Testimony of Robert Housman
of the Center for International Environmental Law
on Behalf of the Sierra Club and Defenders of Wildlife
Before the Subcommittee on Foreign Commerce and Tourism
Senate Committee on Commerce, Science and Transportation
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Chairman Kerry, Members of the Subcommittee, thank you for the opportunity to testify before you concerning the environmental ramifications of the Final Agreement (the Final Agreement or the Agreement)[1] of the Uruguay Round of the General Agreement on Tariffs and Trade (the GATT).[2] My name is Robert Housman. I am a Staff Attorney with the Center for International Environmental Law, and an Adjunct Professor of Law at the American University's Washington College of Law. I appear today on behalf of the Sierra Club and the Defenders of Wildlife (Defenders).

Before moving to our analysis of the Final Agreement, I believe it is necessary to put the issue this hearing seeks to address in context. The issue here is not whether free trade is good or bad. We support the general principles of free and fair trade. Nor is the issue even whether free trade is good or bad for the environment. Indeed, under the right conditions, expanded trade and economic growth can be environmentally beneficial. The issue I will address today is whether or not this particular agreement–the Final Agreement of the Uruguay Round–is good for the environment. This question is vital because environmental degradation has real economic costs–both to public health and to natural resources–that can undermine the very benefits that expanded trade is intended to bring. Environmental degradation also has real costs in human terms–cancer, lung disease, hepatitis, food poisoning. These human costs lower our standards of living–precisely the opposite effect that economic growth through expanded trade is intended to have.

Within this context, the goal of my testimony today is to provide you "just the facts" while avoiding the rhetoric and hyperbole that has plagued past discussions over the environmental impacts of trade agreements.

I. The Standard for Judging the Final Agreement

The Sierra Club and Defenders believe that before the Final Agreement can be considered

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[1]Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade negotiations, Dec. 15, 1993, MTN/FA, UR-93-02461 [hereinafter Final Agreement]. All citations to the various components of the Final Act in this testimony refer to this text.

[2]opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

acceptable to the United States Congress and the American people it should pass two critical tests. First, the Agreement must be able to stand up to the basic principles of democracy. Second, the Agreement must promote environmentally sustainable development. Specifically, it must preserve our high U.S. environmental, health and safety standards and it must protect the global environment from unfair international competition on the basis of lax environmental standards and over-exploitation of natural resources. Unfortunately, based on the information now available to us, the Final Agreement fails both of these tests.

Many of you may experience a sense of deja vu as you listen to our remarks. Environmentalists raised similar concerns regarding the North American Free Trade Agreement (the NAFTA).[3] Regardless of how you voted on the NAFTA, we urge you to take a close look at the Final Agreement. Environmentalists are in broad agreement that the Final Agreement is substantially more threatening to democratic processes and to sustainable development than the NAFTA.

II. The Erosion of Democratic Practices

Our first test is a simple one. The Final Agreement must promote democracy. This test requires that in order to pass muster the Final Agreement must provide citizens with the ability to have information about and participate in decisions that affect their interests. We believe the Final Agreement fails this test.

Democratic practices are essential to environmental protection because only free people can hold their governments accountable to pass good environmental, health and safety laws, to enforce those laws, and to build the necessary environmental infrastructure to compliment those laws. Our experiences with the former authoritarian states of Central and Eastern Europe demonstrate the point.[4] Moreover, as President Clinton recently recognized in his State of the Union address "democracies make the best trading partners." Yet, while we seem to recognize the value of democracy to both environmental protection and free and fair trade, we are rushing to establish an international trading system that weakens these very principles of democracy.

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[3]North American Free Trade Agreement Between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

[4]See Chris A. Wold & Durwood Zaelke, Promoting Sustainable Development in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Development, 7 Am. Univ. J. Int'l L. & Pol'y 559, 561 (1992) ("The state of the environment in Central and Eastern Europe is the epitaph of centrally planned economies . . . .").

The most important democratic failures of the Final Agreement occur within its dispute resolution provisions.[5] These provisions would provide the ground rules for deciding disputes that will arise concerning, among other things, U.S. environmental, health and safety laws. Under the Final Agreement's proposed rules citizens can neither appear before panels nor submit information to panels.[6] The procedures at the appellate level are similarly undemocratic.[7] The Final Agreement not only denies citizens the ability to participate in decisions, but it also denies them the right to have information about these decisions. For example, the Final Agreement explicitly prohibits members of the public from attending the hearings of dispute settlement panels or the standing appellate body.[8] The Final Agreement also explicitly prohibits the public from having access to the pleadings of the parties to disputes.[9]

There are only two ways in which the public can cut through the Final Agreement's shroud of secrecy. First, a party may make its own submissions public, but in so doing it must protect the other party or parties' arguments.[10] Operating under the current GATT, the United States Trade Representative (USTR) has repeatedly requested that other parties challenging U.S. environmental, health and safety make their briefs public. Not once has another party agreed to this request. There is no reason to believe that this pattern will change. USTR has made copies of redacted U.S. briefs available to the public in a number of cases.[11] While we appreciate USTR's efforts, our experience with these redacted briefs is that they are of little or no use. Imagine reading a baseball scorecard that only lists the

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[5]See generally, Final Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1-25 [hereinafter Understanding on Dispute Settlement].

[6]Understanding on Dispute Settlement, supra note 5, at Appendix 3, art. 2.

[7]Id., at art. 17.10.

[8]See id., at art. 17.10; Appendix 3, art. 3.

[9]Id., at art. 18.2; Appendix 3, art. 3.

[10]Id.

[11]See, e.g., USTR, Second Submission to the Panel on United States Taxes on Automobiles, Nov. 24, 1993 (public version); USTR, Rebuttal Submission of the United States to the Panel on United States - Restrictions on Imports of Tuna, undated (public version).

performance of one of the two teams; there is no way to know who is playing and how the game is going.[12]

Second, a party may request that the other parties to a dispute make summaries of their submissions public.[13] Here again our experiences do not bode well. For example, under the Pelosi Amendment governments who want a loan from a multilateral development bank must make a summary of an environmental assessment public, or by law the United States cannot vote in favor of the loan.[14] The summaries that have been produced under the Pelosi Amendment for multi-million dollar mega-projects are often times little more than a page or two in length. We have no reason to believe that many of the same governments who supply these useless summaries will be more forthcoming in the trade context where the stakes in real dollars are much higher.

The inability of citizens to participate in, and have access to these panels both limits the work of citizens and nongovernmental organizations, and denies panels valuable expertise. This problem is compounded by the Final Agreement's failure to ensure environmental expertise in trade disputes over environmental, health, and safety standards. Even where the core issues in a dispute are environmental in nature, dispute panels would be made up of international trade experts.[15] The makeup of these panels would create an inherent bias against environmental, health and safety standards. While the Final Agreement does provide that panels may if they wish seek outside expertise and information, this is merely

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[12]For example, the redacted U.S. brief in the CAFE case begins:

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>] As addressed below, there is no support in the General Agreement for this theory.

See Second Submission to the Panel on United States Taxes on Automobiles, supra note 11, at 2 (brackets and spaces in the original).

[13]Understanding on Dispute Settlement, supra note 5, at Appendix 3, art. 3.

[14]22 U.S.C. § 262m-7.

[15]Understanding on Dispute Settlement, supra note 5, at art. 8.1. In providing guidance as to what individuals are "well qualified" to serve as panelists the Final Agreement lists the following as criteria: (1) prior service on a dispute panel; (2) prior service before a dispute panel; (3) prior service as a representative of a party at the GATT or WTO; (4) prior employment in the Secretariat; (5) prior service as a senior trade policy official for a party; and (6) experience teaching or publishing on international trade law or policy. Id.

recognition of the evolving practice under the current GATT and not a major substantive advance.[16] The only new facet in the Final Agreement are the provisions in the TBT and SPS rules, which would allow panels to request the formation of technical experts groups to assist their deliberations.[17]

The undemocratic nature of the Final Agreement is also reflected in the proposed World Trade Organization (the WTO).[18] The WTO is a gathering of unelected diplomats who would have substantial powers in managing international trade and in setting the rules by which nations must play. The rules of participation for this WTO are as yet unwritten.[19] If the parties adopt rules of procedure that exclude citizens, as the other provisions of the Agreement suggest they will, then the WTO will be a new and unaccountable international bureaucracy standing between citizens and their ability to protect the environment and human health. As democratically elected representatives you should bear this danger in mind as you evaluate the Final Agreement.

Let there be no misunderstanding. If the Final Agreement is implemented trade panels and diplomats will sit in secret judgement over the democratically enacted environmental, health and safety laws of the United States and other nations. Citizens' eyes will be blinded, their ears covered, and their voices silenced. When democratic practices are eroded by international agreements, the law-making function exercised by democratically elected lawmakers–including this Congress–is weakened. Power is subtly, or not so subtly, transferred from the hands of legislatures accountable to their constituents, to diplomats accountable to heads of states. Environmentalists are deeply worried by this prospect. We believe that this issue merits the careful attention of this Subcommittee.

III. The Failure to Ensure Environmental Sustainability

Our second test is environmental sustainability. This test has two parts. First the Final Agreement must not endanger U.S. environmental, health and safety laws. Second, the Agreement must provide the safeguards necessary to ensure that the increases in trade the

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[16]See Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, (adopted Nov. 7, 1990), BISD (37th Supp.), at 201, 216-20 (discussing World Health Organization's submission to and appearance before GATT dispute panel).

[17]Final Agreement, Agreement on Sanitary and Phytosanitary Measures, chapter II.4, at art. 36 [hereinafter Agreement on SPS]; Final Agreement, Technical Barriers to Trade, chapter III.5, at art. 14 [hereinafter TBT Text].

[18]Final Agreement, Agreement Establishing the Multilateral Trade Organization, chapter II, 1-14 [hereinafter WTO Agreement] (the name of the Multilateral Trade Organization has been officially changed to the World Trade Organization).

[19]See, e.g., id., at arts. 2-7.

Agreement will promote will not harm the quality of our environment. Here again, we do not believe the Agreement passes muster.

A. Threats to U.S. Environmental, Health and Safety Laws

The first aspect of environmental sustainability is to ensure that our trade laws do not threaten existing and future environmental, health and safety laws. Regrettably, the Final Agreement is replete with provisions that place these laws in serious jeopardy. The worst of these are found in the rules on Technical Barriers to Trade (TBT).[20]

If the Final Agreement is implemented, the TBT rules will be applied in the vast majority of challenges to our environmental standards. The one notable exception would be challenges to U.S. food safety laws, which will be judged under the separate Sanitary and Phytosanitary (SPS) rules.[21] The Final Agreement's TBT rules would require that our environmental laws be "no-more trade restrictive than necessary . . . ."[22] Simply put, this language requires that each and every U.S. environmental law must be the least trade restrictive means to the environmental ends desired. In other words, if a trade panel, with no environmental expertise or citizen participation, but with the benefit of hindsight and operating in secret without the real world pressures faced by legislatures and regulators, can conceive a hypothetical, alternative less trade restrictive standard that it believes protects the environment, then the environmental law in question will be found to violate the Final Agreement.

By way of an analogy, imagine if the Supreme Court of the United States could reject U.S. government policies and programs in any instance where the program or policy could possibly be improved upon in any way.[23] Those engaged in the difficult business of writing law should take a close look before endorsing any agreement that would judge their work by the exacting yardstick of perfection with 20/20 hindsight.

The least restrictive to trade standard of review invites challenges to a host of our most vital

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[20]See generally, TBT Text, supra note 17.

[21]See generally, Agreement on SPS, supra note 17.

[22]TBT Text, supra note 17, at art. 2.2.

[23]In reality, recognizing that regulators and legislators are better qualified to make these decisions, the Supreme Court gives a great deal of deference to their decisions. See United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (deference to legislative decisions); Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) (deference to regulatory decisions).

environmental laws, including, but not limited to: (1) the Clean Air Act;[24] (2) the Marine Mammal Protection Act;[25] (3) the Endangered Species Act;[26] (4) the High Seas Driftnet Fisheries Enforcement Act;[27] (5) the Sea Turtles Amendment;[28] (6) the African Elephant Conservation Act;[29] (7) the Magnuson Fishery Conservation and Management Act;[30] (8) the Pelly Amendment;[31] (9) the Toxic Substances Control Act;[32] (10) the Federal Insecticide, Fungicide, and Rodenticide Act;[33] and, (11) the Forest Resources Conservation Act.[34]

Many of these same laws would also be endangered by the proposed TBT rules on process standards. Process standards regulate the manner in which products are made, as opposed to product standards, which regulate the characteristics of the actual products. The current GATT text is silent on the product/process distinction, however, it has been interpreted to prohibit process standards. The Final Agreement is troubling because it directly addresses the process/product issue, and does so in a manner that is less than helpful. Under the proposed TBT rules, process methods that relate to the characteristics of products (such as good manufacturing or laboratory practices requirements) would be allowable, however, all other process standards would not.[35]

Neither the High Seas Driftnet Fisheries Enforcement Act's prohibitions on the use of

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[24]See, e.g., 42 U.S.C. § 7545(k)(s)(B).

[25]See, e.g., 16 U.S.C. § 1371.

[26]See, e.g., 16 U.S.C. § 1538.

[27]Pub. L. No. 102-582, 106 Stat. 4900 (1992).

[28]16 U.S.C. § 1537.

[29]16 U.S.C. §§ 4201-4245.

[30]See, e.g., 16 U.S.C. § 1825(a).

[31]See 22 U.S.C. § 1978 (a)(4).

[32]See, e.g., 15 U.S.C. § 2612.

[33]See 7 U.S.C. § 136o.

[34]16 U.S.C. § 488(b)(3),(5).

[35]TBT Text, supra note 17, at Annex 1, art. 1-2.

driftnets,[36] or the Marine Mammal Protection Act's limits on the use of purse seine nets in the Eastern Tropical Pacific Ocean,[37] would seem to fall within the categories of allowable process standards. As these examples show the TBT provisions on process standards would jeopardize a wide range of U.S. environmental, health and safety laws, including, in particular many of our wildlife conservation laws. Moreover, by directly speaking to the process standard issue, the TBT rules would make needed reforms to the process/product distinction far more difficult.

The Final Agreement's provisions on conformity assessments also raise serious concerns about the continued ability of the United States to protect its citizens and their environment.[38] A conformity assessment is the process by which an importing country certifies that products produced under other countries' environmental, health and safety laws also conform with its laws and can be sold on its markets. The potential for nonconforming products finding their way into the United States and harming our citizens or our environment makes it vital that the United States retain its power to effectively determine which products conform to U.S. standards.

Unfortunately, the Final Agreement would limit our ability to conduct these conformity assessments by requiring that our processes for such assessments "be not more strict or applied more strictly than necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create."[39] While this standard may seem innocuous at first glance, the term "necessary" in trade jurisprudence generally means "least trade restrictive."[40] The application of a least trade restrictive test in judging U.S. conformity assessments would seriously hinder our ability to protect our citizens and their environment. Under this standard not only would trade panels be able to determine what procedures are "necessary" to give U.S. citizens the confidence that they are being protected, but these panels would also have the ability to determine what constitutes a significant risk to U.S. citizens that may justify more strict assessments. In other words, these panels would have the right to tell us what we should be afraid of and what we can do to ameliorate those fears.

The TBT text's provisions on harmonization are also troubling. For example, the Final Agreement would commit the United States to using international standards as the basis for

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[36]See supra note 27.

[37]See supra note 25.

[38]TBT Text, supra note 17, at art. 5.1.2.

[39]Id.

[40]See Thai Cigarettes Case, supra note 16, at 200-23.

its environmental, health and safety standards.[41] Article 2.4 of the proposed TBT rules specifically provides that:

> Where technical regulations are required and relevant international standards exist, or their completion is imminent, Members shall use them, or their relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental problems.[42]

In general, international environmental standards are lower than U.S. standards. This is the lowest common denominator problem, where one holdout country can drag a standard down to its own inadequate level. U.S. standards also suffer internationally because we enter these standard setting fora alone. Other nations, with more integrated standards systems, use these fora to effectively block rush our standards. Thus, in setting new environmental standards the United States would have to begin its process at a level that is likely to be lower than where it would otherwise begin. Inevitably, this will put pressure on the United States to lower our environmental standards.

Further, where the United States chooses to depart from an international standard and take a more protective measure, not only would the United States have to provide notice of the departure to the other GATT parties, but it would also have to give these parties the right to comment on the proposed higher standard.[43] If the comments to date of other countries on our environmental standards are any guide, this provision is cause for concern. We are aware of no incident where another country has used trade rules to argue in favor of higher U.S. standards. However, the record of other countries using trade rules to argue against higher U.S. standards is replete.[44] If implemented, this requirement will place the United States in the untenable position of having to decide between turning a deaf ear to its most valued trading partners or having to lower its environmental protections.

The Final Agreement's SPS rules also raise serious concerns with regard to U.S. food safety laws. Although the Clinton Administration was able to secure some changes to the Agreement's SPS provisions, those rules would still jeopardize our ability to ensure that the food we eat in the United States is pure and safe. First and foremost, like the TBT text, the

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[41]TBT Text, supra note 17, at art. 2.4.

[42]Id.

[43]TBT Text, supra note 17, at art. 2.9.4.

[44]See infra notes 72-84 and accompanying text.

SPS rules would require that our food safety laws be least trade restrictive.[45] One of the changes that the Clinton Administration was able to secure seeks to clarify this least trade restrictive test to provide greater leeway for environmental protections,[46] however, the test itself is unchanged: least trade restrictive.[47] Moreover, in determining whether a food safety standard is least trade restrictive the SPS rules would require that the standard's health and safety protections must be weighed against its economic costs.[48] The end result of these rules is that any time a secretive panel made up of trade experts, second guessing U.S. food safety experts, can conceive of an alternative less trade restrictive standard that they feel ensures that the food the American people eat is safe, the standard our food safety experts felt was necessary will be in jeopardy.

The SPS rules would also require that all our food safety standards must be based upon scientific principles and the product of a risk assessment.[49] While scientific principles are vital to environmental policies and risk assessments are valuable tools for crafting environmental protections, such rigid requirements raise a number of serious questions that should not be left unanswered. First, and most importantly, it is unclear how much power the Final Agreement's scientific principles language would give trade panels to second guess the quality of science or play one set of science off another. Second, it is unclear how these requirements would apply where a standard is adopted as a political decision, even where a subsequent risk assessment confirms the risk the standard addresses. Third, it is unclear how these requirements would apply to food safety standards adopted by referendum or popular vote. Fourth, it is unclear whether state and local governments have the human and fiscal resources necessary to meet these rules and still maintain our generally high levels of safety. Finally, it is unclear how these rules would apply to standards that are based on consumer preference or ethical considerations.

The SPS rules on harmonization are also of serious concern. The SPS rules would require the United States to base its food safety standards on international standards. Article 9 of the proposed SPS text states as follows: "[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist. . . ."[50]

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[45]Agreement on SPS, supra note 17, at art. 21.

[46]Id., at art. 21, note 3.

[47]Id., at art. 21.

[48]Id.

[49]Id., at art. 16.

[50]Id., at art. 9.

The use of international standards as a point of departure for U.S. food safety standards is troubling in a number of respects. The principal international food safety standard setting body is Codex Alimentarius. According to a 1992 Congressional Research Service Report, comparing certain Codex Alimentarius and U.S. food safety laws, nearly 20 percent of Codex's standards are lower than the U.S. comparable standard .[51] In real terms, one out of every five apples is bad. The CRS Report also found that differences between the Codex and U.S. standard systems precluded comparison between 61 percent of the Codex and U.S. standards.[52] These differences between the U. S. and international systems are themselves troubling. Unlike U.S. food safety standards, Codex standards are developed without public comment and are not subject to peer review.[53] Moreover, many of the individuals on Codex delegations who actually select the food safety standards are drawn from the regulated industries.[54]

In addition to the requirement to use international SPS standards as a point of departure, the Final Agreement also would require the United States to participate in the Committee on Sanitary and Phytosanitary Measures, which is intended to facilitate harmonization.[55] This Committee is troubling because the Committee's mandate explicitly requires its guidelines to "take into account . . . the exceptional character of human health risks to which people voluntarily expose themselves."[56] In other words, in facilitating the harmonization of standards, the Committee is required to weigh the level of risks we voluntarily accept against the levels of risks we chose not to accept. The full ramifications of this provision are unclear. For example, will the Committee balance the level of risk we accept in driving a car or living in an urban center, such as Los Angeles, when harmonizing the level of cancer risk we will accept in our foods? By the provision's own terms it would seem so.

The SPS rules would also limit our ability to inspect the foods coming into our country to ensure their safety. Under the Final Agreement, the information we can require about food products, and our procedures for inspecting and approving such products (both individual

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[51]Donna Vogt, CRS Report for Congress: Sanitary and Phytosanitary Measures Pertaining to Food in International Trade Negotiations, Sept. 11, 1992, at 22.

[52]Id.

[53]Compare id., at 18-20 (discussing U.S. standard setting) with id., at 20-22 (discussing Codex standard setting).

[54]See Daphne Wysham, The Codex Connection: Big Business Hijacks GATT, 251 The Nation 770, 770-72 (1990).

[55]Agreement on SPS, supra note 17, at art. 20.

[56]Id.

items and classes of items) would have to be "necessary."[57] Here again, the danger is that the term "necessary" in trade jurisprudence generally means least trade restrictive.[58] This provision also would invite trade panels to second guess our food safety inspection and monitoring programs, which if anything need to be stricter.

The potential threat from the TBT and SPS rules to environmental, health and safety laws does not stop at the federal level. The Final Agreement explicitly requires the United States to take measures to ensure that the standards of state and local governments conform with the TBT and SPS rules.[59] These requirements would leave a wide range of state and local environmental, health and safety standards vulnerable to a trade challenge. For example, California's Public Resources Code includes a minimum recycled content requirement for glass beverage and food containers.[60] The European Community has already stated that it believes that this requirement is in violation of the current GATT rules.[61] The Final Agreement's more draconian rules will only serve to strengthen this and other threats to state and local environmental, health and safety laws.

It is important to note as well that the Final Agreement gives no sanctuary to the environmental protections of international environmental agreements such as the Montreal Protocol,[62] the Basel Convention,[63] and the Convention on International Trade in

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[57]Id., at Annex C, art. 1(c),(e).

[58]See, e.g., Thai Cigarettes Case, supra, note 16, at 200-23.

[59]TBT Text, supra note 17, at art. 3.1. ("Members shall take such reasonable measures as may be available to them to ensure compliance by [state and local governments] with the provisions of Article 2); art. 2.2 (setting out least trade restrictive test); Annex 1, art. 7 (defining local government body to include state and local governments); Agreement on SPS, supra note 17, at Annex A, art. 1 (defining SPS measure to include any measure "within the territory of the Member").

[60]See Cal. Pub. Res. Code § 42310 (Deering 1993).

[61]See Commission of the European Communities, Report on United States Trade and Investment Barriers 1993: Problems of Doing Business With the U.S., 62-63 (1993) ("Therefore the application of [the California minimum recycled glass content requirement] to imported products is not in conformity with GATT rules").

[62]The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted and opened for signature Sept. 16, 1987, entered into force Jan 1, 1989, S. Treaty Doc No. 100-10, 26 I.L.M. 1541.

[63]The Basel Convention on Transboundary Movement of Hazardous Waste and Their Disposal, opened for signature Mar. 22, 1989, U.N. Doc. EP/16.80/3, 28 I.L.M. 649.

Endangered Species.[64] Although the NAFTA[65] should not serve as the environmental standard by which trade agreements are judged, even the NAFTA attempted to provide heightened protection to these international environmental agreements.[66] Under the Final Agreement, however, these and other international environmental agreements would be exposed to the same threats that would confront national and sub-federal environmental, health and safety laws. Thus, if a trade panel determined that the United States method of implementing the Montreal Protocol was not least trade restrictive, the United States could be found to violate the Final Agreement. The threats here are real. For example, the United States Congress is currently in the process of amending the Resource Conservation and Recovery Act (RCRA) to implement the Basel Convention. One option for implementation now being discussed would ban trade in wastes with all countries except Mexico and Canada, and to allow trade in recyclables only with countries from the Organization for Economic Cooperation and Development. This option would go beyond the specific requirements of the Basel Convention and might be seen as more trade restrictive than other options for implementing the Convention. Thus, this option if implemented could conflict with the Final Agreement.

Similarly, the United States requires as part of its implementing legislation for the Montreal Protocol the labelling of certain products made with ozone-depleting chloroflurocarbons.[67] The Protocol, however, does not specifically require parties to adopt a labelling scheme. Thus, the United States' implementation of the Protocol could be seen as more trade restrictive than other possible implementation schemes. Here again, this could place our protections under the Protocol in conflict with the terms of the Final Agreement. Despite the repeated pleas of our trading partners and many U.S. interests that we should attack global environmental problems through multilateral means, the Final Agreement rewards our multilateralism by placing it at risk.

There are those who will argue that although the Final Agreement places environmental standards at risk, the risks are low. They will rightfully claim that a trade panel cannot actually invalidate a U.S. law. They will also claim that the chance of another party challenging a rational U.S. environmental, health or safety law is minimal. Their first claim is misguided, their second is erroneous.

While it is true that a trade panel cannot actually overturn a party's environmental, health or safety laws, under the Final Agreement's new dispute resolution provisions substantial

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

[65]See NAFTA, supra note 3.

[66]See NAFTA, supra note 3, at art 104.

[67]See 42 U.S.C. § 7671j.

pressure can be brought to bear on domestic authorities to change their policies and protections. For example, whereas the current GATT allows a defending party to block implementation of a panel decision, the Final Agreement requires consensus of the parties to block a panel decision.[68] The effect of this provision is quite substantial and can be seen by way of comparison to the original Tuna/Dolphin decision.[69] Although Mexico won the Tuna/Dolphin panel decision, recognizing the political and environmental costs at stake, Mexico elected not to pursue adoption of the panel decision. Under the provisions of the Final Agreement no such option would exist; a report of the standing Appellate Body or an unappealed dispute panel report would be adopted automatically unless a consensus of the Dispute Settlement Body rejects the report.[70] Even if both of the parties to a dispute realized that a decision was environmentally or otherwise unsound, they could not block the decision without agreement of all the other parties to the Agreement.

Once a decision has been adopted, the Final Agreement would also increase the power available to the complaining party to induce the losing party to change its practices. For instance, a victorious complaining party would be able to ask the standing Dispute Settlement Body to suspend the application of concessions or obligations granted under the Agreement to the challenged party.[71] If a U.S. standard were to fall victim to the substantive rules discussed above, these new procedures would give other countries tremendous leverage over the United States to change its law.

Moreover, the belief that the Final Agreement's dispute resolution procedures will not be brought to bear on rational U.S. environmental, health and safety laws is not borne out by the facts. In the past three years, other nations have used trade rules to bring challenges against the United States for: (1) the Corporate Average Fuel Economy standards;[72] (2) the Marine Mammal Protection Act;[73] (3) the Toxic Substances Control Act;[74] (4) the

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[68]Understanding on Dispute Settlement, supra note 5, at art. 16.4.

[69]See United States - Restrictions on Imports of Tuna, (decided Sept. 3, 1991), DS21/R.

[70]Id., at arts. 16.4, 17.14.

[71]Understanding on Dispute Settlement, supra note 5, at art. 22.2.

[72]See Second Submission to the Panel on United States Taxes on Automobiles, supra note 11.

[73]See Restrictions on Imports of Tuna Case, supra note 22.

[74]See Brief of Amicus Curiae for the Government of Canada at 16-19, Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).

Internal Revenue Code's Gas Guzzler Tax;[75] and (5) Puerto Rico's milk safety standards.[76] During this same three year period, challenges have also been threatened against: (1) EPA's reformulated gasoline regulations;[77] (2) California's Safe Drinking and Water Toxic Enforcement Act;[78] (3) the High Seas Driftnet Fisheries Enforcement Act;[79] (4) U.S. regulations on the importation of animals or animal byproducts from areas with Bovine Spongiform Encephalopathy;[80] (5) EPA's interim tolerance for the pesticide procymidone;[81] (6) USDA's ban on certain virally infected Canadian potatoes;[82] (7) EPA's regulations governing the pesticide ethylene bisdithhiocarbamates;[83] and (8) the Clinton Administration's proposal for a British Thermal Unit (BTU) energy tax.[84] Added together, there have been no less than 13 trade challenges or threatened trade challenges to U.S. environmental, health and safety laws in roughly three years time. The facts are telling. The threat to environmental, health and safety laws here is real and the Final Agreement will only increase this threat.

Finally, the powers accorded under the Final Agreement to the proposed WTO make it difficult at this time to fully assess the potential threat to U.S. environmental, health and

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[75]See Second Submission to the Panel on United States Taxes on Automobiles, supra note 11.

[76]See Final Report of the Panel, In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk From Quebec, USA-93-1807-01, June 3, 1992.

[77]Venezuela Asks U.S. for Talks on New Fuel Rules, Reuters, Energy News, Fin. Rep., Jan. 14, 1994 (available on NEXIS).

[78]E.C. Report, supra note 61, at 69-70.

[79]U.S. Senator Murkowski Optimistic About ROC Bid to Enter GATT, Central News Agency, Dec. 4, 1991 (available on NEXIS).

[80]E.C. Report, supra note 61, at 58-59.

[81]EPA Cites Trade Consideration in Granting Interim Procymidone Tolerance, 8 Int'l Trade Rep. (BNA) 652 (1991).

[82]U.S. Ban on Some Canadian Seed Potatoes Brings Provincial Calls for Retaliation, 8 Int'l Trade Rep. (BNA) 238 (1991).

[83]See Alan C. Raul & Laurie G. Ballenger, Trade Conflicts Involving Environmental, Health or Safety Standards, June 1, 1993 in Beveridge & Diamond, P.C., International Environmental Law Seminar, June 3, 1993, E, at 15.

[84]See Clinton Energy Tax Staggers in Senate, Predicasts, May 1993 (available on NEXIS).

safety standards. For example, the WTO would be empowered to make certain changes to the Final Agreement's SPS and TBT rules upon a two-thirds vote of the parties.[85] Under the current GATT such changes can only be made by a consensus of the parties. Although changes adopted through the WTO procedure would only be effective upon the parties agreeing to them, this provision still makes the Final Agreement's threat to environmental, health and safety laws a moving target. The ability of the parties to change the rules by a two-thirds vote is most troubling in the trade and environment area, where no other nation has shown the same degree of environmental awareness or leadership that the United States has. Simply put, with the WTO it is impossible to know exactly what we are getting ourselves into.

B. The Failure to Provide Safeguards to Ensure Environmental Sustainability

The second part of our sustainability test is that in order to be acceptable the Agreement must include safeguards to ensure that expanded trade will be environmentally sustainable in nature. Regrettably, the Final Agreement also falls short here.

We fear that the Agreement's incentives for increased trade and foreign investment,[86] absent safeguards, could take us backwards, encouraging countries to compete in international markets by lowering or waiving their environmental standards. Although, we did not support the NAFTA, the NAFTA and the environmental supplemental agreement did at least attempt to deal with the issues of environmentally-related investment flight and industrial relocation.[87] In sharp contrast, the Final Agreement makes no such effort. The Agreement fails to provide a mechanism to ensure that nations will not lower or waive their environmental, health, and safety laws to encourage investment. Moreover, whereas the NAFTA supplemental agreement provided a mechanism designed to ensure that the three parties take seriously their environmental commitments, the Final Agreement fails to provide a process to: (1) ensure that parties will enforce their existing environmental, health and safety laws; and (2) encourage the parties to adopt new laws to address pressing environmental, health and safety threats.

In fact, there is only one sustainability safeguard in the entire Final Agreement. Article 8.2(c) of the Final Agreement's Agreement on Subsidies would allow for one-time, non-recurring subsidies designed to assist existing facilities comply with new environmental

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[85]WTO Agreement supra note 18, at art X.3.

[86]Final Agreement, Agreement on Trade-Related Investment, chapter 7.

[87]See NAFTA, supra note 3, at article 1114.2; North American Agreement on Environmental Cooperation Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, at arts. 22-36, 32 I.L.M. 1480, 1490-94 (1993).

requirements.[88] However, even this "green" subsidy provision is very limited. The subsidy: (1) could not exceed 20% of the cost of the adaptation required; (2) could not be applied to "the cost of replacing and operating the assisted investment . . .;" (3) could not be "directly linked to and proportionate to firm's planned reduction of nuisances and pollution . . .;" (4) could not "cover any manufacturing cost savings which may be achieved;" and, (5) would have to be "available to all firms which adopt the new equipment and/or production process."[89] Given these limitations, it is clear that this subsidy provision cannot be relied on as the sole means of ensuring the sustainability of expanded world trade and investment.

The Agreement Establishing the WTO also provides another troubling example of the failure to build adequate safeguards for environmental sustainability into the Final Agreement. Despite the fact that a host of possible safeguards have been suggested for the WTO framework agreement, the only mention of environmental concerns in the WTO Agreement consists of a non-binding preambulatory acknowledgement of the goal of sustainable development.[90]

Nor does the Final Agreement offer us the luxury of looking to some future trade and environment negotiation to provide the safeguards necessary to ensure environmentally sustainable trade. Over the course of the past three years the explicit message from the world trade community has been that it is too late to address the integration of trade and environmental issues in the Uruguay Round; this integration must wait for the promised "Green Round."

The promise of a Green Round, however, may prove illusory. Not only does the Final Agreement fail to commit to a Green Round, but it also fails to earnestly move towards this goal. For example, despite extensive efforts on the part of the United States, the WTO Agreement does not even provide for a Committee on Trade and the Environment, which might have served as a venue for beginning these reform efforts. The United States is still working diligently with other GATT parties to add such a committee,[91] however, the failure of the GATT parties to include such a committee from the outset raises serious questions as to their commitment to democratic and environmental reform.

The parties' failure to commit to a Green Round, and their refusal to create a Trade and Environment Committee, is not a reflection on the efforts of the United States government,

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[88]Final Agreement, Agreement on Subsidies and Countervailing Measures, chapter II.13, at art. 8.2(c)(i)-(v).

[89]Id.

[90]WTO Agreement, supra note 3, at preamble.

[91]Such an addition is possible pursuant to article 9 of the Agreement Establishing the WTO. See id., at art. 9.

and in particular Ambassador Kantor. The burden of these failures must rest squarely upon our recalcitrant trading partners.

While the parties were unwilling to commit to a Green Round or a Trade and Environment Committee, they did agree to develop a "Work Plan" on trade and the environment.[92] We understand that the United States government is now working to expand upon this Work Plan to bring about the desired reforms. Although we strongly support the Administration's initiatives here and will work with the Administration to help them succeed, the Work Plan is not a panacea for the flaws of the Final Agreement.

Moreover, we have serious questions about the Work Plan's ability to advance an environmental reform agenda. First, GATT negotiations are time consuming.[93] For example, the Uruguay Round required roughly seven years to complete. The Work Plan lacks the immediacy of even a negotiation and so there is no way to predict just how long this process will endure. Moreover, while this time consuming process inches forward our environmental, health and safety laws would remain at risk.

One alternative would have been to reach an agreement on a moratorium to trade challenges to environmental, health and safety laws during the process of the Work Plan. This alternative would not only have insulated environmental laws from challenge, but would have provided some impetus for the parties to negotiate environmental reforms with all deliberate speed. This alternative, however, was not adopted.

Second, many of the problems that need to be addressed through the Work Plan are the result of provisions in the Uruguay Round. The resolve of the parties to turn right around and essentially reopen provisions that were the product of seven years of negotiations must be questioned.

Third, the success from a trade perspective of the Uruguay Round must be attributed in large measure to the wide range of issues included in the Round's package deal; virtually every party had some stake in a successful completion to the Round. If the Final Agreement is signed, sealed and delivered, what inducements will be available to ensure the success of future trade and environment efforts?

Lastly and most importantly, the Work Plan does not even admit to the need for reform. In its most telling provision the Work Plan provides that the "programme of work [shall]

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[92]Trade Negotiations Committee, Trade and Environment: Draft Decision, Dec. 13, 1993, TN. TNC/W/123, UR-93-0196.

[93]In fact, GATT negotiations are so time consuming that some call GATT "the General Agreement to Talk and Talk." GATT Bargaining Goes Down to the Wire, Wall St. J., Mar. 6, 1992, A2.

make appropriate recommendations on whether any modifications of the provisions of the Multilateral Trading System are required, compatible with the open, equitable and non-discriminatory nature of the system . . . ."[94] We have already passed the issue of whether reforms are needed. The issue now is what reforms are needed. The Work Plan's failure to reflect this evolution betrays its overall entrenched reluctance to reform the trading system. Given its inherent limitations, the Work Plan cannot be looked to as an environmental justification for the adoption of the Final Agreement.

Conclusion

For the past three years the integration of trade and environmental issues has occupied a prominent place on the trade policy agenda. Despite three years of intense efforts, this Congress has before it a Final Agreement that not only fails to make a considered attempt at integrating these two vital areas of public policy, but launches a direct attack on our environmental, health and safety protections. While the failure of the current GATT to address the need for environmental protection can be chalked up to benign neglect–environmental issues were not considered pressing in 1947–no such justification is available for the Final Agreement.

Not too long ago I had the opportunity to hear a senior Administration official make an impassioned plea for the environmental community to support the Uruguay Round so that the Clinton Administration "can stop painting the walls that other Administrations have built and can start building their own trade and environment framework." Unfortunately, the very architecture of the Final Agreement would appear to preclude erecting trade policies that support and do not impede environmental, health and safety protection. As a condition for Congressional approval of the Final Agreement, the Administration must do more than offer a few splashes of green paint. It must articulate a plausible strategy for fostering sustainable development through trade.

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[94]Draft Decision, supra note 92.