainable development, the precautionary principle, environmental cost internalization, pollution prevention, and institutional transparency.

Chapter 1 deals with the specific trade and environmental concerns that form the basis of the whole debate on how and why trade liberalization and environmental protection objectives interact. First of all, this Chapter provides an overview of the debate, namely the arguments of both communities, how they collide and why they collide (market, policy and institutional failures). It will show that trade and environmental issues have become increasingly linked, and therefore, they coincide into the need for a more balanced and integrated policy-making with regard to both concerns. Various approaches towards a more

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<sup>1</sup> Just as the WTO serves as an umbrella for its Multilateral Trade Agreements.

balanced debate are highlighted, varying from voluntary action over command-and-control approaches to economic incentive based strategies, from national to international and from positive to negative action. International cooperation in order to find solutions to these problems is stressed as the best long-term response. Secondly, this Chapter takes a look at how both the trade and environmental community deal with today's reality of integrated trade and environmental concerns. How do trade regimes such as the GATT/WTO, NAFTA and EU incorporate trade-related environmental concerns, and parallelly how do environmental protection regimes such as the Convention and Protocol protecting the ozone layer incorporate environmental-related trade concerns? Both regimes' very existence and ability to contribute to the resolution of concerns depends on their perceived legitimacy, which in turn depends upon a political judgment that they are upholding the public values that are important in the present international community.

Chapter 2 broadens up the specific trade-environment horizon of Chapter 1, in dealing with the broader legal framework surrounding trade, environmental and development concerns. Its purpose is to give a general introduction to, and overview of certain basic concepts in international law. In a concise way, the Chapter discusses basic concepts such as sovereignty, global interdependence, international cooperation, international organizations, international agreements, poverty, need for economic growth, North-South divide, and sustainable development. The understanding of these concepts are fundamental prerequisites to the study of the trade and environment debate, a debate which covers such different areas of policy-making. The concepts of sovereignty, growing

international interdependence. North-South divide are essential pieces in the puzzling negotiation of international regimes (agreements and institutions) structuring freer international trade as well as greater environmental protection. Poverty and economic growth concerns are two sides of the same coin of development.

In order to find more efficient answers to trade and environment questions, the existing framework needs more cooperation, integration and coordination, not only among states but also among policy issues. Environmental concerns are best dealt with by integrating them into other policy areas, such as trade; and vice versa. It is in this view that the concept of Sustainable Development enters the scene, and provides for the paradigm with which international action - be it trade or environmentally related - will be scrutinized throughout the rest of the thesis.

Whereas the first Chapter deals with the substantive rules laid out in trade and environmental protection regimes, Chapter 3 analyzes the existing international institutional framework of organizations related to trade and environment considerations. As Chapter 3 demonstrates, there has been a remarkable and extra-ordinary proliferation of institutions at the global, regional and local level that look at trade, development and environment concerns and their interlinkages. Trade regimes, environmental protection regimes, UN institutions, Development Banks, adjudicatory bodies, study groups and NGO's all play an increasingly important role in positioning their views, advocating their interests, and studying possible interactions of the issues at stake. The Chapter lines out the institutional structure, the functions and the role of several major institutional bodies. It focuses on dispute settlement procedures - a prime mechanism in

reconciling often diametrically-opposed views - found in trade regimes and environmental protection agreements, as well as on specially-designed commissions, committees and working groups that deal with the trade-environment debate and try to find solutions and recommendations to balance these concerns. Some of these Bodies - such as NAFTA's Commission on Environmental Cooperation, the EU's Commission and Environmental Agency, and the UN's Commission on Sustainable Development and UNCTAD - could very well be considered as a model in bringing trade objectives and environmental interests together. However they each represent major caveats - the subject of Chapter 4. Furthermore, the Chapter studies the evolution of development banks towards supporting a more sustained development paradigm (sustainable development), and looks at how development banks and UN institutions work together in this respect in newly-created entities (such as the GEF). Finally, the role of adjudication - with its proponents and detractors - and of NGO's and study groups is clarified.

Chapter 4 builds upon the elements gathered in Chapter 3, especially its information concerning the institutional changes several international organizations have undergone in their effort of integrating environmental concerns. UN institutions, environmental protection agreements, development banks and trade regimes all went some way in integrating environmental concerns into their own policies, but still suffer from major handicaps and impediments that obstruct their ability and capacity to deal with the issues at hand. Chapter 4 identifies these obstacles, and consequently tries to find ways to improve the present institutional structure. First of all, the Chapter lists different ways to

strengthen and upgrade existing institutions. A lot of progress can be made by removing obstacles such as ill-suited mandates, limited resources, inadequate and dispersed locations, and lack of transparency and public participation, thus enhancing the status of existing institutions and improving their capability to address the issues at stake. A second way of improving the international institutional structure consists of the creation of a new global institution that will consolidate and coordinate the activities of existing institutions, and canalize the work of balancing and integrating the equally important concerns of trade, development and the environment. The Chapter will discuss several proposals in favor of such an institution, along with the reasons, functions, institutional features and the possible advantages of such a Global Environmental Institution. It will also discuss its practical feasibility, and conclude that, although theoretically very promising, politically a new global environmental institution does not seem to constitute a feasible and real option for the (nearby) future.



# **CHAPTER I : THE BALANCING ACT : TRADE LIBERALIZATION AND ENVIRONMENTAL PROTECTION CONCERNS : IN CONFLICT OR CONVERGENCE?**

This chapter will examine the difficult balance between two of the most basic concerns of the multinational interdependent society of today. It will review the current trade and environment debate between the protagonist communities, discuss relevant trade regimes and international environmental agreements, and - above all - argue for a cooperative view upon these issues; namely, the need for and advantage of a coordinated and balanced approach towards trade liberalization and environmental protection. Where necessary, ample references to literature explaining the basics of the discussed regimes and agreements are provided.

## **SECTION 1 : THE TRADE AND ENVIRONMENT DEBATE**

Concerns over trade and trade liberalization have been preponderant issues on the political agenda of (nearly) every country of this globe - since the industrial revolution replaced the agriculture-oriented society and transformed it into a society based on production, consumption, industrialization, economics of scale, economic theories such as the theory of comparative advantages, and trade. With the creation of the Bretton Woods institutions - and especially the General Agreement on Tariffs and Trade - these concerns were institutionalized at the

international level<sup>2</sup>, promoting the liberalization of international trade (over protectionism) and international cooperation to achieve its basic goals of “raising standards of living, ensuring full employment and the large and steadily growing of real income and effective demand, and the full employment of resources of the world and expanding the production and exchange of goods.”<sup>3</sup> As such, the augmentation of the standard of living and the quality of human life was the purpose, and free and liberalized trade the tool with which that purpose could be achieved. Moreover, at the same time, the liberalization of international trade has also been pursued on the regional level, with the constitution of free trade areas, customs unions, common markets, internal markets or even economic unions: more recently, these regional free trade agreements have ‘exploded’ all over the globe<sup>4</sup>. This global and regional process towards liberalized and freer trade is likely to continue.

At the same time, concerns over the environment - and the idea that our environment needs to be protected from degradation and spoliation of the resource base - have become increasingly important over the past few decades<sup>5</sup>, challenging the assumption that the air, water, land and other features of the environment are

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<sup>2</sup> More recently, the conclusion of the Uruguay Round, with all its innovations and amendments to the GATT and its side-codes, and the establishment of the overarching World Trade Organization, has confirmed and - in many views - strengthened the world’s attachment to global trade.

<sup>3</sup> For a brief but topical introduction to the Bretton Woods Institutions, and especially the GATT/WTO evolution, see B.Colas, ed., *Global Economic Cooperation : A Guide to Agreements and Organizations*, (Deventer : UN University, Kluwer Law & Taxation Publishers, 1994).

<sup>4</sup> No region of the world has been ‘spared’ of this wave : especially spectacular numbers of these agreements have been reached in the Americas (North and South), Europe and Asia.

<sup>5</sup> Indeed, concerns about the degradation of the environment were not preponderant policy-issues at the time of construction of the UN system, or the related Bretton-Woods institutions. Environmental degradation was not even considered a national threat at that time, let alone a pressing global problem that could provoke international conflict and undermine human health, economic well-being and social stability. See H.French, *Partnership for the planet : an environmental agenda for the UN*, (Washington D.C. : Worldwatch Institute, 1995), p. 5 a.f; S.Lahey, “Trade and the Environment” (1996) 16 New York Law School Journal of International and Comparative Law, p.189.

available for free for extraction purposes and waste disposal.<sup>6</sup> From the sixties on, widespread public concern over the degradation of the natural environment, focusing mainly on national and regional problems, pushed national legislators to take the first step towards addressing environmental problems. After a period of economic crisis and social disorders - in which the oil crisis, inflation, recession and unemployment concerns temporarily overshadowed environmental concerns - a second wave of public interest for the environment emerged, much more intense, widespread than the first one, and likely to be more durable<sup>7</sup>. Although uncertainties remain, the scientific basis of the concerns is more solid than 20 years ago. The world population has increased - and still is increasing - exponentially<sup>8</sup>, and so is industrialization, production and consumption of goods and services. These increases are adding substantially to the demand for products - provided by the natural environment in the form of raw materials, energy resources, clean air, potable water, filtered sunlight, and the capacity to absorb waste.<sup>9</sup> At the same time, these environmental concerns have taken on a more global proportion, and thus policy-orientation.

But until recently, the objectives of trade liberalization on the one hand, and environmental protection on the other hand, were often looked upon as

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<sup>6</sup> K.Anderson, R.Blackhurst, "Trade, the environment, and public policy", in K.Anderson, R.Blackhurst, ed., *The Greening of world trade issues*, (New York : Harvester Wheatsheaf, 1992), p.3 a.f.

"Although environmental issues are not new to international relations, world leaders increasingly have moved environmental issues from the periphery to the center of their political agendas." : Editors of the Harvard Law Review, "Trends in international environmental law", (1992) 10 Harvard Law Review.

<sup>7</sup> K.Anderson, R.Blackhurst, *supra* note 6, p.3 a.f.

<sup>8</sup> The latest UN World Summit on Population in Cairo noted that the trend is likely to continue, and is even increasing if the world doesn't take appropriate measures. Moreover, Urbanization trends complement this picture. See *infra*, Chapter II.

<sup>9</sup> For more details, see *infra*, Chapter II.

colliding interests<sup>10</sup>. Both the environmental community and the free trade community viewed their own goals as superior, overriding the interests of the other community. Trade liberalization viewed through the environmentalists' lens seems to invite increased pollution, lost regulatory sovereignty, an anti-environmental counterforce driven by the desire for jobs and profits, and policy-making by obscure, unaccountable, business-oriented international bureaucrats. These are the tendencies : "Environmentalists" fear that increased trade may cause economic growth, which means more pressure on the resource base<sup>11</sup>; they want to use trade sanctions to enforce environmental protection regimes construed at the international and national level; they are convinced that producers everywhere should meet high environmental requirements, and they want the rules of international trade to reinforce the drive for environmental care<sup>12</sup>; at the same time, they fear that standards in a free trade context will be harmonized towards the lowest common denominator.<sup>13</sup>

Similarly, "free traders" regard the environmental agenda as containing protectionist methods, which will use trade penalties to enforce multilateral environmental agreements or - even worse - unilaterally determined environmental policies, thus breaking down the already-fragile balanced international trading system. All this would result in diminished competitiveness, higher prices and unemployment, destroying the wealth necessary to pay for many environmental

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<sup>10</sup> Or in the words of S.Lahey : "historically, trade objectives and environmental objectives have not been perceived as harmonious ...". See S.Lahey, *supra* note 5, p.181.

<sup>11</sup> See *infra*, Chapter II.

<sup>12</sup> Just as these trade regimes have been used to mandate other aspects of fair trade, such as intellectual property protection. See D.Esty, "Unpacking the trade and environment conflict" (1994) 25 Law and Policy in International Business, p.1259 a.f.

improvements.<sup>14</sup> Thus free traders want to protect international commerce from ill-considered environmental policy intrusions. They favor varying environmental protection measures (instead of similar strict standards worldwide)<sup>15</sup>, and note that strict harmonization of environmental standards will undermine the comparative advantages underlying trade regimes. They fear especially the use of trade sanctions, as they could undermine international cooperation and could be misused by protectionist interests as disguised barriers to trade.<sup>16</sup>

Simply put, environmentalists want to stop ecological harm and reduce pollution-based health risks, and believe that freer trade could exacerbate these problems. Free traders want to protect the economic benefits derived from international commerce, and believe that environmental protection could impede this process. Between these two views lies a wide (but not unovercomeable) gap, a difference between cultures (openness and public participation versus secrecy, pragmatism and result-oriented compromise), between paradigms (sanction-centered versus diplomacy-centered and negotiation), and between judgments (mostly over scientific uncertainties).

But in our increasingly interdependent world<sup>17</sup> of today, both environmentalists and free traders can no longer lock themselves up in the comforting solidarity and like-mindedness of their own communities. Instead, they

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<sup>13</sup> D.Esty, *Greening the GATT : trade, environment and the future*, (Washington D.C. : Institute for International Economics, 1994), p.1 a.f.; *Ibid.*, p.1259 a.f.; T.Schoenbaum, "Agora : trade and environment" (1992) 86 American Journal of International Law, p.700 a.f.

<sup>14</sup> CEI, *Trade and the Environment*, a briefing to the US Congress, imploring the recent attempts for greening international trade regimes such as NAFTA and GATT, and urging US Congressmen to "pursue free trade, not managed trade or protectionism under the guise of environmental protection".

<sup>15</sup> As it is arguable that the *assimilative* capacity of natural resources varies from country to country, and thus proper pollution control strategies should vary. For a definition of 'assimilative capacity', see *infra*, Chapter II, section 2.

<sup>16</sup> D.Esty, *supra* note 13, p.2 a.f.; D.Esty, *supra* note 12, p.1259 a.f.

will have to acknowledge the increasing economic as well as ecological interconnectedness of the globe<sup>18</sup> that inevitably results in the conclusion that trade and environmental concerns are issues that are inextricably linked<sup>19</sup>. Consequently to this trend, free traders and environmentalists are increasingly forced to confront their concerns with the view of finding a middle-way, an equitable balance and a harmonious solution to some of their concerns.

As implicitly recognized in the arguments of both communities, trade policies and environmental policies often have an important impact and influence upon each other.

Trade and environmental concerns often interact in several ways. Trade policies have a considerable potential impact - positive as well as negative - on the environment : free trade tends to increase economic activity and economics of scale made possible by larger markets, thus worsening environmental problems by blindly expanding production and consumption;<sup>20</sup> but it can also serve as a means of improving the world's standard of living by generating more incomes - creating more interest for environmental concerns, and more funding for all kinds of environmental protection programmes.<sup>21</sup> As explained *infra*, Chapter II, poverty

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<sup>17</sup> See *infra*, Chapter II.

<sup>18</sup> A country which trades with other countries becomes increasingly economically dependent on their trading partners' production systems and consumption patterns. Parallelly, the environment - and environmental problems - cannot be contained within the borders of states, thus creating regional and global issues when they "overflow". See T.Andersson *et al.*, *Trading with the environment : ecology, economics, institutions and policy*, (London : Earthscan, 1995), 1 a.f.; D.Esty, *supra* note 13, p.17-23. According to a WTO study, the rising ratio of world trade output is the centerpiece of evidence on the pace of global integration and growing interdependence among nations. See *1995 International Trade : trends and statistics*, (Geneva : WTO, 1995), p.21.

<sup>19</sup> D.Pearce, J.Warford, *World without end : economics, environment and sustainable development*, (Oxford : Oxford University Press, 1993), p.297 a.f.

<sup>20</sup> *Ibid.*, p.299 a.f.

<sup>21</sup> K.Anderson, R.Blackhurst, *supra* note 6, p.5 a.f.; S.Walker, *Environmental protection versus trade liberalization : finding the balance*, (Bruxelles : Publications des Facultés universitaires Saint-Louis, 1993), p.11-17.

constitutes one of the greatest dangers to the environment, by reducing the poor's scope of interest to the basic issue of survival, resulting in the fact that poor countries will deplete their natural resources more quickly because they are a (temporary!) source of revenue.<sup>22</sup> Moreover, trade liberalization is said to be fundamentally directed toward more efficient use of natural resources, a core proposition of environmentalists.<sup>23</sup>

Environmental policies of one country also can have effects - positive as well as negative - on environmental or trade policies of another country, by employing environmentally motivated taxes, subsidies, standards or other trade measures imposed on the economy of the other country<sup>24</sup>. Trade opportunities can be affected negatively by too low an environmental protection standard, causing the depletion of natural resources - source of all economic activity. The potential impact of soil erosion, desertification, deforestation or species extinction on production and exports is clear. On the other hand, tough environmental protection standards may enhance competitiveness by stimulating research and development, and positioning industries favorably in the "green products" market (green consumerism). Finally, trade policies can play an important role in bringing about a degree of multilateral cooperation needed to deal with transborder environmental

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<sup>22</sup> This is the case for several countries in Asia, South America, and Africa - notably Brazil, Ethiopia, Zaire, Mauritania, Thailand, Indonesia - who cut their tropical rain forests for hard dollars. Côte d'Ivoire enjoyed a phenomenal economic expansion in the sixties and seventies as its rich tropical hardwood forests yielded export earnings of \$300 million (U.S.) a year. It became a development model for the rest of Africa, but as in other countries that did not practice sustainable forestry, clear-cutting decimated its forests: exports dropped to \$30 (!) million (U.S.) a year in the early nineties. The loss of this major source of employment and export earnings led to a steady decline of its economy. Within a half generation (1980-1994) income per head fell by half! See L.R.Brown, "Uncover the lifeboats!", in L.R.Brown, ed., *Saving the planet*, (London : Earthscan, 1991), p.173 a.f.; and L.R.Brown, "Nature's Limits", in L.R.Brown et al., eds., *The state of the world 1995*, (New York : Norton, 1995).

<sup>23</sup> D.Esty, *supra* note 13, p.63.

<sup>24</sup> K.Anderson, R.Blackhurst, *supra* note 6, p.5 a.f.

problems : trade policies can increase the incentives - sanctions or positive ones (sticks and carrots) - to encourage international cooperation.

In conclusion, the debate between the trade and environment communities has shown the numerous short-term conflicts that pit the interests of the two communities against each other. But in the long run, many believe that the interests of both free trade and environmental protection coincide<sup>25</sup>. The prospects for convergence of both concerns are intrinsically demonstrated and conceptualized by the notion of the world's Sustainable Development<sup>26</sup>, including the need and potential for the balancing of trade as well as environment concerns in policy-making. To say it with the words of the Chairman of the (now defunct) GATT Group on Environmental Measures and International Trade (EMIT) :

*"The work (...) has strengthened the conviction that there need not be, nor should be, any policy contradiction between upholding the values of the multilateral trading system on the one hand and acting individually or collectively for the protection of the environment and (...) sustainable development on the other."*<sup>27</sup> (emphasis added).

Increasingly, trade is seen not as a cause of environmental degradation, but more as a "magnifier" of environmental concern. If the policies necessary for sustainable development are in place, trade will promote development and growth that is environmentally sustainable. Alternatively, if such policies are lacking,

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<sup>25</sup> H.French, *Costly trade-offs : reconciling trade and the environment*, (Washington D.C. : Worldwatch Institute, 1993), p.9.

"The conflict pits two otherwise worthy objectives against each other. We should not be forced to choose between environmental protection and free international trade: both values are essential to our future survival and well-being." : T.Schoenbaum, *supra* note 13, p.702.

<sup>26</sup> See *infra*, Chapter II, section 2.

<sup>27</sup> "Report by the chairman of the Group for Environmental Measures and International Trade (EMIT) presented to the Contracting Parties at their forty-ninth session", in *Basic instruments and selected documents, supp.40, 1992-1993 and 48<sup>th</sup> session*, (Geneva : GATT, 1995), p.77.



trade may contribute to environmental damage.<sup>28</sup> Consequently, trade needs to be *properly managed* - at the national as well as at the regional and global level - in order to avoid environmental destruction.<sup>29</sup> Taking into account that basically both communities pursue the same goal of a more efficient use of the world's limited resources<sup>30</sup>, and generally the improvement of the quality of life and social welfare through worldwide cooperation<sup>31</sup>, an enormous potential for convergence between trade and environmental concerns becomes clear.

In economic terms, environment and trade depend largely on markets, policies and institutional structures. Trade-related environmental degradation can be caused by market failure, policy failure or institutional failure.<sup>32</sup> Market failure exists when markets fail to fully reflect environmental values<sup>33</sup>. The presence of open-access resource exploitation, public environmental goods, incomplete information and imperfect competition all contribute to market failure<sup>34</sup>. When markets do not account for environmental values, the costs of excessive resource

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<sup>28</sup> *International Trade 90-91*, volume 1, (Geneva : GATT, 1992), p.20; Commission of the EC, *Communication to the Council and the Parliament on Trade and Environment*, (Brussels : Commission of the EC, DG I, February 1996), p.4-5.

<sup>29</sup> H.French, *supra* note 25, p.9.

<sup>30</sup> S.Lahey, *supra* note 5, p.196 a.f.; M.Tuchband, "The systematic environmental externalities of free trade : a call for wiser trade decisionmaking" (1995) 83 *Georgetown law Journal*, p.2102 a.f.; J.Jackson, "World trade rules and environmental policies : congruence or conflict?" (1992) 49 *Washington & Lee Law Review*, p.1227 a.f.

<sup>31</sup> D.Esty, *supra* note 13, p.65; K.Anderson, R.Blackhurst, *supra* note 6, p.3-21.

<sup>32</sup> T.Andersson *et al.*, *supra* note 18, p.21 a.f.; M.Munasinghe, W.Cruz, *Economywide policies and the environment : lessons from experience*, (Washington D.C. : World Bank, 1995), p.2-3; *The economic appraisal of environmental projects and policies : a practical guide*, (Paris : OECD, 1995), p.12 a.f.

<sup>33</sup> By the failure of freely functioning markets to reflect the full social costs of production in the price of the product, or by the failure of the very existence of markets of many inputs and outputs, especially environmental goods and services. J.Pearce, J.Warford, *supra* note 19, p.173 a.f. Studies have tried to assign a value to environmental assets. See *The economic appraisal of environmental projects and policies : a practical guide*, (Paris : OECD, 1995), p.24-27.

<sup>34</sup> For an extended list of possible market and policy failures, see *The economic appraisal of environmental projects and policies : a practical guide*, *supra* note 33, p.12 a.f.

mismanagement remain *external* - hence externalities<sup>35</sup>. They will be borne by the society unless sufficient policies are adopted to internalize these costs<sup>36</sup>. While the goal of these policies is to ensure that polluters pay the full bill for their use of the environment - thus providing an economic incentive for these companies to look for more environment-friendly and eventually less-costly solutions - , uncertainties over who is responsible and what price is to be paid remain. In fact, our ability to price environmental resources is still relatively primitive.<sup>37</sup> Without these correction-policies however, our natural environment remains vulnerable to degradation and this market failure - failure of the market to internalize environmental costs - will remain, resulting into increased pollution by increased economic growth.<sup>38</sup>

Consequently, markets need to be managed. However, these market management policies may very well result in policy failures, which occurs when policies required to correct for market failures over- or under-correct for the problem.<sup>39</sup> Inefficient policy interventions may include badly-aimed subsidies, price controls,

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<sup>35</sup> E.Barbier *et al.*, "Economic policy and sustainable natural resource management", in J.Holmberg, ed., *Making development sustainable : redefining institutions, policy, and economics*, (Washington D.C. : Island Press, 1992), p.65 a.f.

Externalities occur "when production or consumption inflicts involuntary costs or benefits on others, yet are not paid for by those who impose or receive them." See M.Tuchband, *supra* note 30, p.2105.

<sup>36</sup> Field and Olewiler provide for several incentive based policy tools to internalize these costs : liability laws, private property rights, moral suasion, environmental standards, emission taxes, abatement subsidies and the creation of a market for transferable discharge permits. See B.Field, N.Olewiler, *Environmental economics*, (New York : McGraw Hill Ryerson, 1995), p.5-10, 69-83, 186 a.f. For more details, see *infra*, the discussion of the economic incentives.

<sup>37</sup> D.Esty, *supra* note 13, p.15-16; p.65-68; I.Goldin, L.Winters, eds., *The economics of sustainable development*, (Cambridge : OECD Centre for economic policy research, Cambridge University Press, 1995), p.128 a.f.

For an interesting view on the feasibility of environmental cost internalization (and the division between 'classical' and 'systemic' externalities), see M.Tuchband, *supra* note 30, p.2099 a.f.

<sup>38</sup> As a matter of economic theory, trade economists note that if environmental harms are properly 'priced', there is no reason to believe trade or economic growth will worsen pollution. If matched with proper environmental policies, free market forces and open trade can serve to protect the environment. See *Trade and environment report*, (Geneva : GATT, 1992), p.30 a.f.

physical output targets, exchange controls and ownership controls, or any other policy that basically keeps prices below the correct (internalized) market price. As said, underpricing generates inefficiency and as a result leads to excessive or wasteful use of natural resources.<sup>40</sup> Thus, government intervention should be aimed at getting the price right, namely up to the corrected market level.

A specific form of policy failure (and closely related to market failure) is institutional. Important forms of institutional weaknesses with negative environmental consequences are the failure to establish (and enforce) clearly defined rights of access, tenure and control over productive resources (property rights), lack of participatory mechanisms and public accountability, and lack of clearly-mandated and well-funded institutions governing the issues at hand.<sup>41</sup>

Environmental degradation and the inefficient use of natural resources resulting from these failures, require intervention to properly price environmental resources and internalize environmental costs. Theoretically, several approaches could be used - and combined to optimize their efficiency.<sup>42</sup>

The first approach for achieving environmental goals is based on voluntary action.

“Green consumerism” is a voluntary action plan whereby consumer preferences and values create a ‘market pull’ upon companies for cleaner products and

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<sup>39</sup> E.Barbier *et al.*, *supra* note 35, p.66 a.f.

<sup>40</sup> See for a detailed description of government interventions in several sectors, and their reasons, D.Pearce, J.Warford, *supra* note 19, p.173 a.f.

<sup>41</sup> R.Sharp, “Organizing for change : people-power and the role of institutions”, in J.Holmberg, ed., *Making development sustainable*, (Washington D.C. : Island Press, 1992), p.39-64; E.Barbier *et al.*, *supra* note 35, p.71 a.f.; D.Pearce, J.Warford, *supra* note 19, p.235-258; H.Ward, “Trade and environment in the Round - and after” (1994) 6 *Journal of Environmental Law*, p.271 a.f.

<sup>42</sup> Economic Commission for Europe, United Nations Environment Programme, *Guidelines on integrated environmental management in countries in transition*, (New York : United Nations, 1994), p.24 a.f.

processes. This movement is on the rise especially in Europe and North-America.<sup>43</sup>

Closely related to green consumerism - and in fact a helpful device for it - is the concept of "ecolabelling", which has received considerable theoretical attention (e.g. in the GATT) and practical application (e.g. in the German, Canadian, U.S. and E.U. labeling programmes).<sup>44</sup>

The second approach is often used and thus quite a traditional one : the command and control approach, in which the national government - through legislation and regulation - sets certain standards relating to products, processes and technology used in order to protect the environment.<sup>45</sup> These measures aim at influencing environmental behavior by regulation and prohibition : certain practices may be banned by law, others may be tolerated but subject to ceilings or permits. They operate indirectly on prices (for instance by affecting indirectly the costs and benefits of production).<sup>46</sup> They help producers to anticipate clearly defined emission levels, and can accelerate technical innovation, but are often criticized for their lack of flexibility and risk of arbitrary setting.<sup>47</sup> At the national level, this approach is very common.<sup>48</sup>

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<sup>43</sup> See for details concerning the market-impact and reasons of success of green consumerism : N.Robbins, A.Trisoglio, "Restructuring industry for sustainable development", in J.Holmberg, ed., *Making development sustainable*, (Washington D.C. : Island Press, 1992), p.165 a.f.; T.Andersson *et al.*, *supra* note 18, p.18-19; B.Hull, A.St-Pierre, *The market and the environment : using market-based approaches to achieve environmental goals*, (Ottawa : Business and Environment Research Program, The Conference Board of Canada, 1990), p.1 a.f.

<sup>44</sup> N.Robbins, A.Trisoglio, *supra* note 43, p.170; D.Esty, *supra* note 13, p.134-135, p.171-172; Commission of the EC, *ecolabeling schemes : EC non-paper*, (Brussels : Commission of the EC, DG I, 1996).

<sup>45</sup> These instruments tend to be mere control instruments, regarding only the result of the polluting activity, the end-of-the-line product.

<sup>46</sup> *The economical appraisal of environmental projects and policies*, *supra* note 32, p.159-161.

<sup>47</sup> *International economic instruments and climate change*, (Paris : OECD, 1993), p.14-15.

<sup>48</sup> For an interesting study of the feasibility for international environmental standard-setting (namely in the International Standards Organization, especially its ISO 14000 series), see N.Roth-Arriaza, "Shifting the point of regulation : the International Organization for Standardization and global lawmaking on trade and the environment" (1995) 22 Ecology Law Quarterly, p.479 a.f.

More and more, public environmental regulation around the world shifts away from this command-and control mechanism to the market-incentive based strategies<sup>49</sup>. The same environmental standards can be enforced through economic incentive systems designed to get polluters to alter the technologies they use to manufacture products, or even to alter the products they produce, and to get consumers to realize that polluting products have higher market prices than non-polluting ones.<sup>50</sup> Economic instruments try to persuade people, firms and states to adopt environmentally-friendly behavior by changing their economic incentives to do so<sup>51</sup>. They allow an element of choice, and operate directly on costs and prices. Moreover, they offer advantages such as flexibility, choice, and encouragement of (green) research and development.<sup>52</sup> Economic incentive instruments include charges and taxes (especially the so-called *pigovian taxes*)<sup>53</sup>, subsidies, deposit refund schemes, market creation for transferable emission permits<sup>54</sup>, structural adjustment programmes<sup>55</sup>, property rights<sup>56</sup> and other mechanisms such as financial and technological transfers<sup>57</sup> and issue linkage<sup>58</sup>.

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However, standard-setting on the international level appears to be difficult, and moreover, these ISO standards would be designed to be voluntary.

Another problem is the possibility that international standards might be set at the level of the lowest common denominator. For a factual example involving the Codex Alimentarius Commission, see K.Steininger, *Trade and environment : the regulatory controversy and a theoretical and empirical assessment of unilateral environmental action*, (Heidelberg : Physica-Verlag, 1995), p.10-11.

<sup>49</sup> N.Roth-Arriaza, *supra* note 48, p.486.

<sup>50</sup> D.Pearce, J.Warford, *supra* note 19, p.202 a.f.

<sup>51</sup> T.Andersson *et al.*, *supra* note 18, p.21 a.f.

<sup>52</sup> *The economic appraisal of environmental projects and policies : a practical guide*, *supra* note 32, p.161-166.

<sup>53</sup> See for more details on pigovian taxes, *International economic instruments and climate change*, *supra* note 47, p.14-16, p.45 a.f.; *Environmental taxes in OECD countries*, (Paris : OECD, 1995); D.Pearce, J.Warford, *supra* note 19, p.205-214.

<sup>54</sup> *International economic instruments and climate change*, *supra* note 47, p.14-44; D.Pearce, J.Warford, *supra* note 19, p.205-214.

<sup>55</sup> *The economic appraisal of environmental projects and policies : a practical guide*, *supra* note 32, p.164-166.

These instruments, representing the three approaches towards environmental protection, can be used in a positive way (to incite environmentally friendly behavior), and as a negative sanction (as a disincentive for environmentally harming behavior), on the national level (protecting the national environment) and on the international level (correcting environmental problems that are regional or global in nature).<sup>59</sup> As Chapter II will show, environmental problems are often trans-national in nature, thus requiring a form of international cooperation to find acceptable and efficient solutions to the problem. The international consensus however, necessary to build multilateral cooperation on regional and global issues is often obstructed by different interpretations of scientific evidence, by different national (or sectoral) priorities, by disagreement upon proposed inter-country (or inter-sector) allocation of responsibility for environmental damage<sup>60</sup> and by free-ride efforts of countries (wishing to profit on the efforts of others).<sup>61</sup> To increase international cooperation, these obstacles therefore should be eliminated (sanctions or sticks), and the incentives to participate should be increased (carrots). Firstly, carrots remain a powerful and

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<sup>56</sup> S.Hanna, M.Munasinghe, eds., *Property rights and the environment : social and ecological issues*, (Washington D.C. : Beijer International Institute of Ecological Economics & World Bank, 1995); *Project and policy appraisal : integrating economics and environment*, (Paris : OECD, 1994); D.Pearce, J.Warford, *supra* note 19, p.235 a.f.

<sup>57</sup> *Promoting cleaner production in developing countries : the role of development cooperation*, (Paris : OECD, 1995).

<sup>58</sup> One of the most remarkable and prominent instances of international issue linkage is the 'debt-for-nature swaps' idea. See L.Susskind, *Environmental diplomacy : negotiating more effective global agreements*, (Oxford : Oxford University Press, 1994), p.82 a.f.; H.French, *supra* note 25, p.23-24; *World debt tables 1996 : external finance for developing countries*, vol.1, (Washington D.C. : World Bank, 1996), p.87-92.

<sup>59</sup> See R.Blackhurst, A.Subramanian, "Promoting multilateral cooperation on the environment", in K.Anderson, R.Blackhurst, eds., *The greening of world trade issues*, (New York : Harvester Wheatsheaf, 1992), p.247 a.f.; and *infra*, Chapter II.

<sup>60</sup> See *infra*, Chapter II for more details on the principle of state-responsibility in international environmental law. A good example is Brazil, Indonesia, Malaysia, Zaire. They view the preservation of their tropical forests as a service rendered to other countries, and accordingly want to receive more financial assistance in exchange for these services.

mainly unopposed tool to increase cooperation : access to markets, to funding, to natural resources and to environmental technology and knowledge<sup>62</sup> are powerful incentives.<sup>63</sup> Such carrots should be used - not just to be nice to other countries, but more fundamentally because they produce voluntary behavior - a key issue in international cooperation.

Secondly, the use of trade sanctions (sticks) to increase environmental cooperation is much more debated and often-opposed. Some argue they are much less likely to produce voluntary behavior, they engender trade distorting effects, and are thus less desirable and effective in the international context.<sup>64</sup> Others<sup>65</sup> on the contrary argue in favor of the use of trade sanctions to promote international cooperation to protect the environment.<sup>66</sup> They argue that trade measures can be used to (i) persuade a country to join international cooperation efforts for environmental

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<sup>61</sup> R.Blackhurst, A.Subramanian, *supra* note 59, p.246 a.f.

<sup>62</sup> Through access to commodity agreements, environmental trade preferences, financial assistance programmes, development assistance, North-South partnerships, improved management of resources, debt relief, new sources of finance, etc. See D.Esty, *supra* note 13, p.189-203; J.Holmberg, "Financing sustainable development", in J.Holmberg, ed., *Making development sustainable*, (Washington D.C. : Island Press, 1992), p.306 a.f.

<sup>63</sup> A recent OECD study once again stressed the importance of clean technology transfer, participation and information, education, green investment funds, and the development of well-functioning domestic markets for international cooperation in the environmental realm - and in North-South relations. See *Promoting cleaner production in developing countries : the role of development cooperation*, (Paris : OECD, 1995), p.11 a.f.

<sup>64</sup> R.Blackhurst, A.Subramanian, *supra* note 59, p.260 a.f.; D.Esty, *supra* note 13, p.185-192; *International trade 90-91*, vol.1, (Geneva : GATT, 1992), p.21; K.Steining, *supra* note 48, p.18, 51.

<sup>65</sup> Such as H.Chang. He argues against a "carrots only" view, for instance as described in the GATT report of 1992, because the use of carrots alone is likely to create perverse incentives (namely countries would pollute *in order* to get carrots), and sticks are an effective deterrent to excessive exploitation of the environment. Instead, he argues for a simultaneous use of both carrots and sticks in order to increase the efficiency of international solutions. See H.Chang, "An economic analysis of trade measures to protect the global environment" (1995) 83 *Georgetown Law Journal*, p.2131 a.f; *International Trade 90-91*, vol.1, (Geneva : GATT, 1992). And K.Steining, arguing for the use of trade sanctions in cases where trade itself contributes directly to environmental problems, and where the geographic scope of the problem requires sanctions of this kind. K.Steining, *supra* note 48, p.51-58, 174-176.

<sup>66</sup> Trade sanctions, such as imports and exports restrictions, can be adopted to safeguard the domestic environment, as a policy tool to enforce international environmental agreements (protecting global resources), as controls on hazardous products, technologies and waste exports.

protection, (ii) deny a country benefits for failure to follow an internationally-established environmental norm, (iii) prevent a country's action from undermining the effectiveness of other countries' environmental efforts, and (iv) remove economic incentives for damaging activities.<sup>67</sup> Consequently, a combination of carrots and sticks is likely to increase efficiency in international law.<sup>68</sup>

Although the best long-time response is multilateral cooperation on baseline environmental standards, this approach is likely to be achieved only within certain specific areas (e.g. ozone layer depletion). Most of the time, unilateral action will be the only feasible option.<sup>69</sup> Although these actions risk degrading international understanding and cooperation<sup>70</sup>, many authors note that unilateral trade measures can be useful in progressing on international environmental agreements (e.g. in areas such as whaling, hazardous waste, endangered species and driftnet fishing).<sup>71</sup> Moreover, one could imagine the case of *multilateral unilateralism* : cases where the imposition of environmental trade measures appear somewhat more unilateral, but still have some elements of multilateralism<sup>72</sup> : the unilateral trade measure is backed up by the multilaterally

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and as controls questioning the adequacy of environmental controls and standards in other countries. See T.Schoenbaum, *supra* note 13, p.703-705.

<sup>67</sup> M.Tuchband, *supra* note 30, p.2100.

<sup>68</sup> See *infra*, section 3, the discussion of the Montreal Protocol and other international environmental agreements.

<sup>69</sup> The US and the EU often pursue their environmental policies unilaterally. See D.Esty, *supra* note 13, p.142 a.f.

For a study of unilateral declarations, and their value in general International Law, see D.Kennedy, *International legal structures*, (Baden-Baden : Nomos Verlagsgesellschaft, 1987), p.54-66.

<sup>70</sup> E.g. E.U.Petersmann, "International trade law and international environmental law" (1993) 27 *Journal of World Trade*, p.43 a.f.

<sup>71</sup> D.Esty, Wirth, S.Charnovitz, T.Anderson, M.Schlagenhof, E.Hudec, S.Murase, L.Brinkhorst, A. van Buitenen. Charnovitz notes that "treaties do not appear like magic spirits. They must be laboriously negotiated ...". See *infra*, Bibliography.

<sup>72</sup> Such as the case of US trade restrictions on Norway for violation of the International Whaling Commission's moratorium; the standard (no whale killing) had been set multilaterally, but the trade measures were imposed unilaterally.



agreed principle that causing global or transboundary environmental harm is unacceptable.<sup>73</sup>

Of course, pure multilateral approaches to global issues remain by far superior.

## SECTION 2 : TRADE REGIMES

The current multilateral and regional trade regimes reflect clearly this difficult relation between trade and the environment<sup>74</sup>. The GATT/WTO, 'the legal and institutional foundation of the multilateral trading regime'<sup>75</sup>, was established on January 1, 1995, as the embodiment of the Uruguay Round results<sup>76</sup>. The WTO Agreements include the GATT 1994, along with all the ancillary agreements, as modified, relating to the GATT 1947, namely GATS, TBT, SPS, Trips, Understanding on dispute settlement : in total 29 texts.<sup>77</sup> The most relevant texts to the trade-environment debate will be shortly discussed.<sup>78</sup>

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<sup>73</sup> S.Charnovitz, "Free trade, fair trade, green trade : defogging the debate" (1994) 27 Cornell International Law Journal, p.459 a.f.: See *infra*, Chapter II, the principle of state-responsibility.

<sup>74</sup> Several authors argue that multilateral trading regimes such as the GATT/WTO can offer an *institutional contribution* to environmental politics (E.U.Petersman calls this the *constitutional function* of the GATT). See D.Esty, *supra* note 13. The GATT/WTO regime represents several important potential advantages for the purposes for environmental protection policies : worldwide membership, compliance, increasingly influential dispute settlement mechanisms, and international cooperation.

<sup>75</sup> *WTO : trading with the future*, (Geneva : WTO, 1995), p. I.

<sup>76</sup> Charnovitz notes that GATT/WTO governs 'only trade restrictions' rather than 'world trade'. See S.Charnovitz, *supra* note 73, p.466-467.

<sup>77</sup> H.Chang, *supra* note 65, p.2133.

<sup>78</sup> Several texts contain reference to the environment : WTO Agreement (preamble states Sustainable Development!), Agreement on Agriculture, TBT, SPS, GATS, Trips, Agreement on Subsidies and Countervailing measures. See F.Weiss, "The GATT 1994 : environmental sustainability of trade or environmental protection sustainable by trade?", in K.Ginther *et al.*, eds., *Sustainable Development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.398 a.f.

Many authors<sup>79</sup> argue that the GATT rules permit a broad latitude in pursuing environmental goals. In fact, GATT<sup>80</sup> does provide large possibilities for countries to pursue their *domestic* environmental policies, as long as the non-discrimination strictures of the multilateral trading system are met.<sup>81</sup> But environmentalists argue that the present rules (and their sometimes narrow interpretation) don't go far enough.

The heart of the existing trade regime is the non-discrimination requirement of article I and III : they oblige parties to treat imports from any GATT party no less favorably than other "like" imports (Most Favored Nation requirement), and no less favorably - after border duties are paid - than domestic "like" products (National Treatment requirement). This permits countries to use trade measures to protect their own domestic environmental standards, provided the restrictions imposed are aimed at *products*, not production processes.<sup>82</sup> Article XI prohibits the use of quantitative restrictions (quotas) on imports and exports.<sup>83</sup>

However, the GATT itself provides for exceptions : environmental regulations who have a discriminatory effect (in regard to art. I and III) can be defended by

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<sup>79</sup> Like Schoenbaum, Charnovitz, Jackson, and the GATT secretariat itself.

<sup>80</sup> For a detailed description of the multilateral trading system and its environmental awareness, see S.Murase, "Perspectives from international economic law on transnational environmental issues" (1995), to be published in *Receuil des Cours*, The Hague Academie of International Law, 1995, p.46 a.f.

<sup>81</sup> *International trade 90-91*, *supra* note 28, p.19 a.f.; T.Schoenbaum, *supra* note 12, p.713.

<sup>82</sup> For more details concerning non-discrimination and 'like' products, see M.Schlagenhof, "Trade measures based on environmental processes and production methods" (1995) 29 *Journal of World Trade*, p.123 a.f.; E.U.Petersmann, *supra* note 70, p.43 a.f.; S.Charnovitz, "The GATT panel decision on automobile taxes" (1994) 17 *International Environment Reporter*, p.921-925.

<sup>83</sup> Certain exceptions apply. See J.McDonald, "Greening the GATT : harmonizing free trade and environmental protection in the new world order" (1993) 23 *Environmental Law*, p.404-405; D.Gerardin, R.Stewardson, "Trade and environment : some lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)" (1995) 44 *International and Comparative law Quarterly*, p.65.

reference to the exceptions provided in article XX (b) and (g), or by reference to the Standards Code and certain Uruguay Round innovations.

Article XX allows countries to deviate from their basic GATT obligations for certain public policy goals, but under very strict conditions<sup>84</sup>. Efficient environmental policies - with trade measures as last resort - have to meet the following criteria : (i) preambular requirements of non-arbitrary and non-unjustifiable discrimination allows discrimination up to some extent : the purpose of the measure must justify the distinct policy, and must not be a disguised (i.e. protectionist) restriction to trade; (ii) they must enter the scope of the article. This has been narrowly interpreted by GATT panels<sup>85</sup>; (iii) they must be *necessary* or *related* to the stated objectives, again narrowly interpreted by the dispute resolution panels<sup>86</sup>; (iv) they must not be unilateral extraterritorial actions.<sup>87</sup> Again, the most fundamental problem with article XX interpretation is that it makes the legitimacy of environmental regulations turn on what is produced (products), not on *how* it is produced (production).<sup>88</sup>

Certain types of environmental measures can be justified under the Agreement on Technical Barriers to Trade (TBT), the former Standards Code. Like GATT article

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<sup>84</sup> J.Dunoff summarizes the stringent positioning of GATT article XX conditions as restricting the use of trade measures to protect the global commons, prohibiting trade restrictions on production processes, forbidding the use of unfair trade statutes to address environmental issues, and constraining trade policy as a tool for environmental protection. See J.Dunoff, "Institutional misfits : the GATT, the ICJ and trade-environment disputes" (1994) 15 Michigan Journal of International Law, p.1052-1063.

<sup>85</sup> S.Walker, *supra* note 21, p.55 a.f.; J.Kirton, S.Richardson, eds., *Trade, environment and competitiveness* (National Round Table on environment and economy, Ottawa, 1992), p.190 a.f.; D.Esty, *supra* note 13, p.46 a.f.

<sup>86</sup> See *supra*, note 85.

<sup>87</sup> D.Esty, *supra* note 13, p.44 a.f.

<sup>88</sup> However, we should note here that the concept of "like product" might be undergoing changes. The recent GATT panel report of June 19, 1992 on US measures affecting alcoholic and malt beverages (i.e. beer), made it possible to distinguish a product for health reasons, upon its alcoholic content. See S.Murase, *supra* note 80, p.59-60, and the references in footnote 82.

XX, the code recognizes the precedence of public policy goals over free trade under certain circumstances : environmental regulations must not be more trade-restrictive than necessary to fulfill a legitimate objective, are revisable if circumstances change, and must be based on relevant international standards, except where these would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued.<sup>89</sup>

The Uruguay Round results also refine the rules relating to food, plant and animal health standards - known as Sanitary and PhytoSanitary measures (SPS) - granting each nation the right to determine its own level of protection of human or animal or plant health, as long as the measures are not “arbitrary or unjustifiable distinctions”. SPS standards must be necessary, based on scientific principles and on a risk assessment, and must be avoided if there is another measure reasonable available which is significantly less restrictive to trade<sup>90</sup>.

But as S.Charnovitz notes, neither the TBT nor SPS agreements deal with import bans aimed at safeguarding the global commons or a foreign environment. Such unilateral measures remain GATT-illegal, although more and more voices are raised to promote such actions.<sup>91</sup>

The narrow interpretations of article XX and the Codes concerning product-production standards, scope, unilateral action, extraterritorial action, and the dispute resolution procedure itself - in short the general subordination of environmental concerns to trade objectives - makes the present multilateral trading

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<sup>89</sup> Articles 2.2, 2.3, and 2.4 of TBT; D.Gerardin, R.Stewardson, *supra* note 83, p.65; S.Charnovitz, *supra* note 73, p.479-480.

<sup>90</sup> Paragraph 6-20 of SPS; D.Esty, *supra* note 13, p.50; D.Gerardin, R.Stewardson, *supra* note 83, p.65; S.Charnovitz, *supra* note 73, p.479-480.

<sup>91</sup> See S.Charnovitz, *supra* note 73, p.459 a.f.; and the discussion *supra*, in section 1 of this Chapter.; T.Andersson *et al.*, *supra* note 18, p.81 a.f.

system in many views ill-equipped to address legitimate trade-related environmental concerns, lacking the balance necessary to adjudicate the relative merits of environmental and trade policies.<sup>92</sup> The GATT/WTO must be updated to reflect environmental considerations<sup>93</sup>.<sup>94</sup>

A more balanced multilateral trading regime could be reached with the following procedural changes<sup>95</sup>. Firstly, provisions for *environmental assessments* could make trade negotiators more aware of environmental issues and concerns on their agenda. Second, *openness, information dissemination* and *public participation* in trade negotiations and in the overall WTO structure would improve the public understanding of the policy-making process - and the policy! - and would generally improve the legitimacy of the process. Third, this openness should also be applied to the dispute settlement process : closed-door reviews by panels of trade experts and secrecy do not produce the needed public support or legitimacy.<sup>96</sup> Lastly, environmental staffing of the WTO and its committees. To go further than this procedural package, a more complicated reform is needed in order to green the GATT's substantive rules, adding environmental protection as a tool

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<sup>92</sup> E.U.Petersmann, "Settlement of international environmental disputes in GATT and the EC", in N.Blokker, S.Muller, eds., *Towards more effective supervision by international organizations*, (Dordrecht : Martinus Nijhoff Publishers, 1994), p.173 a.f.

<sup>93</sup> A.St-Pierre, *Industrial competitiveness, trade and the environment*, (Ottawa : Business and Environment Research Programm, Conference Board of Canada, 1993), p.9 a.f.; D.Esty, *supra* note 13, p.70-71;

<sup>94</sup> Because the environment was not part of the charge laid out at Punta del Este in 1986, the Uruguay Round negotiations did not advance the trade and environment agenda very far. It will take another round (Green Round) to proceed. However, such a Green Round could last very long before finding consensus since the issues to be addressed are complicated and politically charged.

<sup>95</sup> J.McDonald, *supra* note 83 p.462 a.f.; S.Charnovitz, *supra* note 73, p.468-470; J.Schultz, "The GATT/WTO Committee on trade and environment - toward environmental reform" (1995) 89 *American Journal of International Law*, p.433.

<sup>96</sup> Other issues in greater openness towards environmental concerns is a shift of the burden of proof (on the challenger of an environmental measure), and provisions for environmental expertise in dispute resolution panels (the Uruguay Round amendments make some small steps in this direction by giving panels optional access to experts, but do not make it a precondition).

in raising the quality and standards of human life and public welfare.<sup>97</sup> The many proposed ways to reform the trading regime's rules include interpretative rulings<sup>98</sup>, re-interpretations by dispute panels<sup>99</sup>, waivers<sup>100</sup>, subsidiary agreements<sup>101</sup>, and amendments to the GATT<sup>102</sup>.

As we will see *infra* in the next section, the express recognition of international environmental agreements remains a key issue on the agenda of GATT reform. An express 'blessings' from the GATT/WTO would certainly clarify the situation.

The addition of the word 'environment' to GATT article XX (and to the GATS) should also be considered<sup>103</sup>, as well as restructuring its balancing test.<sup>104</sup>

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<sup>97</sup> D.Esty, *supra* note 13, p.205 a.f.; E.U.Petersmann, *supra* note 92, p.173 a.f.

<sup>98</sup> Interpretations of existing rules (e.g. GATT article XX) can be issued by the Contracting Parties. However, one has to remind that - when decided against the backdrop of the current GATT obligations - the exceptions always will be construed restrictively.

<sup>99</sup> Reinterpretations of existing rules and practices by dispute panels - which could be more environmentally staffed and use the reversed burden of proof - could be a flexible method to broaden the scope of article XX and its balancing tests, to clarify the bases on which environmental trade measures may be used to regulate production processes, and whether unilateral and extraterritorial action could be used. J.Schultz, *supra* note 95, p.433.

<sup>100</sup> Obligation waivers (GATT art. XXV) offer the possibility to lift existing rules and obligations, but cannot create new obligations. Moreover, they have to be taken by a two-thirds majority of the votes cast. A more fundamental objection to the use of waivers for accommodating environmental concerns in the trading regime, is that it would mean that no environmental concern could be assured of consistency with the trading regime unless the Contracting Parties had agreed to a waiver, thus confirming that environmental policies are at the mercy of free trade policies. J.McDonald, *supra* note 83, p.463-464.

<sup>101</sup> Typically, when Contracting Parties recognize a deficiency or flaw in the existing rules, they draft separate agreements that operate alongside the GATT. Side-agreements or codes could result in new obligations, but such a code is only binding on the parties that accept it. Already-existing codes could be used to integrate more environmental concerns (such as the SPS and TBT agreements, and the Agreement on Subsidies and Countervailing measures), or new codes - such as a Green Code (developing guidelines for ecolabeling, packaging requirements, investment, etc.) or a Code on GATT article XX - could be concluded. However, since they operate within the GATT framework, their utility for environmental purposes is limited by the terms of the GATT itself. T.Schoenbaum, *supra* note 13, p.726-727; J.Schultz, *supra* note 95, p.433; J.McDonald, *supra* note 83, p.465.

<sup>102</sup> Amendments (GATT article XXX) could include changes to articles I and III (to include production processes in the "like product" concept), article VI (to allow for environmental subsidies), and article XX (to allow for extra-territorial action). They are however very difficult to achieve, since they require a stringent majority of unanimity (article I, II, XXX) or two-thirds majority (while not binding the parties who disagree). This option, along with the theoretical option of replacing the trading system by a brand new treaty, is the least feasible to attain. J.McDonald, *supra* note 83, p.465-468. See e.g. *infra*, Chapter III, section 1, C.

<sup>103</sup> S.Murase, *supra* note 80, p.74-77. See *infra*, Chapter III, section 1, C.

The multilateral trading regime's very existence and ability to contribute to the management of international economic affairs depends on its perceived legitimacy, which in turn depends upon an ongoing political judgment in major trading countries that the regime is upholding important public values and balancing appropriately competing policy goals<sup>105</sup>. This is not only true on the global level, but also at the regional level. Various regional trading agreements have in fact taken the lead in incorporating environmental protection concerns, thus proving the potential for integrating and balancing competing policy goals such as trade and environment concerns.

The value of regional agreements lies in the fact (or belief) that a few like-minded countries might achieve higher levels of international cooperation on trade liberalization or environmental protection regionally, than those attainable through a more global multilateral process.<sup>106</sup> The North American Free Trade Agreement and its side-agreements, and the European Union both hold the pursuit of sustainable development and strengthened environmental policies to be key goals

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For a concise description of the presence of environmental concerns in the various WTO agreements, see W.Benedek, "Implications of the principle of sustainable development, human rights and good governance for the GATT/WTO", in K.Ginthers *et al.*, eds., *Sustainable development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.275-286; and F.Weiss, *supra* note 78, p.382-401.

<sup>104</sup> See D.Esty's suggestions in D.Esty, *supra* note 13, p.114 a.f. The 'necessary' condition as mandating the least GATT-inconsistent policy choice fails to give sufficient deference to the judgments of national policy-makers concerning environmental goals and how to pursue them. Esty suggests to interpret this 'necessary' condition, meaning that policies should "not clearly be disproportionate in relation to the putative environmental benefits and in light of equally effective policy alternatives that are reasonable available".

<sup>105</sup> A sense that GATT/WTO's rules have lost their necessary balance and are not sufficiently attentive to environmental considerations could therefore be damaging to GATT's credibility - and legitimacy.

<sup>106</sup> States with approximately similar policy concerns are more likely to cooperate.

A lot of regional trade agreements have emerged, up to the point that some 45 % of world trade flows now take place under preferential regional regimes. R.Green, *The enterprise for the Americas initiative : issues and prospects for a FTA in the Western hemisphere*, (Westport : Praeger, 1993), p.7 a.f.

of the agreements, *on a par* with liberalizing trade.<sup>107</sup> The main difference between these 2 regional trade regimes, is undoubtedly their institutional ('constitutional') structure : whereas the EU consists of a supranational commitment between 15 member states - with Community law taking direct precedence over national legislation, and the possibility of citizen appeal to Community institutions -, the NAFTA on the other hand is clearly not a supranational, but a mere intergovernmental arrangement, a tripartite agreement, based on the sovereign equality of the three parties. Where the member states of the EU may assign tasks to EU institutions and give them ultimate decision-making authority, the parties to NAFTA talks are restricted to designing trilateral mechanisms for intergovernmental cooperation. This institutional design has of course an impact on how the EU and NAFTA will be able to deal with the trade-environment issues : the EU structure permits to go further into the reconciliation of these concerns, whereas the ability of the NAFTA countries in this will be limited by the nature of the NAFTA package itself.<sup>108</sup>

The NAFTA package enshrined environmental concerns in several ways. First of all, one of the most important examples of integrating environmental and trade issues was the high level of public participation and information during the negotiations.<sup>109</sup> Second, the NAFTA itself deals with trade-related environmental

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<sup>107</sup> An achievement that has yet to be matched by the GATT/WTO! See *supra*, and H.French, *supra* note 25, p.51.

<sup>108</sup> J.Gilbraeth, J.Tonra, "The environment : unwelcome guest at the free trade party", in D.Baer, S.Weintraub, eds., *The NAFTA debate : grappling with unconventional issues*, (London : Boulder, 1994), p.53-89; A. de Mestral, "Trade-related functions of NACE : building on NAFTA", in S.Richardson, ed., *Shaping consensus : the NACE and NAFTA*, (Ottawa : National Round Table on the Environment and the Economy, 1993), p.13-16.

<sup>109</sup> Participation by the environmental ministries, environmental groups (NGO's), sub-federal entities (who will have to implement part of the agreements), and the public; and through environmental assessments (however partial). See R.Housman, "The North American Free Trade Agreement's lessons for reconciling trade and the environment" (1994) 30 *Stanford Journal of*



concerns under several headings.<sup>110</sup> Third, environmentalists' concerns over GATT dispute resolution procedures (no environmental expertise required, international (environmental) law not taken into account, no public participation, and the burden of proof often on the country defending the environmental measure) were included in the NAFTA dispute settlement procedure : in disputes among NAFTA parties concerning international environmental agreements named in article 104, or concerning measures taken under Chapter 7B or 9, the party has the right to have the case heard exclusively by a NAFTA panel (rather than a GATT panel). This provision ensures the applicability of more environmentally sensitive rules and procedures. In addition, the burden of proof is shifted toward the country *challenging* environmental standards, and allows panels to obtain advice from scientific experts.<sup>111</sup> Despite these advances, the dispute resolution process fails to provide greater public participation and transparency in trade disputes. No public involvement - neither from the general public nor from NGO's

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International Law, p.384 a.f.; P.M.Johnson, A.Beaulieu, *The environment and NAFTA : understanding and implementing the new continental law*, (Washington D.C. : Island Press, 1996), p.24 a.f. However, Mark Ritchie notes that the participatory process could have been far more complete since public participation started quite late (after the NAFTA deal itself was concluded, the public urged the negotiation of the side-agreements on environment and social issues). M.Ritchie, "Democratizing the trade policy-making process : the lessons of NAFTA and their implications for the GATT" (1994) 27 Cornell International Law Journal, p.749 a.f.

<sup>110</sup> Namely in the preamble (reference to Sustainable Development), in the investment provisions (pollution haven clause), in article 104 explicitly recognizing bilateral and 3 important Multilateral Environmental Agreements (concerning ozone depletion, hazardous waste movements and trade in endangered species), and in Chapter 7B and 9, pertaining to Sanitary and PhytoSanitary measures and Standards-Related Measures, and their impact on domestic environmental regulations and standards. Given the nature of this thesis research, this is only an introduction to the NAFTA agreement. For more details, see P.M.Johnson, A.Beaulieu, *supra* note 109; P.M.Johnson, A.Beaulieu, "NAFTA's green opportunities" (1994) 1 Journal of Environmental CoPractice, p.5 a.f.; R.Housman, *Reconciling trade and the environment : lessons from the NAFTA*, (Geneva : UNEP, 1994); R.Housman, *supra* note 109, p.394 a.f.; D.Magraw, "NAFTA's repercussions : is green trade possible?" (1994) 32 Environment; T.Andersson *et al.*, *supra* note 18, p. 104 a.f.

<sup>111</sup> According to article 5 and Chapter 20 of NAFTA (article 2014 - 2015), the Free Trade Commission *may* call on technical advisors or create such working groups, and the Dispute Resolution Panel *may* seek information and technical advice from any person or body, or *may* request a written report from a Scientific Review Board on any issue concerning the environment.

- in the process' hearings or consultations is allowed. It seems that NAFTA actually seeks to consolidate secrecy and close-door processes.<sup>112</sup>

To address general environmental issues that were not trade-related, the North American Agreement on Environmental Cooperation was negotiated as a side-agreement of NAFTA. The parties commit themselves to tri-national cooperation on environmental issues, public participation and transparency, upwards harmonization and high levels of environmental protection, and most importantly the effective enforcement of their domestic environmental regulations.<sup>113</sup> Moreover, the NAAEC establishes the institutional structure for regional cooperation on trade-environment related issues, in the Commission on Environmental Cooperation.<sup>114</sup> This CEC could become one of the fora where trade and environment concerns could interact towards a more harmonious and integrated balance.<sup>115</sup>

The European Community - created in 1957 by the Treaty of Rome - has demonstrated through the balancing of fundamental principles, how the law can provide a structure for the successful resolution of trade, environment and

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<sup>112</sup> R.Grinspun, M.Cameron, *The political economy of North American free trade*, (Montreal - Kingston : McGill - Queen's University Press, 1993).

<sup>113</sup> P.M.Johnson, A.Beaulieu, *supra* note 109; P.M.Johnson, A.Beaulieu, *supra* note 110, p.10 a.f.; R.Housman, *supra* note 110; R.Housman, *supra* note 109, p.412 a.f.

The underlying and predominant issue of the side agreement is trilateral cooperation on these matters. Sarah Richardson, CEC programme manager NAFTA / Environment, views such international cooperation as the most important task in balancing trade and environment concerns. Interview with S.Richardson on August 12, 1996, at the CEC Secretariat, Montreal.

<sup>114</sup> Its roles and functions will be discussed *infra*, Chapter III, section 1.

<sup>115</sup> For instance, the CEC Secretariat publishes regularly reports, surveys and papers studying the impact of trade, trade liberalization and the NAFTA agreement on the environment. These reports study claims, arguments, analytic models and evaluation frameworks. They generally indicate that it is "critical to monitor macro-economic issues related to trade liberalization on an ongoing basis, in order to identify trade-induced environmental effects". See CEC, *NAFTA effects : a survey of recent attempts to model the environmental effects of trade*, CEC Environment and Trade series no.1, (Montreal : CEC, 1996); CEC, *NAFTA effects : potential NAFTA effects : claims and arguments 1991-1994*, CEC Environment and Trade series no.2, (Montreal : CEC, 1996); J.Kirton,

development concerns. The Community initially focused on trade liberalization: environmental concerns were only gradually taken into account during the following decades.<sup>116</sup>

The main objective of the Community, establishment of the Common Market and harmonization of the economic policies of the member states, are to be achieved through the four basic 'freedoms' of the EC : free movement of goods, services, capital and persons.<sup>117</sup> The liberalization of goods was a long time the highest priority of the EC, and the articles 30 to 36 of the Treaty of Rome were interpreted by the European Court of Justice on several occasions, thus allowing broad exceptions for domestic environmental regulations.<sup>118</sup>

Besides these exceptions to free movement of goods (art.36 and jurisprudence), environmental protection considerations were not taken into account until 1967.

From that moment on, community legislation<sup>119</sup> on the environment has come forth (under harmonization article 100, and the residual power article 235)<sup>120</sup>. The Single European Act of 1986 contains specific articles concerning the protection of the environment, recognizing the Community's responsibility for the

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J.Soloway, *Assessing NAFTA's environmental effects : dimensions of a framework and the NAFTA regime*, CEC NAFTA effects working paper no.1, (Montreal : CEC, 1996).

<sup>116</sup> See J.Cameron *et al.*, "Relationship between environmental agreements and instruments related to trade and development", in P.Sand, ed., *The effectiveness of international environmental agreements*, (Cambridge : Grotius Publications, 1992), p.474 a.f.; B.Burns, "Everything's gone green : a brief guide on sources of information of EU environmental law and policy" (1994) 25 *The law Librarian*, p.61 a.f.; T.Andersson *et al.*, *supra* note 18, p.99 a.f.; E.U.Petersmann, *supra* note 92, p.165 a.f.; and the references in the footnotes *infra*.

<sup>117</sup> Article 3, Treaty of Rome.

<sup>118</sup> See for more details, S.Walker, *supra* note 21, p.23 a.f.; L.Kramer, *E.C.Treaty and Environmental Law*, (London : Sweet & Maxwell, 1995), p.41 a.f.; D.Gerardin, R.Stewardson, *supra* note 83, p.41 a.f.; e.g. the cases *EEC Commission v. Italy*; *Walloon waste case*; *Cassis de Dijon* case; and others.

<sup>119</sup> Mostly under the form of directives, binding the member states as far as their purposes. More than 300 such regulations concerning the environment have been adopted since the early seventies.

<sup>120</sup> Restrained by the restrictions of those articles, namely these regulations had to be strictly "necessary" for the attainment of the Common Market. Moreover, they were taken by unanimity

environment.<sup>121</sup> The Treaty of Maastricht complements this evolution, in adding the duty to promote sustainable growth respecting the environment, and international action. Furthermore, it contains cost-sharing principles (the Cohesion Fund) and establishes the Environmental Agency in Kopenhagen, designed to facilitate cooperation and coordination of environmental standards and efforts amongst the now-15 members of the EU, and to provide the member states and the EU with objective and reliable information.<sup>122</sup> As such, the Maastricht Treaty confirms the environment as being an area of shared competence between the member states and the EU.<sup>123</sup>

In summary, the EU gives institutional legitimacy to the goals of both environmental protection and economic integration through trade. The environment has gained more than an exemptive status in the EU, whose basic and long-time goal was that of economic integration. The EU structure permitted an evolution to more sensitivity toward the regulation of environmental problems and the balancing of this goal against trade liberalization.<sup>124</sup>

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voting, often turning into *minimal* requirements, a bottom level. S.Johnson, G.Corcelle, *The environmental policy of the European Communities*, (London : Graham & Trotman, 1989), p.4-5.

<sup>121</sup> Article 100 A, and articles 130 R-S-T (the express, distinct and independent head of power regarding environmental protection), both containing the possibility for member-states to retain a higher level of environmental protection than the standardized Community level.

<sup>122</sup> Other institutions that are involved in environmental policies and their relation to trade, are the European Court, and the Commission (through its different Directorate-Generals, especially DG XI). See *Administrative structures for environmental management in the EC*, (Brussels : Commission of the EC, DG XI, 1993). The Commission has decided to prepare the publication of a *Green Paper* on trade and the environment, another reflection of the evolution towards the development of a new consensus on the close inter-relationship between trade and environment concerns. See H.Ward, *supra* note 41, p.294. See *infra*, Chapter III, section 1.

<sup>123</sup> See *Administrative structures for environmental management in the EC*, (Brussels : Commission of the EC, DG XI, 1993).

<sup>124</sup> S.Walker, *supra* note 21, p.26-27; J.Kirton, S.Richardson, *supra* note 85, p.153 a.f.; L.Kramer, *supra* note 118.

### SECTION 3 : ENVIRONMENTAL PROTECTION AGREEMENTS

As we will see *infra*, Chapter II, a large number<sup>125</sup> of multilateral agreements to protect the environment has been concluded, covering the globe's atmosphere, watercourses and marine environment, waste trade, endangered species, etc.; and trade-restrictive measures have found their place into several of these agreements<sup>126</sup>. Most of the international negotiations preceding these agreements have followed a two-step approach : an initial series of meetings is held to review scientific evidence and to draft a *framework convention*, containing the general principles; then, subsequent meetings of the convention signatories focus on the preparation of detailed *protocols*.<sup>127</sup> Probably the most known environmental protection agreement following this approach is the Convention for the Protection of the Ozone Layer (Vienna 1985), and its Protocol on Substances that Deplete the Ozone Layer (Montreal 1987; amended twice : London 1990 and Copenhagen 1992).<sup>128</sup> The framework convention contained general principles<sup>129</sup>.

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<sup>125</sup> According to the legal status and the sources, the number varies from 180 to over 800! See Chapter II, section 1.

<sup>126</sup> Approximately 20 international environmental agreements contain trade restrictions. The most known are the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the further discussed Convention protecting the ozone layer. See P.Birmie, A.Boyle, *Basic documents on international law and the environment*, (Oxford : Clarendon Press, 1995); T.Andersson *et al.*, *supra* note 18, p.96 a.f.; J.McDonald, *supra* note 83, p.450-462; J.Cameron, *supra* note 116, p.467 a.f.

The fact that several international environmental agreements contain trade measures to enforce their objectives seems to indicate that these measures are (if not GATT accepted) at least politically accepted. M.Schlagenhof, *supra* note 82, p.135.

Due to the introductory nature of this Chapter, the regime protecting the ozone layer will be taken as an example of environmental agreements using trade restrictions.

<sup>127</sup> See for a detailed description of this wide-used process, its strong points and its flaws, and the proposed alternative, L.Susskind, *Environmental diplomacy : negotiating more effective global agreements*, (Oxford : Oxford University Press, 1994), p.30 a.f.

<sup>128</sup> Receiving worldwide support : 137 countries in 1994, including all the major producers of ozone-depleting substances and 99 % of the earth's population. See R.Twum-Barina, L.Campbell, *Protecting the ozone layer through trade measures : reconciling the trade provisions of the*

came into force in 1988, and resulted in the Montreal Protocol (into force 1989) and its amendments.<sup>130</sup> The regime set up an institutional framework, with a Meeting of Parties (deciding on the obligations) and a Secretariat based in Nairobi (a forum for the development of constructive ideas, advice, and administration). The agreement contains a list of substances depleting the ozone layer, the consumption of which by the Parties will be controlled and reduced (first a reduction of 50 %, later of 75 to 100 % - according to the kind of substance). Moreover, the Montreal Protocol contains restrictions on trade with non-parties. These restrictions were considered necessary to increase incentives to participate to the convention-protocol<sup>131</sup>; and to prevent states from gaining a competitive economic or trade advantage over Parties, by becoming or expanding their capacity as suppliers of depleting substances<sup>132</sup>. Article 4 of the Protocol gradually prohibits trade in controlled substances with non-Parties.<sup>133</sup> Article 5 grants developing countries, Party to the protocol and with a per capita consumption of under 0.3 kilograms ('article 5 Parties'), a ten-year grace period within which they

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*Montreal Protocol and the rules of the GATT*, (Geneva : Environment and Trade, UNEP, 1994), p.99.

<sup>129</sup> Such as the obligation of the parties to take appropriate measures to protect human health and the environment against ozone layer depletion, to cooperate in scientific research and to exchange relevant information, and to establish a framework for future protocols.

<sup>130</sup> For a detailed overview of the negotiation process of the several instruments, see R.Twinn-Barina, L.Campbell, *supra* note 128, p.5 a.f.

<sup>131</sup> Namely an incentive for countries to join the regime, in which trade in depleting substances initially was controlled (i.e. tolerated in certain circumstances). A ban on exports to non-parties would act as an effective inducement for them to join the agreement to ensure access to controlled substances.

<sup>132</sup> In fact, without these trade restrictions, there would be an incentive for companies to move production of depleting substances to non-Parties.

<sup>133</sup> Containing a ban on imports of listed substances from non-Parties, and an export ban of these products to non-Parties (this export ban originally did not apply to exports coming from 'article 5 Parties', until the London amendment. From that time, the ban applied to exports from all Parties to non-Parties. Furthermore, any existing Party that did not accept the London amendment would be considered a non-Party). An important feature is article 4 paragraph 8, stating that imports and exports are not restricted to non-Parties to the protocol, if they are in full compliance with the

are entitled to delay compliance with the protocol. Moreover, to ensure compliance with the obligations, article 7 of the Protocol provides for reporting requirements : Parties are required to provide the Montreal Protocol Secretariat with annual data on production, consumption, imports and exports of controlled substances.<sup>134</sup> Furthermore, the Protocol encourages technology transfer and financial assistance to Parties who are developing countries, thereby offering economic incentives for them to join and comply<sup>135</sup>, and the London amendment established the Multilateral Fund for the Implementation of the Montreal Protocol to assist eligible Parties (i.e. the 'article 5 Parties') to comply with the control measures.<sup>136</sup> The activities of the Fund are implemented by its administering agencies : UNEP, UNDP, World Bank, and UNIDO<sup>137</sup>.<sup>138</sup>

The effort of the international community in protecting the ozone layer is convincing evidence of the ability of the world to rally together to effectively deal with a global environmental problem: and its trade measures have been significant

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Protocol. As such, the trade restrictions look at compliance with international environmental standards, regardless of membership to the environmental agreement.

<sup>134</sup> The Secretariat furnishes these data to its Implementation Committee, which will report the cases of non-compliance to the Meeting of Parties to the agreement. The Meeting can then decide on steps to bring about compliance (e.g. specific assistance measures). See R.Twum-Barina, L.Campbell, *supra* note 128, p.29-30.

<sup>135</sup> Articles 5, 9 and 10 of the Protocol. However, the provisions on technological assistance did not contain any technology transfer on preferential terms, and thus did not entirely satisfy developing countries. *Ibid.*, p. 32.

<sup>136</sup> The Fund provides money for projects aimed at phasing out consumption and production of controlled substances, provides technical experience and assistance, information on new technologies, and training to article 5 Parties. The fund can also assist non-Parties to carry out country studies. *Ibid.*, p.44; M.Munasinghe, ed. *Environmental economics and natural resource management in developing countries*, (Washington D.C. : Committee of International Development Institutions on the Environment, World Bank, 1993), p.292 a.f.

<sup>137</sup> Countries that are not entitled to assistance from the Multilateral Fund (e.g. because they are not classified as 'developing countries' for the purposes of the Protocol) can rely on the Global Environmental Facility (GEF) - a UNEP, UNDP and World Bank programme - for financial and technical assistance.

<sup>138</sup> For details on the projects and their financial implications of both the Multilateral Fund and the GEF protecting the ozone layer, see the 1995 report of the Environmental Department of the World Bank, *Mainstreaming the environment : the World Bank Group and the environment since the Rio Earth Summit*, (Washington D.C. : World Bank, 1995), p.66-71, p.276-287.

contributory factors in achieving such necessary wide participation. However, the regime recognized as well that trade measures had to be combined with other, more positive measures such as the financial and technological assistance provisions and grace periods to allow developing countries to join.<sup>139</sup>

Since several environmental agreements use trade restrictions, and the GATT is aimed at limiting them, two sets of international agreements are in head-to-head conflict.

The Montreal Protocol, for instance, is inconsistent with the present GATT-structure<sup>140</sup> in several ways<sup>141</sup> : the present GATT interpretation will likely find the trade restrictions discriminatory (contrary to article I and III)<sup>142</sup>, extraterritorial, (contrary to article XX), unnecessary<sup>143</sup>, to mention only the most important

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<sup>139</sup> C.Petsonk, "Recent developments in international organizations" (1990) 5 American University Journal of International Law and Policy, p.369; R.Twum-Barina, L.Campbell, *supra* note 128, p.48-49, 100.

<sup>140</sup> The consistency of certain international environmental agreements with the NAFTA structure has been dealt with in article 104 of NAFTA. See *supra*, section 2 of this Chapter. Although this approach at least provides some certainty about the mentioned agreements, it remains silent about other environmental agreements that use trade measures, whose recognition is still conditioned upon agreement of the parties to the trade agreement.

<sup>141</sup> In fact, the GATT Group on Environmental Measures in International Trade (EMIT) has done considerable work to clarify the GATT position on trade related environmental measures. Several reports have been produced. E.g. "Report by the Chairman of the Group on EMIT presented to the Contracting Parties at their 49<sup>th</sup> session", *Basic instruments & selected documents supp.40, 1992-1993 and 48<sup>th</sup> session*, (Geneva : GATT, 1995), p.75-101; *International trade 90-91*, vol.1, (Geneva : GATT, 1992), p.24; *GATT activities 1992-1993*, (Geneva : GATT, 1992 & 1993), p.81-83; p.93-96; EMIT, "Trade provisions contained in multilateral environmental agreements", found in Netscape, on the GATT homepage <http://www.ustr.gov/reports/annualrpt/1994/gatt-wto.html> Presently, its work has been taken over by the WTO Committee on Trade and the Environment.

<sup>142</sup> Although one could argue that according to article 4, paragraph 8, the discrimination is in fact not based on their membership to the agreement, but on their compliance with an environmental standard that is decided by the quasi-totality of the globe's countries. See R.Twum-Barina, L.Campbell, *supra* note 128, p.64-65.

<sup>143</sup> A GATT report argues that "it is not clear that such departures from the non-discrimination principle are always necessary (...). The parties (...) could have structured the Montreal Protocol in such a way that it reduced consumption (...) without the necessity of including provisions for special restrictions on trade with non-parties." (!) See *International trade 90-91*, *supra* note 141, p.25. For a critique on this view, and arguing that trade sanctions are indeed necessary to effectively enforce environmental agreements, see Hamilton Southworth III, "GATT and the environment" (1992) 32 Virginia Journal of International Law, p.997 a.f.



potential inconsistencies.<sup>144</sup> At the same time, it is clear that a conflict will not arise unless a GATT/WTO member brings an official complaint against another member. Up to now, no complaint has been received contesting the Montreal Protocol, or in fact any other international environmental agreement.<sup>145</sup>

According to international law, when two international agreements are in conflict, article 30 (3) of the Vienna Convention on the Law of Treaties states that a new agreement takes precedence over a previous one on the same subject, and a specific agreement takes precedence over a general one.<sup>146</sup> However, it is difficult to date the GATT because it is constantly being re-negotiated (and GATT didn't come into force in the 'usual' way either since it has been applied for almost 50 years without ever being formally into force). The Montreal Protocol is beyond any doubt more specific than the GATT/WTO.<sup>147</sup> The issue is further complicated by the various side-agreements to the GATT, and by the question whether the negotiations in successive Rounds changed the date of the GATT.<sup>148, 149, 150</sup>

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<sup>144</sup> For a very thorough overview of all the possible inconsistencies, including the TBT and SPS agreements, subsidies, intellectual property, GATT article XX and its interpretative restrictions, see R.Twum-Barina, L.Campbell, *supra* note 128, p.58-80.

<sup>145</sup> T.Andersson *et al.*, *supra* note 18, p.96-98; E.U.Petersmann, *supra* note 92, p.173; M.Schlagenhof, *supra* note 82, p.147.

<sup>146</sup> T.Schoenbaum, *supra* note 13, p.700 a.f. See for a detailed description of applicable rules of international law, J.Cameron, *supra* note 116, p.489 a.f.

<sup>147</sup> T.Andersson *et al.*, *supra* note 18, p. 97; However, it can be said that the conflicting provisions of the two agreements deal with the same subject matter. R.Twum-Barina, L.Campbell, *supra* note 128, p.82-85.

<sup>148</sup> If one admits this, then logically the same reasoning applies to environmental agreements, and their constant renegotiation through the Meeting of Parties. This could lead to constant renegotiations of both trade and environment regimes, and will not resolve the problem of the date.

<sup>149</sup> E.U.Petersman suggests a solution other than referring to art.30 of the Vienna Convention : the well-established principle of State Responsibility in the field of harm to the environment (nl. principle 21 Stockholm Declaration, principle 2 Rio Declaration : see *infra*, Chapter II, p.2, 8.) could help in interpreting the GATT/WTO (especially GATT article XX), so as to allow "national and internationally agreed measures for the protection of the global commons (...) and other environmental resources outside the national jurisdiction of the importing country (...)". The Montreal Protocol would then be perfectly consistent with the GATT/WTO. See E.U.Petersman, *supra* note 92, p.180; M.Schlagenhof, *supra* note 82, p.150-151.

<sup>150</sup> See S.Murase, *supra* note 80, p.72-77, proposing several ways of accommodating such environmental agreements containing trade restrictions in the trade regimes. See *supra*, p.21-22.

In reality however, a large number of GATT/WTO members is in fact party to the international environmental agreements protecting the ozone layer (and others). This explains why it is very unlikely to see a complaint emerge before the GATT/WTO. As T.Schoenbaum notes : "Obviously, (...) multilateral agreements such as the Montreal Protocol and CITES should be upheld in their entirety. There should be no doubt about their validity under the GATT".<sup>151</sup>

### EPILOGUE : INSTITUTIONALIZING THE BALANCE

Several existing institutions<sup>152</sup> on the global and the regional level have been the forum where the trade and environment debate has been held. They often served to clarify positions, encourage studies and research, present information on the subject, and develop constructive ideas on how trade objectives and environmental concerns could interact toward a more harmonious - and needed! - integrated balance. Chapter III will take a closer look at, and provide more information about these institutions.

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<sup>151</sup> T.Schoenbaum, *supra* note 13, p.720.

<sup>152</sup> Such as the Group on Environmental Measures in International Trade (GATT EMIT), the WTO's Committee on Trade and Environment, NAFTA's Commission on Environmental Cooperation, EU's Environmental Agency, the Montreal Protocol's Secretariat, the Basel Convention's Secretariat, the World Bank, OECD, the UN system.

## CHAPTER II : THE LEGAL FRAMEWORK

This Chapter will provide for a legal framework relating to the broad concerns of the environment, trade and development. It will stress the need for international cooperation in favor of international problems (whether they be trade or environment related), and will introduce the concept of Sustainable Development as the leading principle towards the balancing and reconciling of various trade and environment concerns.

### SECTION 1 : INTERNATIONAL LAW

The framework of the international community accepts the current organization of the world into sovereign nation-states. In fact, sovereignty is one of the key concepts of International Law.<sup>153</sup> The principle of sovereignty, as the backbone of public international law, contains several elements, amongst which territorial sovereignty (a state is sovereign within its territory), sovereign equality (all states are equal in international law), and external sovereignty (a state is not

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<sup>153</sup> N.Schrijver, "The dynamics of sovereignty in a changing world", in K.Ginther, E.Denters, P.De Waart, eds., *Sustainable Development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.80-89.

For a detailed analysis of the concept of sovereignty, its legal meaning and historical evolution, see M.Koskenniemi, *From apology to utopia : the structure of international legal argument*, (Helsinki : Finnish Lawyers' Publishing Company, 1989), p.192-263.

subjected to another state or higher authority).<sup>154</sup> Moreover, the concept of sovereignty includes the right of every state to dispose of the natural wealth and resources within its territory, and the resulting right to pursue its own social-economic environmental and development policies. However, it is increasingly recognized that these rights have duties and obligations as their corollaries.<sup>155</sup> Sovereignty is a dynamic concept, evolving along the international society's evolution. Since the second World War, states have accepted many restrictions to their sovereignty through the bias of international law, and the increasing relations of global interdependence are likely to continue this trend. Emerging principles of international law<sup>156</sup> will constitute these responsibilities and obligations of states as corollary to their sovereign rights.

During the same period, global interdependence<sup>157</sup> among nations has increased sharply : technological, social and cultural changes have reduced distances among nations, and as a result many of the stringent policies inhibiting transfrontier contacts have been relaxed, promoting trade, migratory and capital movements. Technological innovations have reduced the costs of, and thereby facilitated the moving of goods, people, capital and information, uniting the globe

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<sup>154</sup> International Law imposes certain limits to sovereignty, such as the duty to refrain from the use of force, and the duty among states to cooperate. See UN Charter, and the 1970 Declaration on Principles of International Law (GA Res. 2625 (XXV), 24 October 1970).

<sup>155</sup> N.Schrijver, *supra* note 153, p.86-87.

<sup>156</sup> E.g. in the field of international trade : the basic principle of non-discrimination and fair trade. E.g. in the field of environmental protection law : Principle 21 and 22 of the 1972 Stockholm Declaration, confirming state sovereignty over their natural resources, and the obligation to "cooperate to further develop international law protecting the environment": thus confirming the concept of State Responsibility in the field of the environment. See *infra*, p.8.

See P.Birnle, A.Boyle, *Basic documents on international law and the environment*, (Oxford : Clarendon Press, 1995), p.1-9.

For a discussion on the legal value of such principles, see *infra*, p.10 a.f.

<sup>157</sup> Be it economic, political, social or ecological interdependence. See J.Dunoff, "Resolving trade-environment conflicts : the case for trading institutions" (1994) 27 Cornell International Law Journal, p.620.

and forcing governments to lower their separationist and protectionist border policies.<sup>158</sup> Successive multilateral negotiation Rounds under the GATT have clearly demonstrated this need for “lowering the separation fences”, as well as the proliferation of regional free trade areas, customs unions or common markets everywhere on the five continents.

However, as trade issues became globalized or internationalized by this movement towards an increasingly interdependent and interconnected world, so did environmental concerns. Literature generally describes three ways in which environmental concerns become international (even when they appear initially purely domestic in nature) : concerns can generate over the impact of environmental policies on international competitiveness; concerns over the assertion of jurisdiction over other nations’ environmental priorities and practices; and the obvious concerns over transborder spill-over of pollution into another country or into the global commons (such as air, high seas, outer space, and the Antarctica region).<sup>159</sup> As a result of this problem-globalization, it is no longer possible for a country to act entirely on its own. Because of society’s and ecosystems’ interconnectedness, more and more environmental issues should be regarded as global, crossing national boundaries : disturbances and modifications

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<sup>158</sup> R.Cooper, *Environment and resource policies for the world economy*, (Washington D.C. : The Brookings Institution, 1995), preface: N.Roth-Arriaza, “Shifting the point of regulation : the International Organization for Standardization and global lawmaking on trade and the environment” (1995) 22 Ecology Law Quarterly, p.479 a.f.

<sup>159</sup> See *International trade 90-91*, vol.1, (Geneva : GATT Secretariat, 1992), p.19 a.f.; S.Charnovitz, “Free trade, fair trade, green trade” (1994) 27 Cornell International Law Journal, p.459 a.f.

in ecosystems easily spread out over the whole region, causing regional and ultimately global concern.<sup>160</sup>

Even when environmental problems are still in their *domestic phase* (i.e. the above-described movement towards globalization did not *yet* occur)<sup>161</sup>, countries need to cooperate multilaterally to create appropriate environmental policies, in order to avoid badly-aimed unilateral actions (such as unilateral trade measures). National action without global multilateral planning will probably prove insufficient<sup>162</sup> and counter-productive<sup>163</sup>. Global and globalized problems need international solutions.<sup>164</sup> The resolution of environmental problems and the promotion of environmental stability requires international cooperative action.<sup>165</sup>

It is the pursuit of this mutual cooperation among nations that is the task every time environmental negotiations are undertaken. Reluctance towards this kind of action is often stimulated by a country's sovereignty concerns (or rather a country's *perception* of its sovereign rights rather than the corollary responsibilities), making it difficult to create effective international regimes.

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<sup>160</sup> T.Andersson *et al.*, *Trading with the environment : ecology, economics, institutions and policy*, (London : Earthscan, 1995), p.17-21. Environmental damage not only negatively influences other countries' environment, but also their social and economic structure.

<sup>161</sup> It must be noted that most environmental problems have international implications : pollution, effluents and emissions recognize no boundaries and are easily transported into other nations' territory. Damage to the resource base has implications on the global level. Clearly, solutions to such problems should be sought on the international level. L.Wenner, "Transboundary problems in international law", in S.Kamieniecki, ed., *Environmental policies in the international arena : movements, parties, organizations and policy*, (Albany : State University of New York Press, 1993), p.165 a.f.

<sup>162</sup> A.Bennet, *International organizations : principles and issues*, (New Jersey : Prentice Hall, 1991), p.318.

<sup>163</sup> Even the GATT warns for trade frictions and unilateral trade restrictions against countries who decide to "go alone on environmental policies". *International trade 90-91*, vol., 1, (Geneva : GATT Secretariat, 1992), p.20.

<sup>164</sup> *The environment and emerging development issues*, (Tokyo : WIDER, UN University, 1992), p.3 a.f.

<sup>165</sup> C.Petsonk, "Recent developments in international organizations" (1990) 5 *American University Journal of International Law and Policy*, p.351 a.f.; D.Pearce, J.Warford, *World without end : economics, environment and Sustainable Development*, (Oxford : Oxford University Press, 1993).

institutions and measures. It is the (often-difficult) task of international negotiators to find sufficient incentives for countries to revise their sovereignty based claims and convince them to join the international system of rights and obligations towards the world's resource base.<sup>166</sup>

In a historical perspective, the negotiation of international regimes concerning the environment has known a gradual movement from bilateral towards regional and multilateral of international instruments.<sup>167</sup> This movement of course is partly explained by the perception of the negotiating states of their state sovereignty, as discussed above. Only when responsibilities and obligations come to qualify the concept of sovereign rights, states undertake negotiations and value international cooperative problem-solving. In the field of the environment, negotiations are increasingly being supported by public participation of the various parties concerned (from environmental NGO's to private citizen pressure). This approach is still in stark contrast with the entire international trade community, where trade negotiations and dispute resolution proceedings tend to be preferable dealt with in complete secrecy.<sup>168</sup>

An important aspect of international regimes<sup>169</sup> is institutional.

International cooperation among states will not likely result in the imposition of a

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p.327 a.f.; P.Haas, R.Keohane, M.Levy, *Institutions for the earth*, (London : MIT Press, 1993), foreword by J.Nye.

<sup>166</sup> It is often emphasized that especially developing countries need such incentives in order to be able to support or join cooperative action. Especially in the trade, development and environment debate, the importance of tangible assistance through financing, technology transfer, increased development assistance and access to markets for the South is being stressed. See S.Vaughan, "Trade and environment : some North-South considerations" (1994) 27 Cornell International Law Journal, p. 591 a.f.

<sup>167</sup> For a more detailed survey of this evolution, see L.Wenner, *supra* note 161, p.165 a.f.

<sup>168</sup> H.French, *Costly trade-offs : reconciling trade and the environment*, (Washington D.C. : Worldwatch Institute, 1993), p.60.

<sup>169</sup> For the most topic definitions of 'international regime', see L.Jurgielewicz, "International regimes and environmental policy : an evaluation of the role of international law", in R.Bartlett *et*

“World Government” over them: sovereign states will - at the present configuration of international relations - not subject themselves to such form of government.<sup>170</sup> International organizations resemble more intergovernmental cooperation schemes among nations, balancing sovereignty and cooperation needs, providing a bridge between the national and the international.<sup>171</sup> The increasing interdependence and interconnectedness of today's world and problems urges the international community to cooperate together in creating the organizations needed to manage the global reality.<sup>172</sup> A rapid growth of such international organizations has consequently occurred.<sup>173</sup> International organizations are usually defined as *a formal, continuous structure established by agreement between members (governmental and/or non-governmental) from two or more sovereign*

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*al.*, eds., *International organizations and environmental policy*, (Westport : Greenwood Press, 1995), p.139 a.f.; S.Murase, “Perspectives from international economic law on transnational environmental issues” (1995) to be published in the *Receuil des Cours*, The Hague Academy of International Law, 1995, p.164 a.f.

On international regimes and their establishment (contractual approach, evolutionary approach, and piecemeal process), see W.Feld *et al.*, *International organizations*, (Westport : Praeger, 1994), p.251 a.f.

<sup>170</sup> R.Keohane, P.Haas, M.Levy, “The effectiveness of international environmental institutions”, in P.Haas *et al.*, eds., *Institutions for the earth*, (London : MIT Press, 1993), p.4; A.Bennet, *supra* note 162, p.318.

Several schools of thought study and describe the inter-relatedness of state sovereignty and international cooperation and organization (e.g. realism; neorealism; globalism - or idealism?). For a detailed discussion, see M.Malik, “Do we need a new theory of international organizations?”, in R.Bartlett, ed., *International organizations and environmental policy*, (Westport : Greenwood Press, 1995), p.223 a.f.

<sup>171</sup> A.Bennet, *supra* note 162, p.413 a.f.

As such, international organizations respect the principle of state sovereignty. See R.Keohane *et al.*, *supra* note 170, p.6.

<sup>172</sup> Whether they be peace, security, trade, environment, development, transportation or other issues.

<sup>173</sup> O.Young, “International organizations and international institutions : lessons learned from environmental regimes”, in S.Kamieniecki, ed., *Environmental politics in the international arena*, (Albany : State University of New York Press, 1993), p.146 a.f.; D.Stevis, C.Wilson, “The institutionalization of international environmental policy : international environmental law and international organizations”, in R.Bartlett *et al.*, eds., *International organizations and environmental policy*, (Westport : Greenwood Press, 1995), p.125 a.f.

The number of international governmental organizations has reached the number of approximately 300, the majority of them having specific purposes such as trade (e.g. GATT), health (e.g. WHO), environment (e.g. UNEP), finance (e.g. IMF), education, etc. See C.Archer, *International organizations*, (London : Routledge, 1992), p.135.



*states with the aim of pursuing the common interest of the membership.*<sup>174</sup> As such, membership, common aim, and formal permanent structure are its key-elements. International Organizations play the role of instrument being used by its members for a particular end; the role of a forum or arena within which actions and meeting take place; or sometimes even the role of independent actor (meaning that it can act through a stable and coherent decision-making process in a certain independent way).<sup>175</sup> They can play a catalytic role (influencing the conception and framing of issues, principles and guidelines), a coordinating role or even take on the role of leadership in a negotiating process.<sup>176</sup> Their functions are (amongst others) : contributing to the norm- and rule-making process; the rule-enforcement process; and the rule-adjudication and information process. Overall, they contribute to more efficient and appropriate international and national policy conception and implementation.<sup>177</sup> However, their effectiveness corresponds directly to the degree of state cooperation : problems of underfunding and paralysis, cooptation by national or special interests, and state intrusiveness and bureaucratization undermine highly their work<sup>178</sup>, underlining once again the necessary condition of intergovernmental cooperation. New approaches and initiatives, such as the increasing of government concern (by providing access to information, public pressure<sup>179</sup> and issue linking), enhancing the negotiation process (by providing monitoring and information services, and negotiation fora), and increasing national capacity (especially for the less developed countries : technical training,

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<sup>174</sup> C.Archer, *supra* note 173, p.33-37; W.Feld, *supra* note 17, p.10 a.f.

<sup>175</sup> C.Archer, *supra* note 173, p.135 a.f.

<sup>176</sup> O.Young, *supra* note 173, p.150 a.f.

<sup>177</sup> R.Keohane *et al.*, *supra* note 170, p.8.

<sup>178</sup> O.Young, *supra* note 173, p.158 a.f.

assistance, grants, etc.) are necessary steps to take in architecting better international organizations.<sup>180</sup>

International organizations do not come alone. They are part of the international regime or system<sup>181</sup>, embedding norms and rules outlined in international legal instruments, such as treaties, agreements, protocols, etc. These international legal instruments - whether they be binding agreements or non-binding guidelines - constitute important mechanisms for achieving international cooperation in various fields.<sup>182</sup> It should be stressed that the international trade, environmental protection and development regimes are not self-contained or autonomous systems, but all part of general International Law, as various specialized fields of International Law.<sup>183</sup>

In the field of the environment<sup>184</sup>, as the realization has grown that protection of the environment must be addressed on a global basis, the number of environmental instruments has proliferated, and more than 250 agreements have been concluded.<sup>185</sup> Methodologically, academic writing construes a difference between

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<sup>179</sup> International organizations often promote state cooperation by magnifying public pressure on recalcitrant states.

<sup>180</sup> M. Levy, R. Keohane, P. Haas, "Improving the effectiveness of international environmental institutions", in P. Haas *et al.*, eds., *Institutions for the earth*, (London : MIT Press, 1993), p.98 a.f.

<sup>181</sup> In fact, as mentioned, international organizations - as magnifiers of concern, facilitators of agreement and builders of capacity - play a predominant role in construing international regimes. See *Ibid.*, p.408 a.f.

<sup>182</sup> C. Petsonk, *supra* note 165, p.351 a.f.

<sup>183</sup> See on this S. Murase, *supra* note 169, p.46-47.

<sup>184</sup> The major sources of international law are : customs, general principles, treaties, judicial decisions, and certain decisions of international organizations. International environmental law is mostly treaty law. See D. Stevis, C. Wilson, *supra* note 173, p.123 a.f.; P. Birnie, A. Boyle, *International law and the environment*, (Oxford : Clarendon Press, 1992), p.11 a.f. Customary environmental law is yet in an embryonic state of development. See J. Dunoff, "Institutional misfits : the GATT, ICJ and trade-environment disputes" (1994) 15 Michigan Journal of International Law, p.1093 a.f.

<sup>185</sup> 194 of them accompanied by some sort of organizations structure. D. Stevis, C. Wilson, *supra* note 173, p.125-127.

Other sources propose the number of approximately 180 international environmental treaties. If one counts not only the environmental treaties, but also the less-binding declarations, action plans

*traditional* and *modern* international environmental law.<sup>186</sup> The traditional approach, based on the principle of unconditional state sovereignty, stressed the limited scope of application (purely neighborly relations, protection of specific concerns such as human health, economic interests and property), significant harm as condition, and equitable use. The whole is characterized by an anthropocentric perspective of the environment. Gradually, however, this view started to shift towards a more modern approach, stressing wide-scope protection of all aspects of the environment, the perception of a reality of a multitude of states having an impact on the environment, and of the erosion of the traditional view of sovereignty - only rights - towards more joint responsibilities, cooperation and global concern.<sup>187</sup> This modern environment-centered approach emerged in the late sixties - early seventies, and began appearing in environmental instruments such as the 1972 Stockholm Declaration.<sup>188</sup> This modern approach towards the environment - contrary to the traditional view - not only stresses the cooperation

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and accords containing provisions addressing the environment, the number of international environmental instruments tops over 800! See H.French, *Partnership for the planet : an environmental agenda for the UN*, (Washington D.C. : Worldwatch Institute, 1995), p.9-11; E.Brown-Weiss, "Global environmental change and international law : the introductory framework", in E.Brown-Weiss, ed., *Environmental change and international law*, (Tokyo : UN University Press, 1992), p.7 a.f.

<sup>186</sup> H.Hohmann, *Precautionary legal duties and principles of modern international environmental law*, (Dordrecht : Graham & Trotman / Martinus Nijhoff Publishers, 1994), p.34 a.f., p.184 a.f.

<sup>187</sup> See *supra*, p.45, sovereignty as a dynamic concept. See for a general description of the concept of State Responsibility in International Law, D.Kennedy, *International legal structures*, (Baden-Baden : Nomos Verlagsgesellschaft, 1987), p.173-188; and for its application in the field of the environment, see W.Lang, H.Neuhold, K.Zematek, *Environmental protection and international law*, (London : Graham & Trotham / Martinus Nijhoff Publishers, 1990), p.187-203.

<sup>188</sup> Principles 21 and 22 clearly introduced the right-duty concept of sovereignty, management and preservation of natural resources and state cooperation in favor of the environment. They were reiterated on several occasions, including in the 1992 Rio Declaration (principles 2, 5 and 7). See *supra* footnote 156 on page 45. See Chowdhury, "Common but differentiated state responsibility in international environmental law : from Stockholm (1972) to Rio (1992)", in K.Ginther *et al.*, eds., *Sustainable Development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.325 a.f.

among states, but also cooperation among different policy sectors and concerns<sup>189</sup> : the cooperative management of the earth's resources is most efficiently done by integrating environmental concerns into other policy areas, and vice versa. As such, the view that environmental and development policies, trade policies, health policies, agriculture policies, financial policies etc. need to be coordinated and integrated became more and more accepted.<sup>190</sup>

As noted above, many international environmental agreements have been negotiated.<sup>191</sup> The negotiation process is often a difficult one, obstructed by North-South problems, sovereignty concerns and the lack of incentives to cooperate. Procedural betterment, such as NGO participation, issue linkage<sup>192</sup> (e.g. with trade, or debt issues), and prenegotiation assistance for less-developed countries could facilitate the process. Moreover, new approaches in international treaty law have been developed : the emerging use of soft-law instruments, non-binding texts and guidelines, participation in the creation of new international rules, by formulating emergent values that later on may be formally confirmed in hard-law instruments, or technical details. The trend of "pactum contrahendi", a cooperation scheme that will lead to more precise obligations; the method of relative standards (standards varying from country to country, e.g. based on their respective grade of

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<sup>189</sup> H.Hohmann, *supra* note 186, p.35-40; H.French, *supra* note 185, p.7-8; S.Chowdhury, *supra* note 188, p.325 a.f.

<sup>190</sup> See *infra*, the concept of Sustainable Development, p.61 a.f.

<sup>191</sup> For more details about the negotiation process, see L.Susskind, *Environmental diplomacy : negotiating more effective global agreements*, (Oxford : Oxford University Press, 1994); and L.Susskind, C.Ozawa, "Negotiating more effective international environmental agreements", in A.Hurrell, B.Kingsbury, eds., *The international politics of the environment : actors, interests and institutions*, (Oxford : Clarendon Press, 1992), p.142 a.f.

<sup>192</sup> For a theoretical analysis of issue linkage and its capacity to broaden the environmental coalition, see I.Goldwin, A.Winters, eds., *The economics of Sustainable Development*, (Cambridge : Centre for Economic Policy Research, OECD, Cambridge University Press, 1995), p.264-288; and L.Susskind, *supra* note 191, p.82-97.

development); the use of umbrella conventions (agreements proclaiming the principles - protocols with more concrete obligations); regional conventions: etc.<sup>193</sup>

However, negotiating treaties is one thing, making them work is another. The effectiveness of environmental instruments depends on different factors : use of carrots - financial assistance, technology transfer, aids and grants - and sticks - penalties such as trade sanctions -, assessment and public information schemes<sup>194</sup>, public participation, enforcement and monitoring provisions<sup>195</sup>, and most recently, the use of market or economic incentives, such as pollution taxes and the creation of markets for tradable emission permits<sup>196</sup>. Here lies an important task for secretariats and like-wise institutional bodies accompanying the agreement.<sup>197</sup> As noted above, these international organizations as supportive institutions for the surveillance and implementation of treaty obligations are increasingly numerous and more and more used, and not only in the field of the environment.<sup>198</sup>

The above-mentioned trend towards more use of soft-law instruments has opened the door to yet another discussion : their legal status. Generally, soft-law

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<sup>193</sup> A.Kiss, "The implications of global change for the international legal system", in E.Brown-Weiss, ed., *Environmental change and international law*. (Tokyo : UN University Press, 1992), p.315 a.f.

<sup>194</sup> Environmental awareness is a very important factor of compliance : this means the exploitation of accountability of states by rendering their performance transparent to scrutiny by the international community. C.Petsonk, *supra* note 165, p.351 a.f.; L.Jurgielewicz, *supra* note 169, p.144 a.f.; E.Brown-Weiss, *supra* note 185, p.20-21; and A.Kiss, *supra* note 193, p.334 a.f.

<sup>195</sup> T.Carrol-Foster, ed., *A guide to Agenda 21 : issues, debates and Canadian initiatives*. (Ottawa : International Development Research Center, 1993), p.110-111; L.Susskind, *supra* note 191, p.99 a.f.; H.French, *supra* note 189, p.10 a.f.

<sup>196</sup> Abundant literature exists concerning the use of market incentives. Given the introductory nature of this Chapter, these incentives will not be treated here, but in Chapter I of this thesis, with the appropriate references.

<sup>197</sup> See *supra*, international organizations.

<sup>198</sup> E.g. in the field of trade law, where numerous regional free-trade areas have emerged with certain institutional structure (EU, NAFTA, Mercosur, Asean, ...); and of course the multilateral trading system of the WTO/GATT.  
E.g. in the field of Human Rights, with UN bodies (where NGO's can participate in the discussions), and regional bodies such as the European Court/Commission and the American Court of Human Rights.

declarations and guidelines are considered as non-binding instruments: at best, they are recognized as playing the role of “*pré-droit*”, a fore-runner to the development of new international law. But could one assume that they could in part contain legally binding duties or principles of customary law?<sup>199</sup> Here, the usual objection raised is that customary law only arises when a *continual state practice* supported by *opinio iuris* can be shown to exist. In this view, such soft-law could hardly be recognized as customary law, since so many states acted - and sometimes still act - without any considerations for several soft-law principles.<sup>200</sup> However, upon closer examination of the conditions of customary law, disagreements seems to exist regarding the requirements for the formation of customs<sup>201</sup> : two theories - the theory of ‘spontaneous law’, and the ‘instant custom’ theory - are more skeptical of the high value accorded to state practice, as states often act against their legal convictions<sup>202</sup>; these theories would permit the acceptance of soft-law declarations and guidelines as possibly containing obligations and principles of customary law.

Finally, the new directions taken by the modern approach of international environmental law - as opposed to the traditional view, centered on a narrow-

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A.Kiss, *supra* note 193, p.326 a.f.

<sup>199</sup> For a general introduction on the role of customs in international law, see D.Kennedy, *supra* note 187; M.Koskenniemi, *supra* note 153, p.342-421; P.Bimie, A.Boyle, *supra* note 184, p.15 a.f.

<sup>200</sup> The question of state compliance is in environmental law (and in international law in general) very topic; the continued divergence between rhetoric and practice, and between the principles and substantive provisions does not incite the creation of customary law. See J.Moffet, F.Bregha, “The role of law reform in the promotion of Sustainable Development” (1995) 6 *Journal of Environmental Law and Practice*, p.1-2.

<sup>201</sup> E.g. the continuous long-term and consistent practice requirement seems to be subject to redefinition. See H.Hohmann, *supra* note 186, p.167-168.

<sup>202</sup> It is more the continuing violation of a rule that places doubt on its customary value. Declarations of states can have a great influence on the formation of customary law, since unilateral declarations can be legally binding, provided that states rely upon them. Accordingly, every state must assume that its solemn declarations can become part of the reciprocal expectations upon which customary law relies. *Ibid.*, p.166 a.f.

focused interpretation of state sovereignty - are likely to amplify in the future negotiation of, and dealing with environmental problems.<sup>203</sup> The most important of these trends is, in my view, certainly issue linkage. The environment cannot be looked upon as a distinct sector of our society. Rather, environmental problems are qualified by their inter-relatedness and inter-connectedness with all other sections of our society. Consequently, policies addressing these problems will have to take into account all their interdependent aspects : links between the environment and human rights<sup>204</sup>, environment and development/poverty concerns, environment and issues of world economy and commerce, (to cite only a few) are numerous and ever-increasing. Human awareness of these links is emerging into an approach towards integrating and coordinating policies to address those concerns. The next section will examine more closely these links between poverty, development and environment concerns, and will conceptualize the notion of Sustainable Development.

## SECTION 2 : DEVELOPMENT LAW

There exists a powerful link between poverty, population growth and environmental degradation<sup>205</sup>. To put it schematically : environmental degradation

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<sup>203</sup> E. Brown-Weiss, *supra* note 185, p.3-23.

<sup>204</sup> The growing link between environmental issues and human rights concerns can be illustrated by conceptualizing the rights to information, freedom of speech, citizen participation, environmental refugee and indigenous people concerns, rights of future generations and of present generation, the right to the environment. See *Ibid.*, p.19.

<sup>205</sup> For an analytical discussion of various interactions between the three concepts, see R. Baldwin, "Does sustainability require growth?", in I. Goldwin, L. Winters, *supra* note 192, p.51 a.f.

contributes to poverty<sup>206</sup>, and poverty restricts the poor to acting in ways that are environmentally damaging. The poor often live in places that are environmentally vulnerable, threatened or degraded, and they generally lack the means to avoid or mitigate the negative effects of degradation. Moreover, the very poor have often very short time-horizons, meaning that their ability to plan ahead is jeopardized by their preoccupation with day-to-day survival provoking short term action<sup>207</sup> - poverty as a disabling factor.<sup>208</sup>

It is clear that the poor suffer the consequences of environmental degradation the most, since they are most vulnerable and least able to avoid the degradation.<sup>209</sup> In addition, high population growth rates directly exacerbate the problems of environmental degradation, and thus of poverty<sup>210</sup>. As more and more people exploit open-access resources<sup>211</sup> - sometimes the poor's only resource base - the environment is further degraded (through soil erosion, desertification, deforestation, depleted fishing grounds, loss of biodiversity, polluted groundwater and silted rivers, and so forth), and the cycle starts all over again. Several solutions to contain this vicious cycle have been proposed, among which the interesting

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<sup>206</sup> Through worsened health, reduced productivity of natural resources upon which the poor rely, and lowered labor productivity of the poor. See S.Mink, *Poverty, population and the environment*, (Washington D.C.: World Bank, 1993), p.1-10.

<sup>207</sup> A "caveat" exists in this line of reasoning, however : short horizons are not exclusive to the poor; but the specific circumstances of their situation leaves them no choice, pushing them towards the kind of short-sighted plans endangering their environment. *Ibid.*, p.13.

<sup>208</sup> Poverty could be analyzed as a mechanism by which the true underlying causes are transformed into actions degrading the environment. Poverty reduces the options available to the poor, and determines their responses to outside pressures; it removes their ability to respond and adapt because the time horizon is typically short, and few feasible options are available. D.Pearce, J.Warford, *supra* note 165, p.272 a.f.

<sup>209</sup> M.Munasinghe, W.Shearer, *Defining and measuring sustainability*, (Washington D.C.: World Bank, 1995), p.21 a.f.

<sup>210</sup> More people means more energy needed, more pollution and waste emitted, and in general a greater pressure on the earth's resource base.

<sup>211</sup> It is mostly these open-access renewable resources (such as air, water, forests, fisheries, etc.) that are most vulnerable because they are underpriced. For a general description of price mechanisms and market/policy failures, see *supra* Chapter I, section 1.



proposal of the raising of the level of education - which raises income and reduces fertility<sup>212</sup> and health care.<sup>213</sup>

One of the necessities in this debate is the reduction of poverty, and the raising of general income. This is the aim of Development - which is not to be reduced to economic growth alone, although that forms a part of it<sup>214</sup>. Furthermore, economic growth and development do not necessarily affect negatively the environment : growth can generate technological improvements changing the economic output (the product) and the production process, a more efficient restructuring of resource use, and prosperity in the standard of living affecting the above-mentioned time-horizons of people<sup>215</sup>.<sup>216</sup> It becomes clear that growth must be based on *quality* improvements rather than on quantitative rise.<sup>217</sup>

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<sup>212</sup> R.Baldwin, "Does sustainability require growth?", in I.Goldwin, L.Winters, eds., *supra* note 192, p.76.

Again, the importance of education, training, access to information and public participation in the field of environment and development is being stressed.

<sup>213</sup> Reducing population growth rates is, of course, only part of the solution. For other solutions, such as reducing market failures, policy failures, institutional failures, see *supra*, Chapter I, section 1.

<sup>214</sup> I.Goldwin, L.Winters, *supra* note 192, p.1 a.f.

<sup>215</sup> For instance in expressing greater pressure in demands for a cleaner and healthier environment - market pressure (green consumerism) and political pressure (green awareness). G.Grossman, "Pollution and growth", in I.Goldwin, L.Winters, eds., *supra* note 192, p.20-21.

<sup>216</sup> These elements are dear to the people who advocate free trade. See for instance *International trade 1990-91*, (Geneva : GATT Secretariat, 1992), p.19. The same source admits even that "unrestricted trade can be harmful for the environment, especially when a country's environmental policies are weak ...". The general view is that trade is not the cause, but merely a magnifier of environmental degradation. Trade liberalization can hurt the environment, but only in the absence of appropriate environmental protection policies.

<sup>217</sup> T.Andersson *et al.*, *Trading with the environment : ecology, economics, institutions and policy*, (London : Earthscan, 1995), p.14 a.f., noting that "irreversible changes in the ecosystem as a result of production and consumption should be avoided" : "Growth and technical development by themselves cannot guarantee solutions. It is *how economic growth occurs* and in what direction technology develops which determine if ecologically sustainable economic development will take place".

Of course, on the other hand, growth is likely to exacerbate the pressure on natural resources and their assimilative and carrying capacity<sup>218</sup>, hence the need for appropriate and sufficient environmental protection policies<sup>219</sup>. Once again, the need for the coordination, integration and balancing of growth concerns (i.e. the main concern of free trade advocates) and environmental protection is being stressed over and in replacement of the growth-environment conflict view.

A central issue in development law, and strongly related to population and growth concerns, is the all-important division between rich and poor, developed and developing, North and South. The North-South divide is often depicted as a conflict over money and technology, yet there is more to this conflict than mere economic and scientific ascendancy : the question of cultural hegemony is what underlies these debates. The South views a lot of its problems - deforestation, food shortages, urbanization - as by-products of the dominant economic culture, and wants the North to accept - at least join - responsibility in causing these problems by pursuing an economic and development pattern that is at odds with the ways of the South.<sup>220</sup> This attitude is the general approach of the South in the negotiation of international legal instruments relating to development, economy and the environment.<sup>221</sup>

Another issue in the North-South confrontation relates to population (mostly concentrated in developing countries) and consumption (concentrated in

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<sup>218</sup> Carrying capacity marks the capacity to sustain a maximum population within a specific area and under given technological capabilities; assimilative or regenerative capacity marks the capacity of the area to assimilate and break down waste and pollution. *Ibid.*, p.10 a.f.

<sup>219</sup> Such environmental policies can play a role in avoiding or extending the reaching of the potential limits to growth (a high agenda point of certain environmentalists, such as the "limits to growth" school).

D.Pearce, J.Warford, *supra* note 165, p.3 a.f.

<sup>220</sup> L.Susskind, *supra* note 191, p.18-21.

developed countries). While the North emphasizes population growth rates as a major concern, the South argues that it is the *product* of both population and consumption levels that cause global problems such as resource degradation and development concerns, thus linking the population concern with equally concerning consumption patterns.<sup>222</sup>

The participation of the South in development and environment negotiations is of major importance for the success of the resulting instruments. Sufficient incentives to join, such as technology transfers, access to markets, debt-relief and other financial incentives should be construed in order to enable developing countries to participate. These incentives are necessary, not only economically but also psychologically, as the North's acceptance of its involvement in the South's problems.<sup>223</sup>

Lastly, we remark that the eternal division of countries into 'developed' or 'developing' seems to be a poor basis on which to build a global partnership for sustainable development.

As discussed above, there is a growing recognition of the fact that it is the *quality* of development rather than the quantity of economic growth that is important. This view is emphasized by the concept of "Sustainable Development".

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<sup>221</sup> M.Grubb *et al.*, *The earth summit agreements : a guide and assessment*, (London : Earthscan, 1993), p.26 a.f.

<sup>222</sup> *Ibid.*, p.30 a.f.; J.Rowley, J.Holmberg, "Living in a sustainable world", in J.Holmberg, ed., *Making development sustainable*, (Washington D.C. : Island Press, 1992), p.334 a.f.

<sup>223</sup> The South, with its weak economic base, sometimes irrational economic structures, overpopulation, indebtedness and its lack of modern technology, is not only a cause of environmental degradation, but also its principal victim. What they need is to reduce their dependence, and to develop their economies, agricultural methods and technologies. Financial and technological assistance, development banks, education and training, environmental funds, and increased participation in negotiation could alleviate some of these problems. L.Cheng, "The legislation and implementation of international environmental law and the third world : the example of China", in E.Brown Weiss, ed., *Environmental change and international law*, (Tokyo : UN University Press, 1992), p.184 a.f.

The term gradually emerged literature since the mid-seventies<sup>224</sup>, but came to fame - and received political weight - by the work of the World Commission on Environment and Development (chaired by Gro Harlem Brundtland) in its report *Our Common Future*<sup>225</sup>. The report - accepted by the UN General Assembly on 11 December 1987 and reiterated in several successive international instruments, such as the 1992 UNCED Declaration (or Rio Declaration)<sup>226</sup> - defines "Sustainable Development" as "development which satisfies the basic needs of the present generation without compromising the capability of future generations to satisfy their basic needs"<sup>227</sup>. This goal signifies the integration of environmental concerns into the entirety of economic and development policies - environmental protection is recognized as a *cross-sectional* responsibility, affecting policies concerning population, agriculture, forestry, energy, industrial development, urban settlement, and trade; in short the entire development scene. In addition, the goal of sustainable development requires the inclusion of *equity* - intra- and inter-generational equity - into public policy. Finally, sustainable development indicates

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<sup>224</sup> See J.Holmberg, R.Sandbrook, "Sustainable development : what is to be done?", in J.Holmberg, ed., *Making development sustainable*, (Washington D.C. : Island Press, 1992), p.19.

<sup>225</sup> WCED, *Our common future*, (Oxford : Oxford University Press, 1987).

<sup>226</sup> H.Hohmann, *supra* note 186, p.77 a.f.; K.Hossain, "Evolving principles of sustainable development and good governance", in K.Ginther *et al.*, eds., *Sustainable development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.18 a.f.; M.Grubb *et al.*, *supra* note 221, p.87-89. For an introduction to that other UNCED document, Agenda 21, see T.Carrol-Foster, *supra* note 195.

In fact, Sustainable Development has become a notion around which "legally significant expectations regarding environmental conduct have begun to crystallize". It is being increasingly used in the development-trade-environment debate, at the national and international level, and in binding agreements. In time, Sustainable Development, the obligation to protect the environment and the right to a sound environment might become *preremptory norms* of International Law (i.e. *ius cogens*). See P.Birnie, A.Boyle, *supra* note 184, p.5-14; B.Simma, ed., *The Charter of the UN : a commentary*, (Oxford : Oxford University Press, 1994), p.779.

<sup>227</sup> WCED, *supra* note 225, p. 43.

the need to emphasize policies that are consistent with the planet's endowments, i.e. consistent with the earth's resource base.<sup>228</sup>

At the most basic level, dictionaries define the verb sustain as 'keep up, prolong, nourish', and development as 'the improvement of human well-fare and the quality of life'<sup>229</sup>. As noted above, development is therefore not entirely synonymous with economic growth, but is a far wider concept : development takes place on several levels, in several systems; and it intrinsically involves trade-offs between these levels. Development will become increasingly sustainable when system goals overlap.<sup>230</sup>

Moreover, theoreticians from those three systems or disciplines place varying interpretations on the concept of Sustainable Development. The biophysical or ecological view focuses on a development process that respects and improves the *stability of the biophysical system* : the natural environment could become unstable as a result of stresses resulting from 'unsustainable' activities. Protecting the environment then means limiting the stresses on the ecosystem to 'sustainable' levels. Maintaining nature's biodiversity, the carrying and assimilative capacities of the resource base, and its capacity to adapt to change are essential. Second, the socio-cultural approach emphasizes the maintaining of the *stability of social and cultural systems* - ethics, beliefs, institutions, etc. In this view, it is crucial to develop 'sustainable' social practices to help manage the resource base. In this approach social equity and cultural diversity are essential. Third, the economic

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<sup>228</sup> H.Hohmann, *supra* note 186, p.78-79; I.Goldwin, L.Winters, *supra* note 192, p.147 a.f.

<sup>229</sup> Such as advances in the realm of education, health, self-esteem and utilities. See D.Pearce, J.Warford, *supra* note 165, p.42-43.

<sup>230</sup> J.Holmberg, R.Sandbrook, *supra* note 224, p.23-27.

school bases sustainability on the *improvement* of the economic living standard *while at least maintaining* the stock of assets that yield these benefits.

These different interpretations of the same concept illustrate the theoretical possibilities of sustainable development.<sup>231</sup> Furthermore, they are merely accents that are being placed on the same concept. It is clear that these social as well as ecological and economic elements all constitute Sustainable Development. A useful<sup>232</sup> practical definition of Sustainable Development, containing the three elements, could read : “the maximization of benefits of social and economic development, subject to maintaining the services from and quality of natural resources over time”.<sup>233</sup>

Out of the preceding, several “Core Sustainable Development Principles” can be put forward<sup>234</sup>. First, sustainable development requires a development process that respects ecological integrity, i.e. the conservation of the earth’s life-supporting systems (such as atmosphere, climate, water, soil, etc.). In practice, this means avoiding irreversible harm to the ability of the resource base to act as a provider of inputs (carrying capacity) and as a “sink” to absorb waste (assimilative or regenerative capacity), and to respect the earth’s biodiversity. Second, sustainable

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<sup>231</sup> But it also shows its difficulty : various authors catalogue ‘Sustainable Development’ as a “buzz word”, because of the lack of agreement on its precise meaning, noting that the discussion over its substance has produced a variety of often difficult-reconcilable themes. See P.Malanczuk, “Sustainable developemt : some critical thoughts in the light of the Rio Conference”, in K.Ginther *et al.*, eds., *Sustainable development and good governance*. (Dordrecht : Martinus Nijhoff Publishers, 1995), p.25 a.f.; P.Dasgupta, “Optimal versus sustainable development”, in I.Serageldin, A.Steer, eds., *Valuing the environment*, (Washington D.C. : World Bank, Proceedings of the 1<sup>st</sup> annual international conference on environmentally sustainable development, 1993), p.35-46.

<sup>232</sup> Offering at least a general orientation and direction for action.

<sup>233</sup> See for a concise description of the different theoretical approaches : M.Munasinghe, J.McNeely, “Key concepts and terminology of sustainable development”, in M.Munasinghe, W.Shearer, eds., *Defining and measuring sustainability*. (Washington D.C. : World Bank, 1995), p.19-55; and I.Serageldin, “Promoting sustainable development : toward a new paradigm”, in I.Serageldin, A.Steer, eds., *supra* note 231, p.13-21.

development stresses the necessity of the most efficient use of capital (natural, social and manufactured) : it means using the resource as to prolong its availability, through preventative and anticipatory policies, and full-cost accounting (i.e. the internalization of all costs in the price)<sup>235</sup>. Third, sustainable development requires that the benefits of development be shared equitably, among the present generations and with the future ones : equity within - *intergenerational* equity.<sup>236</sup> Fourth, public participation and access to information, allowing meaningful involvement and self-empowerment. Fifth, the principle of stewardship and individual responsibility, based on the idea that each individual's action has environmental, social and economic significance, and that environmental awareness begins at the individual level. Sixth, sustainable development requires international cooperation among states, among all sectors and at all levels of policy.

In conclusion, we can say that Sustainable Development requires the integration and coordination of environmental, social and economic considerations in decision-making. Such a *holistic approach* takes into account a multiplicity of factors of scientific, economic, social, political and ecological nature in the development process : every state - on the basis of sovereign equality - and every generation - on the basis of social equity within or between generations - is to

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<sup>234</sup> See J.Moffet, F.Bregha, *supra* note 200, p.1 a.f.; *Trade and sustainable development principles*, (Winnipeg : International institute for sustainable development, 1994), p.14 a.f.

<sup>235</sup> M.Pinto, "Reflection on the term sustainable development and its institutional implications", in K.Ginther *et al.*, eds., *Sustainable development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.72 a.f.; T.Andersson *et al.*, *supra* note 160, p.13-15.

<sup>236</sup> J.Goldwin, L.Winters, *supra* note 192, p.148 a.f.; D.Pearce, J.Warford, *supra* note 165, p.44 a.f., proposing several solutions on how to put intergenerational equity into practice, for example the idea of an intergenerational fund, or non-declining capital stocks.

participate in the process towards global cooperation in the field of the environment, economy and development.<sup>237</sup>

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<sup>237</sup> M.Pinto, *supra* note 235, p.76-79; H.French, *supra* note 189, p.7-8; M.Munasinghe, W.Cruz, *Economywide policies and the environment : lessons from experience*, (Washington D.C. : World Bank, 1995), p.1 a.f.



### **CHAPTER III : INSTITUTIONS I : THE EXISTING INTERNATIONAL ORGANIZATIONS RELATING TO TRADE AND ENVIRONMENT.**

Chapter III will focus on the already-existing organizational structures that deal with trade and environment issues. The institutions of trade regimes and environmental protection regimes will be discussed, as well as the UN structure, including the International Court of Justice, Development Banks and NGO participation. We will provide for a general understanding of the functioning and role played by these various institutions, their organizational structure, and their respective ability (or lack of) to deal with the variety of trade-environment-development issues at stake.

The aim of the Chapter is to provide a factual overview of how existing institutions deal with the trade-environment debate, and how these institutions have undergone organizational changes in order to deal with these issues. We will see what progress has been made in creating institutions that deal with the environment, and in integrating environmental concerns into trade and development organizations. In sum, Chapter III will furnish us with the necessary factual elements that will permit us to assess these institutions' respective capacities and abilities to deal with the trade-environment-development debate - the assessment itself will be made in Chapter IV.

## **A.: WTO/GATT.**

Before the advent of the WTO, since the General Agreement did not explicitly provide any formal structure<sup>239</sup>, the organizational structure of the multilateral trade regime evolved pragmatically : the Contracting Parties meeting once a year, they quickly created the GATT Council<sup>240</sup>, several committees and a small secretariat, and assigned much work to this structure. With the creation of the WTO on January 1<sup>st</sup>, 1995, these organizational infirmities are remedied.<sup>241</sup>

The WTO's functions are to administer, facilitate the operation, and further the objectives of the Multilateral Trade Agreements (i.e. the GATT and its side agreements)<sup>242</sup>; to serve as a forum for international trade negotiations; to administer the dispute settlement system; to oversee national trade policies; and to cooperate with other international institutions involved in global economic decision-making (e.g. those listed in this Chapter).<sup>243</sup>

The Agreement Establishing the WTO (the WTO Agreement) provides for the structure of the organization it creates. The highest authority is the Ministerial

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<sup>238</sup> As with the environmental protection regimes in section 2, the discussion in section 1 will be limited to the three most relevant regimes to our research.

<sup>239</sup> It was intended that the GATT would be subsumed under the - deadborn - International Trade Organization.

<sup>240</sup> In 1960.

<sup>241</sup> See P.Pescatore *et al.*, *Handbook of WTO/GATT dispute settlement*, vol.1, (The Hague : Kluwer Law International, 1995), p.11 a.f.

<sup>242</sup> Certain side agreements (those on government procurement, dairy products, bovine meat and civil aircraft) are not included in the Multilateral Trade Agreements (which are binding on all WTO members). They are referred to as *plurilateral agreements*, and are not binding on WTO members not party to them. They are administered by their own respective management bodies, which report to the WTO General Council. See "About the WTO", Netscape

[http://www.unicc.org/wto/about\\_wpf.html](http://www.unicc.org/wto/about_wpf.html)

<sup>243</sup> *Trading into the future :the WTO*, (Geneva : WTO, 1995): "About the WTO", *supra* note 242.

Conference, to be held every two years.<sup>244</sup> However, the day-to-day work of the WTO falls to a number of subsidiary bodies, principally the General Council, which also functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Three bodies are situated under - and report to - the General Council : the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-related aspects of Intellectual Property Rights. Other bodies, such as the Committee on Trade and Development, the Committee on Balance of Payments, and the Committee on Budget, Finance and Administration also report to the General Council.<sup>245</sup> The General Council established a **Committee on Trade and Environment**, which reports to the Ministerial Conference. The small and rather passive GATT secretariat is subsumed by the WTO secretariat.<sup>246</sup>

One of WTO's declared objectives is to seek to avoid and resolve trade disputes<sup>247</sup>. The dispute settlement mechanism<sup>248</sup> under the WTO Agreement, including dispute settlement under GATS, TRIPS and the other side-agreements, is still based on the principles of the GATT articles XXII-XXIII. In addition, the 1994 Dispute Settlement Understanding establishes procedures for dispute

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<sup>244</sup> The next Conference will be held in December 1996, in Singapore.

<sup>245</sup> See *Trading into the future : the WTO*, *supra* note 243.

<sup>246</sup> Staffed with around 450 people, the WTO secretariat's responsibilities include servicing the WTO bodies, providing technical support to developing countries, assisting in the resolution of trade disputes, and reviewing national trade policies. See "About the WTO", *supra* note 242; P.Pescatore *et al.*, *supra* note 241, p.14-15.

<sup>247</sup> This is one of the major functions of the WTO, since dispute settlement and their procedures are seen as core measures for effective enforcement of the obligations found in the Multilateral Trade Agreements. See J.Jackson, "The legal meaning of a GATT dispute settlement report : some reflections", in N.Blokke, S.Muller, eds., *Towards more effective supervision by international organizations*, (Dordrecht : Martinus Nijhoff, 1994), p.151; P.Pescatore *et al.*, *supra* note 241, p.70. The aim of the WTO dispute settlement procedure is to secure a positive and mutually-acceptable solution to a problem. See for more details, *Trading into the future : the WTO*, (Geneva : WTO, 1995), p.18-19; updated information on panel procedures can be found in WTO's newsletter *Focus*, (Geneva : WTO).

<sup>248</sup> Its task being not only to settle disputes, but also by doing so further develop International Trade Law. E.U.Petersmann, "International trade law and international environmental law" (1993) 27 *Journal of World Trade*, p.53.

settlement under a new entity, the above-mentioned Dispute Settlement Body<sup>249</sup>. If negotiations and consultations fail<sup>250</sup>, a party may request the DSB to establish a panel - or an Appellate Body - to consider the dispute and make findings that will assist the DSB in making recommendations or rulings<sup>251</sup>, their reports being adopted by the DSB unless it decides by consensus not to do so. This WTO procedure has been greatly strengthened and judicialized compared to its predecessor, the procedure under the GATT (which stressed more negotiation, consensus, and compromise).<sup>252</sup> This predecessor has since 1980 been more frequently used for the settlement of international environmental disputes than the procedures of any other world-wide organization<sup>253</sup>, however in such a manner that it reinforced the tendency to subordinate environmental considerations to trade interests : panel members often are chosen for their expertise in trade matters (with less or no regard to their expertise in other relevant areas, such as the environment); panels place the burden of proof on the party relying upon the article XX exception; panelists typically do not apply International Law other than GATT law; and the procedure remains a largely closed, secret, confidential process.<sup>254</sup> None of this seems to have changed in the new procedure.<sup>255</sup>

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<sup>249</sup> Which is in fact the WTO General Council acting in a dispute settlement role.

<sup>250</sup> In International Law (and International Trade Law is no exception), the importance of negotiations and consultations as means to solve a conflict is continuously stressed, e.g. by the International Court of Justice. See S.Murase, "Perspectives from international economic law on transnational environmental issues" (1995) to be published in the *Receuil des Cours*, The Hague Academy of International Law, 1995, p.107-108.

<sup>251</sup> In assessing the relevant provisions, the Antidumping Code (but not the Dispute Settlement Understanding) provides that the panel shall interpret them *in accordance with customary rules of interpretation of (general) public international law*. Including principles of international environmental law?!? See *infra*, Chapter IV, section 1. P.Pescatore *et al.*, *supra* note 241, p.72-73.

<sup>252</sup> *Ibid.*, p.104 a.f.; J.Jackson, *supra* note 247, p.155.

<sup>253</sup> E.U.Petersmann, *supra* note 248, p.43 a.f.

<sup>254</sup> See *supra*, Chapter I; and J.Dunoff, "Institutional misfits : the GATT, the ICJ and trade-environment disputes" (1994) 15 Michigan Journal of International Law, p.1063-1066. GATT panels have been empowered to call upon the assistance of bodies of experts for a long time (since the 1979 Understanding on Dispute Settlement, further strengthened by the 1994 WTO

Another forum where the multilateral trading system considered the relationship between trade and the environment is inside its non-dispute related organs. GATT's initial response to the trade-environment controversy came from the GATT Secretariat<sup>256</sup>, and from the GATT Council, who established in November 1971 a Group in order to examine - upon request - matters relevant to the trade policy aspects of pollution control measures. Never active, this group was reactivated in 1991 as the Group on Environmental Measures and International Trade (EMIT). The mandate of the Group was to study the trade effects of packaging and labeling requirements, transparency issues and - most importantly - the use of trade restriction in Multilateral Environmental Agreements.<sup>257</sup> The Group made substantial progress in examining the trade-environment relationship in the context of the GATT, and was given - along with the Committee on Trade and Development, and the GATT Council - a remit to follow-up on trade-oriented decisions of the UNCED held in Rio de Janeiro, June 1992 (the Earth Summit).<sup>258</sup> The Marrakech Decision on Trade and the Environment (adopted at the first Ministerial Conference on April 14<sup>th</sup>, 1994).

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Agreement on Dispute Settlement). However, to date panels have refused to do so in environmental matters. See A.De Mestral, *Dispute avoidance: weighing the values of trade and environment under the NAFTA and the NAAEC*, CEC Environment and Trade Series, no.3. (Montreal : CEC, 1996), p.16.

<sup>255</sup> More transparency, openness and NGO representation should be built in. See L.Brinkhorst, A.van Buitenen, *Focus on environment and trade*, (Leiden : Europa Institute, 1994), p.16-17.

<sup>256</sup> See e.g. its report on trade and environment in *International trade 1990-1991*, vol.1. (Geneva : GATT secretariat, 1992), p.19 a.f.

In addition, the Secretariat organized the public GATT symposium on trade, environment and sustainable development in June 1994. See "GATT/TWO activities on trade and environment", Netscape <http://www.unicc.org/wto/Trade-Env/te2.html>

<sup>257</sup> See *GATT activities 1992-1993 : an annual review of the work of GATT*, (Geneva : GATT, 1993-94), p.81-83; 93-96; *Basic instruments and selected documents, supp.40, 1992-1993 and 48<sup>th</sup> session*, (Geneva : GATT, 1995), p.75-101; "Group on environmental measures and international trade", Netscape <http://www.ustr.gov/reports/annualrpt/1994/gatt-wto.html>

<sup>258</sup> W.Benedek, "Implications of the principle of sustainable development, human rights and good governance for the GATT/WTO", in K.Ginther *et al.*, eds., *Sustainable development and good governance*, (Dordrecht : Martinus Nijhoff, 1995), p.277 a.f.

decided on the creation of a permanent WTO Committee on Trade and Environment, which was established in early 1995 by the General Council.<sup>259</sup> The Committee will continue the work of the defunct EMIT Group<sup>260</sup>, with the aim of making international trade and environment policies mutually supportive.<sup>261</sup> However, two important assumptions guide the work of the Committee : WTO competence for policy coordination in this area is limited to trade; and the permanent upholding of the fundamental principles of the multilateral trading system.<sup>262</sup>

Following the WTO's objective of 'promoting cooperation with other international institutions involved in global economic policy-making', 11 inter-governmental organizations have obtained observer status in this Committee on Trade and Environment.<sup>263</sup>

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<sup>259</sup> In the mean time, the work was carried out by a Sub-Committee of the Preparatory Committee of the WTO. W.Benedek, *supra* note 258, p.278; G.Handl, ed., *Yearbook of international environmental law*, vol.5, 1994, (Oxford : Clarendon Press, 1995), p.283 a.f.

<sup>260</sup> Including its work concerning the follow-up of the UNCED, packaging and labeling requirements, standards, competitiveness concerns, trade restrictions in environmental agreements, transparency, market access, exports of domestically prohibited goods, and the relationship between dispute settlement procedures in trade regimes and in environmental protection agreements. It will consider the work program envisaged by the Decision on Trade in Services and the Environment, the relevant provisions of the TRIPS Agreement, and the arrangements for relations with intergovernmental and Non-Governmental Organizations. See G.Handl, *supra* note 259, p.283-284, and p.608 a.f.; and "WTO committee on trade and environment" Netscape <http://www.unicc.org/wto/Trade+Env/tocte.html>

<sup>261</sup> Its objectives are the identification of the relationship between trade measures and environmental measures in order to promote sustainable development, and the making of appropriate recommendations on whether modifications to the multilateral trading system are required. See *Trading into the future : the WTO*, *supra* note 243, p.34.

<sup>262</sup> *Ibid.*, p.34.

<sup>263</sup> Amongst others, the UN Commission on Sustainable Development, UNEP, UNDP, UNCTAD, the World Bank, OECD, EFTA, FAO. Document "WTO trade and environment bulletin no.1", Netscape <http://www.unicc.org/wto/Trade+Env/tel.html>

No NGO's have received observer status (an argument of the US in favor of NGO observers was rejected by a large majority; WTO proceedings will remain private and secretive). NGO's look at these observers as precedents for their own inclusion. See R.Page, "International trade and the environment : the WTO and the new beginning", in J.Kirton, S.Richardson, eds., *The Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table on the Environment and the Economy, 1995), p.66-69; and *infra*, Chapter IV, section 1, p.118.

## B.: NAFTA/NAAEC.

The institutional aspect of the NAFTA trade deal that is the most related to the trade-environment debate is its dispute settlement procedure headed by the Free Trade Commission, which is a bit more affirmative towards environmental concerns (choice of forum, burden of proof, and panelist expertise) than the GATT/WTO procedure, but still looks at environmental objectives as subordinated to trade interests.<sup>264</sup>

The parallel North American Agreement on Environmental Cooperation addresses the environmental perspective, and aims at strengthening trilateral environmental cooperation, the effective enforcement of domestic environmental regulations, the promotion of sustainable development and of transparency and public participation in the policy process.<sup>265</sup> The NAAEC establishes the **Commission for Environmental Cooperation (CEC)**, comprising a governing Council, a central Secretariat, and a Joint Public Advisory Committee (JPAC). The Council, composed of cabinet-level representatives of the Parties (thus a truly intergovernmental body), will oversee the implementation of the Agreement, serve as a forum for discussion of environmental matters, develop recommendations on them, promote and facilitate cooperation, oversee the Secretariat, and govern the NAAEC's specific dispute settlement provisions. The Council equally maintains a list of (environmental) experts who could provide technical advice to NAFTA

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<sup>264</sup> See *supra*, Chapter I, section 2, p.30-31.  
J.Dunoff, *supra* note 254, p.1072 a.f.

<sup>265</sup> Preamble of NAAEC.

institutions such as the Free Trade Commission (e.g. in the dispute resolution procedures).<sup>266</sup>

The Secretariat is responsible for providing administrative, technical and operational support to the Council or other committees. It will prepare an annual budget and program. The Secretariat will consider submissions from any person or non-governmental organization (NGO) or association alleging a Party's failure to effectively enforce its environmental law.<sup>267</sup>

The Joint Public Advisory Committee includes 5 members of the public (mainly NGO representatives) from each country, and will advise the Council and provide technical, scientific or other information to the Secretariat.

NAAEC's dispute resolution (articles 22 to 36 NAAEC) - a pure inter-party or intergovernmental procedure - aims at ensuring that each Party effectively enforces its domestic environmental laws. Again, if consultations and negotiations cannot bring a solution, any Party can request the Council (by a two-thirds vote) to establish an arbitral panel. Panelists will include environmental experts, they can seek technical advice and information from any appropriate body, and the reports (but not the hearings!) of the panel will be made public. At the end, 'monetary

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<sup>266</sup> Art. 9 par.5, and art. 10 par. 6 reveal that the Council *may* establish ad hoc committees or working groups, *may* seek the advice of NGO's or experts, and that the Council *shall* cooperate with the NAFTA Free Trade Commission to achieve environmental goals and objectives of the NAFTA, by ( c ) contributing to the prevention or resolution of environment-related trade disputes, by (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies. However, S.Richardson, CEC Programme Manager NAFTA / Environment, indicates that a lot more use could be made of this provision in the future. At the present time, this provision is not being frequently used. Interview with S.Richardson, August 12, 1996, at CEC Secretariat, Montreal.

<sup>267</sup> This would initiate the procedure of articles 14 and 15 of NAAEC, giving the Secretariat - under stringent conditions - the power to redact a factual report, which could - under a two-thirds Council majority vote - be made public. This publicity is however the only sanction available in this "NGO participation procedure" - in stark contrast with the Intergovernmental Dispute Resolution procedure of articles 22 to 36 NAAEC.



enforcement assessments<sup>268</sup> and even the suspension of NAFTA benefits (!)<sup>268</sup> - a real trade sanction - are possible sanctions.

Overall, the drafters of the NAAEC have responded to a pressing concern in the environmental area, namely the NGO preoccupation with accessible trade and environment institutions. Compared to other organizations, the CEC offers a great deal of openness and transparency, although not completely. Can the CEC go beyond public participation in the JPAC?<sup>269</sup>

### **C.: EUROPEAN UNION.**

As much as NAFTA is focused on trilateral intergovernmental cooperation, the EU goes significantly further in its (supranational) commitments. This expresses itself not only in the substantive rules<sup>270</sup>, but also in the structure and strength of its institutions.

The institutional structure comprises a Parliament, a Commission, a Council of Ministers, and a Court of Justice. The Parliament, originally a mere

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<sup>268</sup> Only in the case of US and Mexico. In the case of Canada, the monetary enforcement assessment is enforceable in the Canadian Courts. However, given the many opportunities for compliance in this subtly crafted procedure, it is quite unlikely that these remedies will ever be used. See G.Grayson, *The NAFTA : regional community and the new world order*, (Lanham : University Press of America, 1994), p142-143; J.Dunoff, *supra* note 254, p.1085.

<sup>269</sup> P.M.Johnson, A.Beaulieu, *The environment and NAFTA : understanding and implementing the new Continental law*, (Washington D.C. : Island Press, 1996), p.70-73, 136-169, 171-240; *NAAEC/NAALC : background information*, (Ottawa : Government of Canada, 1993); B.Condon, "The impact of the NAFTA, the NAAEC and constitutional law on environmental policy in Canada and Mexico", in S.Randall, H.Konrad, eds., *NAFTA in transition*, (Calgary : University of Calgary Press, 1995), p.282-286; G.Grayson, *supra* note 268, p.133-144; J.Gilbraeth, J.Tonra, "The environment : unwelcome guest at the free trade party", in D.Baer, S.Weintraub, eds., *The NAFTA debate : grappling with unconventional trade issues*, (London : Lynne Rienner Publishers, 1994), p. 80-88; P.M.Johnson, A.Beaulieu, "NAFTA's green opportunities" (1994) 1 *Journal of Environmental CoPractice*, p.5 a.f.; R.Housman, "The NAFTA's lessons for reconciling trade and the environment" (1994) 30 *Stanford Journal of International Law*, p.379 a.f.

<sup>270</sup> See *supra*, Chapter I, Section 2. For a summary for the EU's recent action on the environment, see G.Handl, *supra* note 259, p.501 a.f.

advisory body with few legislative powers, acquired additional powers (mostly of consultation) by the Single European Act and the Maastricht Treaty.

The Commission has no legislative powers either, but is the initiator and coordinator of Community policies, and as the executive organ it is the guardian of its Community Law. The Commission has organized itself into 23 Directorates-General (DG). DG XI is responsible for environment, nuclear safety and civil protection, and was created in 1981. It employs a staff of 350, and is sub-divided into several directorates (who are responsible for waste management, environmental quality, natural resources, economic instruments, etc.)<sup>271</sup>. Since the Single European Act and its article 130 R, all DG's have the obligation to integrate the environment into their policies. This has led to the creation of units responsible for environmental policy in a number of DG's.<sup>272</sup> The Commission is also increasingly involved in international environmental policy-making : it participates in the work of international organizations such as the OECD, several UN institutions, and the WTO Committee on Trade and Environment, and receives negotiation mandates from the Council for the negotiation of environmental agreements, where it coordinates the definition of a common Community position.<sup>273</sup> In the Commission, DG XI is the prime responsible for the implementation of *intra*-Community policies related to the environment. Regarding the EC's environmental policies and positions towards *extra*-Community affairs, DG XI cooperates closely with, and under the leadership of, DG I, the responsible Directorate-General for *extra*-Community economic

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<sup>271</sup> See *Administrative structures for environmental management in the EC*, (Brussels : Commission of the EC, DG XI, 1993).

<sup>272</sup> *Ibid.*

relations. Together DG I and XI represent the Community in the International institutions that deal with the question of Trade-Development-Environment. Especially in the WTO's Committee on Trade and Environment (CTE) they participate very actively, by preparing and submitting numerous background studies and policy papers on issues such as ecolabeling, market access, and environmental benefits of the removal of trade distortions. On the most important issue of the CTE agenda, namely the relationship between the multilateral trading system, and trade measures for environmental purposes (including those pursuant to Multilateral Environmental Agreements), they submitted an innovative proposal : the Commission proposed to amend GATT Article XX, so as to "form a legal and procedural framework, which aims at reconciling the need for the WTO to accommodate the legitimate goals of Environmental Protection *when it is the expression of international consensus and cooperation*, whilst at the same time preserving the open, equitable and non-discriminatory character of the Multilateral Trading System". This initiative, submitted to the CTE at its 26-29 February 1996 session, contains two possible proposals of amending article XX. Both ways refer to an "Understanding on the relationship between trade measures taken pursuant to Multilateral Environmental Agreements (MEA) and the WTO rules": the Understanding defines an MEA as "an international written instrument, adopted in conformity with the customary International Law as codified by the Vienna Convention on the Law of Treaties, creating legal obligations (...) and aimed at solving environmental problems the solution of which requires action on the international level". If the MEA is "open to participation by all parties concerned

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<sup>273</sup> A topic example is the Commission's role in the coordination of the implementation of *the*

(...)", and "reflects, through adequate participation, the interests of all parties concerned (...)", measures taken pursuant of the MEA shall be presumed to be necessary. Any WTO dispute settlement panel will review whether the measures satisfy the preambular requirements of article XX, but shall not test if the measures were 'necessary' to achieve the objectives of the MEA. In addition, the first amendment-proposal only refers to measures taken pursuant to the thus-defined MEA's. The second amendment-proposal goes even further, by adding the word 'environment' in article XX (b), thus even allowing for measures protecting the environment taken outside the framework of an MEA to be WTO-consistent: however, such measures taken outside the framework of an MEA remain under full panel scrutiny, including the 'necessary' test! Furthermore, the Understanding would encourage consultation and cooperation between the WTO Secretariat and the Secretariats of the MEA's.

However, this progressive and innovative approach of the Commission of the EC was totally frustrated, challenged and contested by virtually all other members of the CTE, especially by many developing countries and even by the US. In this and other issues, the EU's positioning was most of the time put aside, and not much progress has been made in the CTE. In fact, it is feared by the Commission that the report of the CTE to the WTO Ministerial Conference in Singapore will be totally void of concrete recommendations or legally meaningful results.<sup>274</sup>

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*Montreal Protocol on substances that deplete the ozone layer* for the Community as a whole.  
<sup>274</sup> Commission of the EC, *non-paper by the EC : The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements*, (Brussels : Commission of the EC, DG I, 1996); Commission of the EC, *Ecolabeling schemes : EC non-paper*, (Commission of the EC, DG I, 1996); Commission of the EC, *non-paper by the EC : The effect of environmental measures on market access, especially in relation to developing countries, and environmental benefits of*

The Council of Ministers is the principal decision-making body. The articles 100A and 130S<sup>275</sup> allow qualified majority voting for environmental regulations<sup>276</sup>. The Council also decides on the famous *Environmental Action Programmes*, which began in 1973, and which define the basic principles and objectives of the EU towards the environment.<sup>277</sup> These Programmes are a perfect example of how the Commission initiates, coordinates and participates in Community Policies, decided by the Council. The current Programme of 'Policy and Action in Relation to the Environment and Sustainable Development' focuses on achieving Sustainable Development, "economic and social development for current and future generations which ensures the continuity of our ecosystems". On January 10<sup>th</sup>, 1996, the Commission adopted a Progress Report on the Implementation of the fifth Programme. The report identifies the major areas of concern and highlights key-concepts of EU's Environmental Policy.<sup>278</sup>

The European Court of Justice has the task to settle disputes and conflicts, thereby interpreting and developing Community legislation. The procedure can be initiated by Community institutions (principally the Commission), member states, and in some cases individuals concerned. The Court has been very active in interpreting

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*removing trade restrictions and distortions*. (Brussels : Commission of the EC, DG I, 1996); Interview with Alessandro Paolicchi, Commission of the EC, DG I, Brussels, October 8<sup>th</sup>, 1996.

<sup>275</sup> See *supra*, Chapter I, Section 2.

<sup>276</sup> Except for regulation involving fiscal matters, urban and rural planning, and energy supplies structures, where unanimity voting persists. See Article 130 S. Treaty of Rome.

<sup>277</sup> The current Action Programme is the fifth, and runs from 1993 to 2000.

<sup>278</sup> Key-concepts such as policy integration, shared responsibility, policy instruments (e.g. funding, fiscal and market-based incentives), implementation and international cooperation. The progress report aims to reinforce the existing Action Programme, and thus the EU policy towards Development and Environment. Commission of the EC, *Taking European Environment Policy into the 21<sup>st</sup> Century*, (Brussels : Commission of the EC, 1996).

regulations that could have an impact on the environment. especially in the early years.<sup>279</sup>

Finally, a new **European Environmental Agency (EEA)** - accompanied by its 'environmental information and observation networks' - has been established in Copenhagen. Their purpose is to provide the Community and the member states with objective, reliable and comparable information at European level. and technical and scientific support and assistance in the development of environmental policies and the assessment of their implementation. thus facilitating cooperation among the member-states. Although totally independent from the Commission, the EEA will collaborate closely with EU and relevant international organizations.<sup>280</sup>

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<sup>279</sup> E.g. Cases *Commission v. Italy*; *Walloon waste case*; *Cassis de Dijon case*; *Commission v. Denmark (Danish bottles case)*. See S.Walker, *Environmental protection versus trade liberalization : finding the balance*, (Bruxelles : Publications des Facultes Universitaires Saint-Louis, 1993), p.23 a.f.; L.Kramer, *EC Treaty and Environmental Law*, (London : Sweet & Maxwell, 1995), p.99 a.f.; D.Gerardin, R.Stewardson, "Trade and environment : lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (EC)" (1995) 44 *International and Comparative Quarterly*, p.41 a.f.

The ECJ has the express mandate to balance trade and environment considerations. and can seek expert advice from environmental assessors to complete the information received from the arguments of the Parties, and the Advocate General to the Court. See A.De Mestral, *supra* note 254, p.18-19.

<sup>280</sup> See generally on the EU structure, *Administrative structures for environmental management in the EC*, (Brussels : Commission of the EC, DG XI, 1993); P.Birnie, A.Boyle, *International law and the environment*, (Oxford : Clarendon Press, 1992), p.65 a.f.; J.Gilbraeth, J.Tonra, *supra* note 269, p.66 a.f.; S.Walker, *supra* note 279.

## SECTION 2 : THE INSTITUTIONAL ASPECTS OF ENVIRONMENTAL AGREEMENTS<sup>281</sup>

Upon negotiation of environmental protection agreements, the real task of ensuring that paper commitments are translated into real policy changes fall largely on the institutions that are created by the agreements. These institutions include a Conference of Parties-annex-Secretariat, and a structure to deal with non-compliance (i.e. dispute settlement mechanisms).

At a minimum, each individual treaty spawns a Conference of Parties, and a Secretariat.<sup>282</sup> Conferences of Parties are regular Meetings of treaty members, at which the Parties can alter, strengthen, assess the agreement, and review its implementation.<sup>283</sup> Secretariats are the offices set up to service these meetings of signatories, but although they could play a potential important role in overseeing the implementation of agreements, all too often Parties vest them with too limited a mandate and funding.<sup>284</sup> Their mandate generally does not permit them to verify

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<sup>281</sup> The Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Convention for the Protection of the Ozone Layer and its Protocol will serve as the most known examples of multilateral environmental agreements.

<sup>282</sup> See H.French, *Partnership for the planet : an environmental agenda for the UN*, (Washington D.C. : Worldwatch Institute, 1995), p.22 a.f.

<sup>283</sup> For instance, the Meeting of Parties to the Vienna Convention for the protection of the ozone layer met several times, to explore the possibility of, and negotiate the implementing Protocol and its amendments. The CITES Conference of Parties established a panel of experts to undertake a review of interpretative problems of the Convention. See R.Twum-Barina, L.Campbell, *Protecting the ozone layer through trade measures : reconciling the trade provisions of the Montreal protocol and the rules of the GATT*, (Geneva : UNEP, Environment and Trade series, 1994), p.11-42; K.Christie, "Stacking the deck : compliance and dispute settlement in international environmental agreements", in K.Christie, ed., *New directions : environment, labour and the international trade agenda*, (Ottawa : Carleton University Press, 1995), p.56.

<sup>284</sup> A typical secretariat employs fewer than 20 staff, and has an annual budget of \$ 1 to 3 (U.S.) million, "a drop in the bucket compared to the budgets of US federal agencies charged with implementing domestic environmental laws". See H.French, *supra* note 282, p.22. For instance, the Secretariat to the Basel Convention has primarily been given information gathering and transmitting powers, without however any real oversight possibilities. As such, the

the information governments are supposed to supply. Moreover, governments often even fail to provide any complete and timely information as is required.<sup>285</sup> Another problem is the scattered location of these secretariats all over the globe. Centralizing these bodies under one roof would offer enormous opportunities for the exchange of information, ideas, and the coordination of their activities. Although Agenda 21 endorses the idea of centrally locating secretariats, countries still remain reluctant to do so. Further on, the problem of underfunding leaves a lot of good intentions unexplored : shortages of resources to provide financial and technological assistance render many developing countries unable to comply with some treaty requirements, a critical issue for the success or failure of such treaties. The ozone protection regime's **Secretariat** is based in Nairobi, and its functions are critical for the effectiveness of the regime protecting the ozone layer. The Secretariat arranges the meeting of the Parties, takes the initiative in conceptualizing new and constructive ideas, and provides advice to the Parties. These are obliged to submit data on their consumption of controlled substances, and on their scientific research and the exchange of information. The Secretariat carries out the administrative role in the non-compliance procedure by receiving the submissions of non-compliance by a Party (see *infra*). It also provides information and advice to the Funding mechanisms (the Multilateral Fund).<sup>286</sup>

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Basel Convention was left without any viable enforcement mechanisms. M.Amlak, *African countries and the conventions on the control of transboundary movements of hazardous wastes*, (Montreal : McGill University, 1992), p.68-77.

<sup>285</sup> While 80% of the parties to the Montreal Protocol had presented the required information, only 30% of the members of the London Dumping Convention, and less than 25% of the CITES parties had done so. See H.French, *supra* note 282, p.22-23. A notable exception is the CITES secretariat, which has the power to demand explanations from non-complying countries.

<sup>286</sup> R.Twum-Barina, L.Campbell, *supra*, note 283, p.42-43.



The regime protecting the ozone layer also provides a model on mechanisms for financial and technological assistance and cooperation. The Multilateral Fund provides financial support for projects aimed at phasing out the use of controlled substances, and technological experience and assistance, including information on new technology and training, to the so-called 'article 5 Parties'.<sup>287</sup> Parties who are not eligible for the Multilateral Fund, can rely on the Global Environmental Facility (GEF), as discussed below (in section 4).

The activities of the Multilateral Fund are administered by its 4 implementing agencies, the UNEP, UNDP, UNIDO, and the World Bank, thus forging a global and sector-wide cooperation between international organizations.

With this model in mind, countries created the Global Environmental Agency (GEF) in 1991 with a mandate to address the following environmental issues : ozone layer depletion, biodiversity, international waters, and global warming.<sup>288</sup>

The GEF is not a new international institution, but rather a joint undertaking of the World Bank, UNEP and UNDP, and constitutes the funding arm of the environmental agreements that cover one or more areas of the GEF's mandate.

More than one-third of the multilateral environmental agreements contain dispute settlement provisions destined to solve conflicts concerning non-complying Parties.<sup>289</sup> Disputes between Parties to the regime protecting the Ozone layer can be settled through either the Convention or the Protocol provisions.

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<sup>287</sup> See *supra*, Chapter 1, Section 3.

<sup>288</sup> Initially a pilot programme, in 1994 governments made the GEF permanent, replenishing its resources, creating an independent secretariat, and introducing a 'double majority' voting system (first round one nation - one vote; second round one dollar - one vote). H.French, *supra*, note 282, p.25-27.

<sup>289</sup> It should be noted that Non-Parties are not governed by these dispute settlement procedures. Instead, they face often-vigorous sanctions (such as the trade restrictions of article 4 of the Montreal Protocol, article 4 of the Basel Convention, article XIV of CITES). Non-Parties often are

Article 11 of the Convention provides for negotiation, good offices, and mediation. A member state may agree to arbitration or resolution by the ICJ, but only if it chooses to. The last option under the Convention is the establishment of a “Conciliation Commission”, charged with making recommendations *which the parties shall consider in good faith*. Hardly a stringent procedure! Article 8 of the Protocol provides for its own non-compliance procedure, adopted in 1992 by the 4<sup>th</sup> Meeting of Parties in Copenhagen (Copenhagen Amendment). Any Party may, through the Secretariat, submit reservations regarding another Party’s (non-)implementation of the Protocol. The Secretariat sends them to the Implementation Committee, which will seek ‘amicable solutions’ and report to the Meeting of Parties, who then finally *may* decide on further action. However, no time limits, and a tradition of the Meeting to decide by consensus, renders this procedure not a bit more effective. Moreover, a Party undergoing eventual sanctions remains a Party; and Article 4, which covers trade sanctions, remains reserved for Non-Parties.<sup>290</sup>

Equally weak dispute settlement procedures regarding non-complying Parties are found in the Basel Convention and CITES. Basel’s article 16 allows the Secretariat to prepare reports on non-compliance, and to render them public. If public pressure alone does not suffice, negotiations, and ultimately arbitration and the ICJ (again if both Parties agree) could settle the matter. Under CITES as well,

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in a sense presumed guilty by the mere fact of being a non-Party, and severely sanctioned. See K.Christie, *supra* note 283, p.58-69.

<sup>290</sup> R.Twum-Barina, L.Campbell, *supra* note 283, p.91-94.; K.Christie, *supra* note 283, p.58-60.

negotiation, good offices, consultations, and arbitration (again by mutual consent) are preferred.<sup>291</sup>

It is obvious that compared to trade regimes, the dispute settlement provisions in environmental agreements remain underdeveloped.<sup>292</sup>

### SECTION 3 : UN INSTITUTIONS

For several years, the United Nations have been building structures and institutions to manage many types of conflicts. Initially established to deal with the prevention and removal of threats to peace, the UN system has been working increasingly with social, economic, development, trade, culture, humanitarian and environment issues.<sup>293</sup> A number of UN institutions have pronounced themselves on development, trade and environment issues.

The General Assembly discusses any matter within the scope of the Charter, and can make recommendations in the form of resolutions to either the Security Council or the Member States. Following its adoption of the 1972 Stockholm Declaration of Principles on Human Environment, it has assessed a

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<sup>291</sup> Under CITES, a more stringent process through the Secretariat and a Standing Committee of Parties is being established, yet more questions (e.g. about procedural balances) need to be answered before the advent of an elaborate and effective dispute settlement procedure. H.Christie, *supra* note 283, p.60-63.

<sup>292</sup> The Commission of the EC adopts the position of expressly favouring the development of proper and equally-efficient dispute settlement and enforcement mechanisms for Multilateral Environmental Agreements, and encourages information and experience exchange on dispute settlement with the WTO Secretariat. Commission of the EC, *Communication to the Council and the Parliament on Trade and Environment*, (Brussels : Commission of the EC, DG I, 1996), p.17.

<sup>293</sup> J.Trollidalen, *International environmental conflict resolution : the role of the UN*, (New York : UNITAR, 1993), p.13 a.f.; P.Birnie, A.Boyle, *International law and the environment*, (Oxford : Clarendon Press, 1992), p.32 a.f.; B.Simma, ed., *The Charter of the UN : a commentary*, (Oxford : Oxford University Press, 1994), p.759-779, discussing UN Charter article 55.

considerable number of environmental issues, including the convocation of several Conferences relating to the environment (see *infra*, the Stockholm and Rio de Janeiro Conferences).<sup>294</sup>

The Security Council - the central security organ - is primarily responsible for maintaining peace and security. Some have recently put forward the idea that 'ecological threats' could fall under its responsibility, however with no practical result (yet).<sup>295</sup>

The Economic and Social Council (ECOSOC) is a principal organ of the UN, and has wide-ranging responsibilities on social, economic and development issues. Lately, its role in environmental matters is rapidly expanding given the policy of sustainable development, and its environmental and social implications<sup>296</sup>. ECOSOC could play a more active and even coordinating role on environmental matters in the future.<sup>297</sup>

There have been some proposals to turn the Trusteeship Council into an Ecological Council, but the present functions of the Council have little to do with environmental issues. Neither does the Secretary General have a greater role to play in environmental issues than elaborating innovative and constructive policy proposals in areas of UN concern.<sup>298</sup>

During the last 25 years, the UN has used major Conferences to develop policies and positions on environmental matters, encourage international cooperation, and simultaneously and parallelly develop legal principles and

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<sup>294</sup> P.Birnie, A.Boyle, *supra* note 293, p.38; J.Trollidalen, *supra* note 293, p.17-18; G.Handl, *supra* note 259, p.559 a.f.

<sup>295</sup> J.Trollidalen, *supra* note 293, p.16-17.

<sup>296</sup> See *supra*, Chapter II, Section 2.

<sup>297</sup> J.Trollidalen, *supra* note 293, p.18; P.Birnie, A.Boyle, *supra* note 293, p.38-39.

concepts on the environment. The first UN Conference of this kind was held at Stockholm in 1972, and considered specifically problems relating to the human environment. It was convened by the General Assembly, attended by a large number of states<sup>299</sup>, and resulted in the adoption of a Declaration and an Action Plan. The Stockholm Declaration, although not *prima facie* binding on states, does establish basic rules and principles of special importance of international environmental law. Of special legal significance are certainly its Principle 1, 7, 21 and 22.<sup>300</sup> The Stockholm Action Plan was the further elaboration of the Declaration.<sup>301</sup>

Twenty years later, a second major UN Conference, on Environment *and* Development (UNCED) was held at Rio de Janeiro in 1992. Convened by the General Assembly, it was attended by 176 (!) states, and resulted in the Rio Declaration, an action program called Agenda 21, the Convention on Biological Diversity (secretariat in Bonn), and the Framework Convention on Climate Change (secretariat in Montreal).<sup>302</sup> The Rio Declaration, though not formally

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<sup>298</sup> J.Trolldalen, *supra* note 293, p.21: "Institutional arrangements to follow up the UNCED", Netscape UN homepage <http://www.un.org/>

<sup>299</sup> Namely 113 states.

<sup>300</sup> Take for instance Principle 21. It has been referred to in a number of multilateral environmental agreements, and even in the Rio Declaration. As such, it is thought to represent a basic principle of international environmental law. P.Birnie, A.Boyle, *Basic documents on international law and the environment*, (Oxford : Clarendon Press, 1995), p.1.

See *supra*, Chapter II, Section I.

<sup>301</sup> P.Thatcher, "The role of the UN", in A.Hurrell, B.Kingsbury, eds. *The international politics of the environment : actors, interests and institutions*, (Oxford : Clarendon Press, 1992), p.183 a.f.; H.Hohmann, *Precautionary legal duties and principles of modern international environmental law*, (London : Graham & Trotman/Martinus Nijhoff, 1994), p.34 a.f.

<sup>302</sup> Moreover, a non-binding Statement of Consensus on Forest Principles was reached, and later - building on the Rio Conference - the Convention to Combat Desertification (in 1994) and the Agreement relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in 1995) were signed. For more details, see "Institutional arrangements to follow up UNCED", *supra* note 298.

binding, again is a particularly important instrument<sup>303</sup>. reaffirming existing principles (e.g. Stockholm Declaration Principle 21). and introducing new principles such as precautionary action, public participation, impact assessment, polluter pays principle - in short : sustainable development<sup>304</sup>. Agenda 21 again elaborates further on these fundamental principles.<sup>305</sup>

Since the concept of sustainable development insists on the integration of environmental considerations into broader economic and development policies, various UN bodies got involved with environmental issues in their policy-making.<sup>306</sup> However, considerable confusion about the respective roles of these bodies exists, hence the creation of various coordination organs<sup>307</sup>. The Inter-Agency Committee on Sustainable Development (IACSD) was created by the Administrative Committee on Coordination (ACC), on the recommendation of UNCED. Composed of representatives of several UN agencies, its task is to deal with the vexed problem of coordinating the proliferation of numerous UN bodies and agencies dealing with environment and development. The High-Level Advisory Board on Sustainable Development consists of 21 experts of environmental and development expertise, and serves as a source of expert advice to the Secretary General (e.g. in matters of intergovernmental or inter-agency coordination).<sup>308</sup> The new Department for Policy Coordination and Sustainable

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<sup>303</sup> Because adopted by a consensus of 176 states, its normative character, and its prolonged negotiations process. P.Birmie, A.Boyle, *supra* note 300, p.9.

<sup>304</sup> See for a detailed description of the concept of sustainable development, its components, its evolution and its relationship to UNCED, *supra* Chapter II, Section 2.

<sup>305</sup> T.Carroll-Foster, ed., *A guide to Agenda 21 : issues, debates and Canadian initiatives*, (Ottawa : International Development Research Centre, 1993); P.Birmie, A.Boyle, *supra* note 300, p.9.

<sup>306</sup> Those various bodies (e.g. UNEP, UNDP, UNCTAD, WMO, CSD, ...) will be discussed *infra*.

<sup>307</sup> However, the creation of these coordinating bodies has not ended the confusion. Quite on the contrary, even these coordinatory bodies have proliferated, maintaining the confusion.

<sup>308</sup> H.French, *supra* note 282, p.31: "Institutional arrangements to follow up UNCED", *supra* note 298; P.Malanczuk, "Sustainable development : some critical thoughts in the light of the Rio

Development provides staff for the IACSD and the CSD, and a focal point for promoting sustainable development throughout the UN.<sup>309</sup>

Following the Stockholm UN Conference on Human Environment, the General Assembly established the UN Environment Program (UNEP), located in Nairobi, as the center-piece of the world organization's environmental effort. UNEP's purpose was to 'promote international cooperation in the field of the environment, to recommend policies, and to provide general policy guidance for the direction and coordination of environmental programmes within the UN system'.<sup>310</sup> UNEP consists of a political organ, the Governing Council, and of a small Environment Secretariat (small budget - small staff), which will serve as a focal point for environmental action and coordination within the UN system. The Secretariat administers the Environment Fund<sup>311</sup>, financed through voluntary - thus modest - contributions.<sup>312</sup> UNEP reports to the GA through the ECOSOC.

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Convention", in K.Ginther *et al.*, eds., *Sustainable development and good governance*, (Dordrecht : Martinus Nijhoff Publishers, 1995), p.49.

<sup>309</sup> See H.French, "Forging a new global partnership", in *Preliminary discussion paper and background material : the Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table on the Environment and the Economy, 1995), p.11.

<sup>310</sup> UNEP aims to "provide leadership, courage and partnerships in caring for the Environment, by inspiring, informing and enabling nations and people to improve their quality of life". UNEP is to serve as an integrative and interactive mechanism through which separate efforts by intergovernmental, Non-Governmental, national and regional bodies in the service of the environment are reinforced and interrelated.

Document "UNEP in brief", Netscape <http://unep.unep.no/unep/about.htm>

<sup>311</sup> A small and 'additional' fund, based on the principle that each operating element of the UN system has its own environmental responsibilities, and that modest additional funding should be available to help them better discharge these responsibilities. See P.Thatcher, *supra* note 301, p.192; and B.Gosovic, *The quest for world environmental cooperation*, (London : Routledge, 1992), p.20.

<sup>312</sup> An Environment Coordination Board was also established by the same GA resolution. Inoperative, it was in effect replaced by the Interagency Board of Designated Officials on Environmental Matters (DOEM), a "UNEP-created quasi-subsidary of the Administrative Committee on Coordination (ACC)". See P.Szasz, "Restructuring the international organizational framework", in E.Brown-Weiss, ed., *Environmental change and international law*, (Tokyo : UN University Press, 1992), p.341.

UNEP serves as the central catalyzing, stimulating and coordinating body in the field of the environment<sup>313</sup>. Pursuant to this mandate, it has actively concerned itself with the promotion and development of international environmental law.<sup>314</sup> Besides this policy mandate, other UNEP priorities are environmental assessment and environmental management.<sup>315</sup> Furthermore, since its formation, UNEP serves as the secretariat for over 24 international environmental agreements, thus becoming the foremost international organization in coordinating international environmental agreements.<sup>316</sup>

In the effort to increase coordination and cooperation between various institutions, and thus to bring organizations and public closer together, UNEP's Governing Council decided to create and strengthen its regional representation through Regional and Liaison Offices, adopted a program ensuring that UNEP "should

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<sup>313</sup> J. Trollidalen, *supra* note 293, p.21-22.

<sup>314</sup> In areas as diverse as protection of the ozone layer, climate change, hazardous wastes, marine environment, fresh water, land degradation, deforestation, biodiversity, and monitoring and information systems. See "UNEP in brief", Netscape <http://unep.unep.no/unep/about.htm> UNEP has played an extraordinary important role in the development of interest, unified policies, guidelines and recommendations in the preparations of several international environmental agreements, such as the regime protecting the ozone layer, the Basel Convention on Hazardous Waste Movements, the London Guidelines for the exchange of Information on Chemicals in International Trade, the Conventions relating to Biodiversity and Climate Change, thus contributing greatly to the development of international environmental law. For a specially interesting overview of UNEP's activities in this area, the evolution of its approaches and the Montevideo Programme adopted by the UNEP Governing Council on the Development and Periodic Review of Environmental Law, see C. Petsonk, "Recent developments in international organizations : the role of UNEP in the development of international environmental law" (1990) 5 American University Journal of International Law and Policy, p.351 a.f.; and H. Hohmann, *supra* note 301, p.42 a.f.

The UNEP Governing Council, by a 1993 decision concerning a "Programme for the Development and Periodic Review of Environmental Law for the 1990's", commonly referred to as "Montevideo II", reiterated, reframed and strengthened many of its objectives, strategies and activities relating to the development of International Environmental Law, addressing items such as effective state participation, effective implementation, dispute avoidance and settlement, and prevention of environmental damage. See G. Handl, *supra* note 259, p.546 a.f.

<sup>315</sup> Examples of action undertaken are the Earthwatch system (assessment), World Environment Day (public awareness), information exchange, natural resource accounting promotion, technical advice provision to organizations and governments, etc. See "Institutional arrangements to follow up UNCED", *supra* note 298.



cooperate with all relevant international organizations", and established the Inter-Agency Environment Coordination Group<sup>317, 318</sup>.

UNEP's greatest strengths lie in the areas of monitoring, assessing, reporting, developing action plans, and developing international environmental law.

However, since it is not a full agency of the UN, it has very little power beyond that of simply watching over the other agencies and commenting wherever appropriate. It can influence others, but in the end UNEP has little power to compel other UN agencies - or national governments - to take action.<sup>319</sup>

The idea for a **Commission on Sustainable Development (CSD)** emerged during PrepCom IV (a preparatory committee of the Rio Conference (UNCED)). The CSD was called for to ensure effective follow up of UNCED, to enhance international cooperation, and to examine the progress in the implementation of Agenda 21.<sup>320</sup> CSD began meeting in 1993, and reviewed implementation progress of Agenda 21 items such as environmentally sound technology transfer, capacity building, international cooperation, trade, development and environment<sup>321</sup>.

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<sup>316</sup> D.Stevis, C.Wilson, "The institutionalization of international environmental policy : international environmental law and international organizations", in R.Bartlett *et al.*, eds., *International organizations and environmental policy*, (Westport : Greenwood Press, 1995), p.131.

<sup>317</sup> As a flexible consultative and advisory body, the IAECG is to focus on assisting the Secretariat in coordinating the activities of the UN system. See "Institutional arrangements to follow up UNCED", *supra* note 298.

<sup>318</sup> Another coordinating institution was created, the Committee of International Development Institutions in the Environment (CIDIE), to improve coordination between UNEP, UNDP, FAO and several development banks (e.g. World Bank, Asian Development Bank, Inter-American Development Bank, etc.). See P.Thatcher, *supra* note 301, p.191-192.

<sup>319</sup> J.McCormick, "International NGO's : prospects for a global environmental movement", in S.Kamieniecki, ed., *Environmental politics in the international arena*, (Albany : State University of New York Press, 1993), p.136.

<sup>320</sup> Cross-sectoral issues such as Trade, Environment and Sustainable Development received considerable attention in the CSD, especially in the wake of the successful conclusion of the Uruguay Round of multilateral trade negotiations. In particular, the CSD supported the Marrakech Decision on Trade and Environment, and indicated its intention to interact with the WTO Committee on Trade and Environment. See G.Handl, *supra* note 259, p.494 a.f.

<sup>321</sup> On May 25, 1995, the CSD discussed the relationship of the CSD and other international organizations involved in these issues, and called to be represented in the WTO Committee on

education, and public participation of major groups<sup>322, 323</sup> Concerning this last item, the CSD invites governments, international organizations as well as major groups to participate actively in the work of the CSD.<sup>324</sup>

Perhaps the major strength of the CSD is that its mere existence has served to keep Agenda 21 and the Rio agreements alive : governments and agencies are forced to look at their implementation efforts, which will be publicly displayed by CSD.

Another positive aspect of CSD is that it constitutes a permanent forum for the discussion of new and emerging issues on sustainable development. Furthermore, the active participation of major groups in CSD has induced greatly public participation and support.<sup>325</sup> However, it is not clear if CSD can actually take action : until now, CSD seems more a talk show than an action program. In addition, lack of interest and time made that real discussions did not materialize :

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Trade and Environment - a request acknowledged by the WTO Committee (granting CSD and other organizations observership status). See *supra*, section 1, p.70-71.

<sup>322</sup> The following major groups were identified : women, children and youth, NGO's, local authorities, trade unions, business and industry, scientific community, and farmers. See "Major Groups", Netscape <http://www.unep.no/unep/partners/un/scd/home.htm>

<sup>323</sup> In June 1997, a special UN General Assembly session will evaluate Agenda 21 after the first 5-year period following UNCED. The CSD is responsible for preparing this session. All these issues will be discussed and evaluated. See "UNCED Update", Netscape <http://www.prosus.nfr...ter/1996-01/unced.html> and "Upcoming meetings related to CSD", Netscape <http://www.iisd.ca/linkages/csd/upcoming.html>

This CSD evaluation will be preceded by an Independent Review of the Rio Summit by the Civil Society, including the business sector, the Governments of Brazil and the State of Rio de Janeiro, Earth Council, the Brazilian NGO forum, a number of National Councils for Sustainable Development, and the UN Department for Policy Coordination and Sustainable Development (DPCSD), in March 1997, under the name "Rio + 5".

"Rio + 5, an assessment of past performance", Netscape <http://www.ecouncil.ac.cr/rio/rio5a.htm>

<sup>324</sup> Document "Major Groups", *supra* note 322: "Institutional arrangements to follow up UNCED", *supra* note 298; G.Handl, *supra* note 259, p.496 a.f.

In a report of May 1996, the CSD examines the role and contributions of major groups in implementing Agenda 21. It found that major groups contribute to Agenda 21 follow up through dissemination, collection and analysis of information, through networking, technical assistance, consensus building, participation in various programmes and the identification of common priorities. See "CSD : role of major groups in implementation of agenda 21", Netscape on the CSD homepage <http://www.unep.no/unep/partners/un/csd/home.htm>

<sup>325</sup> Document "Strengths", Netscape on the CSD homepage <http://www.unep.no/unep/partners/un/csd/home.htm>

government and agency representatives just read their prepared statements, and NGO's were not particularly effective due to lack of funding.<sup>326</sup> However, overall, there is still a great opportunity for the CSD to become the central coordinating and evaluating body on issues such as public participation, consumption patterns, trade and environment, information, poverty alleviation and development.<sup>327</sup>

The UN Development Programme (UNDP) was established in 1965, pursuant to a resolution of ECOSOC approved by the GA. The UNDP is headed by an Administrator, who is responsible to the Governing Council of the UNDP, which reports to the GA through ECOSOC. UNDP is the world's largest multilateral source of grant funding for development cooperation. The UNDP works with governments and agencies to build up the capacities for sustainable human development.<sup>328</sup> Pursuant to Agenda 21, UNDP has integrated environmental considerations into its development policies, and it assists countries to do alike.<sup>329</sup> With the World Bank and UNEP, UNDP is one of the managing partners of the GEF; and along with the UNIDO, those three implement together the Multilateral Fund for the implementation of the Montreal Protocol.<sup>330</sup>

The UN Conference on Trade and Development (UNCTAD) was established by the GA in 1964, and meets every 4 years. It is a universal forum, focused on economic development. Its permanent organ is the Trade and

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<sup>326</sup> Document "Weaknesses", *supra* note 325; H.French, *supra* note 282, p.32-34.

<sup>327</sup> Document "Opportunities", *supra* note 325.

<sup>328</sup> In priority fields such as technology transfer, poverty eradication, private sector development, grassroots participation, empowerment of women. See "UNDP : organizational descriptions", Netscape on the UNDP homepage <http://www.undp.org/undp/>

<sup>329</sup> For instance, UNDP established Capacity 21 Unit as a direct response to the Rio Conference. Its mandate is "to assist the integration of sustainable development issues in development policies, to assist the involvement of all stakeholders in development and environmental planning, and to build capacity for sustainable development". See "Institutional arrangements to follow up UNCED", *supra* note 298.

<sup>330</sup> Document "UNDP", *supra* note 328.

Development Board<sup>331</sup>, which in 1994 established an **Ad Hoc Working Group on Trade, Environment and Development**, in order to examine the interlinkages between the three major areas.<sup>332</sup> Together with the Standing Committee on Commodities (which discusses the polluter pays principle and environmental cost internalization), this Working Group provides reports to the Trade and Development Board, which in turn provides reports to the CSD. Trade and Environment also figured on the agenda of UNCTAD IX, held in Midrand, South Africa, 27 April - 11 May 1996.<sup>333</sup> Moreover, the UNCTAD Secretariat upholds close ties with other international organizations on these issues : the UNCTAD is observer in the WTO Committee on Trade and Environment (where the output of

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<sup>331</sup> There are 7 Committees to the Board, and a Secretariat. See "UNCTAD : organizational descriptions", Netscape on the UNCTAD homepage <http://gatekeeper.unicc.org/unctad/> and "UNCTAD IX - basic facts", Netscape <http://www.unicc.org/unctad/en/special/u9facts.htm> The 43<sup>rd</sup> session of the Trade and Development Board will be held on 7-18 October 1996, in Geneva, and discuss several matters related to Trade, Development and Environment. "UNCTAD IX : Trade and Development Board 43<sup>rd</sup> session", Netscape

<http://www.unicc.org/unctad/en/special/tb43agen.htm>

and <http://www.unicc.org/unctad/en/special/tb43work.htm>

<sup>332</sup> More precisely, the Working Group will study issues concerning market access, competitiveness, green consumerism, ecolabeling, and environmental policy instruments with trade impact (e.g. the trade sanctions in multilateral environmental agreements). See "Terms of reference of the ad hoc working group on trade, environment and development", *supra* note 331.

<sup>333</sup> UNCTAD IX brought together over 2500 participants from 135 states, intergovernmental and Non-Governmental Organizations, and stressed above all the need for and commitment to a "Global Partnership for Development". The delegations discussed the Uruguay Round implementation, stressed some basic principles of the Multilateral Trading System (e.g. non-discrimination, non-trade distortion, fairness), and talked about the new challenges the trading system is meeting, such as the proposals to include environment, labour and Human Rights issues in the trading rules. Again, key-principles such as trade liberalization, non-discrimination, least trade restrictiveness and the development needs of developing countries were stressed. The Conference concluded that there is more than ever place for UNCTAD as a forum for consensus-building on development and trade issues, and argued for active participation of the Civil Society (e.g. NGO's, Trade Unions, women's groups) in UNCTAD's work. However, it was added that their participation would be limited to development issues.

See "UNCTAD IX - final outcome", Netscape

<http://www.unicc.org/unctad/en/special/u9final.htm>

"UNCTAD IX - Ministerial Round Table - International Trade as an instrument for development in the Post-Uruguay Round World", Netscape

<http://www.unicc.org/unctad/en/special/mrtrade.htm>

"UNCTAD IX - Ministerial Round Table - Future work of UNCTAD in accordance with its mandate : institutional implications", Netscape

<http://www.unicc.org/unctad/en/special/mruwork.htm>

the Working Group has been fed directly into the discussions<sup>334</sup>), in the OECD Joint Session of Trade and Environment Experts, and as a liaison organization in ISO Technical Committee 207 on ecolabeling. UNCTAD operates closely with UNDP, UNEP, ASEAN, and participates in numerous academic institutions and NGO's.<sup>335</sup>

Other UN bodies who carry out one or more tasks on the array of environment - development - trade arena are numerous, and come to burden this already complex institutional set. The most important among them are the FAO (agriculture, fisheries, forests), UNESCO (education), WMO (climate), IMO (oceans), IAEA (nuclear energy), UNSO (desertification and drought), UNIDO (industrial development), and WHO (human health).<sup>336</sup>

Lastly, the UN, realizing the appropriateness of a more specialized regional approach in certain policy-areas, has created several regional structures, namely the regional economic commissions<sup>337</sup>, coordinated through ECOSOC. These regional commissions have been variably successful in integrating environmental concerns into their agendas. In the case of the ECLA and the ECA, the environment is not mentioned neither in its mandate nor policy work. The ECWA has established an Environmental Coordination Unit. The ESCAP and the ECE

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"UNCTAD IX - Basic facts", *supra* note 331.

<sup>334</sup> "Institutional arrangements to follow up the UNCED", *supra* note 298.

<sup>335</sup> "UNCTAD activities on trade, environment and development", *supra* note 331; and "UNCTAD IX - basic facts", *supra* note 331.

<sup>336</sup> From time to time, these various institutions come together and establish a joint organ, such as the CIDIE (see *supra*, note 318). See for a more detailed description of these institutions, P.Szasz, *supra*, note 312, p.347-351; P.Birnie, A.Boyle, *supra* note 293, p.53 a.f.: "Institutional arrangements for follow up of UNCED", *supra* note 298.

<sup>337</sup> They include the Economic Commission of Europe (ECE), the Economic Commission for Latin America (ECLA), the Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Africa (ECA), and the Economic Commission for Western Asia (ECWA).

specifically mention and emphasize the environment in their mandate, and cooperate with the other agencies such as UNEP.<sup>338</sup>

#### SECTION 4 : DEVELOPMENT BANKS

At the global level, the World Bank Group<sup>339</sup> is responsible for aiding countries in their development. The main functions of the Bank are to provide capital for development purposes, to promote private foreign investment, to identify urgent projects supporting social and economic development, and to ensure that such projects are given appropriate priority.<sup>340</sup>

From the end of the eighties on, the World Bank has become increasingly aware of the potential side-effects of its policies and endeavors on the environment.<sup>341</sup> Since 1988, the Bank has organized itself for a more responsible role on environmental questions. It's activities to protect and enhance the

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<sup>338</sup> J.Trollidalen, *supra* note 293, p.26; "Institutional arrangements for follow up of UNCED", *supra* note 298; G.Handl, *supra* note 259, p.565-571.

<sup>339</sup> The Group consists of the World Bank *sensu stricto* (including the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)), the International Finance Corporation (IFC), and the Multilateral investment Guarantee Agency (MIGA).

Besides the World Bank Group, the International Monetary Fund (IMF) has less relevance in the field of the environment. See J.Trollidalen, *supra* note 293, p.22-23.

<sup>340</sup> "World Bank : organizational descriptions", Netscape  
<http://www.worldbank.org/html/extdr/glance.html>

<sup>341</sup> Both the World Bank and its critics launched major efforts to evaluate and reevaluate the Bank's record and ability to face today's challenges. One of the largest campaigns is certainly the "Fifty years is enough" campaign (allusion on the Bank's period of existence), in which environmental, social and development groups question the efficiency of the Bank's projects and models. See G.Handl, *supra* note 259, p. 291.

For instance, the Bank organizes an Annual World Bank Conference on Environmentally Sustainable Development. On September 25-27 1996, the Fourth Annual Conference was held in Washington D.C., on "Rural well-being : from vision to action". "Fourth Annual WB Conference", Netscape  
<http://www-esd.worldbank.org/esdcnf/home.htm>

environment are based on a fourfold agenda : assisting countries in setting priorities, strengthening institutions and implementing programmes; minimizing potential adverse social and environmental impacts of development projects; building on the positive linkages between poverty reduction, economic efficiency and environmental protection (see *supra*, Chapter II); and addressing global challenges.<sup>342</sup>

As the World Bank has assisted its member countries in making development sustainable, so has it undergone its own 'greening' : a series of operational policies addressing the environmental aspects of Bank projects and activities has been put into place; operational departments are strengthening their capacity for environmental analysis (an Office of Environmental Affairs - or Environmental Department - has been created, which will provide environmental impact studies, long-term planning, training and coordination. The Bank has also introduced environment divisions in its regional offices)<sup>343</sup>; the number of technical environmental staff has increased fivefold since the end of the eighties; the amount of specific environmental lending has gone up; and a new Vice presidency of Environmentally Sustainable Development (charged with providing overall policy guidance and technical support to projects) has been created. As a result, the Bank's entire lending portfolio is being adjusted in the light of new knowledge and concern about the environment, making broad use of

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<sup>342</sup> *Making development sustainable : the World Bank Group and the environment, fiscal 1994*, (Washington D.C. : World Bank, 1994), p.2 a.f.

<sup>343</sup> P.Birnie, A.Boyle, *supra* note 293, p.62.

environmental assessments to screen projects for their potential environmental impacts.<sup>344</sup>

Furthermore, the Bank has also begun to introduce the concept of Sustainable Development into its operations. The Bank's activities cut across many sectors of the development spectrum, and thus is extremely well-suited to implement Sustainable Development's devise of integration of environmental considerations into all policy areas. Moreover, as a global institution it is equally well-suited to deal with problems of a cross-border nature.<sup>345</sup>

The World Bank cooperates closely with other international organizations, such as UNEP and UNDP, and with the regional development banks.<sup>346</sup> As the

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<sup>344</sup> *Mainstreaming the environment : the World Bank Group and the environment since the Rio Earth Summit, fiscal 1995*, (Washington D.C. : Environment Department, the World Bank, 1995), p.1-20; *Making development sustainable : the World Bank Group and the environment, fiscal 1994*, (Washington D.C. : the World bank, 1994), p.2-23.

The World Bank now has operational policies and procedures in place concerning environmental assessments, action plans, agriculture, water resources management, indigenous people, forestry, dam and reservoir projects, cultural property, poverty reduction, technical assistance, NGO participation. See *Mainstreaming the environment : the World Bank Group and the environment since the Rio Earth Summit, fiscal 1995*, (Washington D.C. : Environment Department, the World Bank, 1995), p.207 a.f.

These World Bank studies show that Bank lending projects with a particular environmental impact continue to grow. By 1994, 120 environmental projects (for a value of over \$ 9 billion US) were being implemented. A good example of the Bank's improving concern over the environmental impacts of its lending commitments can certainly be found in the area of forest management : since the adoption of its new forest policy in 1991, the Bank has significantly increased its lending to the sector, and given special emphasis to 4 basic principle of sustainable forestry : rectify market and policy failure that encourages deforestation; expand public participation; promote sustainable forest management; and expand protected forest and the precautionary principle. For more details on the environmental assessment procedure, see P.Thatcher, *supra* note 301, p.202-221.

<sup>345</sup> B.de Vries, "Challenges and opportunities for the World Bank", in O.Kirshner, ed., *The Bretton Woods - GATT system : retrospect and prospect after 50 years*, (London : M.E.Sharpe, 1995), p.224 a.f.

<sup>346</sup> Regional Development Banks, such as the Asian Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, face similar developments. They formed in conjunction with the World Bank, UNEP, UNDP, OAS and the EC the CIDIE (Committee of International Development Institutions on the Environment), and adopted a Joint Declaration of Environmental Policies and Procedures Relating to Economic Development. See P.Birnie, A.Boyle, *supra* note 293, p.63: "Institutional arrangements to follow up the UNCED", *supra* note 298.



Bank's attention to global environmental concerns has expanded. new channels are being used to fund these global issues. The largest of these new entities is certainly the GEF<sup>347</sup>.

The **Global Environmental Facility**, initially established in 1991 as a pilot programme, has been restructured as a permanent organ in 1994, based on principles of transparency, accountability, cost-effectiveness, and universality. Its general function is to provide funding to help developing countries meet their obligations under international agreements regarding the ozone layer, climate change, biological diversity and international waters.<sup>348</sup> Through its financial and technical assistance, the GEF has become an important instrument for promoting participation and implementation by developing countries of policies and conventions intended to protect the global environment, and as such has emerged as an important tool for enabling development countries to address global concerns.<sup>349</sup>

The GEF is governed by a Council, and its policies are reviewed by an Assembly (the Meeting of Participants). Both are serviced by a Secretariat. The Council is composed of 32 members with a balance of developed and developing countries.

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For an overview of several regional development banks, and their activities relating to environmental protection and sustainable development, see G.Handl, *supra* note 259, p.294-297, 528-546.

<sup>347</sup> Another such new funding entity is the Multilateral Fund of the Montreal Protocol, see *supra* Section 2.

*Making development sustainable : the World Bank Group and the environment, fiscal 1994, supra* note 342, p.18 a.f.

<sup>348</sup> GEF has been confirmed as the main operating funding entity of the Framework Convention for Climate Change and the Convention on Biological Diversity. In addition, GEF provides additional funding to the implementation of the regime protecting the ozone layer. See *supra*, Chapter I, Section 3; R.Twum Barina, L.Campbell, *supra* note 283, p.43-47; *Mainstreaming the environment : the World Bank Group and the environment since the Rio Earth Summit, fiscal 1995, supra* note 344, p.62 a.f.

<sup>349</sup> P.Birmie, A.Boyle, *supra* note 300, p.666 a.f; See *Mainstreaming the environment : the World Bank Group and the environment since the Rio Earth Summit, fiscal 1995, supra* note 344, p.66

and decisions - if not taken by consensus - require a double majority of 60 % of all members (one state, one vote), and 60 % of all donors (one dollar, one vote).<sup>350</sup>

Each of the three implementing agencies have distinct areas of responsibility. UNEP will catalyze scientific and technical analysis, advance environmental management policies, ensure that the global policy-framework of GEF is consistent with environmental agreements, and organize the Scientific and Technical Advisory Panel (STAP). UNDP will provide technical assistance, and is responsible for capacity building. The World Bank - as Trustee and Administrator of GEF - will ensure the development and management of investment projects, encourage the inclusion of GEF investment areas in national environment programmes of recipient countries, and mobilize private sector resources.<sup>351</sup> The implementing agencies shall be accountable to the Council for their GEF-financed activities.

Although initiatives like the GEF prove that there is nothing marginal about the environment in the World Bank's policy processes<sup>352</sup>, the GEF disposes over quite limited resources, and limited accommodation and participation of the public, in particular NGO's. However, these financial limitations can be overturned by increased cooperation with its three implementing agencies and by cooperation through co-financing arrangements with other organizations (such as the IDA and

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a.f., and p.276 a.f., for an extensive list of projects financed and implemented by the GEF, and by the Multilateral Fund of the Montreal Protocol.

<sup>350</sup> P.Birmie, A.Boyle. *supra* note 300, p. 666; H.French, *supra* note 282, p.26.

<sup>351</sup> "UN Bodies, the Banks, and overseas development assistance", Netscape on the World Bank homepage <http://www.worldbank.org/> : D.Reed, "The Global Environment Facility and Non-Governmental Organizations" (1993) 9 American University Journal of International Law and Policy, p.198-199.

<sup>352</sup> P.Thatcher, *supra* note 301, p.219.

the IFC).<sup>353</sup> Concerns over the explicit exclusion of NGO's from the GEF Council, the Implementation Committee and the STAP have resulted in increased public pressure and NGO lobbying efforts, which in turn led to the convocation of an NGO-Participants Consultation, days prior to each formal Meeting of Participants to the GEF (the Assembly).<sup>354</sup> NGO's now pressure in favor of observer status at the Meeting of Participants.<sup>355</sup>

## SECTION 5 : ADJUDICATION

Those who seek a more balanced resolution of the competing demands of trade, environment and development have not only looked for using trade institutions, environmental regimes or development organizations. More and more believe that besides economic, technical and scientific instruments, legal instruments should play a major role : international adjudication.<sup>356</sup> International adjudication involves the submission of a dispute to either a permanent judicial body or an arbitral tribunal for binding decision, typically on the basis of international law.<sup>357</sup> The primary forum for resolving international

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<sup>353</sup> H.French, *supra* note 282, p.27.

<sup>354</sup> For instance, the next GEF Council Meeting takes place on October 8-10 1996, and the NGO consultation takes place on October 7, 1996. All accredited NGO's are invited to attend, and the notification, invitation and even details on registration and accreditation are available on the Worldbank homepage, Internet, "GEF Council Meeting", Netscape

<http://www.worldbank.org/html/gef/meetings/council8.htm>

"Notification of NGO Consultation on the GEF", Netscape

<http://www.worldbank.org/html/gef/ngo/ngo1096.htm>

<sup>355</sup> D.Reed, *supra* note 351, p.201-213.

<sup>356</sup> A.Postiglione, "An international court for the environment?" (1993) 23 Environmental Policy and Law, p.73 a.f.

<sup>357</sup> J.Dunoff, "Institutional misfits : the GATT, the ICJ and trade-environment disputes" (1994) 15 Michigan Journal of International Law, p.1085 a.f.

legal disputes is the International Court of Justice (ICJ), the principal judicial organ of the UN (and one of the six principal organs of the UN)<sup>358</sup>. The ICJ is competent to decide environmental disputes, and has repeatedly declared its willingness and readiness to deal with such cases fully and promptly.<sup>359</sup> Consequently, to “be prepared to the fullest extent to deal with any environmental cases falling within its jurisdiction”, the ICJ has formed a special seven-member Chamber for Environmental Matters in 1993.

Although the Court and its Chamber could play a useful role, several major impediments persist that make the use of the ICJ less attractive. First, international courts do not have compulsory jurisdiction, needing the consent of all the disputing parties. States have always been very reluctant to accept the authority and jurisdiction of the ICJ. This lack of international support, based on the states’ unwilling to limit their sovereignty<sup>360</sup>, and a general reluctance of states towards “judicial” solutions typically producing a winner and a loser (states generally prefer negotiated compromises), result in major political impediments to the use of the ICJ. Second, a variety of doctrinal and procedural impediments remain, including uncertainties evolving around international environmental law, and the Court’s stringent standing requirements which only allow States to be parties in

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<sup>358</sup> Its 15 members are selected by the Security Council and the General Assembly. All UN members are automatically party to the ICJ. Although the ICJ carries out its judicial functions independently of the other UN organs, given the very nature of international law and dispute settlement, it is and continues to be heavily influenced by politics. See J.Trollidalen, *supra* note 293, p.19-20.

<sup>359</sup> Indeed, several commentators and countries have called for greater use of the ICJ in environmental disputes. For instance, nations as diverse as New Zealand, Colombia and Mexico called for a strengthening of the ICJ’s role in these matters at the Rio Conference on Environment and Development (UNCED). See J.Dunoff, *supra* note 357, p.1086-1087.

<sup>360</sup> An often recurrent problem in the international realm of environment and development. See *supra*, Chapter II.

cases before the Court<sup>361</sup>. Lastly, it is argued that the disputes at stake often exceed the bilateral, adversarial nature of adjudication. The multiplicity of the actors, the complexity of the problems caused by the world's interdependence and interrelatedness, and scientific uncertainties make that these problems are more often than not *polycentric* and multilateral, thus making the adjudication procedures as they now exist quite ill-suited.

These impediments, however do not mean that international adjudication is *in se* incapable of addressing the issues at stake. Rather, a number of scholars and politicians have proposed certain changes and innovations to the adjudication process<sup>362</sup>, so as to accommodate environmental and development concerns. However, given the numerous political obstacles, it is unlikely that a new international environmental court will be formed.<sup>363</sup>

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<sup>361</sup> Other major players in disputes on development, environment and trade issues, such as NGO's, private individuals and multinational corporations thus are *a priori* excluded from the ICJ procedures. Giving them standing before the ICJ would require a "significant, and unlikely, revision of the ICJ statute". J.Dunoff, *supra* note 357, p.1098-1099.

<sup>362</sup> Such as the participants to the International Congress held at the National Academy of Lincei, Rome, and the States issuing the The Hague Declaration (promoting a human rights based approach towards environmental matters, linked to the establishment of a new institutional authority in these matters. See *infra* Chapter IV, section 2, p.121-122.), J.Trollaldalen, *supra* note 293, p.20; J.Dunoff, *supra* note 357, p.1106-1107.

One of the most eminent advocates of the adjudication concept for environmental disputes is certainly A. Postiglione, who is well-known for advancing the idea of an International Court for the Environment. His Court would be based on a general International Convention on the Environment, which recognizes the human and individual right to the environment, and which gives individuals access to it. The International Court for the Environment would then come to protect and implement this "human right", this fundamental right of every individual. In this view, individuals as well as NGO's would have standing before the Court. And Postiglioni to conclude : "By systematic application and interpretation of existing and emerging rules in international environmental law, the International Court of the Environment will play an invaluable role in helping to introduce certainty, predictability and stability in international relations." A.Postiglione, *supra* note 356, p.73-78; A.Postiglione, "A more effective international law on the environment and setting up an international court for the environment within the UN" (1990) 20 Environmental Law, p.321-328.

<sup>363</sup> J.Dunoff, *supra* note 357, p.1107-1108.

NGO's or **Non-Governmental Organizations** have proliferated in modern times. Their aims and activities are as wide and diverse as human interest. Environmental and Development concerned NGO's equally abound. Some operate in the scientific field, others have exclusively educational or research purposes<sup>364</sup>. others advocate particular courses of action<sup>365</sup>, some mix various interests, all provide forums for discussion and aim at influencing policy makers.<sup>366</sup> These non-state actors are a major instrument in making policy more open, available to the public, and make public participation and awareness possible. Their role in international organizations is increasing, and they have been focusing a lot on UN institutions and Development facilities.<sup>367</sup> However, this openness towards the public and NGO's of the UN system has only just begun : no formal provisions are yet made for public review or comment on international treaties, nor is there a mechanism for citizen standing before the ICJ, and international negotiations are often closed to public participation.<sup>368</sup> Furthermore, no NGO has yet obtained access to the GATT/WTO.<sup>369</sup>

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<sup>364</sup> Such as the World Resources Institute, or the International Institute for Environment and Development.

<sup>365</sup> Such as Friends Of the Earth, Greenpeace International, the Sierra Club, World Wide Fund for Nature (WWF).

<sup>366</sup> P.Birmie, A.Boyle, *supra* note 293, p.76 a.f; G.Handl, *supra* note 259, p. 577 a.f..

<sup>367</sup> As we have seen *supra*, they play an increasing role in the UN CSD, the GEF and the World Bank. See H.French, *supra* note 282, p.45: "CSD : role of major groups in implementation of Agenda 21", *supra* note 324; D.Reed, *supra* note 351, p.201-213.

There was also a great participation of NGO's at the Rio Summit (UNCED), where they had unprecedented access to the Preparatory Committees (PrepComs), and consequently made major contributions to the Summit's results. So does Agenda 21 encourage more transparency and publication of information, which automatically gives NGO's greater access. See M.Grubb *et al.*, *The Earth Summit Agreements : a guide and assessment*, (London : Earthscan, 1993), p.44 a.f.

<sup>368</sup> H.French, *supra* note 282, p.45-46.

<sup>369</sup> NGO's do not even have observer status in the WTO Committee on Trade and Environment. See *supra*, Section I: "GATT/WTO activities on trade and environment", *supra* note 256.

Many a studygroup and think-tank on environment, trade and development issues has been created along the road.<sup>370</sup> The more important one is undoubtedly the Organization for Economic Cooperation and Development (OECD), which coordinates, negotiates, discusses and debates the economic and trade policies of its member countries. The OECD established in 1970 an Environment Policy Committee, and in April 1991, a **Joint Trade and Environment Working Group**, in which many of interesting ideas and proposals were discussed<sup>371</sup>. The OECD cooperates with several organizations, such as the EU (the Commission has observer status at OECD meetings), the WTO (especially with its Committee on Trade and Environment, where the OECD has observer status<sup>372</sup>), and UNCTAD. In fact, the OECD as a forum for discussion on trade, environment and development interlinkages has considerable weight, especially because of its expertise, historical record, its involvement in economic as well as environmental

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<sup>370</sup> E.g. the NATO's Committee on Challenges on Modern Society; and the Conference on Security and Cooperation in Europe (CSCE). P.Birnie, A.Boyle, *supra* note 293, p.72 a.f.

<sup>371</sup> Such as the famous polluter pays principle, the harmonization principle, the role of technology transfer, economic instruments such as environmental taxes and tradeable emission permits, property rights. See K.Steininger, *Trade and environment : the regulatory controversy and a theoretical and empirical assessment of unilateral environmental action*, (Heidelberg : Physica-Verlag, 1995), p.36 a.f.; *Promoting cleaner production in developing countries*, (Paris : OECD, 1995); *The economic appraisal of environmental projects and policies*, (Paris : OECD, 1995); *Environmental taxes in OECD countries*, (Paris : OECD, 1995); *International economic instruments and climate change*, (Paris : OECD, 1993); *Project and policy appraisal : integrating economics and environment*, (Paris : OECD, 1994), p.1-24.

The Environmental Policy Committee and the Joint Trade and Environment Working Group report to the OECD Council, which in turn adopts the appropriate decisions. See G.Handl, *supra* note 259, p. 526-528.

Other OECD Committees have been established, such as the Joint Working Party of the Environment Policy Committee and of the Committee for Agriculture. Its task is to study sustainable forms of agriculture (e.g. the impact of agricultural subsidies). The Joint Party cooperates closely with the FAO, CSD, Economic Commission for Europe (ECE), and the World Bank.

The OECD's Environment Policy Committee, created in 1971, cooperates closely with UNEP, UNCTAD and the WTO's Committee on Trade and Environment.

"OECD/Food, Agriculture and Fisheries". [http://www.oecd.org/agr/age\\_pueb.htm](http://www.oecd.org/agr/age_pueb.htm)

"Meeting of OECD Environment Policy Committee"

[http://www.oecd.org/news\\_and\\_events/reference/nw96-15a.htm](http://www.oecd.org/news_and_events/reference/nw96-15a.htm)

<sup>372</sup> See *supra* Section 1.

interests, and its flexibility to adapt to new issues and priorities on the international agenda. However, for the OECD to become the major seat of trade-environment discussion, and not to be perceived as the 'rich-persons' club, it should open up to developing countries.<sup>373</sup>

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<sup>373</sup> C.Stevens, "The OECD", in J.Kirton, S.Richardson, eds., *Trade, environment and competitiveness*, (Ottawa : National Round Table on the Environment and the Economy, 1992), p.209-213; and J.Kirton, "Canada's contribution to a new trade-environment regime", in J.Kirton, S.Richardson, eds., *Trade, environment and competitiveness*, (Ottawa : National Round Table on the Environment and the Economy, 1992), p.256-258; P.Birnie, A.Boyle, *supra* note 293, p.71-72.



**ORGANIZATIONS FOR THE FUTURE.**

Whereas integrating environmental protection objectives and sustainable development considerations into the world's economic, trade and development institutions - such as the WTO, regional trade regimes, global and regional development banks, IMF, and UNDP - is a very important step in balancing trade and environment concerns (see *supra*, Chapter III), further steps are required and specific institutional arrangements should be made in order to accommodate these concerns. Strengthening the existing institutional structure (by a further greening of development and trade regimes, and a substantial strengthening of environmental protection institutions such as the UNEP and CSD) will most likely be a less difficult job than creating entirely new institutions on the global level (such as a new Environmental Agency, a kind of 4<sup>th</sup> 'Bretton Woods pillar',<sup>374</sup> that would be for the protection of the environment what GATT/WTO is for trade liberalization, the World Bank for development objectives, and the IMF for monetary stability concerns). Any change to the institutional agenda, however, requires the necessary political will and international cooperation - its absence being more often than not a major obstacle and impediment.

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<sup>374</sup> Idea set forth by D.Esty, in D.Esty, "A Global Environmental Organization : the fourth Bretton Woods pillar?", in J.Kirton, S.Richardson, ed., *The Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table on the Environment and the Economy, 1995), p.75-79.

## SECTION 1 : STRENGTHENING AND IMPROVING EXISTING INSTITUTIONS

As Chapter III shows, the extraordinary proliferation of organizations that deal with trade, environment and development questions has given the world a disorganized system of institutions, a 'patchwork quilt' rather than a cohesive and coordinated system. To come up with an organized, streamlined system capable of balancing basic concerns of the world community, several avenues of change and improvement could be envisaged to strengthen development institutions, trade regimes and environmental organizations.

The idea that the **United Nations'** environmental capacities need to be strengthened is not a new one<sup>375</sup> : most importantly, the 1992 Earth Summit held at Rio (UNCED), and its Agenda 21, backed up the idea of strengthening the UN system<sup>376</sup> - although this endorsement of strengthening existing structures was probably more due to the continuing reluctance of governments to consider new institutions (reluctance that was continuously illustrated by the UNCED's participants), than to their firm and honest allegiance towards the existing

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<sup>375</sup> E.g. ideas to strengthen UN capacity in the field of the environment were present in the 1989 The Hague Declaration (which will be discussed in more details *infra*, section 2); and in the idea to reform the Trusteeship Council into an Ecological Council that would exercise trusteeship over the global commons in the collective interest of humanity, e.g. by administering environmental protection agreements protecting the global commons. See *supra*, Chapter III, section 3 p. 84; *Preliminary discussion paper and background material : the Halifax summit, sustainable development and international institutional reform*. (Ottawa : National Round Table on the Environment and the Economy, 1995), p.47-48.

<sup>376</sup> Chapter 38 of Agenda 21 states that "the integration of environment and development issues (...) and thus sustainable development (...) necessitates strengthened cooperation and coordination in the UN system and with national, intergovernmental, and nongovernmental organizations, as well as an effective exchange of information". See T.Carrol-Foster, ed., *A guide to Agenda 21 : issues, debates and Canadian initiatives*. (Ottawa : International Development Research Centre, 1993), p.108.

institutional system.<sup>377</sup> Either way, the emergence of the idea of improving the UN system, along with the establishment of several new and innovative institutional structures<sup>378</sup>, and the initiative of more than 80 countries to establish National Councils of Sustainable Development or similar bodies in which representatives of the governments and of various sectors of the business and civil society can consult, advise, negotiate and discuss any issues related to Sustainable Development<sup>379</sup>, are all hopeful signs, but they are not enough : there is a fundamental need to make substantial change in the dynamics and direction of the UN system. Global interdependence and global risks result in implications for global governance, making global cooperation more and more necessary : the UN system needs to reflect the new configuration and reality of economic and political power, by providing more say for developing countries, and the “losers” of 50 years ago (i.e. Japan and Germany); and in addition, greater provision must be made for dialogue and cooperation with the NGO’s of civil society.<sup>380</sup> Global cooperation among all states and among the representatives of civil society are the key guidelines in improving the UN structure.

The UN system, as briefly introduced in Chapter III, displays several organs responsible for environment and development concerns. We will here focus only on the most important of them in assessing how they could be institutionally

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<sup>377</sup> See M.Grubb *et al.*, *The Earth Summit Agreements : a guide and assessment*, (London : Earthscan, 1993), p.40-43.

<sup>378</sup> Such as the GEF and the CIDIE. See *supra*, Chapter III, sections 3 and 4.

<sup>379</sup> For instance, for Canada, the National Round Table on the Environment and the Economy, established in 1988; for the UK, the UK Round Table for Sustainable Development, created in 1994; for the US, the President’s Council for Sustainable Development, established in 1993; and (interesting) for the European Union, the General Consultative Forum on the Environment, created in 1993. See *Preliminary discussion paper and background material : the Halifax Summit, Sustainable Development and international institutional reform*, *supra* note 375, p.35.

improved.<sup>381</sup> These institutions generally suffer from narrow mandates, small budgets, limited support and lack of coordination.

UNEP - UN's first environmental organ - is a very good example of how UN institutions can be ill-designed for their task. Although UNEP has contributed considerably to supply significant impetus to global environmental protection activities and sensitivity<sup>382</sup>, it suffers from serious handicaps. The UN Environmental Programme's principal institutional difficulty is its insufficient clout and support, both among nations and organizations.<sup>383</sup> It has a far too narrow mandate to effectively coordinate across the spectrum of global issues. Its budget is small (about 0.1 % of the US Environmental Protection Agency), and its staffing is inadequate for the many tasks that need to be undertaken. Moreover, its location in Nairobi, Kenya, compromises a great deal (bad communications, political instability, and low ability to attract a high-level staff).<sup>384</sup> Lack of funding, poor internal management and lack of power (UNEP is a mere

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<sup>380</sup> M.Strong, "After Rio : the question of international institutional reform", in *Preliminary discussion paper and background material : the Halifax summit, sustainable development and international institutional reform*, *supra* note 375.

<sup>381</sup> P.Szasz provides for an analysis of the powers and the abilities of the principal organs of the UN in relation to sustainable development concerns, and an assessment of the institutional changes that could - or could not - improve their potential to deal with these issues. So would neither the composition nor the voting system of the GA and the Security Council allow much room for the design of effective sustainable development policies, and the idea of reforming the Trusteeship Council into an Ecological Council seems even more of a challenge, given the Council's composition (too large) and its current powers (too small). See P.Szasz, "Restructuring the international organizational framework", in E.Brown Weiss, ed., *Environmental change and international law : new challenges and dimensions*, (Tokyo : UN University Press, 1992), p.357-369.

<sup>382</sup> See *supra*, Chapter III, section 3: A.Berret, *International organizations : principles and issues*, 5<sup>th</sup> ed., (Englewood Cliffs : Prentice Hall, 1991), p.317; H.French, *Partnership for the planet : an environmental agenda for the UN*, (Washington D.C. : Worldwatch, 1995), p.28 a.f.

<sup>383</sup> Its creation in 1972 was at best somewhat half-hearted, reflecting a lack of conviction on the part of the developed countries about the importance of environmental issues on the one hand, and the opposition of certain developing countries, perceiving environmental issues as contradictory to the needs of rapid development, on the other hand. P.Szasz, *supra* note 381, p.351-352.

<sup>384</sup> D.Esty, *greening the GATT : trade, environment and the future*, (Washington D.C. : Institute for International Economics, 1994), p.91.

programme, not a full agency of the UN) are its main weaknesses.<sup>385</sup> It will be these impediments that have to be addressed in upgrading and strengthening UNEP : greater financial resources, a more central location (for instance Geneva or New York) that will facilitate contacts and cooperation with other organs - UN or others -, and a clearer mandate as to the functions UNEP is to fulfill are essential to the needed and necessary transformation of UNEP into a more independent organization : preferably a UN agency.<sup>386</sup>

The UN Commission on Sustainable Development (CSD), the institutional legacy of the 1992 Rio Earth Summit (UNCED), has even more limited authority than UNEP : it has an almost impossible mandate of trying to follow up Agenda 21 - the 700 page compendium of environmental needs and concerns, covering every imaginable environmental issue without differentiating priorities and often reflecting contrary points of view<sup>387</sup> -, suffers (as does the UNEP) from lacking political support and a tiny budget, and of the belief in many developed countries that it has been 'captured' by developing countries, and as a result will not act in the general global interest.<sup>388</sup> Furthermore, the mere creation of the CSD resulted in a loss of prestige for the UNEP and the confusion of its mission<sup>389</sup>, and added

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<sup>385</sup> J.McCormick, "International Nongovernmental Organizations : prospects for a global environmental movement", in S.Kamieniecki, ed., *Environmental politics in the international arena*, (Albany : State University of New York Press, 1993), p.136.

<sup>386</sup> P.Szasz, *supra* note 381, p.370-371.

Agenda 21 stresses the need for UNEP and its Governing Council to have an enhanced and strengthened role, including in its involvement in the development of international environmental law, and UNEP's performance of Secretariat duties for environmental protection agreements. See G.Handl, ed., *Yearbook of international environmental law*, vol.5, 1994, (Oxford : Clarendon Press, 1995), p.546 a.f.

<sup>387</sup> D.Esty compares this mission "as being told to follow up the Bible". D.Esty, *supra* note 384, p.91.

<sup>388</sup> D.Esty, "A case for a Global Environmental Organization", in *Preliminary discussion paper and background material : the Halifax summit, sustainable development and international institutional reform*, *supra* note 375, p.4-5.

<sup>389</sup> H.French, *supra* note 382, p.32.

even more to the complex and clouded multitude of institutions dealing with development and environment issues. At the end of the day, the result of these deficiencies is that the CSD is acquiring a reputation as a talk shop, a mere gathering place, where not much of real significance happens.<sup>390</sup> In order to change this and to improve the CSD, more financial and political support should be available, along with a more focused mandate, especially taking up a coordinating role as a top priority.

The UNDP - the UN's main development organization - on the other hand does have a well-funded and broader budget, and is a full agency of the UN. It has increasingly moved into the environmental arena by integrating environmental considerations into its policies (as a result of the concept of Sustainable Development), has created in early 1995 a new Sustainable Energy and Environment Division, and works actively together with development banks and the UNEP (e.g. in structures such as the GEF and the Multilateral Fund for the implementation of the Montreal Protocol).<sup>391</sup> At the Rio Earth Summit, UNDP was entrusted with "capacity building" for Sustainable Development. UNDP thus remains a main actor in the area of Sustainable Development. However, throughout the UN, and thus also in the UNDP, a sizable gap persists between rhetoric and practice. An independent review commissioned by the agency itself concluded that many of its country offices disregard the concepts of Sustainable Development and environmental sensitivity in the inception and implementation

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<sup>390</sup> *Ibid.*, p.34; M.Strong, "Post-Rio sustainable development and the Summit", in J.Kirton, S.Richardson, ed., *The Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table on the Environment and the Economy, 1995), p.14.

<sup>391</sup> See *supra*, Chapter III, sections 3 and 4; H.French, *supra* note 382, p.35.

of their projects.<sup>392</sup> Moreover, UNDP's focus on development issues leaves only minor space for related concerns (such as environment and trade) as additional topics.

Building on the UN system and all of its organs that have direct or indirect impact on environment and development policy-making (see Chapter III, section 3), and in advance to the next section of the present Chapter, one could conceive the idea of a constructive consolidation and redirection of several of these organs into one principal organ, or at least into one agency (and not a simple programme) of the UN : as such, political support could be more easily canalized, financial resources could be directed into one direction - without wasteful overlaps of action projects and scientific research - and a clear and sufficient mandate could be designed coordinating automatically all efforts done in the field of environment and development.<sup>393</sup> One could easily imagine rechartering and consolidating three or four existing organs, such as the UNEP, the CSD, the UNDP and the UNCTAD, which could channel together and canalize the necessary resources, mandate and experience in the fields of global development, environment and trade.<sup>394</sup>

Despite the manifest inadequacy of the existing, utterly decentralized institutional structure, some international observers still argue in favor of **issue-by-issue management** of global environmental problems, characterized by individual *ad hoc* international environmental protection agreements : a

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<sup>392</sup> H.French, *supra* note 382, p.35.

<sup>393</sup> D.Esty, *supra* note 384, p.89-91; D.Esty, *supra* note 388, p.6.

<sup>394</sup> Idea discussed during the interview with S.Richardson, CEC Program Manager NAFTA/Environment, on August 12, 1996, in the CEC Secretariat, Montreal. D.Esty adds other institutions such as the UNIDO, WMO, and UNITAR to the list. See D.Esty, *supra* note 384, p.90, and D.Esty, *supra* note 388, p.16.

convention, a protocol, and separate secretariats for each environmental problem that manages to get enough support. The problem with this ad hoc decision-making is that it does not exploit the advantages linked to the interconnectedness and interdependency of global environmental problems : without a comprehensive approach to solving these problems, opportunities for efficiency and synergies across issues will be lost.<sup>395</sup> A lot of improvement and strengthening of this institutional structure could be obtained by centralizing and coordinating the negotiation of international environmental law, and the work of these secretariats under one agency.

As Chapter III has shown, global as well as regional **development banks** have changed dramatically since the end of the eighties. Especially the World Bank has taken major steps towards directing the Bank's activities, policies and programmes to more environmentally sound development.<sup>396</sup> New structures and new policies have been instituted to reflect the principles of sustainable development and environmental protection, reflecting into real changes in the Bank's lending programmes. But despite this progress, most of the Bank's investments are still devoted to large infrastructure projects, and in addition its policies are often breached<sup>397</sup> - in the World Bank as well there seems to exist a large gap between policy and practice.<sup>398</sup>

If the Bank were to promote truly sustainable development, it would place far less emphasis on large infrastructure projects (which are often environmentally and

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<sup>395</sup> D.Esty, *supra* note 384, p.90-91, and D.Esty, *supra* note 388, p.5-6.

<sup>396</sup> See *supra* Chapter III, section 4.

<sup>397</sup> A 1994 internal review suggests that policy guidelines are routinely violated. For instance, only 2 out of 46 power sector loans in the pipeline have been found compatible with the new policy papers on energy. H.French, *supra* note 382, p.37-38.



socially disruptive). and far more on smaller efforts carried out in close cooperation with local communities. Another way to improve and strengthen development banks. is to ensure that they develop policies that ensure compatibility between major environmental protection agreements (CITES. Ozone protection regime. Basel convention. Biodiversity convention. Climate change treaty, etc.), and the lending programmes of development banks.<sup>399</sup> In addition, the size and complex structure of the World Bank Group (which includes a number of agencies)<sup>400</sup>, comprising close to 10,000 individuals and many different cultures mitigate against rapid, thorough and sometimes necessary change.<sup>401</sup> Finally, there consists considerable overlap and duplication between the World Bank on the one hand, and certain UN institutions (such as UNDP), the regional development banks, and the IMF on the other hand. There is substantial room for improvement in the coordination and cooperation between these institutions.<sup>402</sup>

Chapter III has equally shown that **trade regimes** such as the GATT/WTO have gone some way in institutionalizing the consideration of environmental concerns : at the end of the Uruguay Round, as part of the deal, trade negotiators agreed to create the WTO Committee on Trade and Environment (the successor of the GATT EMIT), charged with exploring ways to ensure that trade rules and environmental goals are 'mutually supportive'.<sup>403</sup> That environmental protection

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<sup>398</sup> And the Global Environmental Facility (GEF) also suffers from structural problems, in particular funding problems. D.Esty, *supra* note 384, p.87.

<sup>399</sup> For instance, the development of a policy that prevents lending in violation of international treaties. See H.French, *supra* note 382, p.36-41.

<sup>400</sup> See *supra*, Chapter III, section 4.

<sup>401</sup> L.Good, "The World Bank", in J.Kirton, S.Richardson, ed., *supra* note 374, p.55.

<sup>402</sup> *Ibid.*, p.55-56.

<sup>403</sup> H.French, *supra* note 382, p.43.

The Committee is to report the results of its work to the WTO Ministerial Conference, which will be held in December 1996 in Singapore. On the 2-day Asia Conference on Trade and the Environment, held in June 1996, several participants (such as Prof. Tommy Koh of Singapore, and

issues now at least have a seat at the trade table is important, but the question remains exactly how the multilateral trade regime will deal with, and what treatment will be reserved to environmental objectives. Indeed, the GATT/WTO system remains based and anchored upon several key-principles bearing on the nature of the international legal system, principles that are entirely inherent to the multilateral trade regime. First, the WTO is a structure predicated on state sovereignty, which means that the states members of the WTO - through their representatives - define interests, make the rules and settle the disputes in the WTO. Second, the WTO system holds up the principle of collectively-approved action over unilateral enforcement. In addition, the WTO protects states, within their jurisdiction, from impingement by other states. Thus, extraterritorial and extrajurisdictional action are not tolerated by the WTO regime. Fourth, the multilateral trade regime finds itself not authorized to interfere in domestic environmental policy. Fifth, the multilateral trading system generally only applies GATT/WTO principles (such as fair trade, and non-discrimination)<sup>404</sup> : the

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Daniel Esty, Director of the Yale Centre for Environmental Law and Policy) urged the WTO Committee to make more progress in concrete recommendations to be made at the Ministerial Conference. Dr. Michael Rieterer (who is Deputy Director-General of the Department of European Integration on Trade Policy at the Austrian Federal Economic Chamber) pointed at several agenda items as main candidates for concrete results, namely the issues of eco-labeling, transparency of trade and environmental measures, and the relationship between trade regimes and environmental protection agreements. European Commission official Jean-Pierre De Laet expected concrete proposals on market access issues, and the issue of the export of domestically prohibited goods. However, despite the Commission of the EC's efforts to push ahead with some innovative proposals, progress in the CTE's work has been very slow and disappointing, and it is not sure whether the CTE's report to the Ministerial Conference will contain any concrete results or practically-useful recommendations.

See "Call for WTO Trade, Environment Group to 'make more progress'", Netscape  
<http://www.wto96.org/news/envir/190.html>

"WTO Trade, Environment Group 'unlikely to finish work this year'", Netscape  
<http://www.wto96.org/news/envir/188.html>

Interview with Alessandro Paolicchi, Commission of the EC, DG I, Brussels, 8 October 1996.

<sup>404</sup> Some GATT panels, such as in the Tuna Dolphin case, did interpret some rules of general international public law (e.g. concerning extraterritorial and unilateral action), but even in these interpretations trade concerns remained by far more dominant than environmental protection

multilateral trade regime is limited to dealing with trade issues - trade concerns remain clearly the WTO's first and foremost priority.<sup>405</sup> It is clear that these principles often are in sharp contrast with the needs and objectives of global environmental protection and sustainable development, and that the WTO likely will continue to put trade concerns ahead of environmental objectives.

The dispute settlement procedures still retain their high level of secrecy : the NGO community has no formal standing in the process, any expert input of 'persons of professional standing and experience in the field' is entirely optional for the panel, and proceedings are confidential except that - on request of a WTO member - a summary of documents may be released to the public. This last option is at least some progress from past GATT practices.<sup>406</sup> Furthermore, more documents will be made publicly available with the new Derestriction Policy, adopted by the WTO General Council on July 18<sup>th</sup>, 1996, that will allow for more WTO documents to be derestricted and circulated (even on the Internet).<sup>407</sup> More progress could be made if the dispute panels would apply international law *other* than GATT/WTO law (for instance international environmental law) - highly unlikely if one considers the fifth key principle of the WTO regime.<sup>408</sup>

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objectives. Although the analysis of the Tuna Dolphin case panel provoked heated debates about GATT's ability to balance trade and environment interests, the findings of the first panel report (i.e. the case between the US and Mexico, commonly referred to as Tuna Dolphin I) were not adopted by the GATT Council, and thus have technically no precedential value. See D.Esty, *supra* note 384, p.31.

<sup>405</sup> G.Handl, ed., *supra* note 386, p. 13-32, giving an exhaustive explication of the impact of these key WTO principles on environmental protection considerations.

<sup>406</sup> R.Page, "International trade and the environment : the WTO and the new beginning", in J.Kirton, S.Richardson, ed., *supra* note 374, p.68-69.

<sup>407</sup> With certain exceptions, documents produced after the establishment of the WTO on January 1<sup>st</sup>, 1995, will be unrestricted and circulated "if they contain only information that is publicly available or information that is required to be published under this decision".

Decision on Procedure for the Circulation and Derestriction of WTO Documents (WT/L/160). See "General Council takes steps to increase public access to WTO information", Netscape [http://www.unicc.org/wto/Whats\\_new/ngo.htm](http://www.unicc.org/wto/Whats_new/ngo.htm)

<sup>408</sup> See however *supra*, note 404.

The WTO Committee on Trade and the Environment has been discussing the role of NGO's in the trade regime. This topic clearly showed an overwhelming opposition of WTO delegates to include NGO's as observers.<sup>409</sup> However, given the WTO's goal of "cooperating with other international institutions involved in global economic decision-making"<sup>410</sup>, and given the existence of many financial, development and environment institutions and organizations with interest in the issues related to environment and trade, there is room for more cooperation and coordination, and consequently the WTO Committee on Trade and Environment has granted observer status to several international organizations.<sup>411</sup> These efforts by the Committee and the WTO to reach out to other bodies are important initiatives; now the NGO community looks at these observers as precedents for their own inclusion.<sup>412</sup>

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Although the 1994 Dispute Settlement Understanding does not establish a general standard of review to guide panels in their deliberations and rulings, the 1994 Antidumping Code article 17.6, provides that (ii) "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law", thus general international law (including trade law but also international environmental law, and customary international law) could become standardly used in the settlement of disputes. However, these provisions are worded in such general terms, that it remains to be seen whether they will have much impact on the results of panel decisions. See P. Pescatore *et al.*, *Handbook of WTO/GATT dispute settlement*, vol. 1, (The Hague : Kluwer Law International, 1995), p. 72-74.

<sup>409</sup> In fact, the US argued in favor for granting NGO's observer status in the Committee's proceedings, believing that this reflected the need for open processes in order to build public credibility. However, many countries rejected this proposition, and the debate ended with a clear majority in favor of releasing more information, but their proceedings would remain private. See *Ibid.*, p. 66.

Also, The Commission of the EC proposes to create effective mechanisms for information exchange and the opportunity for NGO's to submit comments and views to the WTO Committee on Trade and Environment.

Commission of the EC, *Communication to the Council and the Parliament on Trade and Environment*, (Brussels : Commission of the EC, DG I, 1996), p. 20.

<sup>410</sup> See *supra*, Chapter III, section 1.

<sup>411</sup> Including UNEP, UN CSD, UNDP, UNCTAD, IMF, World Bank, OECD and others. See *supra* Chapter III, section 1.

<sup>412</sup> R. Page, *supra* note 406, p. 69.

A most interesting and very recent development in the WTO, is the recent WTO invitation extended to NGO's "concerned with matters related to those of the WTO", to attend the WTO Ministerial Conference in Singapore (December 1996). Arrangements are being made for registration of NGO representatives wishing to attend the Singapore Meeting. R. Ruggierro, WTO Director-General, in his speech addressing the APEC Trade Ministers (July 15<sup>th</sup>, 1996, New

In conclusion to this section, one has to consider the increasing importance of public participation and process transparency in the legitimacy and public credibility of all these institutions. Strengthening open-door processes and improving public accessibility is a basic factor in improving existing institutions. Essential requirements in this strengthening process are improving transparency (processes of decision-making must be open to public view, in order to be seen as free of interference from special interests), accountability (not only in the financial but essentially in the political sense), freedom of information (accentuating the people's right to know as a precondition to their right to participate), and education and training.<sup>413</sup> More and more the traditional view on international relations and law as a states-only process is breaking down under the enormous pressure by a range of non-state actors (including environmental groups, scientists, and business communities), now exerting a direct and powerful influence in international environmental negotiations and institutions.<sup>414</sup> The UN (especially its CSD), the GEF and the World Bank are the subject of intense NGO interest and scrutiny. Although the UN has begun to extend NGO access<sup>415</sup>, this has been done

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Zealand), said to expect in Singapore "at least 3000 people, representing 120 member governments, 30 accession candidates, other international organizations, NGO's representing environment, consumer, and development groups - 60 *environmental groups alone* - as well as trade unions, business and of course the media from all over the world". (emphasis added) See "WTO - Non-Governmental Organizations", Netscape

<http://www.unicc.org/wto/regngoe.htm>

"Speech by Mr. R.Ruggierro, Director-General of the WTO, to the APEC trade ministers in Christchurch, New Zealand, 15 July 1996", Netscape

[http://www.unicc.org/wto/Whats\\_new/press52.htm](http://www.unicc.org/wto/Whats_new/press52.htm)

<sup>413</sup> R.Sharp, "Organizing for change : people-power and the role of institutions", in J.Holmberg, ed., *Making development sustainable : redefining institutions, policy, and economics*, (Washington D.C. : Island Press, 1992), p.51-54.

<sup>414</sup> H.French, *supra* note 382, p.45.

<sup>415</sup> Especially during the Rio Summit (UNCED), and as a result of Agenda 21, which encourages the democratization of international policy-making by focusing on the important role of major groups. For instance, more than 500 major groups have been accredited to observe CSD deliberations and make selective interventions. See *supra*, Chapter III, section 3: *Ibid.*, p.45-49. New ideas to formalize the growing importance in the UN system consist of making regular use of

on an ad hoc basis, without formal provisions for public review on international negotiations, or for NGO or individual standing before the ICJ.<sup>416</sup> The World Bank has instituted policies to make more Bank documents publicly available, creating an information center to disseminate them, and has created an independent inspection panel, an impartial forum where public complaints about Bank projects can be discussed.<sup>417</sup> More than any organization discussed above, the WTO remains subject to particularly strong criticism for their secretive methods and closed-door procedures, and continue to bar public access and NGO participation to a maximum, although there have been some recent attempts to increase public access to WTO information.<sup>418</sup>

## SECTION 2 : NEW INSTITUTIONS ON THE GLOBAL LEVEL

Regional trade regimes such as the NAFTA package and the European Union system have created institutional structures and regimes that could act as a model, a prototype for what could be possible and might be needed on a more global level.

Overall, the NAFTA and its side-deal are fairly successful in dealing with the various concerns at stake (i.e. trade liberalization and environmental protection) : an innovative institutional structure in the CEC, a more active role for

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public hearings, or even of the creation of a new 'NGO or people's assembly' (on the model of the Parliament of the EU); *Ibid.*, p.50.

<sup>416</sup> See *supra*, Chapter III, section 3 and 5; *Ibid.*, p.45.

<sup>417</sup> *Ibid.*, p.51.

<sup>418</sup> See *supra*, pages 118-120, and notes 409 and 414.

NGO's and the public<sup>419</sup>, and (largely symbolic) trade sanctions as the ultimate penalty.<sup>420</sup> However, in order to see the CEC as a model for a more multilateral initiative, one must - again - consider institutional aspects such as its budget<sup>421</sup>, composition, staffing and mandate or responsibilities.<sup>422</sup> Concerning its mandate, key challenges facing the CEC are the following : more active participation in the dispute resolution process of the NAFTA<sup>423</sup>, oversight reports on environmental concerns related to NAFTA's implementation<sup>424</sup>, enforcement and levying of fines, assistance in implementing NAFTA's environmental provisions and in developing additional supplementary provisions, and serving as a source of information on environmental issues.<sup>425</sup> Recently the CEC has acted upon several incidents that have environmental implications : it released a report on the tens of thousands of birds that were killed on a Mexican reservoir, and it is studying the port construction project at Cozumel island for its potential damaging environmental

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<sup>419</sup> Although some important opportunities have been missed, overall the public accessibility - a major NGO preoccupation - has been enlarged, and the CEC is likely to have a more sustained and meaningful relationship with NGO's and the public. The existence of JPAC, the permanency of public submissions channels, and the important role that NGO's have played in the public debate surrounding NAFTA/NAAEC are reasons for (cautious) optimism. See P.M.Johnson, A.Beaulieu, *The environment and NAFTA : understanding and implementing the new continental law*, (Washington D.C. : Island Press, 1996), p.160-169; and see *supra*, Chapter III, section 1.

<sup>420</sup> Only in the case of Mexico and the US. Canada has successfully negotiated a separate regime. See *supra*, Chapter III, section 1.

See G.Grayson, *The NAFTA : regional community and the new world order*, (Lanham : University Press of America, 1994), p.141; and see *supra*, Chapter III, section 1.

<sup>421</sup> Certainly a weakness in the institutional structure is CEC's annual budget, necessitating the CEC to prove its efficiency and necessity of its existence each year. Such short-term resources do not favor longer-term planning. Interview with S.Richardson, CEC Program Manager NAFTA/Environment, on August 12, 1996, at the CEC Secretariat, Montreal.

<sup>422</sup> J.Dunoff, "Resolving trade-environment conflicts : the case for trading institutions" (1994) 27 Cornell International Law Journal, p.626-627.

<sup>423</sup> For instance nomination of the roster of NAFTA dispute resolution panel members with environmental expertise by the CEC. A.De Mestral, *Dispute avoidance : weighing the values of trade and environment under the NAFTA and the NAAEC*, CEC Environment and Trade series no.3, (Montreal : CEC, 1996), p.26; and *supra* Chapter I, section 2, note 115.

<sup>424</sup> Reports on the effects of NAFTA on the environment have already been redacted and published by the CEC. See *supra* Chapter III, section 1.

<sup>425</sup> F.Runge, *Freer trade, protected environment : balancing trade liberalization and environmental interests*, (New York : Council on Foreign Relations Press, 1994), p.66-70.

impacts. Overall, the basic structure of the CEC could offer an important prototype for and even a stepping stone towards broader international efforts in balancing trade, environment and development concerns.<sup>426</sup>

As we have seen in Chapters I and III, the EU - as a supranational arrangement - has addressed trade and environment linkages directly, actively setting environmental policies, resolving disputes concerning trade and environment interests, creating institutional structures to deal with trade and environment issues, and ultimately providing strong leadership in balancing trade objectives and environmental protection concerns, in order to avoid multiple, competing national (i.e. member-state level) solutions to similar environmental problems. The substantial budgetary resources needed to enforce the EU's environmental regulations, and its overarching institutional capacity could very well serve as model for a more multilateral structure. Most importantly, the insight of the EU experience shows that some degree of *subsidiarity* might be required<sup>427</sup>, in order to balance out the states' desire to maintain as much of their sovereignty, and the world's need for multilateral and international responses to global

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<sup>426</sup> Certainly noteworthy is the CEC Council decision made in August 1996 in Toronto. The Council - made up of the three environment ministers - recognized in the field of trade and environment the "unique perspective on the relation between trade and environment policies provided by the North American experience. The Council agreed to seek a joint meeting with trade ministers of the three countries (...). The Council also agreed that senior trade and environment officials (...) should meet to explore the possibilities for common ground in advance of the WTO ministerial meeting in Singapore in December." The CEC Secretariat will make up a report of these meetings, to be presented at the WTO Singapore Meeting. Interview with S. Richardson, CEC Program manager NAFTA/Environment, on August 12, 1996, at the CEC Secretariat, Montreal. Document "North American Environment Ministers accelerate environmental protection efforts", (Montreal : CEC, 1996).

<sup>427</sup> The subsidiarity principle (article 3 b (2) of the E.C. Treaty) reads that the "Community will take action (...) only if and in so far the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore (...) be better (read *more effectively* or *faster*) achieved by the Community", (emphasis added). In this respect, environmental action will be undertaken by the Community if the objectives can be attained faster and more effectively by the Community or in the 'Community eco-system'. L. Kramer, *EC Treaty law and environmental law*, 2<sup>nd</sup> ed., (London : Sweet & Maxwell, 1995), p.59-63.



problems.<sup>428</sup> Much of the strength and efficiency of the EU system in balancing trade and environment concerns comes from its special, supranational stature. It is more than a mere intergovernmental cooperation commitment (like the NAFTA/NAAEC), a difference to be kept in mind when talking about global institutional structures for the environment, which will more likely be based on intergovernmental cooperation than on supranational commitments.<sup>429</sup> The Commission itself argues that the many obstacles which burden the Trade-Development-Environment debate at the international level are, in many respects, similar to those the EU is facing in its effort to integrate environmental requirements into other policy areas. However, the Commission argues, at the international level there exists no integrated institutional framework as in the EU, but a multitude of bodies and institutions with “specialized tasks, different composition and varying structures”, making it necessary to bring together, and coordinate the work conducted in the various international fora.<sup>430</sup>

At the very heart of the antagonism between trade, development and environment issues lies the fact that there is a lack of institutional structure to protect the environment the way the GATT/WTO guards international trade issues<sup>431</sup> : there is no institutional international organization to protect environmental values the way the WTO protects principles of free trade.<sup>432</sup> During the last few years, several radically new proposals of institutions at the global

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<sup>428</sup> F.Runge, *supra* note 425, p.35-53.

<sup>429</sup> See *supra* Chapter I, section 2 and Chapter III, section 1.

<sup>430</sup> Commission of the EC, *Communication to the Council and the Parliament on Trade and Environment*, (Brussels : Commission of the EC, DG I, 1996), p.19-21.

<sup>431</sup> Or the way the IMF guards monetary stability, and the World Bank development interests.

<sup>432</sup> *Preliminary discussion paper and background material : the Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table for the Environment and the Economy, 1995), p.18.

level, together with a call for fuller public participation, have been put forward, responding to the challenge of designing and crafting a multilateral institution that will balance and integrate the *equally important* issues of trade, development and environment. These proposals respond to the fear that an international institutional ‘organizational crisis’ will aggravate environmental threats, resulting in a widening gap between international environmental objectives and the capacity of organizations to deal with these objectives.

One of these proposals is the The Hague Declaration, adopted at the The Hague Ministerial Conference, attended by 24 states in March 1989.<sup>433</sup> It states the following :

*“Because the problem is planet-wide in scope, solutions can only be devised on a global level. (...) remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done (...).*

By these words, environmental degradation is regarded as a *human rights* problem, as endangering the right to live in dignity in a viable environment, from which the fundamental duty to preserve the ecosystems is derived.<sup>434</sup> Quite an innovative instrument! Furthermore, the Declaration considers that

*“faced with a problem the solution to which has three salient features, namely that it is vital, urgent and global, we are in a situation that calls (...) for a new approach, through the development of new principles of international law including new and more effective decision-making and enforcement mechanisms. (...)*

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<sup>433</sup> The Hague Declaration on the Environment, March 11, 1989. It was signed by Australia, Brazil, Canada, Ivory Coast, Egypt, France, Federal Republic of Germany, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, the Netherlands, Senegal, Spain, Sweden, Tunisia, Venezuela, and Zimbabwe. 28 International Legal Materials 1308 (1989).

<sup>434</sup> See H.Hohmann, *Precautionary legal duties and principles of modern international environmental law*, (London : Graham & Trotman / Martinus Nijhoff, 1994), p.163; and *supra* Chapter II, section 1.

*The signatories acknowledge and will promote the following principles : (a) The principle of developing, within the framework of the UN, new institutional authority, either by strengthening existing institutions or by creating a new institution (...). (c) The principle of appropriate measures to promote the effective implementation of and compliance with the decisions of the new institutional authority, decisions which will be subject to control by the ICJ (...).*

This idea of creating new institutional authority in the UN framework was proposed by the governments of France, Norway and the Netherlands, originally in a more extreme form of the establishment under UN auspices of an authority that will take decisions with *qualified majority* voting, and the acceptance of the principle of *economic sanctions* subject to control by the ICJ.<sup>435</sup>

Proposals like this one calling for international structures have been vigorously debated since, and essentially recognize (and need) a shift of the concept of state sovereignty from the traditional concept to a more dynamic one (rights *and* responsibilities).<sup>436</sup> However, most countries still persist in maintaining their individual rights and privileges over more global approaches, and obstruct considerably the (at least partly) realization of a new global institutional structure. However, it is not useless to take a look at the debate and proposals of the doctrine and literature concerning new multilateral institutional structures.

Over the past 25 years in particular, the focus on environmental issues has grown dramatically as did our understanding of the public health and ecological effects of certain economic and development activities. Consequently, the environment emerged as a policy priority just as trade liberalization, monetary

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<sup>435</sup> G.Plant, "Institutional and legal responses to global environmental change", in I.Rowlands, M.Greene, ed., *Global environmental change and international relations*, (London : MacMillan Academic and Professional, 1992), p.122-142.

stability and economic development emerged as the major policy issues of the international agenda 50 years ago, at the creation of the Bretton Woods institutions.<sup>437</sup> Today's global economic as well as ecological interdependence theoretically necessitates an improved and innovative institutional structure for managing environmental problems and the trade-environment intersection on an international scale.

The internalization of the environmental challenge can be separated into three different issues, each of which provides a fundamental reason to consider establishing a new global environmental institution. First, more and more, we recognize the existence of global environmental issues that need to be addressed properly, on a global level. Such global issues require collective action at the international level.<sup>438</sup> They demonstrate the need to provide for an international regulatory structure. Second, it is equally important to provide an intersection point or discussion forum for countries, business and other major groups, and the public at large where they can think, dialogue, discuss scientific research and policy action about 'common problems' - problems that many of them face. Sharing information and scientific data, developing common understanding, trying to understand other points of view, and promoting shared learning in addressing these common problems is indeed a great source of progress and gain - and a

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<sup>436</sup> See *supra*, Chapter II, section I; H.Hohmann, *supra* note 434, p.164; L.Susskind, *Environmental diplomacy : negotiating more effective global agreements*, (Oxford : Oxford University Press, 1994), p.21 a.f.

<sup>437</sup> D.Esty, *supra* note 388, p.1 a.f.

<sup>438</sup> Where the problem is local, a local response is appropriate; where the problem is provincial, a provincial response is desirable; where the problem is national, a national response is needed; when it is international, one needs to have an international structure. See D.Esty, *supra* note 374, p.76.

fundamental precondition of cooperation and collective action on these issues.<sup>439</sup> A third set of issues deal with competitiveness problems. A global institution is needed to address these issues, namely to reduce competitiveness tensions and the resulting 'political drag' (i.e. downward pressure) on national environmental regulations. Competitiveness concerns arise out of divergent national environmental policy choices (and thus different national environmental regulations); in an interdependent global economic market place, these differences create different degrees of capability to compete, hence competitiveness tensions.<sup>440</sup> From the perspective of economic theory, the case for a strong, comprehensive and overarching global environmental institution is rather strong.<sup>441</sup>

In addition, the lacking existing institutional structure that deals with these global issues of economical and ecological interdependence<sup>442</sup>, and the equally lacking ad hoc approach consisting of totally uncoordinated issue-by-issue management of environmental problems<sup>443</sup> are more reasons in favor of the innovative and creative construction of a new global institution.<sup>444</sup>

In this debate, some have argued for a new global institution built within the framework of the United Nations<sup>445</sup> (in the line of the The Hague Declaration).

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<sup>439</sup> In this respect, the OECD could very well be taken as a model for this kind of institution. The 25 different countries member of the OECD use the OECD as a forum to come together, share information, talk through problems, promote studies and research, and even reach guidelines on collective action on common solutions. *Ibid.*, p.76; See *supra* Chapter III, section 6. However, on a global level such a forum needs to involve also developing countries, which will make decisions more difficult to obtain.

<sup>440</sup> D.Esty, *supra* note 374, p.75-77; D.Esty, *supra* note 388, p.2-10.

<sup>441</sup> D.Esty, *supra* note 384, p.79-80.

<sup>442</sup> See the institutions and their defects described in Chapter III, and Chapter IV, section 1.

<sup>443</sup> See *supra*, section 1.

<sup>444</sup> D.Esty, *supra* note 388, p.4-6.

<sup>445</sup> For instance P.Szasz, and Hillary French, who argue in favor of a new principal organ within the UN. See P.Szasz, *supra* note 381, p.363 a.f.; H.French, *supra* note 382, p.54-57. The fact

while others have more argued for a new global structure outside the UN, more in the line of the Bretton Woods institutions, a 4<sup>th</sup> Bretton Woods pillar so to speak.<sup>446</sup> Whether built inside or outside the UN structure, both sides recognize several important functions of this new Global Environmental Institution (or Global Environmental Organization (GEO) or World Environmental Organization (WEO) - the terms used respectively by Esty and Runge) - and these roles and functions all constitute more reasons in favor of its creation.

First of all, this new agency could substantially facilitate the development of international environmental law, by being involved in the elaboration of new international environmental standards and new basic principles of international environmental law. It could provide for an ongoing forum for negotiation on environmental norms, best practices, standards, and the framing of cardinal principles in the environmental realm that are implementable policies. It could provide a forum of discussion on and identification of new principles of global environmental policy, and eventually collect enough scientific necessity, political will and public acceptance to implement and apply them.<sup>447</sup> Second, it would

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remains that there is no full-fledged environmental agency within the UN system, but only a handful of disparate and badly coordinated bodies. An idea could be to transform UNEP into an operational UN Environmental Agency (maybe even by consolidating several UN bodies such as UNEP, UNDP, UNCTAD and CSD). See *supra*, section 1.

<sup>446</sup> This is the case for D. Esty, J. Dunoff, and F. Runge. Of course, differences in views remain, for instance concerning the mandate of the new institution : Esty is more in favor of construing an institution that will be responsible for environmental protection concerns, and thus counterbalance other organizations that favor other basic concerns (such as the GATT/WTO, whose mandate is trade liberalization, and World Bank, whose mandate covers development objectives); whereas Dunoff pleads for a new global organization that has a double mandate, namely in the field of environmental protection as well as in the field of economic development policies. See D. Esty, *supra* note 384, p. 77-98; J. Dunoff, "Institutional misfits : the GATT, the ICJ and trade-environment disputes" (1994) 15 Michigan Journal of International Law, p. 1108-1128.

<sup>447</sup> For instance, principles such as the polluter pays principle and environmental cost internalization, commitment to good science and life-cycle analyses of products (including its production process and its disposal) and environmental issues, the precautionary principle (environmental action can be undertaken in the light of serious scientific probability, without however the need for 100 % scientific certainty), emphasis on prevention rather than end-of-the-

promote the exchange of information and data on common global environmental problems, and could provide better coordination of technical and financial assistance to the developing countries. Third, a new global institution could recharter, eliminate, coordinate and consolidate several existing institutions that deal with these issues. Many of these institutions face fundamental impediments such as inapplicable or limited mandates, limited resources, and inappropriate staffing; malfunctioning, disorganized and ill-equipped institutions should be “creatively destroyed”, and could be subsumed by the new Global Environmental Institution.<sup>448</sup> Fourth, this global institution could very well serve as a focal point, coordination center and umbrella organization for the current scattered collection of environmental protection regimes set up by the different international agreements : it could bring together their dispersed secretariats under one roof and coordinate their activities, and could rationalize and coordinate further collective environmental protection action in one center. It could bring a halt to the traditional ad hoc approach of issue-by-issue management of environmental problems, which is responsible for the loss of many opportunities for efficiency and synergy across issues : today’s economic and ecological interdependence and interconnectedness of the problems requires a new comprehensive and collective approach; an issue-linkage rather than an issue-separate approach is needed and could only be furthered by a global and cross-sectoral institution. Fifth, a strong and credible Global Environmental Institution could protect environmental values

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pipe environmental damage treatment, the use of economic incentives, and public participation, transparency, open-door processes, and access to information are fundamental new principles that could be discussed, conceptualized and applied in such a global forum. See D.Esty, *supra* note 388, p.13-14. The new global institution could improve the opportunities for bargaining, and facilitate NGO access. H.French, *supra* note 382, p.55.

the way other international structures protect their principal objectives (such as the GATT/WTO protects the principle of trade liberalization) : just as the GATT/WTO ‘constitutionalizes’ the commitment to freer trade, a successful Global Environmental Institution would establish and protect the principle of environmental cost internalization and other environmental norms.<sup>449</sup> Our Global Environmental Institution would counterbalance other important institutions and principles; it would help to ensure that environmental values are not overwhelmed by more established interests (such as trade liberalization). In doing so, the new institution would provide a counterweight to the GATT/WTO, and *ipse facto* address the fear of many environmentalists that when trade and environmental principles collide, trade goals triumph. If the environment had its own international body, the WTO’s narrow focus on trade principles (or the World Bank’s focus on development concerns) would seem less oppressive since there is a global institution that carries enough weight and influence to counterbalance other well-rooted and institutionalized objectives. In doing this, it could relieve some environmental pressure (that now exists on the WTO) of the trade regimes.<sup>450</sup> Shortly summarized, a Global Environmental Institution should upgrade enforcement of upwards harmonized environmental standards, involve citizens and experts, and cooperate closely with other institutions such as trade regimes (WTO, NAFTA, EU) and development banks (World Bank).<sup>451</sup>

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<sup>448</sup> Candidates for reinvigoration, consolidation and creative destruction could include several of the institutions discussed in Chapter III, namely UNEP, CSD, UNDP, UNCTAD, UNIDO.

<sup>449</sup> D.Esty, *supra* note 384, p.96-97.

<sup>450</sup> D.Esty, *supra* note 384, p.77-98; D.Esty, *supra* note 388, p.1-18; S.Richardson, ed., *Shaping consensus : the North American Commission on the Environment and NAFTA*, (Ottawa : National Round Table on the Environment and the Economy, 1993); P.Szasz, *supra* note 381, p.353-366; H.French, *supra* note 382, p.54-57; J.Dunoff, *supra* note 446, p. 1108 a.f.

<sup>451</sup> F.Runge, *supra* note 425, p.93-109.



In order for such a Global Environmental Institution to be successful in performing these functions, several institutional features are required : a strong, clear and broad institutional mandate<sup>452</sup>; access to impartial scientific and technological expertise; transparent, participatory processes that enhance institutional legitimacy and public credibility (with a broad membership of developed and developing countries, transparent procedures and open decision-making processes, and NGO and citizen participation); the tools necessary to induce compliance with its decisions (e.g. monitoring and reporting requirements, positive economic incentives such as technology transfer, financial assistance, access to funding and markets, and economic sanctions such as trade restrictions - carrots and sticks); and overall, an institution designed to promote the broader international interests of the global environment. All of this will provide a framework that is designed to facilitate the identification and balancing of the economic and ecological interests implicated in trade-environment conflicts. Compared to the present *status quo*, the adoption of such an institution would be a major advance in our international institutional structure.<sup>453</sup> The efficiency gains, cost savings, and perceived public legitimacy made possible by such a new Global Environmental Institution all broaden the base of support for it and make it an attractive change.<sup>454</sup>

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<sup>452</sup> Be it a single (environmental protection) or a double (environmental protection and economic development) mandate. See *supra*, note 446.

<sup>453</sup> J.Dunoff, *supra* note 446, p. 1108-1128; J.Dunoff, "Resolving trade-environment conflicts : the case for trading institutions" (1994) 27 Cornell International Law Journal, p. 607-628; D.Esty, *supra* note 388, p.11; p. 17-18.

<sup>454</sup> D.Esty, *supra* note 388, p. 18.

Although this debate about the functions, institutional elements and the role attributed to such a Global Environmental Institution looks theoretically very promising and reveals the many advantages of a global centralized environmental regime, there is one thing that is often overlooked : the political and practical feasibility of the project. States are still very reluctant to give up even the smallest part of their authority (not to use the legal term state sovereignty) to any international organization, and certainly to an organization that will have such a clear and broad mandate. The prospects for the creation of such an innovative institution in the near future appear to be very dim. Faced with this practical obstacle, we are forced to turn our attention to the improvement and strengthening of the existing institutions : “like it or not, we must build on what we’ve got”.<sup>455</sup> Scrapping the existing structure and replacing (or consolidating) it with the new global environmental organization is just not (yet?) a political option. The most likely institutional reform (if any) will be the enhancement of the status of existing institutions (such as the UNEP) and the rationalization of their place in the international system.<sup>456</sup>

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<sup>455</sup> J.MacNeill, “UN Agencies and the OECD”, in J.Kirton, S.Richardson, eds., *The Halifax summit, sustainable development and international institutional reform*, (Ottawa : National Round Table on the Environment and the Economy, 1995), p.82.

<sup>456</sup> G.Plant, *supra* note 435, p.138.

## CONCLUSION.

This thesis has tried to deal with several fundamental concerns of our society of today. We have explored the major debate between the free trade proponents and the pursuers of environmental protection objectives, a debate in which - besides the traditional view of possibility of conflict of interests - we have discovered a lot of potential for cooperation and convergence between these concerns. The debate has shown the overwhelming interest of the world community to integrate, coordinate and balance out these objectives in all of their policy-making. As such, mere economic development has been put in a more *sustained* perspective, stressing qualitative and not just quantity-measured growth. From an international law's perspective, this gives the concept of Sustainable Development. From a trade regime's or environmental protection regime's perspective, this means (amongst other issues) institutional reform.

Indeed, institutions are a major player in this issue-integration process, and often are the prime responsible for it. So it is on the institutional level that a lot of progress in this sense can be made. The thesis has therefore focused on the international organizations and regimes that today have come to deal with these issues. The research has shown that international organizations have increasingly considered these issues : trade regimes are dealing with environmental concerns: environmental agreements are using economic restrictions: development institutions affect through their policies trade interest and environmental concerns: non-state actors emerge as the voice of public opinion: etc. *De facto*, these

institutions have developed structures through which they affect trade, environment and development interests. What remains to be seen however, is *how* they deal with these issues.

It is on this point that the thesis has elaborated, in reviewing the institutions' structures - the institutional changes - that have emerged through past practice in dealing with these concerns. The research has shown the existing institutional framework of (certain) international regimes, it has put the finger on sore spots and structural weaknesses, and has proposed several ways to improve what we've got. Although ambitious and far-reaching proposals have been made about the construction and creation of a single Global Environmental Institution (GEI) - within or outside the UN - which would institutionalize and attend to environmental objectives the way the WTO/GATT does for trade liberalization, the World Bank for development concerns, and the IMF for global monetary stability, this theoretical proposition suffers from a total and fundamental lack of political support. In today's world, sovereignty issues are still a major obstacle, reducing such a GEI to theory, making it a practical near-impossibility. There appears to exist a considerable gap between theoretical need and practical feasibility in today's international community relating to the creation of a new Global Environmental Institution. Consequently, and as a direct result, the international community will be left with a case-by-case improvement and strengthening of existing international organizations, to try to match up the international institutional structures with the real need of integration and balancing of trade, environment and development concerns. And even this strengthening - although politically more feasible - is not likely to be an easy one ...

Have these proposals of either strengthening existing institutions and regimes or of creating new institutional structures than been useless or superfluous? Of course, when making new proposals in the realm of international law and politics, one has to consider the current practical limitations. But certainly debates and discussions like these over trade-environment-development interlinkages and their institutional consequences can progress the knowledge on the issues, and even prepare the world for a future international political, socio-economic and ecological situation where such institutional reforms do belong to the realm of the feasible.

This work has shown that, during the last few decades, the international legal framework concerning development, trade and environment has been progressively elaborated, and a constant (however slow) evolution towards the framing of cardinal values and core principles on environmental conservation and Sustainable Development has been notable in various international instruments and regimes. The 1972 Stockholm Conference, the 1987 UN World Commission on Environment and Development Report (the Brundlandt Commission Report), the 1992 Rio Conference (UNCED) are all examples of how international instruments have given form to an emerging world-wide consensus among legal experts, government leaders, NGO's and the civil society, about these fundamental principles.<sup>457</sup>

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<sup>457</sup> Maurice F.Strong, the UNCED Secretary General, called for the creation of a so called "*Earth Charter*", a Charter framing principles that are fundamental in character, universal in applicability and enduring in their validity; a Charter that would provide "clear guidelines for the conduct of nations and peoples regarding the environment and Sustainable Development". Some of these fundamental principles include : the formation of a global partnership; the view of the biosphere as a unique, indivisible ecosystem; the Human Right of all people - including future generations - to a sound environment **and** the corollary duty to preserve and protect the environment; the concept of Sustainable Development (including the precautionary principle, emphasis on prevention, and

Key-institutional elements for organizations and regimes that deal with environment, trade and development concerns include *legitimacy* and *credibility* (through unrestricted membership, and neutrality towards specific interests), *a clear mandate*, *access to information* (improving public participation and organizational transparency), and appropriate *conflict resolution mechanisms*; all contribute to compliance with the institutional structure<sup>458</sup>, and thus its success. They have to be borne in mind as key criteria in crafting new institutions, or changing the ones we have.

In a world where environment issues, development concerns and trade objectives increasingly emerge as preponderant items on the agenda of institutional and organizational change, principal concepts - such as *consensus* and *cooperation*, the *acknowledgment* of the importance of trade liberalization as well as environmental protection, and of the *positive interactions* between trade and the environment - in our approach to both international trade and environmental problems are to be emphasized. In short : greater global dialogue is needed.<sup>459</sup>

The declaration on the occasion of the 50<sup>th</sup> anniversary of the United Nations itself stresses the essential need of the UN to be reformed and modernized

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environmental impact assessment); inter- and intragenerational equity; the sovereign right of states to utilize their natural resources **along with** their corollary responsibility to protect and preserve them; transparency and public participation; education, scientific research and information exchange.

See "Survey of principles", Netscape <http://www.ecouncil.ac.cr/value/principi/introeng.htm> and "Summary of principles", Netscape <http://www.ecouncil.ac.cr/value/principi/summeng.htm>

<sup>458</sup> See J.Trollidalen, *International environmental conflict resolution : the role of the UN*, (Geneva : UNITAR, 1992), p.29-32.

<sup>459</sup> See "Trade need not be sacrificed for environment", Netscape <http://www.wto96.org/news/wtosi/191.html>

The document elaborates on the situation in Asia, environment as an emerging issue on the Apec agenda, and Singapore's Prime Minister Goh Chok Tong's view on how to make the WTO think more green.

in order to be able to respond to the challenges of the future. whether they concern peace, security, equality, justice or development. The declaration says :

*"In order to foster sustained economic growth, social development, environmental protection and social justice in fulfillment of the commitments we have made on international cooperation for development, we will :*

*(...)*

*Promote an open and equitable, rule-based, predictable and non-discriminatory multilateral trading system (...);*

*Give particular attention to national and international action (...);*

*Invigorate the dialogue and partnership between all countries (...);*

*Promote social development through decisive national and international action aimed at the eradication of poverty (...);*

*Improve the effectiveness and efficiency of the UN system for development and strengthen its role in all relevant fields of international economic cooperation;*

*and*

*reduce and eliminate unsustainable patterns of production and consumption (...), recognizing that environmental sustainability constitutes and integral part of the development process."*<sup>460</sup>

*(emphasis added)*

However, the declaration equally stressed the importance of adequate resources in order to carry out the work of the UN effectively, and in order to make the necessary changes and improvements to the institutional structure.<sup>461</sup> These resources, and accordingly the political backing and support, are often totally or partially lacking, endangering the UN's capacity to do its job, even when this requires institutional change. By enlargement, this goes for all international organizations.

Consequently, all these fundamental values and key-principles that have emerged or are emerging in the global fora of discussion are of increasing importance in the institutional restructuring and reorganization of the international

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<sup>460</sup> "Declaration on the occasion of the fiftieth anniversary of the United Nations". Netscape <http://www.un.org/UN50/dec.htm>

institutional framework, the international organizations that deal with trade-development-environment issues. When taken into account, they increasingly serve as basic and necessary guidelines and directives, veritable conductors of *how* and *where* institutional changes can be fraught.

In conclusion, the trade-environment interaction in the international fora has reached the point of institutional reform, but in the present political, socio-economical and institutional configuration, entire innovative institutional reform is likely to be hard to achieve, certainly at present. The emergence of New Institutional Authority shall most likely not take the form of the creation of a new Global Environmental Institution, but of the improvement and strengthening of the vast array of already-existing institutions dealing with development-trade-environment concerns.

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<sup>461</sup> “Member States must meet, in full and in time, their obligation to bear the expenses of the Organization (...)”. See *Ibid.*



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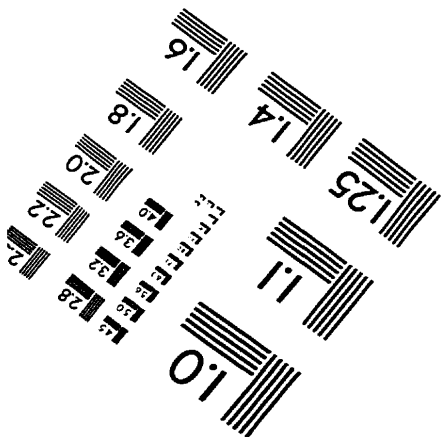
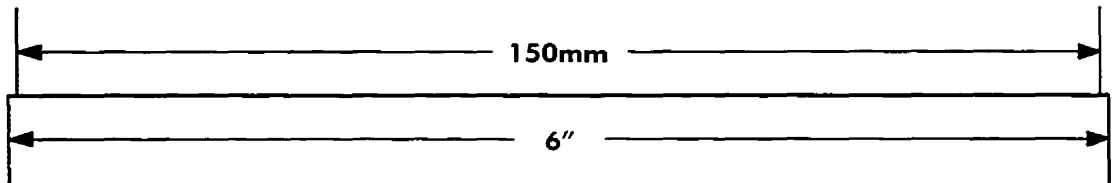
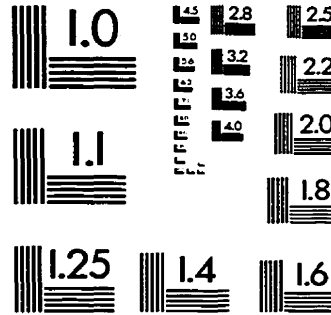
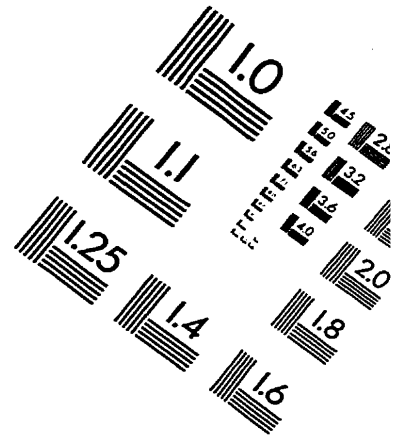
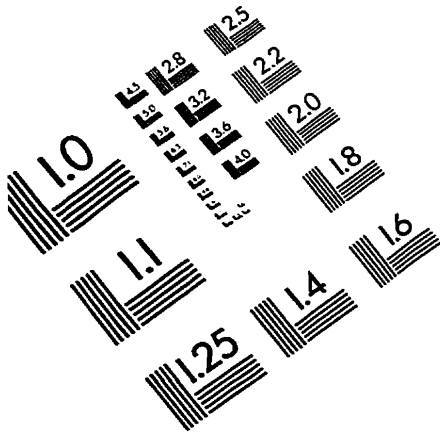
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### **INTERVIEWS**

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