Frictions Between International Trade Agreements and Environmental Protections

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I. INTRODUCTION

The underlying goal of free trade policy is to allow markets to *allocate* resources to their most efficient uses, while the general goal of environmental policy is to *manage efficiently* and *maintain* the earth's resources. Where the same resources are the subject of both trade efforts to allocate and environmental efforts to manage efficiently and maintain, conflicts can and do arise. These conflicts between trade and the environment must be reconciled, because both trade and environmental policies are too important to let conflicts persist. Yet many environmentalists still believe that the economic system, including trade, is the enemy; and many trade and development experts still believe that the environment is not a fundamental part of the economy, but rather a luxury to be added on later, when and if it can be afforded.

The trade and environmental communities have different training and professional "cultures." Trade experts are guided largely by economic principles: efficiency and comparative advantage, to name two. Environmental experts are informed more by the biological sciences and ecological principles than by economics.

On the other hand, most environmental professionals appreciate the need to internalize environmental costs, and many now see that market-based strategies may be more efficient than command and control in achieving this in many instances. In addition to the common language of cost internalization, both the trade and environmental cultures also use law to help implement their goals and to resolve disputes.

Given time, it seems reasonable to expect that sustainable development will be accepted as the legitimate goal of both trade and environmental policy. As the Trade and Environment Committee noted last summer, "[o]n the most fundamental level, trade and environmental policy must meet in the concept of sustainable development. Both trade policy and environmental policy must serve that concept as their ultimate goal."

The problem, of course, is that time appears to be running out. World population is expected to double

to ten billion by the middle of the 21st century and may not stabilize until it reaches 14 billion in the early part of the 22nd century. Moreover, the world economy of $15 trillion may reach $75 trillion by the middle of the 21st century.

Even with the most optimistic projections of technological advancement, these trends in population and the economy are almost certainly not sustainable. Even more troubling, the scale of today's development already appears to be overextending the ecosystem that sustains us all. "Further growth beyond the present scale," according to World Bank senior economist Herman Daly, "is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in a new era of 'uneconomic growth' that impoverishes rather than enriches." Daly believes that "[t]his is the fundamental wild fact that so far has not found expression in words sufficiently feral to assault successfully the civil stupor of economic discourse."

As the critical scientific and policy debate about the limits of the ecosystem goes on, it is necessary for the legal relationships between trade agreements and environmental agreements to be reconciled. Accordingly, this memorandum reviews provisions within the General Agreement on Tariffs and Trade ("GATT") and other trade agreements that may be relevant to environmental concerns. It then reviews several international environmental agreements and domestic laws for possible frictions with those trade provisions. It concludes with a brief discussion of issues and options for reducing or eliminating such frictions.

II. PROVISIONS WITHIN TRADE AGREEMENTS RELEVANT TO ENVIRONMENTAL AGREEMENTS AND CONCERNS

The GATT is the legal framework under which almost all trade among nations occurs. Co-existing with the GATT are a number of regional trade agreements (e.g. the European Free Trade Association) and bilateral trade agreements (e.g. the United States-Canada Free Trade Agreement).

The goal of the GATT and these other agreements is to provide a secure and predictable international trading environment while at the same time fostering greater economic efficiency and growth through trade liberalization. The GATT's preamble, for example, begins with the recognition "that...trade and economic endeavor should be conducted with a view to raising standards of living, ...developing the full use of the resources of the world and expanding the production and exchange of goods...." Free trade proponents argue that utilizing the "comparative advantage" of individual countries leads to maximum welfare for all. However, as Stewart Hudson has noted in his paper for the Trade and Environment Committee, it is important to keep in mind that the economic activity spawned by trade has significant positive and negative consequences for the environment when viewed in the context of sustainable development.

A. GATT

The GATT consists of three major parts: Part I (Articles I to III) which contains the most-favored-nation ("MFN") and tariff concession obligations; Part II (Articles III to XXIII) — sometimes referred to as the "code of conduct" — which contains the majority of the GATT's substantive provisions and the exceptions to its

obligations; and Part III (Articles XXIX to XXXVIII) which contains the procedural mechanisms for implementing the other obligations and provisions contained within the GATT.

1. GATT's General Trade Principles and Their Environmental Implications

a. The Most-Favored-Nation-Principle:

Established by Article I, the most-favored-nation principle ("MFN") is intended to ensure that the contracting parties do not discriminate among imported products on the basis of their national origin. The MFN obligation requires that each contracting party extend any privilege or advantage it provides to a product immediately and unconditionally to like products from, or destined for, all GATT contracting parties.

Because the MFN obligation requires all like products from contracting parties to be treated equally, it poses an obstacle to a contracting party wishing to use trade restrictions to punish or otherwise attempt to influence a particular exporting country's domestic environmental policies. The MFN obligation has been found to apply to labeling schemes that are not marks of origin, including "eco-labeling" regimes. Therefore, government labeling requirements relating to production process methods ("PPMs") that grant market access or have the effect of providing market advantages may also conflict with this GATT provision.[2]

b. The National Treatment Principle:

Article III's national treatment principle requires that a contracting party treat like foreign and domestic products equally once tariffs and other import requirements have been met. This requirement has been read narrowly by GATT dispute settlement panels to permit parties to subject imports to only those domestic regulations that apply directly to, or affect the physical and/or chemical composition of, the product in question. Thus, as the Tuna/Dolphin Panel Report demonstrated, a contracting party that distinguishes among imported products based on the environmental soundness of the exporting party's PPMs is vulnerable to attack under Article III.

c. The Prohibition of Quantitative Restrictions:

GATT Article XI prohibits quantitative restrictions such as quotas, bans, and licensing schemes on imported or exported products. Article XI contains several exceptions that allow departure from its general proscription against quantitative restrictions in certain strictly defined circumstances, such as the application of standards to internationally-sold commodities and agricultural products.[3] Even when the exceptions permit a quantitative restriction, the contracting parties must still observe the MFN and national treatment obligations in implementing it.[4] By broadly prohibiting quantitative restrictions, Article XI arguably conflicts with such environmental measures as conservation bans or limits imposed on exports of resources, unless they can be justified under one of the general exceptions to the GATT contained in Article XX. Examples of environmental measures that may run afoul of Article XI include the United States law banning the exportation of old growth timber harvested from federal lands[5] and the proposed EC and Dutch bans on unsustainably harvested timber.

2. Other GATT Articles and Their Impacts on Environmental Agreements and Concerns

In addition to the GATT's general principles, many of the GATT's other Articles could cause frictions to arise between trade and environmental policies.

a. Article II: Maximum Tariff Barriers:

Article II establishes the negotiated maximum tariff levels, as provided for in the accompanying annexes to the GATT, for national products. This Article also prohibits the imposition of import surcharges by exempting the scheduled items from all other duties and/or charges imposed in connection with importation. Article II(2)(a), however, provides exceptions from the maximum tariff levels for: 1) any charge imposed on an import, consistent with the national treatment principle, that is equivalent to an internal tax imposed on the like domestic product or articles from which the like domestic and imported products are derived; 2) antidumping or countervailing duties applied consistent with the GATT; and 3) fees or charges, in accordance with Article VII (valuations for customs purposes), commensurate with the costs of services rendered.

The only deviation from the environmental neutrality of Article II occurs in the case of products which appear on the Article's annexed lists of scheduled items. If a product is listed, such as tropical timber, then a contracting party cannot levy new, additional import taxes or other charges, such as a sustainable use tax, on the products that do not conform with the listed negotiated charges.

b. Article VI: Antidumping and Countervailing Duties:

Article VI condemns the practice of dumping (the introduction of products by one contracting party into the markets of another contracting party at less than the normal value of the products) if it causes or threatens material harm to a domestic industry or retards the establishment of a domestic industry. Article VI also sets the ground rules for contracting parties to impose antidumping duties on imported products to combat dumping and to apply countervailing duties to offset bounties or subsidies relating to imported products. The scope and details of Article VI were significantly elaborated upon by the Subsidies Code negotiated in the Tokyo Round of Multilateral Trade Negotiations. An analysis of the environmental implications of Article VI, as well as Article XVI regarding subsidies, can be found in section II.3.b. of this memorandum regarding the Subsidies Code.

c. Article X: Transparency and Equal Access to Review Processes:

Article X requires transparency in the publication and administration of all regulations affecting trade. It does not provide, in reciprocal fashion, affected citizens or consumers access to information or recourse to review procedures when imports or exports allegedly cause them environmental harms. Moreover, the transparency requirements in Article X do not apply to the GATT's own information and review processes.

d. Article XIX: Emergency Measures Provisions:

Article XIX allows a contracting party to impose emergency trade restrictions to protect a domestic industry that is seriously threatened by imports. If an environmental regulation so burdens a domestic industry as to place it in jeopardy, Article XIX allows the contracting party to adopt measures to protect its

industry. The procedural and political burdens of invoking Article XIX, however, significantly diminish its value as a bridge between trade and environmental concerns.

e. Article XX: Policy Exceptions:

Article XX establishes certain limited exceptions to the contracting parties' general obligations under the GATT for measures based on national policy considerations. These exceptions do not exempt measures that constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or are disguised restrictions on international trade. In a challenge to a contracting party's action, the party seeking to invoke Article XX to justify a departure from the GATT's general obligations bears the burden of proving that the action: 1) was justified and not arbitrarily applied; and 2) was proportional in scope (i.e., "necessary") to the concern giving rise to the action so as to meet the objectives of the exceptions.

i)Article XX(b): Human, Animal, and Plant Life or Health:

Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health." The Tuna/Dolphin Panel held that Article XX(b)'s exception is available only for health, safety, and preservation initiatives within a contracting party's jurisdiction, and not within the global commons (or within the jurisdiction of a third party state).

In the GATT dispute panel report covering "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes," the term "necessary" as used in Article XX(b) was interpreted as requiring that: 1) no reasonably available alternative measure consistent with the GATT existed; and 2) the measure taken was the least trade restrictive measure of all the available alternatives. Elaborating on this, the Tuna/Dolphin Panel Report noted that the United States had not demonstrated to the Panel — as required of the party invoking an Article XX exception — that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT, including, in particular, the negotiation of international cooperative arrangements relating to dolphin protection. Moreover, even assuming that an import prohibition were the only measure reasonably available to the United States, the panel felt that the course chosen by the United States could not be considered necessary within the meaning of Article XX(b) because of its unpredictable application.[6]

The limitations placed on the use of Article XX(b) by recent GATT dispute panel reports has consequences for many measures currently sought by environmental groups. The dispute panel reports put in question the use of Article XX(b) as a justification for unilateral trade restrictions aimed at either influencing other contracting parties' domestic environmental practices or protecting at-risk resources in the global commons.

ii) Article XX(g): Conservation of Exhaustible Natural Resources

Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The GATT dispute panel in its report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon" stated that any trade measure taken under the guise of Article XX(g) must be "primarily aimed at" conserving the resource.[7] Under this standard trade measures aimed at preserving

a resource need not be necessary to preserve the resource, but instead need only to be: 1) primarily aimed at preserving the resource; 2) taken in conjunction with domestic restrictions on the use of the resource; and 3) primarily aimed at rendering the domestic restriction effective.

As with Article XX(b), prior to the Tuna/Dolphin Panel Report, Article XX(g) was viewed by many as a mechanism for allowing environmental protection actions of the contracting parties that would otherwise be in conflict with their obligations under other provisions of the GATT. The Tuna/Dolphin Panel Report, however, interprets the scope of Article XX(g) much more narrowly. The Tuna/Dolphin Panel Report found that Article XX(g) did not apply to measures that extend beyond the jurisdiction of a party. Additionally, the Panel narrowed the scope of Article XX(g) by reading Article XX(g)'s "primarily aimed at" test to require many of the more stringent requirements that the Panel applied under Article XX(b)'s "necessary" test.

iii) Article XX(h): Intergovernmental Commodity Agreements

Article XX(h) provides an exception for the actions of the contracting parties taken pursuant to obligations these contracting parties have incurred under any international commodity agreement. Article XX(h) is looked upon by certain GATT scholars as the precedential model for the creation of a similar exception for actions taken to accomplish obligations incurred under international environmental agreements.[8]

f. Article XXII and Article XXIII: Dispute Resolution Procedures:

Articles XXII and XXIII provide the basis for the GATT's dispute resolution procedures. Article XXII allows for informal consultations to take place between the parties in dispute without the need to invoke a formal GATT proceeding. Article XXIII provides for two alternative methods for the formal resolution of GATT disagreements: subsection (1) provides for a process of exchanging written representations while subsection (2) provides for a process of submission to the contracting parties for the establishment of a dispute panel.

While these dispute resolution mechanisms have been enhanced by the Tokyo Round's Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (discussed in section III.3.d of this paper), both the formal and informal dispute resolution mechanisms provided for in Articles XXII and XXIII are quite opaque, precluding affected populations from playing an oversight role during the dispute resolution process. This is of considerable concern to environmentalists, who have traditionally sought standing to challenge environmentally-related government actions in domestic courts and to participate in the shaping of environmental policies.

g. Article XXIV: State and Local Laws:

Article XXIV:12 obliges each contracting party to take all reasonable measures to ensure that the obligations provided in the GATT are complied with at sub-national levels, including the actions of regional, State, and local governments. A great number of environmental laws and regulations, especially within the United States, exist at the sub-national level. Local, State, and regional environmental laws and regulations that do not comply with the GATT could place a contracting party in violation of its GATT obligations.[9]

3. Tokyo Instruments and Their Impacts on Environmental Agreements and Concerns

a. The Agreement on Technical Barriers to Trade:

The Agreement on Technical Barriers to Trade, commonly known as the "Standards Code," is intended to ensure that the testing and adoption of technical regulations or standards relating to health, safety, consumer and environmental protection, and other police power type purposes do not create unnecessary barriers to trade. In accordance with GATT Article X's transparency mandates, the Standards Code requires contracting parties to notify other parties of such standards and regulations where they differ from international standards, or are adopted in the absence of any international standard and are expected to have an impact on trade.[10] After notification, the other parties have the opportunity to comment on the measures.

While the Standards Code generally follows Article XX, the environmental scope of the code is arguably broader than that article. The term "environment" is explicitly mentioned in the code. The ramifications of this for transparency purposes and for international harmonization of environmental standards remain to be seen.

b. The Agreement on Interpretation and Application ofArticles VI, XVI, and XXIII of the GATT:

The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, or the "Subsidies Code" substantively expands GATT Article XVI's provisions to more forcefully encourage the parties to eliminate subsidies as a form of domestic trade regulation. Pursuant to the GATT, as expanded upon by the Subsidies Code, a contracting party that subsidizes a domestic industry to reduce any additional costs its domestic industry must bear because of stricter environmental standards is likely to be in violation of its GATT obligations. If a contracting party commences a subsidy to its industries to mitigate the costs its industries bear because of environmental cost internalization, the industries' exports could be subject to the imposition of countervailing duties by other contracting parties seeking to eliminate the subsidy. An example of a conservation subsidy that might conflict with the code is the Canadian Government's subsidization of reforestation efforts and the development of sustainable forestry practices.[11]

In addition to effectively precluding contracting parties from subsidizing their industries for the costs of complying with higher environmental standards (at least where the industries are export-oriented), the Subsidies Code also makes it difficult for a contracting party to institute countervailing measures, under Article VI, to combat the environmental standards subsidies provided by lower environmental standards.

c. The Agreement on Import Licensing Procedures:

The goal of the Agreement on Import Licensing Procedures is to ensure that import licensing and registration schemes are not used by the contracting parties to erect protectionist barriers to free trade. The Agreement establishes requirements parties must follow in their national procedures for the submission, review, and granting of importation licenses for products entering their markets. The Agreement also establishes certain limitations as to the penalties that can be administered for violations, including omissions and misstatements, of such national licensing requirements.

A number of national and international environmental protections that attach to import licenses, such as the United States' Resources Conservation and Recovery Act,[12] are based on stringent information and documentation regimes that must be followed to their letter or else substantial penalties attach. At least at present, there have been no challenges to such programs under the Agreement on Import Licensing Procedures that would shed light on its application in an environmental context.

d. The Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance:

One of the GATT's most important goals is to provide a forum for the peaceful resolution of trade conflicts. The Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance establishes the procedural framework for the handling of disputes between the contracting parties arising under the terms of the GATT. Because these procedures place a priority on easing the political difficulties that can arise in a multinational dispute, they include a number of provisions geared towards allowing the parties to negotiate freely, unbridled by the spotlight of public attention and oversight.

Because the Understanding cloaks its dispute resolution procedures, its process contrasts sharply with the American system of citizen access to information and public participation and oversight. Areas of friction between this experience and the Understanding's dispute resolution provisions focus on: 1) the closed nature of the GATT dispute resolution process, including the exclusion of interested citizens and non-governmental organizations from presenting information to GATT dispute panels; 2) the embargo of papers submitted by the parties to GATT panels; and 3) the embargo of panel decisions for a period of time to allow for negotiations to take place.

Moreover, the decisions that result from the dispute resolution processes are based solely on the terms of the GATT. Therefore, the dispute resolution process, and the decisions that ensue, suffer from the environmental limitations embodied within the GATT as a whole.

4. Instruments Under Negotiation in the Uruguay Round and Their Impacts on Environmental Agreements and Concerns

The underlying intent of the Uruguay Round is trade liberalization through the removal of the remaining barriers to free and fair trade. Trade liberalization, per se, is not necessarily linked to either environmental degradation or environmental preservation and remediation. Rather, it is the processes and mechanisms by which trade is liberalized that can have environmental implications. The 105 parties — GATT's 102 will be joined by three developing nations — participating in the Uruguay Round are discussing fifteen primary negotiating goals, of which at least ten have environmental implications.[13]

a. Tariff Reductions:

The tariff reductions under negotiation in the Uruguay Round apply exclusively to imports. During the course of these negotiations, emphasis has been placed on "tariffication," or the elimination of quotas in the agricultural sector. While tariff reductions could cause demand side pressures for the over utilization of developing nation resources, these increased demands may be balanced by the effects of eliminating tariff escalation schemes that place higher tariffs on more processed products, and by increased access to

developing country markets for goods from developed countries. By eliminating escalating tariff schemes, the disincentives to the production, within developing nations, of higher value added products are removed. By encouraging developing nations to produce products that increase wealth through additional human labor, as opposed to through higher rates of resource consumption, tariff reductions can diminish demands on developing nation resources.

b. Reduction of Agricultural Subsidies:

One of the main priorities of the United States and certain other developed countries in the Uruguay Round is the reduction of agricultural price supports, export subsidies, and border controls. Agricultural subsidies, like all other forms of subsidies, create trade distortions that lead to inefficiencies in resource usages. In developed countries, specific area agricultural subsidies have been a major factor in the specialization of agricultural activities. This has caused distortions in the natural development of agricultural markets with preferences going to development within these subsidized sectors.

In developed countries, the trade distortions from agricultural subsidies include increasing loss of biodiversity and heightened demands being placed on already diminishing available water resources. Thus, assuming that unanticipated negative environmental results do not outweigh anticipated benefits, the elimination of agricultural subsidies in developed nations should have a positive environmental effect.

In developing nations, the effects of agricultural subsidies cuts are more uncertain and will vary to a large extent from country to country, depending on the manner in which each nation removes such subsidies. Generally speaking, however, environmentalists have expressed fears that the elimination of agricultural subsidies will cause increased demand for these agricultural products, increasing the pressure to clear and put to tillage greater amounts of marginal lands.

The overall environmental balance of the elimination of agricultural subsidies will, to a large extent, be decided by the treatment the Round affords to domestic agricultural support measures taken to reduce the degrading effects of current agricultural production methods. Examples of such support measures include the United States' conservation reserve program which provides subsidies to retire vast amounts of farmland as a soil conservation measure, and the European Communities Common Agricultural Policy provisions granting subsidies to set aside farmlands that are environmentally sensitive. Many of the Uruguay Round participants have expressed the view that such measures, provided they meet certain criteria, should be excluded from the agricultural subsidies the Round is considering eliminating.

c. Liberalized Trade in Natural Resource Products:

One of the primary goals of the developed nations in the Uruguay Round is the removal of trade barriers to the free flow of natural resources and natural resource-derived products. The ongoing negotiations in the natural resource-derived products group have focused on liberalized trade in fisheries, forestry, minerals, and non-ferrous metals. Efforts of the developed nations in this group have been aimed at the elimination of domestic export controls by developing countries. Meanwhile, the developing nations' agenda in this group has focused on increasing the access their products enjoy to the markets of the developed countries.

If this group is successful in forging an agreement that removes export controls and/or increases market

access for developing nations' natural resource-derived products, then it is possible that demand for these products will increase — creating disincentives to the sustainable management of these natural resources.

d. Technical Barriers:

Also among the Uruguay Round's negotiating goals is the curtailing of non-tariff, or technical, barriers to trade, such as automobile emission standards. Increased emphasis on removing technical barriers to trade, including labeling requirements, could adversely effect the ability of the contracting parties to adopt environmental or conservation-oriented policies and laws. Under the rules now being discussed in the Uruguay Round, where international technical standards exist parties have an obligation, subject to certain narrow exceptions, to adopt these standards. Moreover, the agreement now being negotiated would require federal governments to take affirmative actions to bring standards adopted at the sub-federal level into compliance with GATT. This proposed rule would severely limit the ability of states and municipal governments to regulate local environmental concerns. Additionally, the proposed rules would make technical barriers subject to full GATT enforcement mechanisms, including countervailing duties and dispute resolution procedures. Thereby diminishing the ability of the parties to maintain environmentally motivated non-tariff barriers.

e. Trade in Tropical Products:

In addition to the Uruguay Round's general attention to eliminating barriers to trade in natural resource-derived products and to agricultural subsidies, similar proposals are being negotiated in the specific context of tropical products and resources. The negotiations on tropical products, focusing mainly on plant-derived foods, but also including tropical timber, tobacco, and natural rubber, seek to reduce tariffs on these products and eliminate non-tariff barriers to their trade.

As discussed in section II.4.a above, the expected environmental effects of tariff reductions are somewhat mixed, and these reductions may ultimately produce benefits to the environment. The environmental effects of tariff reductions, however, may not be as benign in tropical regions where many of the food products — for example, coffee and coconut palms — that could experience demand-driven production intensification are grown on cleared forest lands.

f. Trade Related Aspects of Intellectual Property Rights:

The negotiation of Trade Related Intellectual Property Rights ("TRIPS") has been one of the more contentious areas under consideration in the Uruguay Round. Developed countries, recognizing the trade distorting effects of the lack of effective intellectual property protections, are looking to the TRIPS negotiations to provide international protections against widespread "pirating" of intellectual property from their research organizations and industries. Developing nations, many of which continue to lack effective domestic intellectual property protection mechanisms, have sought to trade concessions on a TRIPS agreement for greater access to developed nations' markets for their TRIPS products and as inducement for concessions in other areas of the Round. Additionally, some developing countries have argued that the need to stimulate domestic development justifies lower levels of intellectual property rights protection in developing countries, and have sought to distinguish intellectual property rights and trade issues.

The TRIPS agreement could have two significant environmental ramifications. First, certain environmental organizations fear that stronger intellectual property protections will hamper the transfer of environmentally-sound technologies to developing countries, especially in light of the transfer goals of the Montreal Protocol and the global warming agreement currently being negotiated. However, it is likely that such protections would actually assist the transfer of such technologies, although developing countries may find themselves in need of financial assistance to pay for the costs of such technologies. In general, evolving environmentally-friendly technologies are owned by private entities, and unless the private investments in developing these technologies are secure from "piracy," these private parties will be reluctant to supply these technologies to much of the developing world.

Second, industries in developed countries are increasingly turning to biodiverse ecosystems, such as tropical rain forests, as resource warehouses, and to the indigenous peoples who live in these ecosystems for their traditional knowledge about the resources these ecosystems hold.[14] At issue in the Uruguay Round's negotiations is whether or not the contributions of indigenous discoverers, preservers, and users, and national governments that preserve these ecosystems, will receive some form of intellectual property recognition to give economic value to their efforts. A trade agreement providing tangible benefits to these indigenous peoples and national governments would encourage the preservation of these ecosystems and indigenous cultures, whereas the failure of the Round to come to such an agreement could substantially frustrate even ongoing conservation and preservation efforts.

g. The "Development Policy":

Throughout the GATT's history, developing nations have been accorded special privileges to accommodate their development needs. This commitment, called the "Development Policy," as seen in GATT Articles XII and XIII's balance of payment provisions, permits developing nations to use trade restrictions, including import curbs and export limits, that are unavailable to other contracting parties. Developed countries are using the Uruguay Round to encourage developing countries to relinquish many, if not all, of these special privileges.

While reducing the barriers to trade can have certain environmental benefits, see *supra* section II.A.4.a, if the Development Policy is rescinded, the inability of these nations to provide protections to fledgling industries could cause these industries to adopt practices aimed at short-term survival, as opposed to long-term sustainability. The ultimate environmental accounting of this proposal is difficult to quantify at this time.

h. Subsidies and Countervailing Measures:

In an effort to provide greater clarity and reduce international trade conflicts, the Uruguay Round is attempting to classify a range of subsidies into three general categories: 1) permissive subsidies; 2) "proceed at the risk of domestic countervailing duty proceedings" subsidies; and, 3) prohibited subsidies. The current draft Agreement on Subsidies and Countervailing Measures under negotiation attempts to place environmental subsidies in the permissive, or "no-action" category.

The types of programs that would likely benefit if the permissive classification extends to environmental subsidies include Canada's program of subsidizing the development of sustainable forestry practices.

Classification of environmental subsidies, however, in the "proceed at risk" category would continue the status quo, and classification in the prohibited category, while unlikely, would arguably be a blow to environmental initiatives.

i. Harmonization of Environmental, Health, and Safety Standards:

One of the most environmentally important negotiations underway in the Uruguay Round is the negotiation of harmonized health and environmental standards.[15] The Uruguay Round's negotiations on harmonization of standards have been premised on three principles: 1) parties must adopt strict principles of national treatment in standard setting and enforcement; 2) parties' decisions to permit or restrict the availability of a new product or technology may only be based upon "sound scientific evidence"; and 3) international agencies, such as Codex Alimentarius, are the only legitimate sources of scientific information.

Harmonization of standards could produce either more stringent or lenient standards depending upon how the process develops. If existing levels of protection are not compromised in the process, the harmonization of environmental, health, and safety standards could have significant environmental and trade benefits. By providing unified standards, harmonization would diminish the burdens imposed on internationally-traded products by the plethora of sometimes widely divergent national standards which now apply to these products. Moreover, harmonized standards that ratchet up the environmental, health, and safety standards of nations with lower levels of existing protections would bring much needed protections to many nations.

Additionally, whether or not industries actually migrate to nations with lower environmental standards, harmonized standards would remove the incentive for industries to do so. Developing nations, however, fear that ratcheting up standards to the level of the developed world would be an impediment to increased market access for their products and would deprive them of the ability to choose increased levels of development, as opposed to higher levels of environmental quality.

If, however, instead of ratcheting up national standards in contracting parties with low levels of protections, the agreed-upon harmonized standards adopt a least common denominator approach, reducing the environmental protections in countries with higher standards, environmental protection will suffer. Additionally, the strict harmonization of standards could hamper the evolution of environmental protections by removing the ability of individual contracting parties to push the envelope of environmental standards forward.

The delegation of environmental, health, and safety standard-setting to international appointees, rather than democratically elected representatives, could undermine developing democratic processes in many nations. It also raises conflicts with the traditional processes of public participation and accountability in nations, including the United States, with established democratic schemes of governance. Additionally, concerns have been expressed over presence of procedural obstacles, such as the lack of a "paper trail" of the decision making process, to effective peer review of these internationally set standards.

j. Trade in Services:

Article XIV in the draft Agreement on Trade in Services contains exceptions to the general obligations set out in the agreement. These exceptions to a large extent parallel the public policy exceptions to GATT's

general obligations contained in GATT Article XX. Certain countries have proposed that Article XIV should not only allow the parties to take measures necessary to protect human, animal and plant life and health, but should also allow for measures which are necessary for "sustainable development and environment," "cultural values," and "conservation of exhaustible natural resources."

k. Dispute Resolution:

The dispute resolution rules being negotiated in the Uruguay Round would make a number of significant changes to the existing GATT dispute resolution framework. First, under the proposed rules, unless a consensus of the parties vote against adopting the report of a dispute resolution panel, all panel reports are automatically adopted 60 days after publication. This change would reverse the current rule which requires a consensus of the parties to adopt the decision of a dispute resolution panel. This would minimize the ability of the parties to block the adoption of panel decisions, thereby exacerbating the potential for direct conflicts between GATT obligations and environmental protections.

The Uruguay Round dispute resolution proposal would also expand the reach of the GATT's dispute resolution mechanisms, including the application of countervailing sanctions and the availability of dispute panels, to explicitly include sub-federal level trade restrictions. This proposal would expose a host of sub-federal level environmental regulations to potential GATT challenges.

Additionally, the proposed dispute resolution rules strengthen the enforcement of GATT obligations over trade restrictive actions of the parties by: 1) increasing the burden on parties defending against a GATT challenge by requiring the defending party to rebut the inference that a breach of a GATT obligation entails an injury to challenging party; and 2) affirmatively charging parties that violate GATT obligations with either coming into compliance with its GATT obligations or facing trade sanctions. Strengthening the enforcement powers of GATT would exacerbate the already existing potential for direct conflicts between the GATT and environmental initiatives.

l. Multilateral Trading Organization:

The final proposed text of the Uruguay Round would also establish a Multilateral Trading Organization ("MTO"). The proposed MTO would adopt the GATT as it exists after the Tokyo and Uruguay Rounds as its rules, and would have in all territories of the member states, the legal capacity, privileges and immunities as may be necessary to carry out its functions under these rules. The creation of a MTO as now proposed would significantly expand the powers and scope of GATT, increasing the GATT's ability to trump environmental regulations. Additionally, the creation of an MTO might re-start the GATT's clock, making the GATT later in time than most environmental laws and agreements.[16]

5. Other GATT Activities

a. The Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances:

In 1982, the contracting parties agreed that it was appropriate for the contracting parties to examine

measures to control the export of products which are prohibited from sale in domestic markets, yet are allowed to continue as exports. This agreement evolved into the creation by the GATT Council in 1989 of the Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances. This working group examines the trade-related aspects of ongoing international work to regulate the flow of such goods and substances among the contracting parties.

The working group is currently considering a Draft Decision on Products Banned or Severely Restricted in the Domestic Markets. This draft, as now written, covers all products (including hazardous wastes) that a contracting party determines present a serious and direct danger to human, animal, or plant, life, or health, or the environment within the contracting party's territory, and which are banned or severely restricted within the contracting party's domestic markets.[17] The draft also includes notice provisions requiring the contracting parties to notify the GATT Secretariat of all such banned or restricted products for which no similar actions to control exports have been taken. The draft, in an effort to avoid conflict and duplication, does not apply to substances covered under another international regime (such as the Basel Convention discussed in Section III.A.3) to which the contracting party in question is a signatory. An agreement allowing the contracting parties to take efforts to regulate trade in hazardous and otherwise restricted substances could provide substantial environmental protections, as well as allowing international environmental agreements pertaining to similar matters greater ability to conform with GATT's mandates.

b. The Group on Environmental Measures and International Trade:

The Group on Environmental Measures and International Trade was originally established at the November 1971 GATT Council meeting. In the ensuing twenty years, the group has been dormant. However, as a result of pressure from European Free Trade Association member states and other countries, the group has recently been convened. The group's current agenda is as follows: 1) trade provisions contained in existing multilateral environmental agreements; 2) multilateral transparency of national environmental laws and regulations that are likely to have effects on trade; and 3) trade effects of newly developing domestic and international "eco" packaging and labeling requirements. Additionally, the group is discussing a GATT contribution to the 1992 United Nations Conference on Environment and Development. Believing that the GATT is not the appropriate forum for such discussions, certain GATT parties, most notably the developing nations, were reticent to convene the group.

Given the group's early emphasis on the impacts of environmental protection on trade, a number of environmental groups have expressed fears that the group will focus on how the environment and environmental protections can be made subject to trade's regimes, as opposed to finding some way of reconciling the concerns of both trade and environmental interests. At this time, it is unclear to what extent these fears are justified.

B. The Environmental Implications of the CFTA and the NAFTA

Although the vast majority of trade occurs under the umbrella of GATT, there are a wide range of additional regional and bilateral trade agreements that have a hand in determining patterns of national and

international resource use. In the context of resource consumption patterns in the Americas, the most important of these bilateral agreements are the United States/Canadian Free Trade Agreement ("CFTA") and the ongoing negotiation of a trilateral North American free trade agreement among the United States, Canada, and Mexico ("NAFTA").

1. NAFTA

NAFTA, in particular, has been the subject of intense scrutiny by environmentalists. Proponents of NAFTA argue that it, and the negotiations leading up to the agreement, will provide Mexico with both the impetus and resources to address its environmental difficulties. Critics argue that absent significant changes in Mexico's environmental practices, NAFTA will open the way for U.S. industries to escape U.S. environmental requirements by moving their operations to Mexico. They also argue that the increased economic activity in Mexico, absent proper environmental controls, will only exacerbate Mexico's environmental problems. Finally, they criticize the U.S. decision to deal with environmental issues on a parallel track rather than as an integrated part of NAFTA.

2. CFTA

The concerns over NAFTA have been heightened by problems arising out of CFTA. Challenges to domestic environmental laws as non-tariff trade barriers and harmonization through reduction of standards under CFTA have pointed out the weaknesses of negotiating trade agreements without regard to environmental issues.

The CFTA has been used both as a sword against domestic environmental regulation and as a shield permitting reduced environmental and health standards. For instance, the CFTA and GATT prohibitions on non-tariff trade barriers have been utilized by both U.S. and Canadian entities to challenge the other nation's domestic environmental laws. The U.S. Non-Ferrous Metal Producers Committee has challenged Canadian environmental and safety programs in lead, zinc and copper smelters as unfair trade practices under the CFTA. Conversely, EPA regulations that would phase out production, importation, and use of asbestos were challenged in U.S. Federal court by both the Canadian asbestos industry and the Canadian government as violations of CFTA and GATT.

Further, harmonization required under CFTA has arguably resulted in lower environmental standards and reduced import protections at the border. For example, Canadian pesticide regulations now are set using the U.S. risk-benefit model rather than the pre-existing, more stringent Canadian requirements. In addition, inspection of Canadian meat at the U.S. border was replaced by a "streamlined" random inspection system to further the CFTA goal of reducing trade restrictions. A 1990 U.S. Department of Agriculture proposal to end U.S. meat inspections along the Canadian border as part of the CFTA[18] was abandoned in 1991.[19] Incentives built into trade agreements, such as provisions of the CFTA exempting energy exploration and development from the CFTA, can run counter to previously-negotiated international environmental agreements, such as those concerning air pollution and ozone depletion.

III. THE EFFECTS OF ENVIRONMENTAL PROTECTIONS ON TRADE

A. Trade Aspects of International Environmental Protections

1. The Montreal Protocol on Substances That Deplete the Ozone Layer

The Montreal Protocol on Substances That Deplete the Ozone Layer (the "Protocol"), first negotiated in 1987 and then substantially revised in June of 1990, provides for the elimination, by the year 2000, of CFCs and other chemicals that are harmful to the ozone layer. The consequences of ozone depletion range from health effects, such as increased incidence of skin cancer and cataracts, to reductions in yield of food crops.

The Protocol controls both the production and consumption of CFCs and other ozone-depleting substances. Several of the Protocol's key enforcement provisions have direct implications for trade. First, the Protocol restricts parties from trading in CFCs and CFC-related products with non-parties. Second, the Protocol restricts trade in CFCs and CFC-related products between parties. Third, the Protocol contains a number of provisions to assist developing countries in meeting their obligations under the Protocol, including lengthened timetables for the phase-out of controlled substances, financial assistance, and technology transfer incentives.

a. Trade with Non-parties:

Provisions:

To encourage countries to participate in the Protocol and to discourage industries that produce and use CFCs from migrating to non-party states, the Protocol establishes three tiers of regulation of trade in restricted products between parties and non-parties. The first tier of restrictions apply directly to trade in the controlled substances, banning parties from importing controlled substances from non-parties. As of January 1, 1993, parties to the Protocol will also be forbidden to export controlled substances to non-parties. The Protocol's second tier of restrictions apply to products that contain controlled substances. In June of 1991, the parties adopted an annex listing products containing controlled substances. This annex became effective in December of 1991, and those parties that did not object must ban import of such products by June 1992. The third tier of restrictions envisioned by the Protocol would apply to products made with, but not containing, controlled substances. The Protocol requires the parties to conduct, by January 1, 1994, a feasibility study on banning imports from non-parties of substances made with, but not containing, controlled substances.

Analysis:

Because the Protocol provides for a *phase-out* of trade in controlled substances among the member states during the same time in which it *bans* the import of "like" products from non-party states, there is a period during which non-party states will be precluded from exporting products containing controlled substances to party states that continue to be able to trade such products among themselves. Thus, if the Protocol's import restrictions are applied by GATT contracting parties against imports from other contracting parties that are not parties to the Protocol, these import provisions would appear to violate GATT's basic non-discrimination obligations. Similar GATT non-discrimination issues arise from the Protocol's ban on exports of controlled substances to non-parties. Moreover, should the parties enact restrictions that apply to import products made

with, but not containing, controlled substances, such restrictions would be Production Process Method restrictions that could violate GATT's Article III (national treatment) and Article XI (prohibition on quantitative restrictions).

The use of these trade restrictions to accomplish the Protocol's goals was an area of substantial discussion during the Protocol's negotiation in 1987. The parties agreed to use trade restrictions because they feared that the industries of the parties could not internalize the costs of complying with the agreement and, at the same time, compete with industries in non-party countries that did not have to bear these costs. In practice, however, efforts to eliminate the use of CFCs and other controlled substances have, in many instances, led to the discovery of less expensive and more efficient substitutes for these products. Nevertheless, these trade restrictions were, at the time of the agreement, deemed essential incentives to encourage countries to join the Protocol, and they continue to play a major role in preserving the integrity of the Protocol.

The compatibility of these trade restrictions with the GATT was also addressed during these discussions. An opinion was provided to the Protocol's negotiators by a legal expert from the GATT Secretariat that these measures would be compatible with the GATT by virtue of Article XX's exceptions because the conditions present in the party nations would be substantially different from those in non-party nations — allowing the parties to draw non-arbitrary distinctions between products from party nations and non-party nations. In light of the findings of the Tuna/Dolphin Panel Report, this conclusion may have to be reexamined.

b. Special Provisions for Developing Countries:

Provisions:

The Protocol contains a number of provisions with trade implications to assist developing countries in meeting their obligations under the Protocol. First, the Protocol permits developing countries to delay by ten-years their phase out of controlled substances. Second, the Protocol establishes a Multilateral Fund to provide developing countries and their industries with technical and financial assistance necessary for compliance with the Protocol.

Analysis:

These special provisions for developing countries could run afoul of certain GATT obligations, especially in light of the Uruguay Round emphasis on eliminating preferences to developing countries. For example, a developing nation receiving financial assistance from the Multilateral Fund and then passing it on to its industries to purchase clean technologies could be in violation of the GATT's provisions against subsidies.

2. Convention on International Trade in Endangered Species of Wild Fauna and Flora

Provisions:

In recognition of the global threats to the world's biodiversity, the goal of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") is to control or eliminate trade in plant and animal species which are now, or may become, threatened with extinction. Because the intent of CITES is to alleviate trade-driven pressures on a species, its trade-related provisions are necessary to the achievement of its goal.

The severity of the trade restrictions CITES places on trade in a species is proportional to the degree of the threat to the species. CITES classifies each regulated species by its degree of "endangeredness," and establishes corresponding levels of trade restrictions, through a listing system consisting of three Appendices. Parties are free to propose changes to the categorization of a species as well as additions and deletions to the Appendices.

Appendix I includes species that are currently threatened with extinction. The threats of extinction to an Appendix I species need not be linked with trade demands on the species. Commercial trade is defined broadly to include transactions in the species and species-derived products that have even nominal commercial aspects. Such commercial trade is prohibited. Noncommercial trade is allowed only if the movement of the species will not be detrimental to the survival of the species. Prior to an export country granting a permit for non-commercial trade in a species, the import country must issue an import permit.

Appendix II lists species which are not currently threatened with extinction but may become threatened unless trade in the species is strictly regulated. Export permits for Appendix II species may be granted where the exporting country's scientific authorities determine that the export will not be detrimental to the survival of the species.

Appendix III consists of those species that any party has identified as requiring protection to prevent the species' demise from trade-driven overexploitation and for which the co-operation of the other parties is needed to control the threat to the species. Appendix III listing applies to only those populations of a species found within those countries that have classified the species as an Appendix III species. Appendix III listing enables the contracting parties to address localized threats of extinction to sub-populations of species where these threats do not effect other sub-populations of the species. Trade in Appendix III species between parties that have not listed the species as Appendix III species is allowed so long as the species or product is accompanied by a certificate of origin.

While parties are required to conform to these mandates, nothing in the agreement limits the ability of a party to adopt unilaterally stricter protection standards, and parties are required to enforce the provisions of CITES in their dealings with non-parties.

Analysis:

A number of CITES provisions pose potential areas of friction with the GATT's obligations. Because CITES allows a party to protect non-domestic species through trade restrictions, such trade restrictions would not, in light of the Tuna/Dolphin Panel Report, appear to qualify for Article XX's exceptions for conservation of exhaustible natural resources and protection of species health and life. If the provisions would not qualify for exception under Article XX, then trade restrictions imposed by a CITES party against products of a GATT party that is not a CITES party could be viewed as a violation of GATT's basic prohibition against quantitative restrictions.

3. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

Provisions:

To avoid the high costs of domestic disposal of hazardous wastes caused by stringent environmental

laws and regulations, industries in developed countries have increasingly sought to export these wastes to developing countries with lower environmental standards. International negotiations to address the environmental and social implications of this practice led to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the "Basel Convention"). The Basel Convention is intended to control international trade in hazardous wastes so that baseline health and safety standards are met in all countries. Because the convention is intended to restrict trade in wastes, the trade provisions are central to achievement of the convention's goals.

The Basel Convention permits the transboundary movement of hazardous wastes by parties in only three circumstances: (1) where the exporting party lacks the technical capacity, necessary facilities, and /or siting capacity to ensure the environmentally sound disposal of the wastes in question; or (2) where the wastes in question are required as a raw material for recycling and recovery industries in the importing nation; or (3) where the transboundary shipment and disposal is performed in accordance with the particular requirements established in the convention.

The Basel Convention prohibits the export of wastes: (1) to nations that have prohibited the import of such hazardous wastes; (2) to non-parties; and (3) to the Antarctic region. Parties will only permit the shipment of hazardous wastes if the shipment is authorized in writing by the importing country. Exports of such wastes to developing countries are not allowed if the exporting country has reason to believe that the wastes will not be managed in an environmentally-sound manner, and the exporting party has the burden of ensuring that any exports of wastes that it permits are, in fact, managed in an environmentally-sound manner.

Parties that choose to prohibit the import of hazardous wastes must inform the other parties of this decision. A party that chooses instead to allow the import of such wastes must not allow the import of any wastes that it has reason to believe will not be managed in an environmentally-sound manner.

The Basel Convention requires exporting parties to provide prior notification of any shipment. The exporting party shall not allow any shipment to embark until it has received written consent for the shipment in response to the notice provided to the importing party. Importing parties must respond to written requests for consent by authorizing or denying the shipment or requesting additional information.

If a shipment of hazardous waste is found to have occurred in violation of the convention's terms, then the exporting country must either return the waste itself, or ensure that the exporter or generator returns the waste, or if the return of the waste is impracticable, the exporting country must provide for its disposal in accordance with the requirements of the convention.

Analysis:

Because many of the conditions imposed on exporting countries are designed to protect the welfare of individuals and the environment in importing countries "extrajurisdictionally," they would appear to fall outside the scope of the Article XX exceptions. Similarly, the prohibition on exports to the Antarctic region may not be justifiable under Article XX. Most troublesome is the ban on trade with non-parties. For this provision to come within Article XX, it would have to be shown that the discrimination against non-parties is justified on the basis of domestic health, safety or conservation concerns in the exporting country.

4. Proposed International Agreements

In June of 1992, the United Nations Conference on Environment and Development ("UNCED") will be held in Rio de Janeiro. It is expected that UNCED will produce a number of important international agreements, including: the "Earth Charter" (a statement of the fundamental principles governing the interrelation of people and the earth); "Agenda 21" (a framework for implementing the Earth Charter); and agreements or statements on climate change, biodiversity, and forestry. Although the June conference date is fast approaching, few of the negotiators drafting these instruments have focused on the issue of enforcement and implementation mechanisms, and thus the degree to which trade measures will play a role in these agreements is unclear. At least one group, the biodiversity group, has requested representatives of the GATT Secretariat to attend its negotiations; however, no one from GATT has attended those negotiations.[20]

B. Trade Aspects of Unilateral Environmental Protections

Many domestic environmental protections, in the United States as well as other countries, rely heavily upon trade measures to either ensure their effectiveness, and/or to ensure that domestic industries that must meet more stringent environmental standards are not placed at a competitive disadvantage by these standards. Certain of these measures are summarized below.

1. Current Environmental Laws

a. The Endangered Species Act:

Provisions:

To friend and foe alike, the Endangered Species Act ("ESA") is one of the strongest U.S. laws for the protection of the environment. The ESA is best known for its provisions making illegal the domestic "taking" of an endangered species or the destruction of such species' habitat. The ESA also makes it illegal for any person or entity subject to U.S. jurisdiction to import or export any species listed by the Secretary of the Interior as endangered, or any product derived from such a species. While the ESA's prohibitions that apply to endangered species generally apply to threatened species as well, the Secretary of the Interior, through the Fish and Wildlife Service, may promulgate special rules excepting threatened species from some or all of these provisions. Listing of a species for the purposes of the ESA does not necessarily correspond to the international listing of a species under CITES. Species listed as endangered or threatened include both domestic and extraterritorial species, and a species need not be protected in its habitat country for the species to receive protection under the ESA.

Analysis:

The import and export bans imposed by the ESA may conflict with the GATT's non-discrimination obligations in terms of its treatment of distinct population segments. For these provisions to comply with the GATT, they would have to be justified under Article XX. If, however, the species being protected is not found in the United States, these provisions would seem to be in violation of the United States' obligations under the GATT, since Article XX has been read as not extending "extrajurisdictionally."

b. The Marine Mammal Protection Act:

Provisions:

One of the primary goals of the Marine Mammal Protection Act (the "MMPA") is to reduce the incidental killing of marine mammals, particularly dolphin, during the course of commercial fishing operations. To achieve this goal, the MMPA establishes a regulatory program that sets industry-wide standards for fishing practices of the U.S. tuna fleet. This regulatory program is strictest in the Eastern Tropical Pacific Ocean ("ETP"), where schools of tuna tend to swim in the waters below pods of dolphin. Under this program, foreign tuna fishing fleets operating in the ETP must meet similar standards to be able to import their tuna to the United States. For a foreign tuna fleet to be able to import its tuna and tuna products into the United States, the Secretary of Commerce must certify that the foreign fleet operates under a regulatory program that is comparable to that of the United States, and that during a given period of time the foreign fleet's adjusted average rate of incidental taking of marine mammals did not exceed 1.25 times the unweighted average of the U.S. fleet for that same period of time. Additionally, intermediary nations that import tuna from nations that have not obtained comparability findings cannot export their tuna and tuna products to the United States.

Analysis:

In the recent Tuna/Dolphin Panel Report, these MMPA import and intermediary restrictions were found to be in violation of the GATT's prohibitions contained in Article III (national treatment) and Article XI (quantitative restrictions). Additionally, the MMPA's provisions were found to be outside the scope of Article XX because they were both extrajurisdictional in nature, and not "necessary" within the meaning of Article XX.[21]

c. The Magnuson Fishery Conservation and Management Act:

Provisions:

The Magnuson Fishery Conservation and Management Act (the "Magnuson Act") establishes a national program for the conservation and management of fisheries resources, including domestic, migratory, and anadromous stocks. The basic purpose of the act is to provide a program for the development of under-utilized fisheries, while at the same time providing conservation programs to replenish over-utilized and depleted stocks. The Magnuson Act was, to a large extent, motivated by fears that foreign fishing fleets were depleting U.S. fisheries.

Under the Magnuson Act, trade figures most directly in the provisions regarding access for foreign fleets to fishery stocks claimed by the U.S. No foreign vessel is permitted to fish in U.S. waters unless it has obtained a permit to do so. Foreign vessels operating in United States waters are required to have a U.S. observer on board the vessel during their time in these waters. The act requires the Secretary of Commerce to establish total allowable levels for foreign fishing fleet catches from U.S. fisheries. In establishing these levels, the Secretary is instructed to look at a number of factors, including the extent to which the foreign government is helping the United States develop export markets for its fishery products, and the degree to which the foreign government imposes tariffs and non-tariff barriers on U.S. fishery exports. Foreign fleets that violate

the act's provisions may be subject to an embargo on all fishery imports to the United States pursuant to section 8 of the Fishermen's Protective Act.

Analysis:

The Magnuson Act appears to establish conditions for trade that violate GATT's non-discrimination obligations and quantitative restriction prohibition. While these measures at first glance would seem to qualify for Article XX's exception for measures to conserve a domestic exhaustible resource, to qualify for Article XX a measure must not be applied in a discriminatory or arbitrary manner. Because the act links certain of its conservation conditions with what seem to be trade protectionist standards, these provisions may not come within Article XX.

d. The Dolphin Protection Consumer Information Act:

Provisions:

In an effort to encourage consumer-driven, market-based protection of dolphins, the Dolphin Protection Consumer Information Act (the "DPCIA") specifies labeling standards that allow qualifying tuna products to carry the terms "dolphin safe" on their packaging. The DPCIA makes it a violation of section 5 of the Federal Trade Commission Act for any producer, importer, distributor, or seller of tuna products to include on its label the terms "dolphin safe" or any equivalent statement, unless the manner in which the tuna was harvested meets certain standards for the protection of dolphin.

Analysis:

The recent Tuna/Dolphin Panel Report decision found that the DPCIA complied with the GATT because the DPCIA established voluntary standards that did not restrict a product's access to the market, and did not establish a basis for obtaining a government-supplied market advantage. In contrast, mandatory labeling requirements that require an imported product to carry a label that can only be obtained by meeting certain standards that do not apply directly to the product, but apply instead to the PPM of the product, would appear to violate GATT's obligations.[22]

e. The Pelly Amendment:

Provisions:

The Pelly Amendment, also known as section 8 of the Fishermen's Protective Act, seeks, *inter alia*, to provide a means to ensure that the unsustainable fishing practices of foreign fishing fleets do not jeopardize American fishery stocks or harm American fishing fleets. To provide added protection to American fishing fleets and fisheries, the Pelly Amendment works in conjunction with certain other American laws, such as the MMPA and the Magnuson Act, which are designed to ensure the use of sustainable fishing practices, by enabling the President to increase the trade sanctions for the continued violation of these laws by foreign fishing fleets. Under the Pelly Amendment, the President of the United States has the discretionary authority to embargo all fishery imports from another nation upon notice from the Secretary of Commerce that that nation has been in violation of one or more of these underlying American laws for a certain period of time.

Analysis:

The Tuna/Dolphin Panel Report found the Pelly Amendment to comply with the GATT's provisions, but only because the President had not invoked his powers under the Amendment. The actual application of the Pelly Amendment's embargo provisions to another party's fisheries imports would, however, appear to violate GATT's non-discrimination obligations.

2. Pending Environmental Legislation

a. The General Agreement on Tariffs and Trade for the Environment Act of 1991 (S.59):

Provisions:

The General Agreement on Tariffs and Trade for the Environment Act of 1991 ("S.59") was introduced by Senator Moynihan. It would require a comprehensive study of the impact of international trade on international environmental agreements. S.59 would also require a study of foreign environmental laws, foreign governments' compliance with international environmental agreements, and foreign environmental laws that restrict trade. Further, S.59 would require the United States Trade Representative to provide a statement of what efforts are being undertaken to make the GATT more environmentally sound. Additionally, S.59 requires that foreign trade practices that diminish the effectiveness of international agreements aimed at preserving species be treated as unjustifiable trade practices under the Trade Act of 1974, and would allow the United States to adopt measures to retaliate against the foreign party's practices.

Analysis:

The study provisions of S.59 would in no way conflict with obligations under the GATT. S.59's provisions with regard to the justifiability of foreign actions that diminish international protections of species, however, if adopted, would appear to conflict with the GATT's obligations.

b. House Concurrent Resolution 246:

Provisions:

House Concurrent Resolution 246 ("H.Con.Res. 246"), introduced by Representative Waxman for himself and 25 other representatives, would express the sense of the House and Senate with respect to the relationship between trade agreements and health, safety, labor, and environmental laws of the United States. H.Con.Res. 246 calls upon the President to initiate and complete discussions within the Uruguay Round to make GATT compatible with the MMPA and other American health, safety, labor, and environmental laws. H.Con.Res. 246 also expresses Congress' resolve to reject legislation to implement any trade agreement, including both the Uruguay Round and the NAFTA, if such agreement jeopardizes U.S. health, safety, labor, or environmental laws.

Analysis:

Although H.Con.Res. 246's provisions do not directly conflict with the GATT's provisions, they do raise substantial implications for the GATT and trade policy generally. H.Con.Res. 246 calls upon the President to expand the scope of the debate in the Uruguay Round negotiations that are well along and already fraught with difficulty. Moreover, this statement from Congress that they will not adopt any trade legislation that

could undermine American social protections would place additional burdens on the negotiation of NAFTA and the Uruguay Round instruments.

c. International Pollution Deterrence Act of 1991 (S.984):

Provisions:

The International Pollution Deterrence Act of 1991 ("S.984"), introduced by Senator Boren, seeks to level the playing field for international trade by removing what many perceive to be subsidies to foreign industries in the form of lower national environmental standards. The goal of S.984 is to ensure that all products sold in U.S. markets fully reflect their environmental costs, at least to the extent that U.S. laws require such internalization.

S.984 amends the countervailing duty provisions of U.S. trade law to establish that the failure to impose and enforce effective environmental protections amounts to a subsidy which can be subjected to a countervailing duty. The amount of the subsidy provided by lessened environmental standards would be determined by the costs the manufacturer or producer would have to bear to comply with the U.S. environmental laws imposed on like domestic products. Additionally, S.984 would allocate 50% of the monies paid through the countervailing duty provisions to a fund that would be distributed by the Agency for International Development to assist developing countries in purchasing U.S. pollution control equipment. The other 50% of the countervailing revenues would be appropriated to an EPA-administered fund that would assist U.S. companies in the research and development of pollution control technologies. S.984 would also require the EPA to create an index for the top fifty U.S. trading partners to measure, in comparison to U.S. standards, each country's pollution control standards.

Analysis:

S.984 would have a number of significant trade implications. The use of countervailing duties to mitigate environmental standards subsidies appears to violate GATT Articles I, II and III, as well as the countervailing duty provisions of the GATT and the Subsidies Code. Additionally, subsidies paid to both U.S. companies to create environmental technologies, and to developing countries to purchase U.S. environmental technologies, could allow other parties to institute countervailing measures to mitigate these subsidies.

3. Sub-National Level Environmental Laws

Provisions:

In addition to the national-level environmental protections that have trade implications, under the United States system of governance, a wide latitude of powers are reserved to State and local governments to legislate environmental protections. Certain of these sub-national level protections have trade implications as well.

For example, at least nine states and twenty-five municipalities have adopted legislation that restricts the sale and use of CFCs as products or in consumer products. Additionally, a number of states have introduced legislation to control the flow of agricultural research information and products, including ten states that have enacted controls over Bovine somatropin (BST) or beef hormones. Hawaii has enacted legislation to provide funds to help establish and operate small business medical incubator research facilities.

Analysis:

Many of these sub-national provisions seem to be inconsistent with the GATT's obligations. These areas of conflict raise the issue as to whether a contracting party can be in violation of its GATT's obligations by virtue of an act undertaken by a sub-national level governmental body.

IV. OPTIONS FOR REDUCING OR ELIMINATING FRICTIONS BETWEEN ENVIRONMENTAL PROTECTIONS AND TRADE AGREEMENTS

The goal of free trade policy is to allow markets to allocate the use of resources, while the general goal of environmental policy is to manage efficiently and maintain the earth's resources. Where the same resources are the subject of both trade and environmental policies, conflicts can and do result. Yet the ability of both free trade and environmental policy to accomplish their respective goals is becoming largely dependent on their mutual ability to reconcile these conflicts. In the long-term, if economic development from expanded trade endangers the world's resource base, trade may find itself with no natural resources left to allocate. Contemporaneously, in many instances, improving environmental quality and the standard of living around the globe requires economic resources that economic growth, such as the growth attendant to expanded free trade, can provide. Moreover, the ability of the global community to adopt international agreements that encourage state participation and discourage "free riders" appears to be, at this time, dependent upon the use of trade measures within these agreements.

What follows is a brief discussion of certain options to reconcile trade and environmental concerns and to move each of these disciplines closer to the mutually reinforcing goal of sustainable development. This discussion focuses on the legal predicates for, and ramifications of, these options.

A. Application of Treaty Law

Perhaps the most obvious question that arises regarding how to reduce or eliminate the frictions described in the earlier sections of this memorandum is whether there is any way to reconcile conflicting terms of an international trade agreement and an international environmental agreement. It turns out that treaty law provides at least some guidance on this subject.

Article 30 of the Vienna Convention on the Law of Treaties provides general rules governing the relationship of successive treaties.[23] Under Article 30, when the provisions of two treaties conflict, the later in time prevails, as between parties to both, unless one treaty expressly specifies otherwise. If a State is party to only one of the treaties, then under Article 30(4)(b) only that treaty governs.

Thus, for example, as between States that are parties to both the GATT and the Montreal Protocol, paragraphs 4 and 4 *bis* of the Montreal Protocol (banning import of substances produced with, but not containing, the controlled substances listed in Annexes A and B of the Protocol) would prevail over inconsistent provisions of the GATT. (This ignores, of course, the legal opinion the negotiators of the Montreal Protocol obtained from the member of the GATT Secretariat regarding the consistency of the proposed

provisions of the Protocol with the GATT.) Note that paragraphs 1 through 3 *bis* of the Protocol would presumably not be inconsistent with the GATT even when applied against States that are not parties to the Protocol because they pertain to products rather than processes.

This leaves the problem of non-parties. Specifically, can a State party to the GATT be bound by a subsequent environmental agreement that contains inconsistent trade provisions, absent joining as a party? Article 34 of the Vienna Convention states that a subsequent treaty cannot bind non-party States without their consent. Article 38 notes a limited exception to this if the treaty rule becomes customary international law. Thus, a GATT contracting party that has not signed the Montreal Protocol may very well have a legitimate dispute under the GATT if its products made with CFCs are banned by another contracting party that is a party to the Protocol (unless the Montreal Protocol has become customary law).

B. Application of International Law: Extrajurisdictional Actions

Because the GATT's Article XX exceptions now only allow for jurisdictional actions, concerns have been expressed over who has the jurisdictional ability to take actions to preserve the global commons. Under principles of international law, such as the Law of the Sea and the Law of Space, it may be said that jurisdiction over the commons areas is *sui generis* to the international community or the international community has reserved jurisdiction over these commons areas.[24] Thus, actions taken pursuant to multilateral agreements to protect resources in the global commons should fall within Article XX. The Tuna/Dolphin Panel Report recognized this principle in a very limited sense by allowing parties to act "jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement."

Additionally, under international law, it may be argued that unilateral trade actions, that are not specifically provided for in an international agreement, are permitted under Article XX, if they are necessary for the party to meet its general obligations under an international agreement.[25] Thus, for example, although the Law of the Sea III does not specifically authorize or provide for trade restrictions, if a party adopts a trade restriction in order to fulfill its obligations to preserve the sea, this trade restriction should not conflict with Article XX's jurisdictional requirements.

C. Reexamination of Fundamental Principles

Obviously, the foregoing analysis is not an adequate long-term solution. The law of treaties applies only after two treaties or other international agreements have come into conflict and so does not help in avoiding those conflicts in the first place. Moreover, it offers no mechanism for reconciling the legitimate goals of prior treaties with those conflicting treaties coming later in time. Finally, and perhaps most importantly, it leaves open the question of what to do in disputes where the States are not parties to both treaties or agreements.

Some individuals have called for a reexamination of various fundamental assumptions and principles relating to trade and the environment as a way of at least changing the terms of debate, if not reconciling the two policy areas. As will be obvious from the following examples, a change in any of the following

assumptions and principles would result in a radical reshaping of how trade and environment issues are viewed.

1. Internalization of Environmental Costs

Many of the options proposed to date to reduce or eliminate frictions between trade and environmental concerns have focused on modifying the GATT to permit greater use of trade restrictions to force internalization of environmental costs. Of course, any modification to the GATT must overcome considerable procedural and substantive obstacles.[26] However, United States' environmental laws are increasingly turning to environmental cost internalization for both foreign and domestic products. Unless changes are made to the GATT, these U.S. initiatives could precipitate additional conflicts.

a. "Like Products":

As noted earlier, GATT Articles I, III, XI, and XX pose obstacles to using discriminatory tariffs and quantitative restrictions against other countries' PPMs that are perceived to be environmentally unsound. These obstacles could be overcome by reinterpreting the concept of "like products" in the GATT to allow product standards based on PPMs. Environmentalists, in favor of allowing environmental PPMs, argue that the contemporary meaning of "product" includes the product's life cycle. In order for such a reinterpretation to take place, the GATT would have to be amended, or a side agreement or understanding to GATT adopted, setting out the extensive procedural and substantive requirements necessary to implement such a program.

b. Countervailing Duties or Antidumping Duties:

GATT, in its current form, does not view a party's application of lower standards of domestic environmental protections, that allow the party's industries to externalize their environmental costs, as a subsidy (or dumping when the product is exported), that could be countervailed by another party whose industries are harmed by the subsidy (or dumping).[27] A number of options have been presented to modify or interpret GATT Articles VI and XVI and the Subsidies Code to permit the imposition of countervailing duties or antidumping duties to counter such practices. However, quantifying the effect of differing environmental standards could pose additional administrative problems beyond those already associated with countervailing and antidumping statutes.

2. "Necessary" Under GATT Article XX(b)

As noted earlier, GATT Article XX(b) provides a general exception only to those trade measures that are necessary to protect human, animal or plant life or health. One way to allow for greater use of trade restrictions to enforce internalization of environmental costs might be to give greater consideration to whether a trade restriction is proportional to its environmental benefit in determining whether it is "necessary" under Article XX(b). The case study provided by The Management Institute for Environment and Business to the Trade and Environment Committee shows how this approach was used by the European Court of Justice in reaching its decision in The Danish Bottles Case. However, many trade specialists argue that this approach represents a "slippery slope" that would likely spawn a flood of disguised protectionist measures. At the very least, it would likely sharpen the debate over whether import restrictions based on "consumer preference" rather than "sound science" are ever legitimate. Moreover, many environmentalists

argue that requiring environmental protections to be justified as "necessary" places too high a burden on environmental actions and could diminish the ability of nations to act proactively, under the Precautionary principle, in the face of scientific uncertainty.

3. Harmonization of Standards

The GATT Standards Code makes clear that harmonization of standards is a very important goal of the GATT process. Negotiations in the Uruguay Round have also made harmonization a high priority, particularly with respect to phytosanitary and sanitary regulations and measures. As discussed above, the effects of the harmonization of environmental standards on international trade and the environment will be largely determined by the manner in which harmonization occurs.[28]

If environmental standards are harmonized towards more stringent levels of protection it is possible that certain United States domestic laws might not meet these standards. This would require U.S. environmental protections to be strengthened. Should harmonization adopt international standards or a "least common denominator" approach, the United States would have to weaken many of its environmental laws, a path the U.S. Congress and state legislatures may find difficult.

4. Procedure

a. Dispute Resolution:

There have been a number of proposals for improving GATT's dispute resolution procedures, including: expanding GATT dispute resolution panels to include experts from other disciplines such as environmental scientists and/or law scholars; creating a "cut-out mechanism" to move trade and environment disputes to an alternative forum for dispute resolution; and, improving the ability of trade panels to take into account other areas of concern that relate to trade policy, such as the environment.[29] Expanding the membership of dispute resolution panels to include other disciplines could be achieved under the existing GATT framework, and would provide input as to the non-trade effects of GATT decisions. These multi-disciplinary panels would, however, remain bound to existing GATT rules in formulating decisions. Creating new procedures for dispute resolution that would allow GATT panels to take into account other areas of concern, such as the environment, could turn GATT's dispute resolution panels into international over-courts — a role their creators never envisioned for them and to which they consequently are not well-suited. Establishing a "cut out" mechanism for environmental trade disputes would require an agreement of the Parties and the creation of a new international tribunal — a difficult process to say the least.

b. Transparency and Public Participation:

There is a great deal of concern about the relative secrecy and isolation in which GATT officials make decisions. Many critics argue that the GATT decisionmaking process should be more open to the international public so that individuals and NGOs can participate in GATT decisionmaking by having timely access to GATT documents and decisions, and presenting evidence and arguments to the GATT Council and to GATT dispute resolution panels. Environmentalists view transparency and public participation as integral to the democratic process and to rational decisionmaking. On the other hand, traditional GATT proponents argue with great force that nations have a significant interest in preserving world order through negotiated

settlements of international disputes, insulated from influence of publicity. In order to provide for increased transparency and public participation the Parties would have to either amend GATT or agree to a new understanding or side agreement.[30]

4. Trade Restrictions as a Tool For Enforcing Environmental Protections

Many policy-makers see trade restrictions as a legitimate tool for enforcing international environmental agreements and even pursuing unilateral environmental objectives, while free trade advocates that restrictions are ill-suited as environmental protection devices. They point out that the imposition of trade restrictions skews the efficient allocation of resources just as the failure to internalize environmental costs does. Both, they argue, reduce overall welfare. They cannot see using one economic distortion to fight another. Moreover, in their minds, there is no guarantee that imposing a trade restriction to force internalization of environmental costs will not have a greater distortive effect than the lack of cost internalization in the first place. Among the alternatives they suggest are using side payments and trade concessions to induce adherence to international environmental agreements.

Environmental advocates respond that the effectiveness of environmental restrictions is a highly complex question that is, to a great extent, determined on a case-by-case basis and does not lend itself well to generalizations. They note the relatively few methods available to nations to effect the behavior of other nations, and conclude that absent substantial changes to the central principles of the international law and the international order of nation-states, trade measures offer the most cost-effective means of securing compliance with international agreements. Moreover, they note that compensation schemes that require the international community to effectively purchase protections in all developing countries are not appropriate in all instances and the over-reliance on these schemes could prohibit the effective development of environmental protections.

In an effort to reconcile the trade and environment perspectives, a number of proposals have been advanced that seek to provide frameworks for determining when trade restrictions are appropriate mechanisms for securing environmental objectives. These frameworks focus on delineating certain factors, such as how integral the trade measure is to the environmental protection and the proportionality of the trade measure to the environmental protection sought, to assist in making such determinations.[31]

Throughout the past twenty years a number of alternative proposals that do not focus upon trade sanctions as the primary enforcement device, have been advanced for the enforcement of environmental obligations. Perhaps the most industrious of these proposals is the creation of an international environmental court, with all nations submitting themselves to its jurisdiction. A more recent, and somewhat less far-reaching, proposal seeks to increase the ability of domestic and foreign parties to bring suit in the domestic courts of all nations for violations of national and international environmental laws and obligations. These proposals lack substantial backing within the international community, and so trade restrictions continue to be one of the more, if not the most, attractive mechanism for enforcing environmental obligations.

5. Mutually Reinforcing Market-Based Protections

Both the trade and environment communities embrace cost internalization through the "polluter pays" principle and the elimination of subsidies, particularly those that have direct negative effects on the environment. Allowing greater opportunity in the GATT for the Parties to adopt such market-based

measures, and increasing the reliance on environmental policies that utilize market-based strategies may be the most immediate way to begin the process of reconciling trade and environment concerns. Caution should be exercised, however, in placing too great a reliance upon market-based strategies. Environmentalists stress that while market-based strategies are effective for addressing conventional environmental threats, markets are not effective in dealing with uncertainties, such as setting values for natural resources that do not have readily apparent economic uses, or dealing with the risk of irreversible losses that cannot be countered through the use of economic resource, or setting the costs of unconventional threats whose real harms cannot be scientifically established with great cerfainty.

Weighing the need for increased reliance upon market-based strategies, with the limitations of such strategies, it is possible that the development of market-based strategies should be facilitated where they apply to conventional environmental threats, such as conventional non-toxic pollutants, and the protection of species that are not threatened with extinction. Where, however, environmental protections apply to unconventional threats (such as the Montreal Protocol or the Basel Convention on Hazardous Wastes), irreversibilities (such as CITES), or where they apply to resources that cannot be easily valued in economic terms (such as wetlands or species), market-based strategies should be complemented by other protections designed to ensure against harms caused by market failures.

While market-based strategies are increasingly being incorporated into domestic and international environmental law, full incorporation of these strategies in even conventional areas will require substantial changes to be made to United States environmental laws and the frameworks of international agreements. Moreover, in order for market-based environmental protections to be altogether compatible with the GATT, the GATT will have to be changed to provide the Parties with mechanisms to ensure environmental cost internalization.

CONCLUSION

The rate of ozone layer loss is now believed to be occurring twice as fast as scientists estimated only a few years ago. It is estimated that every year over 50,000 species — over 140 per day — vanish from the face of the earth. Over 17 million hectares of forests — an area equivalent to half the size of Finland — are lost each year. Meanwhile, the world's population is increasing at a rate of approximately 92 million people per year — roughly the population of Mexico — with 88 million of these new inhabitants born within the developing world. It is estimated that between 500 million and 1 billion people are under-nourished.

As these figures demonstrate, the world is currently ill-equipped to suffer either environmental policies that diminish the economic resources necessary to meet the needs and aspirations of its burgeoning human population, or trade policies that jeopardize the survival of the planet and its natural resources. Thus the ongoing, and largely polarized, debate over whether trade policies should serve environmental goals, or the environment protections must conform to the goals of free trade, is woefully misguided. Both trade and the environment must be disciplined to serve the overarching goal of sustainable development.

Past efforts at free trade have paid little attention to the goal of sustainable development. Now free trade

must become synonymous with "sustainable trade."[32] In principle, free trade seeks to address social concerns, such as environmental degradation, by the application of expanded economic resources gained through increased and more efficient economic activity. As World Bank economist Herman Daly has noted, however, "further growth beyond the present scale is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in a new era of `uneconomic growth' that impoverishes rather than enriches."[33] Free trade may have to become managed trade that serves the goal of sustainable development.[34]

Just as trade efforts have operated in relative ignorance to the environmental imperatives of sustainable development, only recently has attention begun to be focused on the negative effects that improperly crafted environmental protections can have upon sustainable development's economic imperatives of increased efficiency and higher standards of living. Today's environmental protections will have to be crafted in ways that avoid unnecessary obstacles to the benefits offered by expanded trade. By reducing unnecessary economic burdens, environmental protections can allow, wherever possible, market forces to dictate the most efficient and sustainable usages of available resources and costs.

NOTES

[1] Additional assistance in the preparation of this memorandum was provided by CIEL-U.S. Legal Intern Margaret Spring.

[2] H. Daly & J. Cobb, For the Common Good: Redirecting the Economy towards Community, the Environment, and a Sustainable Future, 2 (1989).

[3] For further background, see the following research memoranda by CIEL-U.S.: "Provisions Within Trade Agreements Relevant to Environmental Concerns" (Housman & Zaelke draft December 31, 1991); "Provisions of the Montreal Protocol Affecting Trade" (Goldberg draft January 16, 1992); "Current UNCED Dialogue on the Relationship of Trade and Environment" (Downes draft January 16, 1992); and "The Collision of the Environment and Trade: The GATT Tuna Dolphin Decision" (Housman & Zaelke draft January 7, 1992)(forthcoming in the *Environmental Law Reporter*).

[4] See J. Jackson, The World Trading System: Law and Policy of International Economic Relations 40 (1989).

[5] Panel report on "United States - Restrictions on Imports of Tuna, issued 3 Sept. 1991, DS21/R, at 50-51 [hereinafter "Tuna/Dolphin Panel Report"]. The Tuna/Dolphin Panel upheld the particular labeling provisions before the panel because the provisions allowed suppliers of dolphin-safe tuna the option of disclosing its environmental character, but did not require unsafe or safe tuna to bear certain labeling to be sold. *Id.* The panel implied that if the labeling requirements had required certain PPM labeling, they would have violated the GATT. *Id.*

[6] Art. XI:2. Other than through Article XI's specific exemptions, the only way a quantitative restriction can conform with the GATT is by falling within one of the public policy exceptions set out in Article XX.

[7] See Articles XIII and XIV of the GATT for extensive prescriptions regarding the non-discriminatory administration of quantitative restrictions.

[8] Customs and Trade Act of 1990, Pub. L. No. 101-382, Title IV, §§ 489(a), 491(a), 493(5) (entitled the Forest Resources Conservation and Shortage Relief Act of 1990); *see also Logging on Protectionism*, Wall St. J., Dec. 6, 1990, at A14; Yung, *Weyerhauser's Exports: An Endangered Species*, Bus. Week, July 16, 1990, at 51. The Forest Resources Conservation and Shortage Relief Act of 1990 is intended "to ensure sufficient supplies of certain forest resources or products which are

essential to the United States" while simultaneously requiring that actions taken to meet this objective conform with the obligations of the United States under the GATT. Pub. L. 101-382, *supra*, at § 488(b)(3), (5).

[9] Panel report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes," adopted 7 November 1990, BISD37S/200, at para. 74 (in a dispute concerning Thai prohibitions on the importation or exportation of tobacco and tobacco products the panel held that, although smoking constituted a serious risk to human health, that Thailand's measures were not "necessary for protecting human life because alternative measures, consistent with the GATT, could have been adopted instead).

[10] The United States had linked the maximum incidental dolphin taking rate which the Mexican tuna fleet had to meet during a particular period to be able to export tuna to the United States to the taking rate actually recorded for U.S. tuna fleet during the same period. Consequently, the Panel believed that Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as "necessary" to protect the health or life of dolphins.

[11] Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted 22 March 1988, BISD 35s/98, para. 4.6.

[12] Many question the overall effectiveness of creating an environmental exception that parallels Article XX(h). Because Article XX(h) only allows actions taken in accordance with international agreements, the creation of an environmental XX(h) would not serve to allow the contracting parties any additional abilities to act unilaterally.

[13] *See Territory v. Ho*, 41 Haw. 565 (1957) (GATT applicable to state law); *see also* Jackson, *supra* n. 3, at 68 (discussing GATT obligations at the sub-national level).

[14] Between 1980 and 1990, 211 notifications have taken place in which the acting party stated the objective of the standard was protection of the environment. GATT, Trade and Environment: Factual Note by the Secretariat at 85, L/6896 (1991). 167 other notifications have been justified under similar grounds such as the protection of health, safety, and consumer protection. *Id.*

[15] *Five Year Development Agreement Reached*, 14 Int'l Envtl. Rep. 185, 207 (1991).

[16] OECD Trade Directorate, The Applicability of the GATT to Trade and Environment Concerns at 17, COM/ENV/EC/TD(91)66 (1991). Three rationales are offered against countervailing measures for environmental standard subsidies: 1) the subsidy is put in place at the production level and thus should be removed at the production level and not by measures at the trade level that will only cause further distortions; 2) allowing countervailing measures for environmental standards subsidies makes the continuation of a party's GATT "rights" contingent on certain environmental behaviors and thus contradicts the unconditional nature of the party's GATT "rights"; and 3) allowing a party to countervail for environmental standards subsidies allows that party to unilaterally determine the appropriate level of environmental protections for another party. *Id.*

[17] *See* 40 C.F.R. § 262.20 (1991) (imports of hazardous waste). The Department of Transportation licensing schemes for the transportation of wastes in the United States work in conjunction with the Environmental Protection Agency's regulations under RCRA and are equally applicable. *See* 49 C.F.R. §§ 171-179 (1990).

[18] *See generally*, Lori Wallach/Public Citizen, Memorandum Concerning Dec. 20, 1991 Uruguay Round "Final Act" Text, Dec. 26, 1991.

[19] *See Prelude to a New Colonialism*, The Nation, March 18, 1991, at 336-38.

[20] *See generally*, Lori Wallach/Public Citizen, Memorandum Concerning Dec. 20, 1991 Uruguay Round "Final Act" Text, Dec. 26, 1991.

[21] For a discussion of the effects of the "later in time" rule, *see* section IV.A, *supra*.

[22] *See* GATT, *supra* note 13, at 9.

[23] *See Corrosion Proof Fittings v. EPA*, - F.2d -, 1991 WL 209789, *24, n. 7 (5th Cir. 1991)(finding that Canadian parties lacked standing, despite their GATT rights, to assert substantive claim that U.S. asbestos regulations violated U.S.'s binding obligations under GATT).

[24] 54 Fed. Reg. 273 (Jan. 5, 1989).

[25] 55 Fed. Reg. 26695 (June 29, 1990).

[26] 56 Fed. Reg. 52218 (Oct. 18, 1991).

[27] *See* Downes/CIEL — U.S., *supra* note 2.

[28] *See* Housman & Zaelke/CIEL-U.S., *supra* note 2.

[29] *See* Housman and Zaelke/CIEL-U.S., *supra* note 2.

[30] For a discussion of the problem of reconciling conflicts between interrelated trade agreements, *see* Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 Stan. J. Int'l L. 45 (1988).

[31] *See e.g.* United Nations Convention on the Law of the Sea, *done* at Montego Bay, Dec. 20, 1982, U.N.Doc.A/CONF 62/122, *reprinted in* 21 I.L.M. 1261 (1982)("the Law of the Sea") (noting all rights to the sea are vested in mankind on whose behalf the [international community acts)(while the Law of the Sea has not been entered into force, it is accepted by most countries including the United States as customary international law, with the exception of Part XI governing the deep seabed); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, articles I-III (noting that states acting within outer space are subject to the principles of international law). This argument might also be more broadly phrased to provide that the international community not only has jurisdiction over the global commons, but also has jurisdiction over the global environment.

[32] *See e.g.* United Nations Convention on the Law of the Sea, *done* at Montego Bay, Dec. 20, 1982, U.N.Doc.A/CONF 62/122, *reprinted in* 21 I.L.M. 1261 (1982)(placing responsibilities for preserving and developing the high seas on the parties); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, at article IX (placing responsibility on parties to conduct their activities in outer space so as to avoid "adverse changes to the environment of Earth").

[33] *See* John Jackson, Memorandum entitled "Changing GATT Rules," Nov. 7, 1991.

[34] *See* Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 Hous. J. Int'l L. 189 (1988).

[35] For a more in depth discussion of harmonization policy options and effects, *see* Pearson & Repetto, *Reconciling Trade and Environment: The Next Steps*, Dec. 1991; Lori Wallach/Public Citizen, Memorandum Concerning Dec. 20, 1991 Uruguay Round "Final Act" Text, Dec. 26, 1991.

[36] For a more complete discussion of the options for changing GATT's dispute resolution mechanisms, *see* Von Moltke, forthcoming paper on dispute resolution.

[37] For a more complete discussion of the options for increasing transparency and public participation in GATT's decisionmaking, *see* Von Moltke, forthcoming paper on dispute resolution.

[38] For a more in depth discussion of mechanisms for determining when trade sanctions should be used to secure environmental obligations, *see* Pearson & Repetto, *Reconciling Trade and Environment: The Next Steps*, Dec. 1991.

[39] Sustainable trade, as a sub-part of sustainable development, is trade and trade policies that meets the needs of the current generation without jeopardizing the resource base for future generations.

[40] H. Daly & J. Cobb, For the Common Good: Redirecting the Economy Towards Community, the Environment, and a Sustainable Future, 2 (1989).

[41] *See Bush's Trip to Japan Sets in Motion Shift Toward 'Managed' Trade*, Wash. Post, Jan. 20, 1992, at A22, col. 1.

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