# TRADE, ENVIRONMENT, AND SUSTAINABLE DEVELOPMENT: A PRIMER

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# Trade, Environment, and Sustainable Development: A Primer

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## I. INTRODUCTION

Free trade policy is designed to let markets allocate resources their most efficient uses, while environmental policy seeks to manage a maintain the earth's resources efficiently. Conflicts can and do a where the same resources are subject to both trade efforts to allocate a environmental efforts to manage and maintain. This conflict must be r onciled; both trade and environmental policies are too important to conflicts persist. Yet many environmentalists still believe that the e nomic system, including trade, is the enemy, and many trade and de opment experts still believe that the environment is not a fundame part of the economy, but rather a luxury to be added on later, when a if it can be afforded.

The trade and environmental communities have different ba grounds and professional "cultures." Economic principles, such as ciency and comparative advantage, guide trade experts wh environmental experts are informed more by the biological sciences a ecological principles.

On the other hand, most environmental professionals appreciate need to internalize environmental costs. Many now see that marl based strategies often may be more efficient than command and con strategies in achieving this goal. In addition to the common languag cost internalization, both the trade and environmental cultures use law help implement their goals and to resolve disputes.

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Given time, it seems reasonable to expect that both trade an ronmental policy makers will adopt sustainable development as a mate goal. As the Environmental Protection Agency's Trac Environment Committee noted last summer, "On the most funda level, trade and environmental policy must meet in the concept tainable development. Both trade policy and environmental polic serve that concept as their ultimate goal."[1]

The problem, of course, is that time is running out. By the of the twenty-first century world population is expected to doubl billion people, and the world economy of sixteen trillion dolla reach eighty trillion dollars.[2] Scientists have detected record level ozone-depleting chemical chlorine monoxide over the New Engl gion of the United States and Canada. This discovery raises fear new hole in the ozone layer may be opening, exposing large num people to harmful levels of ultraviolet radiation.[3] Assuming tl present rate of growth in greenhouse gases remains constant, v have already committed the earth to a mean global warming of bet degrees and 8 degrees Farenheit (1.5 degrees to 4.5 degrees Celsi

Even with the most optimistic projections of technological ac ment, these growth trends in population and the economy almc tainly cannot be sustained. Still more troubling is that the s today's development already appears to be overextending the eco that sustains us all. "Further growth beyond the present scale," a ing to World Bank senior economist Herman Daly, "is overwhel likely to increase costs more rapidly than it increases benefits, thus ing in a new era of uneconomic growth that impoverishes rath

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1. *See* EPA Trade and Environment Committee, Minutes of Aug. 5, 1991 Meeti 6, 1991, at 1 (unpublished minutes on file with CIEL-US). The GATT Secretariat h ever, denied any linkage between trade and the achievement of sustainable developm GATT Secretariat, Trade and the Environment 3 (undated advance copy on file wit thors) [hereinafter GATT Secretariat, Trade and the Environment]. The GATT Se views trade as a mere "magnifier" of the existing policies. *Id.* Thus, if a country has ble policies in place, trade will promote them. *Id.* "Alternatively, if such policies are the country's international trade may contribute to a skewing of the country's develo an environmentally damaging direction, but then so will most of the other economic in the country." *Id.* The Secretariat does not view this "magnifier" effect as a dire relationship between trade and the goal of sustainable development. *Id.*

2. *See* GEORGE HEATON ET AL., TRANSFORMING TECHNOLOGY: AN AGENDA VIRONMENTALLY SUSTAINABLE GROWTH IN THE 21ST CENTURY 1 (1991).

3. *See* Cathy Sawyer, *Ozone-Hole Conditions Spreading*, WASH. POST, Feb. 4, A1.

4. *See* Dean Edwin Abrahamson, *Global Warming: The Issue, Impacts, Resp* THE CHALLENGE OF GLOBAL WARMING 10 (Dean Edwin Abrahamson ed., 1989).

enriches."[5] Daly believes that "[t]his is the fundamental wild fact that far has not found expression in words sufficiently feral to assault succe fully the civil stupor of economic discourse."[6]

As the critical scientific and policy debate about the limits of i ecosystem continues, it is necessary to reconcile the legal relationsh between trade agreements and environmental agreements. They can remain at odds if we are to achieve sustainable development and lo term international economic prosperity. Accordingly, this Arti surveys provisions within the General Agreement on Tariffs and Tra (GATT)[7] and other trade agreements relevant to environmental c cerns. It then reviews several international environmental agreeme and U.S. laws for possible friction with those trade provisions. The A cle concludes by briefly discussing issues and options for reducing eliminating such friction.

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

The GATT provides the legal framework under which almost trade among nations occurs. A number of regional (e.g., the Europe Free Trade Association) and bilateral trade agreements (e.g., the Uni States-Canada Free Trade Agreement) co-exist with the GATT.

GATT and these other agreements seek to provide a secure and p dictable international trading environment while fostering greater e nomic efficiency and growth through trade liberalization. The GAT preamble accordingly recognizes "that . . . trade and economic endea

5. HERMAN DALY & JOHN COBB, FOR THE COMMON GOOD: REDIRECTING ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTUR (1989).

6. *Id.*

7. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 S A3, 55 U.N.T.S. 187 [hereinafter GATT]. GATT was signed in 1947 by 23 countries an rules, which provide the basic structural framework in which trade and environment is interact, went into force on January 1, 1948. The United States became a contracting part GATT by executive agreement and proclamation. *See* Protocol of Provisional Applicatio the General Agreement on Tax on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 6, at A2051 U.N.T.S. 308; Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947). Despite the fact that Senate has never explicitly consented to GATT, nor has Congress formally approved or im mented the agreement, GATT is generally accepted as a binding treaty obligation of United States. *See* John H. Jackson, Changing GATT Rules (Nov. 7, 1991) (memorandur the Trade and Environment Committee of the EPA); Robert Hudec, *The Legal Statu GATT in the Domestic Law of the United States*, *in* THE EUROPEAN COMMUNITY AND GA 187, 199 (Meinhard Hilf et al. ed., 1986).

should be conducted with a view to raising standards of living, . . oping the full use of the resources of the world and expanding t duction and exchange of goods . . . ."[8] Free trade proponents arg utilizing the "comparative advantage" of individual countries ma the welfare of all. The economic activity spawned by trade, howe both positive and negative consequences for the environmen viewed in the context of sustainable development.

## A. GATT

The GATT consists of three major parts: Part I (articles I which contains the most-favored-nation and tariff concession obli Part II (articles III to XXIII), sometimes referred to as the "c conduct," which contains the majority of the GATT's substantiv sions and the exceptions to its obligations; and Part III (articles X XXXVIII), which contains the procedural mechanisms for implen the other obligations and provisions contained within the GATT

### 1. GATT's General Trade Principles and Their Environm Implications

#### a. *The Most-Favored-Nation-Principle*

Article I's most-favored-nation principle (MFN) ensures t contracting parties do not discriminate among imported products basis of their national origin. The MFN obligation requires th contracting party extend immediately and unconditionally any p or advantage it provides to a product to like products from, or d for, all GATT contracting parties. The MFN obligation applie customs, duties, and charges related to imports and exports; 2) th ods of levying all such duties and charges; 3) rules, regulations, a cedures connected with importation and exportation; and 4) i taxes, charges, laws, regulations, restrictions, and rules affecting ternal sale or offering for sale, purchase, transportation, warehou storage, distribution, or use of a product.[10]

Because the MFN principle requires that the parties treat products equally, it seemingly prohibits a contracting party fron trade restrictions to address the differences in environmental sou

8. GATT, *supra* note 7, pmbl., 61 Stat. at A11.

9. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLIC TERNATIONAL ECONOMIC RELATIONS 40 (1989).

10. *See* GATT, *supra* note 7, art. I, 61 Stat. at A12; *see also* Jeanne J. Grimmett, *mental Regulation and the GATT*, Aug. 1991, at 3-4 Cong. Res. Service, No. 91-285-.

Such differences may be caused by differences in production proc methods (PPMs) that exist between like products originating from tions with high environmental standards and from nations with low er ronmental standards or lax enforcement.[11] Thus, an importation ba such as the European Community's ban on animal furs caught w leghold traps—or a tax on a product of one contracting party, impo because the PPM used in creating that product was environmenta harmful, would appear to run afoul of the MFN.[12]

Additionally, the MFN obligation has been found to apply to lal ing schemes that are not marks of origin, including "eco-labeling" gimes.[13] Therefore, government labeling requirements relating to PP that grant market access or indirectly provide market advantages n also conflict with this GATT provision.

b. *The National Treatment Principle*

Article III's national treatment principle requires that a contract party treat like foreign and domestic products equally once they h met tariffs and other import requirements.[14] Additionally, article III quires that any measure taken under its guise may not be applied to p tect the domestic industry.

As the GATT Secretariat has noted so eloquently:

> Production and consumption activities in other countries can also be a source of domestic environmental concern. Pollution may be spilling over borders and harming either the regional environment (acid rain)

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11. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 10 ("In princ it is not possible under GATT's rules to make access to one's own domestic market depen on the domestic environmental policies or practices of the exporting country."); Grimr *supra* note 10, at 16; WORLD WILDLIFE FOUNDATION, THE GENERAL AGREEMENT ON T IFFS AND TRADE, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMEN (1991) [hereinafter WWF]; ROBERT REPETTO, ENVIRONMENTAL ISSUES IN RELATIOI GATT 1 (1991).

12. *See supra* note 11; Council Regulation 3254/91, 1991 O.J. (L 308) 1-2.

13. *United States—Restrictions on Imports of Tuna*, 50-51, GATT Doc. DS21/R (Sep 1991) (finding *inter alia* that certain provisions of U.S. law that protect dolphin in the Ea Tropical Pacific Ocean, as applied to imports of Mexican tuna, violated the United S obligations under GATT) [hereinafter *Tuna/Dolphin Panel Report*]; *see also generally* R Housman & Durwood Zaelke, *The Collision of the Environment and Trade: The GATT Ti Dolphin Decision*, 22 ENVTL. L. REP. 10,268, 10,273-74 (1992). The Tuna/Dolphin F upheld the particular labeling provisions before the panel because the provisions allowed pliers of dolphin-safe tuna the option of disclosing its environmental character, but did require unsafe or safe tuna to bear certain labeling to be sold. *Tuna/Dolphin Panel Re supra*, at 51. The panel implied that if the labeling requirements had required certain l labeling, they would have violated the GATT. *Id.*

14. *See* GATT, *supra* note 7, art. III, 61 Stat. at A18.

> or the global commons (ozone depletion). Or land developn projects may be threatening the extinction of an animal or plant cies, and uncontrolled fishing may be depleting fish stock in the l seas. It is not unreasonable that the government of a country cerned by such practices would seek to see them changed—and th would find it difficult to accept that this would not be possible. . . *principle it is not possible under GATT's rules to make access to o own market dependent on the domestic environmental policies or p tices of the exporting country.*[15]

Article III as applied appears to prohibit a nation from a tariffs, levies, or other import restrictions to protect the competi of a domestic industry that internalizes environmental costs in i uct cost. Foreign competitors whose product costs do not reflect vironmental costs associated with the production of their produ gain a competitive advantage over the domestic products.[16]

While article III restricts a contracting party from imposin ent regulations on imported products than on domestic products III does allow a contracting party to impose the same internal tions applying to domestic products upon imported products point of importation. In order to qualify as a "point of importati lation," the regulation must further apply directly to the produc must alter or affect the physical or chemical makeup of the pro A restriction failing to qualify as a point of importation regulat quantitative restriction and thus violates GATT's general obli Thus, a contracting party that distinguishes among imported p based on the environmental soundness of the exporting party's I vulnerable to attack under article III.[18]

While article III allows point of importation regulations, it h read narrowly to permit only those restrictions that apply directl affect the physical and/or chemical composition of, the product tion.[19] It is as yet unclear as to what level of effect article III require a regulation to make in the product. For example, must a

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15. GATT Secretariat, Trade and the Environment, *supra* note 1, at 8-10 (emph original).

16. GATT Secretariat, Trade and the Environment, *supra* note 1, at 11; *Tun Panel Report*, *supra* note 13, at 50; *see also* Grimmett, *supra* note 10, at 16; WWF, s 11, at 12.

17. *See supra* note 14 and accompanying text. This provision raises the is whether required product content labeling requirements, that relate to, but do not content of a product, could violate article III.

18. Housman & Zaelke, *supra* note 13, at 10,276.

19. *Tuna/Dolphin Panel Report*, *supra* note 13, at 41.

hormones. The only differences between the natural hormone-beef and the all-natural beef is the level of hormones present and these hormones came to be present. Whether natural hormone-beef and all-natural beef are "like" products and must be regulat larly or are not "like" products and may be regulated differe unclear.

c. *The Prohibition of Quantitative Restrictions*

GATT article XI prohibits quantitative restrictions such as bans, and licensing schemes on imported or exported products. XI contains several narrow exceptions that allow departure fr general proscription, such as the application of standards to inte ally-sold commodities and agricultural products.[25] Even when ceptions permit a quantitative restriction, the contracting parti still observe the MFN and national treatment obligations in imp ing it.[26]

Applying the strict prohibition against quantitative restricti hamper environmental initiatives that are not directly intended to tectionist devices in the common sense of the term. By broadly p ing non-tariff barriers, the ban on quantitative restrictions also p a contracting party from instituting environmental restrictions su conservation ban or limit imposed on exports of resources (unless can be justified as an article XX exception).[27] Examples of envir tal protections that could conflict with the prohibition of quar measures include the United States law banning the exportatio growth timber harvested from federal lands.[28]

While the quantitative restriction prohibition may restrict th options available to a contracting party, such constraints sometin

25. *See* GATT, *supra* note 7, art. XI(2), 61 Stat. at A33. Other than through a specific exemptions, the only way a quantitative restriction can conform with the G falling within one of the public policy exceptions set out in article XX.

26. *See* GATT, *supra* note 7, art. XIII, 61 Stat. at A40, art. XIV, 61 Stat. a extensive prescriptions regarding the non-discriminatory administration of qu restrictions.

27. *See* Grimmett, *supra* note 10, at 19; WWF, *supra* note 11, at 14. Article X tions are discussed *infra* at notes 42-43 and accompanying text.

28. 16 U.S.C. §§ 620(a), (c), (e), 489(a), 491(a), 493(5) (Supp. I 1990); *see also L Protectionism*, WALL ST. J., Sept. 6, 1990, at A14; Dori Jones Yung, *Weyerhauser' An Endangered Species*, BUS. WK., July 16, 1990, at 51. The Forest Resources Co and Shortage Relief Act of 1990, Pub. L. No. 101-382, (codified at 16 U.S.C. § 488 (Supp. I 1990)) is intended "to ensure sufficent supplies of certain forest resources o which are essential to the United States" while simultaneously requiring that action meet this objective conform with the obligations of the U.S. under GATT.

tion affect the content, appearance, value, or performance of a produc order to fall within article III? If a content difference is required, i unclear whether, and to what degree, the difference must be discerna This limitation appears to exclude from article III point of importat regulations all environmental regulations that govern the PPM of a pr uct, as opposed to the product itself.[20] Even those environmental p duction process standards that encourage efficiency and free trade, s as Canadian regulations requiring paper products to contain a cer percentage of recycled materials, could be found to violate the proh tion on PPM regulations.[21] Because Canada lacks a sufficient supply recyclable wastes, these paper product regulations would actually courage increased free trade.[22]

Similarly, to qualify for article III treatment, a point of importat regulation must apply equally to "like" domestic and imported pr ucts.[23] But there is no guide as to how to determine when similar pr ucts are "like" products. For example, the European Community's on beef produced using hormones restricted the importation of both b produced with natural hormones and beef produced with synthetic h mones.[24] Beef produced with synthetic hormones may not be "like" b made without hormones. Beef made with artificially-provided nat hormones, however, has no chemicals not found in beef made with

20. *See* Grimmett, *supra* note 10, at 16; Frederick L. Kirgis Jr., *Effective Pollution Co in Industrialized Countries: International Economic Disincentives, Policy Responses, and GATT*, 70 MICH. L. REV. 860, 893-901 (1972); WWF, *supra* note 11, at 12; Durwood Z et al., Frictions Between International Trade Agreements and Environmental Protectio (1992) (paper prepared for the Trade & Env't Comm., Nat'l Advisory Council on Env't P & Technology, EPA) [hereinafter Frictions Between International Trade Agreements and vironmental Protections]. If, however, a PPM has an effect on the product, then the PPM be GATT consistent. PPMs that do not actually effect the product are not, unless other provided for, consistent with GATT.

21. *Imposition of Recycled Paper Regulations Would Force Imports From U.S., Ind Says*, 14 Int'l Envtl. Rep. (BNA) 462, 462-63 (1991) [hereinafter *Imposition of Recycled F Regulations*]. While the Canadian regulation appears to regulate the content of the pape it requires a certain percentage of the material to be derived from recycled materials, u there is a discernable difference between paper made from recycled materials and that r from virgin materials, the regulation will be deemed a production process regulation. *See* Joint Session of Trade and Environment Experts, Organization for Economic Cooperati Development, *The Applicability of the GATT to Trade and Environmental Concerns* 13, C ENV/EC/TD (91) 66 (Oct. 24, 1991) [hereinafter OECD, Joint Session] (noting the dis tion between PPMs that affect the product and those PPMs that do not affect the produ often times a difficult, yet seminal, distinction). If a content difference is required, it is un to what extent that difference must be discernable.

22. *See Imposition of Recycled Paper Regulations*, *supra* note 21.

23. *See* GATT, *supra* note 7, art. III, 62 Stat. at 3680.

24. *See* Council Directive 88/146, 1988 O.J. (L 70) 16.

vide an environmental benefit. In some instances the trade distortio caused by imposing quantitative restrictions can exacerbate the very e vironmental harms the trade measures were intended to minimize eliminate. The Indonesian ban on exports of unprocessed timber pr vides an illustration. The intent of the Indonesian ban was to remo development pressures causing the unsustainable use of dwindling for resources. In practice, the export ban has been cited as having caused discriminatory preference to accrue to local, inefficient sawmills, yieldi a lower rate of output per unit of log input, resulting in increased lev of environmental degradation.[29]

### 2. Other GATT Articles and Their Impact on Environmental Agreements and Concerns

In addition to the GATT's general principles, many of the GAT other articles could cause friction between trade and environmen policies.

#### a. *Article II: Maximum Tariff Barriers*

Article II establishes the negotiated maximum tariff levels, as p vided in the accompanying annexes to the GATT, for national pr ucts.[30] This article also prohibits the imposition of import surcharges exempting the scheduled items from all other duties and/or charges i posed in connection with importation. Article II(2)(a), however, p vides exceptions to the maximum tariff levels for: 1) any charge impo

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29. *See* Carlos Alberto Primo Braga, Tropical Forests and Trade Policy: The Case Indonesia and Brazil 19 (1991) (paper presented at the Symposium on Int'l Trade & the En sponsored by Int'l Trade Division, Int'l Economics Dep't, World Bank). Despite the quan able short-term environmental harms from the Indonesian export ban, the long-term envi mental effects—including the environmental gains made through the reduction of pov from increased profits to the local areas of production—of the ban are difficult to quantify. ROBERT REPETTO, THE FOREST FOR THE TREES? GOVERNMENT POLICIES AND THE U USE OF FOREST RESOURCES (World Resources Institute ed., 1988).

From the Indonesian experience, one scholar argues that the failure of trade policie create environmental protections in Indonesia demonstrates that trade policies are, gener not an appropriate vehicle for creating environmental protections. *See* Braga, *supra*. Fac nuances, however, make it difficult to extrapolate the overall effectiveness of trade restrict in creating environmental protections from this one example and work against this scho conclusion. Whether or not trade policies are actually appropriate mechanisms for craf environmental protections, the ability of the author to draw this conclusion from the isol example of Indonesia's ban on unfinished timber exports must be questioned. The Indone example involved the unilateral use of export bans that resulted in protections being give inefficent local industries that, in the absence of any domestic conservation intiatives, ha incentive to increase their long-term sustainable production capabilities. *See id.*

30. *See* GATT, *supra* note 7, art. II, 61 Stat. at A13.

on an import, consistent with the national treatment principle, equivalent to an internal tax imposed on the like domestic proc articles from which the like domestic and imported products are d 2) antidumping or countervailing duties applied consistent wi GATT; and 3) fees or charges, in accordance with article VII (valu for customs purposes), commensurate with the costs of s rendered.[31]

In essence, article II in its current form is environmentally n While article II does not provide a mechanism that would allow en mental regulations to satisfy the GATT's other obligations, art does not prohibit the use of antidumping measures or countervaili ties to equalize the environmental standards subsidy provided to dustries of nations with lower environmental standards, nor does the application of internal environmental regulations to imported ucts at the point of importation.[32]

The only deviation from the environmental neutrality of art occurs in the case of products that appear on the article's annexed scheduled items. If a product is listed, such as tropical timber, contracting party cannot levy new import taxes or other charges products, such as a sustainable use tax, that does not conform w listed negotiated charges.[33]

b. *Article VI: Antidumping and Countervailing Duties*

Article VI condemns the practice of dumping—when on tracting party introduces products into the markets of anothe tracting party at less than the normal value of the products—if it or threatens material harm to a domestic industry or retards the lishment of a domestic industry.[34] Article VI also sets the groun by which contracting parties may impose antidumping duties c ported products and may apply countervailing duties to offset boun subsidies relating to imported products.[35] The Subsidies Code neg in the Tokyo Round of Multilateral Trade Negotiations signifi elaborates upon the scope and details of article VI.[36]

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31. *See id.* art. II(2), 61 Stat. at A13.

32. As has been explained, however, other provisions of GATT, such as the M article II, would likely bar such environmental regulation.

33. *See* REPETTO, *supra* note 11, at 1.

34. *See* GATT, *supra* note 7, art. VI, 61 Stat. at A23.

35. *Id.*

36. An analysis of the environmental implications of article VI and article XVI r subsidies can be found *infra* in section II.3.b.

c. *Article X: Transparency and Equal Access to Review Processe*

Article X requires transparency (that is, public access) in publishi and administering all regulations affecting trade.[37] This requirement a plies to all laws, regulations, rules, judicial and administrative rulings general or precedential application to requirements, restrictions prohibitions, on imports or exports, or affecting the sale, offering for sa purchase, distribution, transportation, insurance, warehousing, insp tion, exhibition, processing, mixing or other use, of such imports or ports.[38] In addition, article X requires transparency and equal access judicial and administrative review procedures related to such actic and/or requirements.

Article X grants importers and exporters equal access to inform tion and review processes of contracting parties with regard to trade. A ticle X does not, however, provide affected citizens or consumers acc to information or recourse to review procedures when imports or expo allegedly cause them environmental harm. Moreover, the transparer requirements in article X do not apply to the GATT's own informati and review processes.

d. *Article XII and Article XIII: Developing Countries Balance c Payment*

Article XII, as elaborated in the Declaration on Trade Measu Taken for Balance of Payment Purposes from the Tokyo round, and a cle XIII provide certain limited exceptions to the other GATT obli tions for import restrictions imposed by developing countries as a res of their concern over their balance of payments.[39]

The developing country allowances in articles XII and XIII g developing nations greater leeway in enacting measures to protect n cent industries. This increased leeway can assist these nations in achi ing sustainable patterns of growth by minimizing pressures on fledgl industries to overutilize natural resources in order to ensure their sh term survival.

e. *Article XVI: Subsidies*

Article XVI embodies the GATT's general aversion to trade- torting subsidies. While article XVI does not itself prohibit the use such subsidies, its provisions form the basis of the challenge and coun

37. *See* GATT, *supra* note 7, art. X, 61 Stat. at A30-31.
38. *See id.*
39. *See id.* art. XII, 61 Stat. at A34, art. XIII, 61 Stat. at A40.

vailing duties provisions developed in the GATT Subsidies Code.

f. *Article XIX: Emergency Measures Provisions*

Article XIX allows a contracting party to impose emergency restrictions to protect a domestic industry that is seriously threate imports.[41] If an environmental regulation so burdens a domestic try as to place it in jeopardy, article XIX allows the contracting p adopt measures to protect its industry. The procedural and politic dens of invoking article XIX, however, significantly diminish its v a bridge between trade and environmental concerns.

g. *Article XX: Policy Exceptions*

Article XX establishes limited exceptions to the contracting p general obligations under the GATT for measures based on nation icy considerations.[42] These exceptions do not exempt measures th stitute arbitrary or unjustifiable discrimination between countries are disguised restrictions on international trade. In a challenge to tracting party's action, the party seeking to invoke article XX to ju departure from the GATT's general obligations bears the burden o ing that the action: 1) was justified and not arbitrarily applied; and proportional in scope (i.e., "necessary") to the concern giving rise action so as to meet the objectives of the exceptions.[43]

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

Article XX(b) provides an exception for measures "necess protect human, animal or plant life or health."[44] The Tuna/D Panel held that article XX(b)'s exception is available only for l safety, and preservation initiatives within a contracting party's ju tion, and not within the global commons (or within the jurisdictic third party state).[45]

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40. *See id.* art. XVI, 61 Stat. at A51. The provisions of the Subsidies Code, a environmental implications, are further elaborated on *infra* section II.3.b.

41. *Id.* art. XIX, 61 Stat. at A58.

42. *Id.* art. XX, 61 Stat. at A60-61.

43. *Id.* art. XX, 61 Stat. at A60-61; *see also* Piritta Sorsa, GATT and Environmer Issues and Some Developing Country Concerns (1991) (paper presented at the Sympo Int'l Trade & the Env't, sponsored by Int'l Trade Division, Int'l Economics Dep't Bank).

44. *Id.* art. XX(1)(b), 61 Stat. at A61.

45. *See Tuna/Dolphin Panel Report*, *supra* note 13, at 45-46. It is, however, uncl the Panel's report whether this jurisdictional limitation applies to the scope of the action, or to the location of the individual or species protected. The Panel based its that article XX(1)(b) did not extend "extrajurisdictionally" upon a somewhat errone

The GATT dispute panel report addressing Thai restrictions a taxes on imported cigarettes interpreted the term "necessary" as used article XX(b) to require that: 1) no reasonably available alternative m sure consistent with the GATT existed, and 2) the measure taken was least trade restrictive measure of all available alternatives.[46] Elaborat on these requirements, the Tuna/Dolphin Panel Report noted that United States had not demonstrated to the Panel—as required of a pa invoking an article XX exception—that it had exhausted all options r sonably available to it to pursue its dolphin protection objectives throu measures consistent with the GATT, including, in particular, the neg ation of international cooperative arrangements relating to dolphin p tection.[47] Moreover, even assuming that an import prohibition was only measure reasonably available to the United States, the panel felt t the United States' measure could not be considered necessary within meaning of article XX(b) because of its unpredictable application.[48]

The limitations that recent GATT dispute panel reports have pla on the use of article XX(b) negatively impact many measures curre proposed by environmental groups. The goal of article XX(b) is to p vide the contracting parties with the ability to take measures they feel necessary to preserve and protect the lives of humans, animals, and pl

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derstanding of the negotiating history of the article. *Cf.* Steve Charnovitz, *Exploring the l ronmental Exceptions in GATT Article XX*, 25 J. OF WORLD TRADE 37, 38-47 (1 (providing an excellent discussion of the negotiating history of article XX). Because *Tuna/Dolphin Panel Report* has not, as yet, been adopted by the contracting parties, the sion is not binding. Absent any changes to the GATT, it is likely, however, that if a fu panel was confronted with similar issues, the panel would apply the same reasoning a Tuna/Dolphin Panel.

46. *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Repo the Panel adopted 7 November 1990*, BISD (37th Supp.) 200-23 para. 74 (1990) (in a dis concerning Thai prohibitions on the importation or exportation of tobacco and tobacco p ucts the panel held that, although smoking constituted a serious risk to human health, land's measures were not necessary for protecting human life because alternative meas consistent with the GATT, could have been adopted instead).

47. *See Tuna/Dolphin Panel Report*, *supra* note 13, at 46. Unfortunately, the T Dolphin Panel failed to recognize that the United States and the other ETP nations have involved in ongoing efforts to reach an agreement on the conservation of dolphin sinc 1970s. *See* INTER-AMERICAN TROPICAL TUNA COMMISSION, 1977 ANNUAL REPOR (1978); INTER-AMERICAN TROPICAL TUNA COMMISSION, 1987 ANNUAL REPORT 8-9 (1

48. *Tuna/Dolphin Panel Report*, *supra* note 13, at 46. The United States had linke maximum incidental dolphin taking rate which the Mexican tuna fleet had to meet dur particular period to be able to export tuna to the United States to the taking rate act recorded for U.S. tuna fleet during the same period. Consequently, the Panel believed Mexican authorities could not know whether, at a given point of time, their policies confo to the United States' dolphin protection standards. The Panel considered that a limitati trade based on such unpredictable conditions could not be regarded as "necessary" to pr the health or life of dolphins. *Id.*

species. Thus, article XX(b) would allow a ban, for example, on i ing a product that was hazardous to life or health.[49] Although XX(b) still allows a safe haven for many important environmental tives by limiting the application of the exception to domestic restr and by placing added requirements on the term "necessary," recen decisions have diminished the ability of article XX(b) to reconcil ronmental and international trade policies and laws. First, for a r tion to be "necessary" under article XX(b), according to the Dolphin Panel, the restriction must be preceded by an effort to fo international agreement to create the environmental protection des This requirement creates an obstacle to environmental protectio cause it substantially hinders the ability of the contracting parties t unilateral actions, actions which frequently serve an important r forcing the evolution of environmental protections gained from in tional agreements.[51] Moreover, the Tuna/Dolphin Panel decisio quiring what is essentially a good faith attempt to enter in agreement restricts the ability of contracting parties to act quickly they perceive a developing environmental threat, given the ty lengthy period of time needed to negotiate an international agree

Second, the Tuna/Dolphin Panel's decision creates uncertain to the extent to which a contracting party's environmental standa ting must be justified. One reading provides that by forcing contr parties to set their environmental measures at a fixed level of prot "necessary" to achieve the goal of the exception, which is the pre tion and protection of the species, the panel implicitly equates sor gree of scientific certainty with "necessity." Adopting this ap obviously would limit the ability of the contracting parties to tak cautionary actions in the face of the scientific uncertainty that ofte pers early analyses of environmental threats.[52] This limitation app

49. *See* Grimmett, *supra* note 10, at 19. Such a ban could still be challenged as a d restriction on trade and would receive careful scrutiny under the necessity standards di in this section. *Id.*; *see also* GATT, GATT Activities 1989, at 100-01 (1990) (dis Chile's response to a United States ban on certain Chilean grapes and grape product

50. *See Tuna/Dolphin Panel Report*, *supra* note 13, at 46.

51. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 25 (discus success of unilateral environmentally-based trade restrictions, such as the U.S. threate on Japanese imports of hawksbill sea turtles shells, in affecting other nations' behavi

52. A prime example of a threat whose abatement could be hindered by a require of scientific uncertainty is global warming. Despite general scientific agreement tha warming is occurring, the sheer complexity of the problem makes uncertain what re threats global warming will produce. *See generally* Durwood Zaelke & James Cameron, *Warming and Climate Change: An Overview of the International Legal Process*, 5 A Int'l L. & Pol'y 249 (1990) If a high degree of scientific certainty is required to mee

conflict with the internationally recognized precautionary principle th has developed in the field of international environmental law.[53]

An alternative, and somewhat less restrictive, reading of the pane "necessity" standard provides that the panel primarily based its conce with the U.S. standard on the arbitrary nature of the trade measure a not on the underlying environmental protection.[54] Under this reading, long as the trade measure effectuating an environmental protection is n arbitrary, i.e., is set at a definitive and predictable level, article XX(b) not concerned with the scientific justifications for the underlying envir mental policy.

Third, the panel found that article XX(b) did not extend to the " trajurisdictional" measures of a contracting party.[55] This jurisdictio

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XX's necessity requirement, contracting parties will find it difficult to make such showings will be hindered in their ability to combat global warming and other problems that requi precautionary approach.

53. *See* Lothar Gündling, *The Status in International Law of the Principle of Precaut ary Action*, 5 INT'L J. OF ESTUARINE & COASTAL L. 23 (1990); Margaret Spring, Fish Famine: International Fisheries Management and the Precautionary Principle (1992) (p prepared for CIEL-US).

54. *See Tuna/Dolphin Panel Report*, *supra* note 13, at 45.

55. *See id.* The panel conspicuously fails to use the term "territorial" in describing parameters of article XX(1)(b). While the Panel's decision on the limits of a party's juris tional ability to act is unclear, it is possible that an action taken extraterritorially, but wi the jurisdiction of a contracting party, falls within article XX. This raises the significant i as to what are the "jurisdictional" limitations on a nation's actions. There are a numbe different bases that provide a state with the jurisdiction to prescribe law. *See* RESTATEM (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 (basis of j diction to prescribe), 404 (universal jurisdiction) (1990). Section 402 of the *Restater* provides:

> Subject to [the limitations on a state's jurisdiction set out in] § 403 a state has the jurisdiction to prescribe law with respect to
>
> (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of security interests.

*Id.* § 402.

Section 403 limits these jurisdictional bases in cases where the exercise of jurisdicti unreasonable based on a list of factors, including, for example, the extent of the link bet the territory of the state and the act in question, and "the likelihood of conflicts with re tions of another state." *Id.* § 403(1), (2)(a)-(h).

In addition to the jurisdictional basis for regulation set out in section 402, all states universal jurisdiction, without limitation, to regulate certain types of conduct, such as pi slave trade, genocide, certain acts of terrorism, and war crimes. *See id.* § 404. These are universal jurisdiction have developed as a matter of customary law and additional acts su

limitation imposed on the exception further restricts the scope of XX(b)'s exception. Most importantly, this jurisdictional limitatio strains a contracting party from unilaterally protecting the at-r sources of the global commons, such as the ozone, ocean water q and at-risk species inhabiting common areas such as the high sea

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

Article XX(g) provides an exception to GATT obligation for ures "relating to the conservation of exhaustible natural resources measures are made effective in conjunction with restrictions on do production or consumption."[57] The GATT dispute panel in its rep "Canada—Measures Affecting Exports of Unprocessed Herrin Salmon" stated that any trade measure taken under article XX(g be "primarily aimed at" conserving the resource.[58] Under this sta trade measures aimed at preserving a resource need not be necess preserve the resource, but instead need only to be: 1) primarily ai preserving the resource; 2) taken in conjunction with domestic r tions on the use of the resource; and 3) primarily aimed at renderi domestic restriction effective.[59]

As with article XX(b), prior to the Tuna/Dolphin Panel R

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to universal jurisdiction (including protection of the environment) can be added in fashion. *Id.* § 404 cmt. a.

As applied, these principles give a state the jurisdiction to prescribe laws with re the conduct of foreign branches of domestic corporations and in limited circumstar extraterritorial acts of affiliated foreign entities. This is the case where the regulation tial to further major national interests of the regulating state, or where the national prc which the regulation is a part can only be successful if it is applied to foreign subsidia § 414. The United States also recognizes the jurisdiction of a state to regulate anti-con agreements or conduct occurring outside the territory of a state if the intent of the ag or conduct is to affect commerce and some effect results, or where the conduct has a tial effect on the commerce of a state and the exercise of jurisdiction is not unreason § 415.

In the sphere of the environment, states are obligated to take measures to ensure t within their jurisdiction or control conform with accepted international standards anc and are conducted so as not to cause significant injury to the environment of another beyond the limits of national jurisdiction. *Id.* § 601. The obligations imposed on s section 601 implies, at least indirectly, that states have the jurisdiction to prescribe meet these obligations.

56. *See* WWF, *supra* note 11, at 29.

57. *See* GATT, *supra* note 7, art. XXI(g), 61 Stat. at A61.

58. *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, R the Panel adopted 22 March 1988,* Gatt Doc. L/6268, BISD (35th Supp.) 98, 114, p (1988).

59. *Id.*

many viewed article XX(g) as a mechanism for allowing contracting p ties environmental protection actions that would otherwise be in conf with their obligations under other provisions of the GATT. The Tu Dolphin Panel Report, however, interpreted the scope of article XX much more narrowly, finding that article XX(g), like article XX(b), d not apply to measures extending beyond a party's jurisdiction.[60] Ac tionally, the Panel narrowed the scope of article XX(g) by reading art XX(g)'s "primarily aimed at" test to require many of the more string requirements that the Panel applied under article XX(b)'s "necessa test. By merging to a certain extent article XX(g)'s "primarily aimed requirements with article XX(b)'s stricter "necessity" requirements, tuna dolphin panel diminished the ability of the contracting parties to article XX(g) to harmonize environmental restrictions with their GA obligations.[61]

iii. Article XX(h): Intergovernmental Commodity Agreements

Article XX(h) provides an exception to GATT liability for the tions of the contracting parties taken pursuant to obligations incur under any international commodity agreement.[62] Article XX(h) r provide a precedential model for the creation of a similar exception actions taken to accomplish obligations incurred under international vironmental agreements. Because article XX(h) only allows acti taken in accordance with international agreements, the creation of environmental XX(h) would not allow the contracting parties to unilaterally.

h. *Article XXII and Article XXIII: Dispute Resolution Procedu*

Articles XXII and XXIII provide the basis for the GATT's disp resolution procedures. Article XXII allows the parties in dispute to c sult informally without needing to invoke a formal GATT proceedin Article XXIII sets forth two alternative methods for the formal res tion of GATT disagreements: subsection (1) provides for a proces exchanging written representations, while subsection (2) provides fo

60. As with the Tuna/Dolphin Panel's decision on article XX(1)(b), it is, however clear from the decision whether this limits the exception to domestic actions to protect do tic resources, or whether an extraterritorial action taken to protect a domestic resource is allowed under article XX(1)(g).

61. *See* Frictions Between International Trade Agreements and Environmental Pr tions, *supra* note 20, at 7 (discussing interplay of "primarily aimed at" and "neces standards).

62. *See* GATT, *supra* note 7, art. XX(1)(h), 61 Stat. at A61.

63. *See id.* art. XXII, 61 Stat. at A64.

process of submission to the contracting parties to establish a panel.[64]

While these dispute resolution mechanisms have been enha the Tokyo Round's Understanding Regarding Notification, C tion, Dispute Settlement and Surveillance,[65] both the formal an mal dispute resolution mechanisms contained in articles XX XXIII are quite opaque, precluding affected interests from overse dispute resolution process.[66] This is of considerable concern to e mentalists, who traditionally have sought standing to challenge e mentally-related government actions in domestic courts and othe participate in the shaping of environmental policies.

i. *Article XXIV: State and Local Laws*

Article XXIV:12 mandates that each contracting party ta reasonable measures" to ensure that the obligations provided GATT are complied with at sub-national levels, including the ac regional, state, and local governments.[67] The "reasonable measur has been interpreted to require that a contracting party must available measures except those that are outside its "jurisdictio the constitutional distribution of power," to bring the sub-nation lations into compliance with the contracting party's GATT obliga

A great number of environmental laws and regulations, es within the United States, exist at the sub-national level. Local, st regional environmental laws and regulations that do not comply GATT cause a contracting party to violate its GATT obligatio the United States, such a conflict raises constitutional questions; attempts to enforce GATT obligations that trespass on local or s vironmental regulations could be challenged on the grounds th exceed the constitutional limits of federal power. While the rece ulation of the "reasonable measures" test appears to avoid the p

64. *Id.* art. XXIII, 61 Stat. at A64.

65. The Tokyo Round is discussed in section III.3.d. *infra*.

66. *See* WWF, *supra* note 11, at 19.

67. *See* GATT, *supra* note 7, art. XXIV(6), 61 Stat. at A67-68.

68. *See* GATT, *United States—Measures Affecting Alcoholic and Malt Beverag of the Panel* 97 (Feb. 7, 1992).

69. Before the recent GATT panel decision upholding Canada's challenge of laws that place non-tariff barriers to imports of Canadian beer, it was clear that G posed obligations at the sub-federal level, although the extent of these obligation clear. *See* Clyde H. Farnsworth, *U.S.-Canada Rifts Grow Over Trade*, N.Y. TIMES 1992, at A1; Territory v. Ho, 41 Haw. 565 (1957) (GATT applicable to state law *supra* note 7, at 219-25; JACKSON, *supra* note 9, at 68 (discussing GATT's obligati sub-national level).

for constitutional conflict, it does establish a very broad scope for terms "all reasonable measures." For example, the federal governm can make aid money normally provided to the states contingent upon states adopting certain policies.[70] Presumably, if a state or local envir mental measure violated the GATT obligations of the U.S. to meet "reasonable measures" test, the federal government would have to tempt measures including, but not limited to, conditioning aid to the s federal government entity's compliance with GATT. The heighte burden imposed on federal contracting parties to bring their sub-fed environmental measures into line with the contracting party's GATT ligations could not only jeopardize existing sub-federal environme laws but also could have a significant chilling effect, preventing the en ment of important new protections.[71]

j. *Article XXV: Waiver of Obligations*

Under article XXV, a contracting party's specific GATT obligati may be waived by a two-thirds majority of the votes cast.[72] Art XXV's waiver provision potentially could be a means for ensuring GATT-compatibility of some, if not all, of the existing internatic agreements on the protection of the environment.[73] The "prevai view," however, is that article XXV waivers do not substitute for revi the GATT's rules when necessary.[74] Thus, waivers for existing envi mental agreements are "not a ready way around GATT obligations.

Even if an article XXV waiver did function as a ready way of br ing the GATT and existing environmental agreements into accord thereby reconciling trade and the environment, a number of seriou sues concerning the impact of such a waiver on environmental pro tions must be addressed. For example if such a waiver is viewed a "one shot deal," waiving existing agreements could hamper the crea of effective and enforceable environmental agreements in the fut Moreover, the waiver of the GATT's obligations as to these treaties plies that environmental rules are somehow subservient to those of in national trade—a conclusion that the discussion of conflict of trea rules in section IV.A.B of this article shows may be inappropriate.

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70. The federal government used such a funding device to encourage the states to their drinking ages to twenty-one years of age.

71. *See accordingly* Letter from James E. Doyle, Attorney General of Wisconsin, t Honorable Stanley Gruzynski, State Representative 3-5 (Oct. 3, 1991) (on file with auth

72. *See* GATT, *supra* note 7, art. XXV.

73. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 12.

74. *Id.*

75. *Id.*

### 3. Tokyo Instruments and Their Impact on Environmenta Agreements and Concerns

#### a. *The Agreement on Technical Barriers to Trade: The Sta Code*

The Agreement on Technical Barriers to Trade,[76] commonly as the "Standards Code," is intended to ensure that the testing an tion of technical regulations or standards relating to health, safe sumer and environmental protection, and other police pow purposes do not create unnecessary barriers to trade. In accordan GATT article X's transparency mandates, the Standards Code r contracting parties to notify other parties of such standards and tions where they differ from international standards or are adopte absence of any international standard and are expected to have an on trade.[77] After notification, the other parties may comment measures.

Signatories confronted with a challenge to a regulation may between justifying the regulation under GATT or under the code. has never been a formal dispute resolution under the Standard Consequently it is difficult to determine how the Code's procedu substantive terms would apply, although the United States did *threat* of a Standards Code challenge to cause the European Com to soften its import ban on beef produced with hormones.[78]

Nevertheless, the Standards Code generally follows article X thus incorporates many of the same difficulties now being faced b ronmental regulations seeking to come within article XX. For ir despite the fact that contracting parties may invoke the Code's resolution mechanisms to examine PPMs, the Code is silen whether trade restrictions based on PPMs fall within it.

While the Standards Code generally follows GATT's article X environmental scope of the Code allowances are arguably broad those of GATT article XX's exceptions. The Code explicitly m the environment; thus environmental regulations that might fall article XX's purview may come within the Code's allowances. ample, if it is determined that the Standards Code regulates PP

76. GATT Doc. L/4907, BISD (26th Supp.) 8 (1980).

77. Between 1980 and 1990, 211 notifications took place in which the acting pa the objective of the standard was protection of the environment. GATT Secretariat Trade and the Environment, *supra* note 1, at 23. 167 other notifications have bee under similar grounds such as the protection of health, safety, and consumer prote

78. *See* Werner P. Meng, *The Hormone Conflict Between the EEC and the Uni Within the Context of GATT*, 11 MICH. J. INT'L L. 819, 824-27, 835-39 (1990).

Code's broader environmental scope might allow for a wider range environmental PPM regulations.

b. *The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT: The Subsidies Code*

The Agreement on Interpretation and Application of articles XVI, and XXIII of the General Agreement on Tariffs and Trade,[79] the "Subsidies Code," substantively expands GATT article XVI's pro sions to encourage the parties more forcefully to eliminate subsidies a form of domestic trade regulation. The Subsidies Code requires signa ries to ensure that their use of subsidies does not harm the trading in ests of other signatories and authorizes countervailing duties wh subsidized imports threaten material harm to domestic industries.[80]

Pursuant to the GATT, as expanded upon by the Subsidies Cod contracting party that subsidizes a domestic industry to reduce any ad tional costs its domestic industry must bear because of stricter envir mental standards will likely violate its GATT obligations.[81] I contracting party subsidizes its industries to mitigate internalized en ronmental costs, the industries' exports could be subject to the imp tion of countervailing duties by other contracting parties seeking eliminate the subsidy. The Canadian Government's subsidizing refo tation efforts and the development of sustainable forestry practices, example, might conflict with the Code.[82]

In addition to effectively precluding contracting parties from su dizing their industries for the costs of complying with higher envir mental standards (at least where the industries are export-oriented), Subsidies Code also makes it difficult for a contracting party to insti countervailing measures under article VI to combat the subsidies res ing from lower environmental standards.[83]

Although the language of article VI does not explicitly bar coun

79. BISD (26th Supp.) 56 (1980).

80. *See id.*

81. *See* GATT, INDUSTRIAL POLLUTION CONTROL AND INTERNATIONAL TR (1971); Grimmett, *supra* note 10, at 16; JACKSON, *supra* note 9, at 209.

82. *Five Year Development Agreement Reached*, 14 Int'l Envtl. Rep. (BNA) 185, (1991).

83. OECD, Joint Session, *supra* note 21, at 17. Three rationales are offered against c tervailing measures for environmental standard subsidies: 1) the subsidy is put in place a production level and thus should be removed at the production level and not by measur the trade level that will only cause further distortions; 2) allowing countervailing measure environmental standards subsidies makes the continuation of a party's GATT "rights" co gent on certain environmental behaviors and thus contradicts the unconditional nature o party's GATT "rights"; and 3) allowing a party to countervail for environmental stanc

vailing measures, the Subsidies Code limits a party's ability to such countervailing measures.[84] Pursuant to the Subsidies Code, t mence a countervailing measure against a party subsidizing its d industry, the challenging party must show that a subsidy exists causes harm to the industry of the challenging party. This provis two important implications for the use of countervailing duties ar dumping rules to address differences in environmental protecti tween contracting parties.

First, whether a contracting party's failure to regulate adeq domestic industry is an implicit subsidy to that industry is n answered.[85]

Second, a party seeking to prove an implicit environmental or "eco-dumping" would have a difficult task establishing the ne elements to impose measures in compliance with the Code.[86] For to be considered an "injury," allowing the aggrieved party to ins counter-measure, the harm must fall within the the Subsidies Cod nition of "injury." It is unclear whether harm that stems from e mental standards subsidies falls within the Subsidies Code's defin injury. For example, the Subsidies Code defines "injury" as rel certain types of economic harms felt by a specific industry of o tracting party as a result of a subsidy provided by another cont party to its domestic industry. This definition fails to take into a the many non-economic and attenuated economic harms which e mental standard subsidies may inflict on populations outside of dustrial realm.

Moreover, the GATT Secretariat has indicated that for tracting party to prevail on a claim that another party's lower e mental standards are a subsidy to its industries, the challengin would have to prove not only that the environmental standards w causing a cognizable injury to the challenging party's industries, t the standards were too low given the other party's per capita inco

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subsidies allows that party to unilaterally determine the appropriate level of envir protections for another party. *Id.*

84. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 19.

85. *See* Piritta Sorsa, Environment—A New Challenge to GATT? 28 (June 199 script prepared for the *1992 World Development Report*) [hereinafter Sorsa, Environ New Challenge to GATT?]; *see also* Kenneth S. Komoroski, *The Failure of Gover Regulate Industry: A Subsidy Under GATT*, 10 HOUS. J. INT'L L. 189, 209 (1988).

86. *See* Sorsa, Environment—A New Challenge to GATT?, *supra* note 85, at 2 *infra* section II.B.2.c. (discussing the U.S.'s proposed S.984, known as the Internatio tion Deterrence Act (1991)).

its environment's physical characteristics.[87] This balancing test fails conform with the GATT's usual method of finding a subsidy, which d not look to mitigating factors. Additionally, the Secretariat's balanc formula for environmental subsidies is slanted towards allowing devel ing nations to maintain even lower environmental standards. This l fails to comport with the Uruguay Round's efforts to eliminate pre ences to developing countries.[88]

c. *The Agreement on Import Licensing Procedures*

The Agreement on Import Licensing Procedures[89] seeks to ens that contracting parties do not use import licensing and registrat schemes to erect protectionist barriers to free trade. The Agreement tablishes requirements that parties must follow in their national pr dures for submitting, reviewing, and granting importation licenses products entering their markets. The Agreement also limits the penal that may be administered for violations (including omissions and r statements) of such national licensing requirements.

A number of national and international environmental protecti that attach to import licenses, such as the United States' Resources C servation and Recovery Act,[90] arise from stringent information and c umentation regimes that must be followed strictly to avoid substan penalties. There have been no challenges to such programs under Agreement on Import Licensing Procedures that would shed light applying the Agreement 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 peacefully resolving trade conflicts. The Understanding Regarding N fication, Consultation, Dispute Settlement, and Surveillance[91] establi the procedural framework for handling disputes between contrac parties arising under the terms of the GATT. Because these proced place a priority on easing the political difficulties that can arise in a n

87. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 19.

88. *See supra* section II.4.g.

89. GATT Doc. BISD (26th Supp.) 154 (1980) (open for signature Apr. 12, 1979).

90. *See* 40 C.F.R. § 262.20 (1990) (imports of hazardous waste). The Departme Transportation licensing schemes for the transportation of wastes in the United States wc conjunction with the Environmental Protection Agency's regulations under RCRA an equally applicable. *See* 49 C.F.R. §§ 171-179 (1990).

91. GATT Doc. L/4907, BISD (26th Supp.) 210-18 (1980) (adopted on Nov. 18, 1

tinational dispute, they include a number of provisions geared t allowing the parties to negotiate freely, unbridled by the spotlight lic attention and oversight.

Because the Understanding cloaks its dispute resolution proc its process contrasts sharply with the American system of citizer to information and public participation and oversight. Areas of between these two systems arise from: 1) the closed nature of the dispute resolution process, including its exclusion of interested and non-governmental organizations from presenting informa GATT dispute panels; 2) the embargo of papers submitted by the to GATT panels; and 3) the embargo of panel decisions for a pe time to allow for negotiations to take place.

Moreover, decisions resulting from the dispute resolution pr are based solely on the terms of the GATT. Therefore, the dispu lution process and the ensuing decisions suffer from the enviror limitations embodied within the GATT as a whole.[92]

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

Now in its fifth year, the Uruguay Round of the GATT h called the "most ambitious effort ever to reorganize the world's system."[93] The ambitious goals of the Round have jeopardized its to come to an agreement, leading some to characterize the GAT "General Agreement to Talk and Talk."[94]

The underlying intent of the Uruguay Round is to liberalize t removing the remaining barriers to free and fair trade. There is between liberalization *per se* and either environmental degradatio vironmental preservation and remediation. Rather, the proces mechanisms by which trade is liberalized implicate the envirc The one hundred and five parties (GATT's one hundred and two joined by three developing nations) participating in the Uruguay are discussing fifteen primary negotiating goals, of which at least plicate the environment.[95] The latest expression of the Uruguay F progress towards an agreement among the parties is the GATT S

92. *See* Konrad von Moltke, International Trade and Environmental Imperat pute Resolution and Transparency 2 (Jan. 20, 1992) (unpublished manuscript on author).

93. *GATT Bargaining Goes Down to the Wire*, WALL ST. J. Mar. 6, 1992, at A

94. *Id.*

95. *See generally* Lori Wallach, The Dec. 20, 1991 Uruguay Round "Final Ac

riat's *Draft Final Act Embodying the Results of the Uruguay Rounc Multilateral Trade Negotiations*, commonly known as the "Dun draft."[96]

a. *Tariff Reductions*

The tariff reductions being negotiated in the Uruguay Round ap exclusively to imports. During the course of these negotiations, emph also has been placed on "tariffication," the replacement of quotas in agricultural sector with tariffs.[97]

Reducing tariffs effectively decreases the price of commodities products in the importing nation. In certain instances, tariff reducti could cause the cost of products at market to reflect their true costs m accurately, including their environmental and natural resource costs, ducing the competitiveness of environmentally unsound products and creasing consumer-based environmental protections.[98] However, p reductions that cause the cost of the imported product to fall below t of competing products, can cause an increase in demand for the resou increasing, in turn, incentives to exploit the resource in an unsustain fashion.[99] This is perhaps best exemplified by the reductions in trop timber tariffs currently being negotiated: if the tariffs on unproces logs are abolished (as appears probable) then the demand for these go in timber-consuming nations could create increased pressure to over-u ize already dwindling areas of remaining tropical forests.[100]

Reducing tariffs, however, also could increase access for prod from developed countries to the markets of developing countries, ther potentially alleviating some of the development pressure on develop countries' natural resources.[101] Additionally, tariff reductions that eli nate escalating tariff schemes—schemes that place higher tariffs on va added products—could encourage developing countries to shift proc tion from unfinished raw goods (such as uncut logs) to value-added p

Worse Than Expected on Environmental, Health and Consumer Issues (Dec. 26, 1991) (m orandum to Environmental, Health and Consumer Advocates, on file with *Public Citize*

96. GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Rou Multilateral Trade Negotiations*, Dec. 20, 1991, at C.1, L.2-11, 23, MTN/TNC/W/FA (1 [hereinafter Draft Final Act]; *see also* Keith Bradsher, *Trade Plan Criticized, Stalling W Talks*, N.Y. TIMES, Dec. 24, 1991, at D2.

97. Draft Final Act, *supra* note 96, at C.1, L.2-11, 23; *see also* Bradsher, *supra* note 9 D2.

98. *See* WWF, *supra* note 11, at 25.

99. *Id.*

100. *Id.*

101. *Id.*

ucts (such as tables and chairs) that require less natural resou provide the same amount of economic value.[102]

b. *Reduction of Agricultural Subsidies*

One of the top priorities of the United States and certain ot veloped countries in the Uruguay Round is to reduce agricultur supports, export subsidies, and border controls.[103] Agricultura dies, like all other forms of subsidies, create trade distortions that inefficient use of resources.

In developed countries, specific area agricultural subsidies ha a major factor in their specialization of agricultural activities. Spe tion has caused distortions in the natural development of agric markets because of preferences to development within those sub sectors that have caused environmental harms.[104] Thus, assumi unanticipated negative environmental results do not outweigh pated benefits, eliminating agricultural subsidies in developed should have a positive environmental effect.

In developing nations, the effects of agricultural subsidies c more uncertain and will vary to a large extent from country to c depending on the manner in which each nation removes such su Generally speaking, however, environmentalists have expresse that if demand remains constant, eliminating agricultural subsid increase prices and give farmers added incentive to till greater a of marginal lands.[105]

The overall environmental balance of eliminating agricultura dies will be decided to a large extent by the treatment the Round

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102. *Id.*

103. Draft Final Act, *supra* note 96, at L.2-11, 31-34. While the United States a developed countries are seeking reductions in agricultural subsidies, the split amon tions of the European Community with regard to such reductions has been one of t sticking points in the Round. *See GATT Bargaining Does Down to the Wire*, *supra* Bradsher, *supra* note 96, at D2.

104. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 32-3 tional commodity support programs:

> encourage monocultural, chemical-intensive cropping of . . . a handfull of . . . ' gram' commodities. These rules penalize beneficial, multi-year crop rotations provide natural sources of fertilizer and biological means of pest control. With ited exceptions, subsidized crop insurance and credit programs impose no envi mental conditions, and often make heavy agrichemical use a pre-conditio assistance.

CENTER FOR RESOURCE ECONOMICS ET AL, FARM BILL 1990, at 8 (1991). The env tal effects of these farming practices include increased soil erosion, poisoning of wa and waterways, and the increased use of marginal lands. *Id.* at 8-15.

105. *See* WWF, *supra* note 11, at 27.

to domestic agricultural support measures taken to reduce the degrad effects of current agricultural production methods.[106] Examples of s support measures include the United States' conservation reserve p gram, which provides subsidies to retire vast amounts of farmland a soil conservation measure,[107] and the European Community's Comm Agricultural Policy provisions granting subsidies to set aside envir mentally sensitive farmlands.[108] Many Uruguay Round particip have expressed the view that such measures, provided they meet cer criteria, should be excluded from the agricultural subsidies the Roun considering eliminating.[109] In this vein, the Draft Uruguay Round D sion on Sanitary and Phytosanitary Measures now under negotiat draws a parallel to article XX's exceptions and establishes guidelines ensure that contracting parties' sanitary and phytosanitary measures both necessary for the protection of human, animal, or plant life and not arbitrary or unjustified barriers to trade.[110]

### c. *Liberalized Trade in Natural Resource Products*

Another major goal of the developed nations in the Uruguay Ro is to remove trade barriers to the free flow of natural resources and n ral resource-derived products. Ongoing negotiations in the natural source-derived products group have focused on liberalized trade fisheries, forestry, minerals, and non-ferrous metals.[111] The develo nations in this group have aimed their efforts at eliminating develop countries' domestic export controls. Meanwhile, the developing nati agenda in this group has focused on increasing access for their prod in the markets of the developed countries.[112]

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106. *Id.* at 28.

107. *See* Food Security Act of 1985, Pub. L. No. 99-198, § 1231, 99 Stat. 1354, (1985). Subject to certain limited exceptions, the conservation reserve program prohibit production of commodities on highly erodible lands and pays farmers for setting aside lands for a ten year period. *See* 16 U.S.C. §§ 3811-36 (Supp. 1991). The conservation re program currently protects more than 34 million acres of the United States' most fragile l *See* CENTER FOR RESOURCE ECONOMICS ET AL., *supra* note 104, at 14.

108. *See* 1985 O.J. (L 93) 1, *as amended* 1990 O.J. (L 353) 12; 1991 O.J. (C 104) 1 posed arable land set asides); *see also* D. BALDLOCK & D. CONDOR, REMOVING LAND F AGRICULTURE: THE IMPLICATIONS FOR FARMING AND THE ENVIRONMENT (1987).

109. *GATT, The Uruguay Round and the Environment*, GATT FOCUS, Oct. 1991, at [hereinafter *Uruguay Round and the Environment*].

110. *See* Draft Final Act, *supra* note 96, at L.36-7; GATT Secretariat, Trade and Env ment, *Factual Note by the Secretariat* 14-15 GATT Doc. L/6896 (Aug. 1991) [herein *Factual Note*].

111. *See Ministerial Declaration*, GATT Doc. L/5424, BISD (29th Supp.) 9, 20-21 (1 (adopted Nov. 29, 1982); WWF, *supra* note 11, at 26.

112. *See* WWF, *supra* note 11, at 26.

If this group is successful in forging an agreement that remc port controls and/or increases market access for developing natio ural resource-derived products, it is possible that demand fo products will increase creating disincentives to sustainably ma these natural resources.[113]

d. *Technical Barriers*

Yet another goal of the Uruguay Round is the curtailing tariff, or technical, barriers to trade.[114] Increased emphasis on re technical barriers to trade, including labeling requirements, co versely affect the ability of the contracting parties to adopt environ or conservation-oriented policies and laws. Under the rules nov discussed in the Uruguay Round, where international technica dards exist, parties are obligated to adopt these standards subject tain narrow exceptions.[115] Even where no international standard the rules now proposed in the Uruguay Round would require technical standards be "not-more trade restrictive than necessa This "not-more restrictive than necessary" requirement would li ability of the parties to adopt appropriate environmental substantially.[117]

The agreement now being negotiated further would require governments to take affirmative action to bring standards adopte sub-federal level into compliance with the GATT.[118] By expos contracting party to countervailing measures for the sub-federal violation, this proposed rule could severely limit the ability of sta municipal governments to regulate local environmental concerns. over, the Uruguay Round's proposed rules on technical barriers also require the parties to take steps to ensure that non-govern organizations, such as those that certify products with a "green approval," also function in conformity to the rules against techni riers that the parties adopt.[119] The proposed rules also would technical barriers to full GATT enforcement mechanisms, in countervailing duties and dispute resolution procedures.[120]

113. *Id.*
114. *See* Draft Final Act, *supra* note 96, at G.1-27; *Factual Note*, *supra* note 110,
115. *See* Draft Final Act, *supra* note 96, at G.1-5.
116. *Id.* at G.2.2.
117. *See* Steve Charnovitz, *Trade Negotiations and the Environment*, 15 Int'L. E (BNA) 144, 145 (1992) [hereinafter *Trade Negotiations*].
118. Draft Final Act, *supra* note 96, at G.5.
119. *Id.* at G.5.
120. *Id.* at G.18.

e. *Trade in Tropical Products*

Beyond the Uruguay Round's general attention to eliminating bar ers to trade in natural resource-derived products and to agricultural su sidies, the participants are negotiating similar proposals in the speci context of tropical products and resources.[121] The negotiations on tro cal products, focusing mainly on plant-derived foods, but also includi tropical timber, tobacco, and natural rubber, seek to reduce tariffs these products and eliminate non-tariff barriers to their trade.[122]

As discussed above,[123] the expected environmental effects of ta reductions are somewhat mixed. These reductions ultimately may pr duce benefits to the environment. The environmental effects of tariff ductions, however, may not be as benign in tropical regions where ma of the food products—coffee and coconut palms, for example—th could experience demand-driven production intensification are grown cleared forest lands.[124]

f. *Trade Related Aspects of Intellectual Property Rights*

The negotiation of Trade Related Intellectual Property Rig (TRIPS) has been one of the more contentious areas under considerati in the Uruguay Round.[125] Developed countries, recognizing the tra distorting effects resulting from the lack of effective intellectual prope protections, are looking to the TRIPS negotiations to provide inter tional protections against widespread "pirating" of intellectual prope from these countries' research organizations and industries.[126] Develo ing nations, many of which continue to lack effective domestic intell tual property protection mechanisms, have sought to trade concessio on a TRIPS agreement for greater access to developed nations' mark for their TRIPS products, as well as for concessions in other areas of t Round.[127] Additionally, some developing countries have argued that t need to stimulate domestic development justifies lower levels of intell tual property rights protection in developing countries and have sou to distinguish intellectual property rights and trade issues.[128]

121. *See* WWF, *supra* note 11, at 28.
122. *Id.*
123. *See supra* section II.4.a.
124. WWF, *supra* note 11, at 28.
125. Draft Final Act, *supra* note 96, at 57-90; *see also* Frank Emmert, *Intellectual Prop in the Uruguay Round Negotiating Strategies of the Western Industrialized Countries*, 11 Mi J. INT'L L. 1317, 1319-21, 1354-56, 1372 (1990).
126. Draft Final Act, *supra* note 96, at 57-90.
127. *See* WWF, *supra* note 11, at 29-30.
128. *See* Emmert, *supra* note 125, at 1354-56.

The TRIPS agreement could have two significant enviro ramifications. First, certain environmental organizations fe stronger intellectual property protections will hamper the transfe vironmentally-sound technologies to developing countries, espec light of the transfer goals of the Montreal Protocol and the globa ing agreement currently being negotiated.[129] It is likely, howev such protections would actually assist the development and tra such technologies, although developing countries may find thems need of financial assistance to pay for the costs of such technolo general, evolving environmentally-friendly technologies are ow private entities. Unless these technologies are secure from "pira private parties investing in their development will be reluctant tc these technologies to much of the developing world.

Second, industries in developed countries are increasingly tu biodiverse ecosystems, such as tropical rain forests, as resourc houses and to the indigenous peoples who live in these ecosyst their knowledge about the resources these ecosystems hold.[130] W or not the contributions of indigenous discoverers, preservers, an and national governments that preserve these ecosystems, will some form of intellectual property recognition to give economic their efforts is at issue in the Uruguay Round's negotiations.[131] agreement providing tangible benefits to these indigenous peoples tional governments would encourage the preservation of these tems and indigenous cultures, whereas the failure of the Round t to such an agreement could frustrate ongoing conservation and p tion efforts substantially.[132]

Under the current Dunkel draft text, life forms, including pla animals, may be patented; however, countries may elect to limi protection to only microorganisms.[133] Countries can also elec clude inventions from intellectual property protections for reason rality or of endangering human, animal, or plant life or health not requiring intellectual property protections for biotechnology

129. *See* WWF, *supra* note 11, at 30 (discussing the view that intellectual proper tions could hinder environmental technology transfer). Additionally, it is difficult mine how many of the environmental technologies that must be transferred to assist in developing sustainably are protected by intellectual property regimes.

130. *See* Robert Weissman, *Prelude to a New Colonialism*, THE NATION, Mar. 1 336, 336-38.

131. *See Factual Note*, *supra* note 110, at 17; Weissman, *supra* note 130, at 336

132. *See* Weissman, *supra* note 130; WWF, *supra* note 11, at 29.

133. *See* Draft Final Act, *supra* note 96, at Y, Annex III.

134. *Id.* at 69.

eries, the Dunkel draft fails to ensure the protection of the contributi of indigenous peoples. Similarly, the Dunkel draft leaves a substan loophole for countries to continue to "pirate" technologies by allow for the denial of intellectual property protections for moral, life, hea safety, and conservation goals. While this loophole may allow devel ing countries to obtain existing environmentally friendly technologies expensively, it does little to ensure the international availability of th technologies and stifles the competitive impetus for companies to in in developing new technologies that may be environmentally benefic

g. *The "Development Policy"*

Throughout its history, the GATT has accorded developing nati special privileges to accommodate their development needs. This c mitment, called the "Development Policy," permits developing nati to use trade restrictions, including import curbs and export limits, t are unavailable to other contracting parties.[135] Developed countries using the Uruguay Round to encourage developing countries to re quish many, if not all, of these special privileges.[136]

While reducing the barriers to trade can have certain environme benefits,[137] if the Development Policy is rescinded, the inability of th nations to provide protections to fledgling industries could cause th industries to adopt practices aimed at short-term survival as opposed long-term sustainability.[138] The ultimate environmental effect of proposal is difficult to discern at this time.

h. *Subsidies and Countervailing Measures*

In an effort to provide greater clarity and to reduce internatic trade conflicts, early negotiations in the Uruguay Round attempted classify a range of subsidies into three general categories: permissive s sidies, "proceed at the risk of domestic countervailing duty proceedin subsidies, and prohibited subsidies.[139] Subsidies for environmental p poses were placed in the permissive, or "no-action" category—the called "green box."[140]

Acquiescing to the United States' demands to eliminate what

135. *See* WWF, *supra* note 11, at 29. The Development Policy appears in the balan payment provisions of GATT articles XII and XIII.

136. *See* Draft Final Act, *supra* note 96, at B.1, R.1-4.

137. *See supra* section II.A.4.a.

138. *See* WWF, *supra* note 11, at 29.

139. *See* Draft Final Act, *supra* note 96, at I.1, 3, 5; *Factual Note*, *supra* note 110, at 1

140. *See* Draft Final Act, *supra* note 96, at 92-94; *see also* WWF, *supra* note 11, at

U.S. perceived to be an overly permissive loophole for subsidi
Dunkel draft deletes the green box, rendering virtually all environ
subsidies vulnerable to challenge.[141] Only subsidies for "clearly d
environmental and conservation programs that provide public pa
to agricultural producers would be classified as unactionable.[142]

Approving the Dunkel draft's text on subsidies would imp
ability of the contracting parties to assist their industries in be
more environmentally sustainable. The types of programs made v
ble by the draft's text include Canada's program of subsidizing the
opment of sustainable forestry practices.

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

One of the most environmentally important negotiations un
in the Uruguay Round is the negotiation of harmonized health an
ronmental standards.[143] The Uruguay Round's negotiations on
nizing standards have been premised on three principles: 1) partie
adopt strict principles of national treatment in standard-setting a
forcement; 2) parties' decisions to permit or restrict the availabili
new product or technology may only be based upon "sound sc
evidence;"[144] and 3) international agencies, such as Code
mentarius,[145] are the only legitimate sources of scientific informa

Harmonization of standards could produce either more strin

141. *See Trade Negotiations*, *supra* note 117, at 146-47.

142. *See* Draft Final Act, *supra* note 96, at L, pt. A, Annex 2; *see also Trade Neg*
*supra* note 117, at 147.

143. *See* Draft Final Act, *supra* note 96, at G.1-27; *see generally* Wallach, *supra*

144. Although sound science is an important part of setting appropriate enviro
health, and safety standards, even with the most reliable scientific information, stan
ting still relies heavily upon extrapolation from existing data. Thus, sound scienc
eliminate the need for policy decisions to be made based upon scientific evidence.
even with sound science countries must still make risk assessment and management c
sound science is not a panacea for the conflicts between trade and environmental poli
*Trade Negotiations*, *supra* note 117, at 146.

145. Codex Alimentarius Commission is the primary international standard-sett
dealing with food products. *See* Daphne Wysham, *The Codex Connection: Big Busines*
*GATT*, 251 The Nation 770, 770-72 (1990); WWF, *supra* note 11, at 30-31. Codex
the development of harmonized regulations pertaining to animal, vegetable, and ot
products. Codex is administered by the United Nations Food and Agriculture Orga
and is co-financed by the World Health Organization. *See* Wysham, *supra*. Membersh
the Codex Commission is made up of officials appointed by member-nation governm
For example, the United States delegation is headed up by a White House appointee
Department of Agriculture. *Id.* Codex delegations also, generally, include appointe
from the respective regulated industry sectors. *Id.*

146. *See* Draft Final Act, *supra* note 96, at G.1-5.

lenient standards.[147] If existing levels of protection do not diminish the process, harmonizing environmental, health, and safety standa could have significant environmental and trade benefits. By provid unified standards, harmonization would diminish the burdens that plethora of sometimes widely divergent national standards have impo on internationally-traded products.[148] Moreover, harmonized standa that raise the environmental, health, and safety standards of nations w lower levels of existing protections would bring much needed protecti to many nations.

Additionally, whether or not industries actually migrate to nati with lower environmental standards,[149] harmonized standards would move the incentive for industries to do so. Developing nations, howe fear that raising standards to the level of the developed world would pede increased market access for their products and would deprive th of the ability to choose increased levels of development as opposed higher levels of environmental quality.[150]

In contrast, if harmonized standards are set at the level of the co try with the lowest standard—the least common denominator proach—environmental protection in countries with higher standa will suffer.[151] And the strict harmonization of standards could ham the evolution of environmental protections by removing the ability of dividual contracting parties to push environmental standards forward

The harmonization provisions of the Dunkel draft, with their str bias towards international standards (and consequently, against dome standards that are more stringent than international standards) appea

147. Affidavit of Joan Claybrook at 29-30, Public Citizen v. Office of the United S Trade Representative, 782 F. Supp. 139 (D.D.C. 1992) (No. 91-1916).

148. *See* U.S. COUNCIL FOR INTERNATIONAL BUSINESS, AN INTEGRATED APPROAC ENVIRONMENT AND TRADE ISSUES (statement presented to Carla A. Hills, U.S. Trade R sentative and William W. Reilly, Administrator, Environmental Protection Agency) 1, 6 ( 27, 1991). *Cf.* David Robertson, Trade and the Environment Harmonization and Tech Standards, Oct. 10, 1991 (paper presented at the symposium on Int'l Trade & the Env't, s sored by Int'l Trade Division, Int'l Economics Dep't, World Bank) (noting that harmoniz is not necessary for increased trade efficiencies and may not provide environmental ben

149. *See generally* Patrick Low & Alexander Yeats, Do Dirty Industries Migrate ( 1991) (unpublished manuscript, on file with author); Robert Lucas, et al., Economic Dev ment, Environmental Regulation and International Migration of Toxic Industrial Poll 1960-1988 (Nov. 1991) (unpublished manuscript, on file with author). *See also infra* note

150. *See* Gene Grossman, *In Poor Regions Environmental Law Should Be Approp* N.Y. TIMES, Mar. 1, 1992, at C11 ("Attention to environmental issues is a luxury poor c tries can't afford").

151. WWF, *supra* note 11, at 30-31; Frictions Between International Trade Agreer and Environmental Protections, *supra* note 20, at 9.

152. *See* WWF, *supra* note 11, at 30.

adopt an approach that more closely resembles a lowest common d inator approach.[153] This raises serious concern that if the Dunkel accepted, the harmonizing that will occur under the draft's proc will compromise existing environmental protections. For examp United States' Delaney Clause[154] prohibits the use of any food ad that have a cancer risk level greater than zero. The Delaney C zero risk factor is substantially more stringent than both intern standards and other United States cancer risk standards and co jeopardized by the proposed Uruguay Round provisio harmonization.[155]

Another problem with the Dunkel draft is that its delegation vironmental, health, and safety standard-setting to international a tees rather than to democratically elected representatives undermine developing democratic processes in many nations. conflicts with the traditional processes of public participation a countability in nations (including the United States) with estal democratic schemes of governance.[156] Additionally, there are co over procedural obstacles to effective peer review of these internati set standards, such as the lack of a "paper trail" of the decision-n process. For example, environmentalists note that the Canadian cide standards, which were harmonized under the United States-C Free Trade Agreement, would not have been so compromised if th cess of harmonization had gone through the democratic parliam process.[157]

j. *Trade in Services*

Article XIV in the draft Agreement on Trade in Services cc exceptions to the general obligations set out in the agreement.[158] large extent these exceptions parallel the public policy excepti GATT's general obligations contained in GATT article XX.[159] C

153. *See Trade Negotiations*, *supra* note 117, at 146.

154. 21 U.S.C. § 348(c).

155. *See Trade Negotiations*, *supra* note 117, at 146.

156. *See* WWF, *supra* note 11, at 30-31; Wysham, *supra* note 145, at 770-72. For e Codex panels are heavily lobbied by national constituencies that include disproportior resentation from the industrial sectors the panels regulate. *See id.* Codex panel decis not exposed to external peer review and do not provide a paper record that discl "sound science" behind the decision so as to allow independent evaluation of the decis *id.*

157. *See* Steven Shrybman, *Trading Away the Environment*, 9 WORLD POL'Y J. (1992).

158. *See* Draft Final Act, *supra* note 96, at 18, art. XIV, 103 Annex II.

159. *See supra* notes 42-43 and accompanying text.

countries have proposed that article XIV should not only allow the pa ties to take measures necessary to protect human, animal, and plant l and health but should also allow for measures which are necessary f "sustainable development and environment," "cultural values," a "conservation of exhaustible natural resources."[160] These expanded de nitions would allow a wider range of environmental measures to confo with the GATT in the services area and would provide a precedent f future efforts aimed at minimizing the frictions between trade and en ronmental concerns. These expanded definitions are, however, not flected in the Uruguay Round's proposed final agreement on trade services.[161] Moreover, although the Dunkel Draft's services text inclu an exception for life and health that parallels the GATT's article XX exception, the Draft does not provide a conservation exception parall ing the GATT's article XX(g).

k. *Dispute Resolution*

The dispute resolution rules being negotiated in the Uruguay Rou would change the existing GATT dispute resolution framework sign cantly. First, under the proposed rules, unless a consensus of the part votes against adopting the report of a dispute resolution panel, all pa reports are automatically adopted sixty days after publication.[162] T change would reverse the current rule, which requires a consensus of parties to adopt the decision of a dispute resolution panel. By mak the adoption of panel reports virtually automatic, the proposed r would minimize the ability of the parties to block such an adopti thereby exacerbating the potential for direct conflicts between GATT ligations and environmental protections.

Second, the Uruguay Round dispute resolution proposal would pand the reach of the GATT's dispute resolution mechanisms, includ the application of countervailing sanctions and the availability of disp panels, to include sub-federal level trade restrictions explicitly.[163] T proposal would expose a host of sub-federal level environmental regu tions to potential GATT challenges.

Third, the proposed dispute resolution rules strengthen the enfo ment of GATT obligations by: 1) increasing the burden on parties fending against a GATT challenge by requiring them to rebut inference that a breach of a GATT obligation entails an injury to cl

160. *See Factual Note*, *supra* note 110, at 18.
161. *See* Draft Final Act, *supra* note 96, at 18 art. XIV, 102 Annex II.
162. *See id.* at S.12.
163. *See id.* at S.18.

lenging parties;[164] and 2) affirmatively charging parties that GATT obligations with either complying with their GATT obli or facing trade sanctions.[165] Strengthening the GATT's enfor powers would exacerbate the already existing potential for direct between the GATT and environmental initiatives.

1. *Multilateral Trading Organization*

The final proposed text of the Uruguay Round would esta Multilateral Trading Organization (MTO).[166] The proposed would adopt the GATT as it exists after the Tokyo and Uruguay I as its rules and would have in all territories of the member states tl capacity, privileges, and immunities as needed to carry out its fu under these rules.[167] By expanding the obligations of all the GA1 ties to include the obligations contained in the Tokyo and U Round agreements and understandings, creating an MTO as no posed would expand the powers and scope of GATT significan creasing the GATT's ability to trump environmental regul Additionally, the creation of an MTO might re-start the GATT's making the GATT later-in-time than most environmental lav agreements.[168] Finally, some scholars have noted that institution GATT without mentioning the environment represents a waste of stantial opportunity to bring about the overall greening of GA Proponents of the MTO regard it as too late in the negotiation Uruguay Round to begin discussing the environment. A comp view that would make a "Green Round" of the GATT the first i the MTO's agenda currently is being discussed.[170]

5. Other GATT Activities

a. *The Working Group on the Export of Domestically Prohi Goods and Other Hazardous Substances*

In 1982, the contracting parties agreed to examine measures

164. *See id.* at S.3.
165. *See id.* at S.16.
166. *See id.* at 95.
167. *See id.* at 92, 95.
168. For a discussion of the effects of the "later in time rule" *see supra* section IV.A the adoption of the MTO might make GATT later-in-time, it would not necessar GATT more specific than these environmental laws and treaties. Under conflicts of conflicts of treaties analyses, if an earlier treaty or law is more specific than a late treaty, then the earlier treaty is not trumped by the later treaty.
169. *See Trade Negotiations*, *supra* note 117, at 147-48.
170. *Id.*

trol the export of products that are prohibited from sale in domestic m kets yet are allowed to continue as exports.[171] This agreement evol into the GATT Council's creation of the Working Group on the Exp of Domestically Prohibited Goods and Other Hazardous Substance 1989. This working group examines the trade-related aspects of ongc international work, such as the Basel Convention,[172] to regulate the f of such goods and substances among the contracting parties.[173]

The working group currently is considering a Draft Decision Products Banned or Severely Restricted in the Domestic Markets This draft covers all products (including hazardous wastes) that a c tracting party determines present a serious and direct danger to hun animal, or plant life or health, or the environment within the contract party's territory, and which are banned or severely restricted within contracting party's domestic markets.[175] The draft also includes no provisions requiring the contracting parties to notify the GATT Secr riat of all such banned or restricted products for which no similar con of exports have occurred.[176] In an effort to avoid conflict and dupl tion, the draft does not apply to substances covered under other inte tional regimes (such as the Basel Convention) to which a contrac party is a signatory.[177]

An agreement allowing the contracting parties to make effort regulate trade in hazardous and otherwise restricted substances c provide substantial environmental protections, as well as allowing in national environmental agreements pertaining to similar matters gre ability to conform with GATT's mandates. If the working group car assist the contracting parties in forging such an understanding, howe then domestic initiatives, such as the ban on exporting domestically hibited pesticides Congress considered in the 1990 farm bill, would pear to violate the GATT.[178]

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171. *See Uruguay Round and the Environment*, *supra* note 109, at 3.

172. *See* section III.A.3. *infra*.

173. BISD (36th Supp.) 402, 403 (1990).

174. *See Uruguay Round and the Environment*, *supra* note 109, at 4.

175. *See Factual Note*, *supra* note 110, at 9.

176. *Id.*

177. *Id.*

178. Grimmett, *supra* note 10, at 19. *See also* S. 2830, 101st Cong. 2d Sess. (1990); 3950, 102d Cong. 1st Sess. (1990). The provisions in both the House and Senate bills would have banned the export of domestically prohibited pesticides were dropp conference.

b. *The Group on Environmental Measures and Internationa Trade*

The Group on Environmental Measures and International was established at the November 1971 GATT Council meeting. ensuing twenty years, the group has been dormant. However, as a of pressure from European Free Trade Association member stat other countries, the group has recently convened.[179] The group's c agenda is to consider: 1) trade provisions contained in existing m eral environmental agreements; 2) multilateral transparency of n environmental laws and regulations that are likely to have effe trade; and 3) trade effects of newly developing domestic and interna "eco" packaging and labeling requirements.[180] Additionally, the is discussing a GATT contribution to the 1992 United Nations C ence on Environment and Development.[181] Believing that the GA not the appropriate forum for such discussions, certain GATT p most notably the developing nations, were against convenin group.[182]

Given the group's early emphasis on the impact of environ protection on trade, environmental groups have expressed fears th group will focus on subjugating environmental protections to trad gimes as opposed to finding some way of reconciling the concerns c trade and environmental interests. At this time, it is unclear tc extent these fears are justified.

## B. The Environmental Implications of the NAFTA and the CF

Although the vast majority of trade occurs under the umbr GATT, a wide range of additional regional and bilateral trade ments have a hand in determining patterns of national and interna resource use. With the emergence of rival trading blocs, inclu more integrated European Community and the possibility of an A tion of South East Asian Nations free trade area, bilateral and m eral trade agreements increasingly will play a major role in deter the competitiveness of domestic industries in world markets.[183]

179. *See Factual Note*, *supra* note 110, at 4-6; *GATT to Focus on Trade and Envi Link*, GATT Focus, Oct. 1991, at 1.

180. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 10; *G Focus on Trade and Environment Link*, *supra* note 179, at 1.

181. *GATT to Focus on Trade and Environment Link*, *supra* note 179, at 1.

182. *Id.*

183. *See* Stuart Auerbach, *Bush Stresses U.S. Commitment to Asia*, Wash. Post, 1992, at A23; *ASEAN Endorses Free-Trade Area*, Wall St. J., Oct. 9, 1991, at A-1

context of resource consumption patterns in the Americas, the most i portant of these agreements are the United States/Canadian Free Tra Agreement (CFTA) and the ongoing negotiation of a trilateral No American free trade agreement among the United States, Canada, a Mexico (NAFTA).

### 1. NAFTA

Joint efforts between President Bush and Mexico's President Sali to craft a Mexico/United States free trade agreement began in Septem of 1990.[184] On February 5, 1991, after Canada expressed a desire to included in the Mexico/United States negotiations, the bilateral Uni States/Mexico talks became the current trilateral NAF negotiations.[185]

The creation of a trilateral trade agreement between the Uni States, Canada, and Mexico would form the world's largest market, in porating 360 million consumers and a total output of $6 trillion NAFTA seeks to eliminate trade barriers and to reduce market dist tions and hence economic inefficiencies between the United States fi and third-largest trading partners, enabling a free and fair trade block

Environmentalists have subjected NAFTA to intense scrutiny. P ponents of NAFTA argue that NAFTA and its negotiations will prov Mexico with both the impetus and the resources to address its envir mental difficulties.[188] But its critics argue that absent significant chan in Mexico's environmental practices, NAFTA will open the way for U industries to escape U.S. environmental requirements by moving th

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184. *See* Arlene Wilson et. al, *North American Free Trade Agreement: Issues for Cong* Mar. 25, 1991, at 1, Cong. Res. Service, No. 91-282-E (1991). Official dialogue betwee Bush and Salinas administrations concerning a potential MFTA commenced in June of with the issuance of a joint statement in support of negotiation of an MFTA. *Id.* In a lett Aug. 21, 1990, President Salinas proposed that negotiations commence. *Id.* In response t Mexican President's letter, President Bush notified the Senate Finance Committee and House Ways and Means Committee of the intent to enter into negotiations. *Id.* at 1-2.

185. *See* Executive Office of the President, Response of the Administration to Issues R in Connection with the Negotiation of a North American Free Trade Agreement, May 1, 1 at 1 [hereinafter May 1 Plan].

186. *Id.*

187. *Id.* Taking Mexico as an example, in 1989 Mexico was the United States' third la trading partner with a turnover (exports plus imports) of approximately $52 billion. *See I ico-U.S. Free Trade Agreement?*, Jan. 7, 1991, at 5. In the same year, the United States Mexico's largest trading partner, accounting for 66% of all Mexican exports and 62% imports. *Id.*

188. *See* William K. Reilly, *Mexico's Environment Will Improve With Free Trade*, W ST. J., Apr. 19, 1991, at A15 (Mr. Reilly is the administrator of the U.S. EPA); May 1 *supra* note 185, at 1-3.

operations to Mexico.[189] They also argue that increasing economi
ity in Mexico without proper environmental controls will only exa
Mexico's environmental problems.[190] Mexico's environmental pr
are already surfacing in the Southwestern region of the United St
Additionally, they criticize the U.S. decision to deal with environ
issues on a parallel track rather than as an integrated part of NAF
Environmentalists point out that both the United States and Cana
the most part, have lived up to their obligations under the CFTA b
of the CFTA's trade enforcement provisions; in contrast, the
States and Canada both have failed to live up to their obligations
the Great Lakes Water Quality Agreement because it lacks effect
forcement provisions.[193]

In an effort to reassure environmentalists from all three N

189. *See* Bruce Stokes, *Greens Talk Trade*, NAT'L J., Apr. 13, 1991, at 862, 864-
*North American Free Trade Agreement: Issues for Congress*, July 12, 1991, at 47-4
comprehensive data regarding the potential flight of U.S. businesses south of the b
avoid more stringent U.S. environmental regulation is lacking, such pollution migra
already be occurring. There have been reports that at least forty Southern California
makers have relocated all or part of their operations to Mexico to avoid the Southern
nia Air Quality District's standards that require the use of low-emission paints, varn
solvents. *See* Robert Reinhold, *Mexico Proclaims an End to Sanctuary for Pollute*
TIMES, Apr. 18, 1991, at A20; GENERAL ACCOUNTING OFFICE, U.S.-MEXICO TRAI
U.S. WOOD FURNITURE FIRMS RELOCATED FROM LOS ANGELES AREA TO MEXIC
*to the Chairman, Comm. on Energy and Commerce, House of Representatives*, GAO/
91-191, 1-4 (Apr. 1991).

In addition to the environmental questions raised by the NAFTA, labor groups a
the NAFTA will cause a migration of American jobs to Mexico and will hurt U.S. i
as Mexican industries become more competitive. *See* Gary Lee, *Lobbyists Clash C*
*Trade Accord*, WASH. POST, Apr. 28, 1991, at A4, A6; Geroge W. Grayson *Mexico*
*Begins to Act Like a Competitor*, WALL ST. J., Sept. 27, 1991, at A11.

190. *See* Stokes, *supra* note 189, at 864-66.

191. *See* LESLIE KOCHAN, THE MAQUILADORAS AND TOXICS: THE HIDDEN C
PRODUCTION SOUTH OF THE BORDER 7 (1989). *Issues Relating to a Bilateral Fr*
*Agreement with Mexico: Hearings Before the Subcomm. on Western Hemisphere a*
*Corps Affairs of the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 11
(Statement of Micheal McCloskey, Chairman, Sierra Club [hereinafter McCloskey]).
ifers that supply water to communities on both sides of the U.S./Mexican border a
seriously depleted and poisoned by the improper disposal of wastes, largely from the
maquiladora industries. *Id.* Liver and gall bladder cancer incidence rates from com
that get their drinking water from the Rio Grande have been found to be significant
than the U.S. national averages. KOCHAN, *supra* at 7. Santa Cruz County, Ariz
forced, on at least one occasion, to declare a state of emergency after millions of gallo
sewage from Mexico were released into its water treatment system. *Mexico's Maqu*
*Free Trade, or Foul Play?*, E: ENVIRONMENT MAGAZINE, July/Aug., 1991, at 36-
hepatitis rate in Nogales, Arizona, a community downstream of certain Mexican
ladoras, has shot up to 20 percent over the national average. *Id.*

192. *See* Stokes, *supra* note 189, at 865.

193. Shrybman, *supra* note 157, at 107.

participant countries, the United States Trade Representative, in c junction with other American and Mexican governmental agencies, l released a comprehensive review of U.S-Mexican environmental iss predicated upon the assumption that "increased economic activity likely to translate into greater environmental protection."[194] Envir mentalists point out that economic growth in the U.S.-Mexican bor region, caused by the expansion of the *maquiladora* industry, has fai to bring about environmental benefits and in fact has caused increa environmental degradation.[195] To ensure that the environmental effe of NAFTA are known and addressed, environmentalists have also co menced litigation to have an environmental impact statement prepa for the NAFTA negotiations.[196]

### 2. CFTA

The concerns over NAFTA have been heightened by problems a ing from CFTA. Challenges to domestic environmental laws as n tariff trade barriers and harmonization by reducing environmental st dards under CFTA have underscored the weaknesses of negotiating tr agreements without regard to environmental issues.

The CFTA has functioned both as a sword to attack more string domestic environmental regulation and as a shield to protect less str gent environmental and health standards. For instance, both U.S. a Canadian entities have used the CFTA and GATT prohibitions on n tariff trade barriers to challenge the other nation's domestic environm tal laws. In the CFTA's first dispute resolution panel decision, panel found the provisions of the Canadian Fisheries Act, which requi that all fish caught for commercial purposes in Canadian waters must landed first in Canada for biological sampling, to violate the CFTA. While the biological sampling requirement clearly restricted trade, requirement was intended to provide accurate and reliable data to ens adequate fisheries management over already-depleted stocks of herr and salmon in Canada's Pacific coast waters.[198] The U.S. Non-Ferr

194. *Id.*

195. *Id.*

196. *See* Public Citizen v. United States Trade Representative, 782 F. Supp. 139 (D.I 1992), *appeal docketed*, No. 92-5010 (D.C. Cir. Feb. 14, 1992) (dismissing litigation reques an environmental impact statement for the NAFTA and Uruguay Round negotiations plaintiff's lack of standing).

197. *In re* Canada's Landing Requirement for Pacific Coast Salmon and Herring, Can U.S. Trade Commission Panel, Oct. 16, 1989, 2 TCT 7162; *see also* Shrybman, *supra* note at 99.

198. *See* Shrybman, *supra* note 157, at 99.

Metal Producers Committee has challenged Canadian enviror and safety programs in lead, zinc, and copper smelters as unfai practices under the CFTA.[199] Conversely, in U.S. Federal cou the Canadian asbestos industry and the Canadian government cha EPA regulations that would phase out production, importation, a of asbestos as violations of CFTA and GATT.[200]

Moreover, harmonization as required under CFTA arguably sulted in lower environmental standards and reduced import pro at the border.[201] For example, Canadian pesticide regulations r set using the U.S. risk-benefit model rather than the more stringe cautionary model previously used in the Canadian regulations.[202]

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199. *See* PUBLIC CITIZEN, FACT SHEET #3—TRADE DISPUTES, at 2. Acid rai largely by the mixing of sulfur dioxide emissions from human sources with water in create rain showers high in sulfuric acid content, has been linked to damage to s streams and fisheries in Canada. *See* Drew Lewis & Williams Davis, Joint Report o cial Envoys on Acid Rain 26 (Jan. 1986). The principal sources of Canada's acid rai are non-ferrous metal smelting plants in Ontario and Quebec, however, Canada recei icant "exports" of sulfur dioxide emissions from U.S. based industries as well. *Id.*; Sibley, *A Canadian Perspective on the North American Acid Rain Problem*, 4 N.Y.I INT'L & COMP. L. 529, 530 (1983). To combat its acid rain problems Canada offers incentives to to lead zinc and copper smelters for the purchase and installation of which collect sulfur dioxide emissions. The U.S. Non-Ferrous Metals Producers C has challenged this Canadian program under the CFTA as a non-tariff barrier to t PUBLIC CITIZEN, FACT SHEET #3—TRADE DISPUTES, *supra* at 2.

200. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1209, (5th Cir. 1991 that Canadian parties lacked standing, despite their GATT rights, to assert substan that U.S. asbestos regulations violated U.S.'s binding obligations under GATT); *see* of Amicus Curiae for the Government of Canada at 16-19, Corrosion Proof Fitting 947 F.2d 1201 (5th Cir. 1991).

201. *See* Shrybman, *supra* note 157, at 105; PUBLIC CITIZEN, FACT SHEET #3 DISPUTES, *supra* note 199, at 2.

202. *See* Shrybman, *supra* note 157, at 105; PUBLIC CITIZEN, FACT SHEET #3 DISPUTES, *supra* note 199, at 2. Schedule 7 of Chapter 7 of the CFTA deals specifi pesticides. The schedule provides that the U.S. and Canada must "work toward e guidelines, technical regulations, standards and test methods for pesticide regulation." follows the precautionary principle in licensing pesticides under the Pest Control Act, and requires the pesticides to be demonstrated as safe prior to registration. Vigod, *The Canada-U.S. Free Trade Agreement: Selling the Environment Short*, E MENT (forthcoming 1992) (on file with CIEL-US). In contrast the United States licer cides under the Federal Insecticide, Fungicide and Rodenticide Act, which provid benefit approach to registration decisions. *Id.* The parties also committed to working to achieve equivalence in "the process for risk-benefit assessment." Moving away fro safety towards risk-benefit has weakened Canadian pesticide regulations. *See* PUBLIC FACT SHEET #3—TRADE DISPUTES, *supra* note 199, at 3; Vigod, *supra*. Prior to th Canada had registered twenty percent fewer active pesticide ingredients and seven tir pesticide products than the U.S. *See* PUBLIC CITIZEN, FACT SHEET #3—TRADE D *supra* note 199, at 3. Now Canada finds itself having to increasingly accept import cide products made from compounds that were not among those listed prior to the C *id.*

dition, a "streamlined" random meat inspection system to further CFTA goal of reducing trade restrictions replaced inspection of Ca dian meat at the U.S. border.[203] A 1990 U.S. Department of Agricult proposal to end U.S. meat inspections along the Canadian border as p of the CFTA[204] was abandoned in 1991.[205]

Perhaps the most environmentally devastating effect of the CF has been its elimination of Canadian controls over the exportation of ergy to the United States.[206] Under chapter 9 of the CFTA, both United States and Canada have agreed to eliminate regulatory cont over energy development and trade. To further facilitate the devel ment of energy for export markets, chapter 9 also accords special sta to subsidies for oil and gas exploration and development. While ene development subsidies are protected from challenge, programs that p vide subsidies for energy conservation remain vulnerable to challeng

The energy development incentives set out in the CFTA run cou to the intent, if not the letter, of previously-negotiated internatic agreements, specifically those concerning ozone depletion and air po tion.[207] Moreover, these incentives pose obstacles to ongoing inte tional efforts to address the threat of global warming. The CFTA's towards increased energy development to meet rising U.S. consumpt demands has spawned the development of a number of environment destructive Canadian-based energy mega-projects.[208]

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203. 54 Fed. Reg. 273 (1989) (to be codified at 9 CFR pts. 327 & 381); *see also* U.S. G ERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: FOOD SAFET SUES USFDA SHOULD ADDRESS BEFORE ENDING CANADIAN MEAT INSPECTIONS, G RCED-90-176, 1-2 (1990) [hereinafter FOOD SAFETY].

204. 55 Fed. Reg. 26,695 (1990) (to be codified at 9 CFR pts. 312, 322, 327 & 381); *see* FOOD SAFETY, *supra* note 203, at 1-2.

205. 56 Fed. Reg. 52,218 (1991) (to be codified at 9 CFR pts. 312, 322, 327 & 381).

206. Shrybman, *supra* note 157, at 98.

207. *Id.*

208. *See id.* The two most destructive mega-projects are the Arctic Gas Project an James Bay Hydroelectric Project. The Arctic Gas Project entails the construction of a mile long natural gas pipeline traversing the arctic perma frost—one of the world's most and fragile ecosystems. *Id.* The James Bay Project involves the extension of hydroelectric that will "reshape a territory the size of France and flood an area the size of the sta Vermont." *Id.* The James Bay Project threatens to destroy the culture of the Northern and Innuit peoples and will have a devastating effect on whales, seals, birds, caribou and species. *Id.* at 98-99. In the past, projects like James Bay and the Arctic Gas Project n have been prevented by Canada's National Energy Board. Today, however, The Nat Energy Board's regulatory mandate has been virtually eliminated by the CFTA. *Id.* at

# 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[209]

The Montreal Protocol on Substances That Deplete the Layer[210] (the Protocol), first negotiated in 1987 and substantially in June of 1990,[211] provides for eliminating, by the year 2000, CF other chemicals harmful to the ozone layer. The consequences of depletion range from health effects, such as increased incidence cancer and cataracts, to reductions in yield of food crops.[212]

The Protocol controls both the production and consumpt CFCs and other ozone-depleting substances. Several of the Prc key enforcement provisions directly implicate trade.[213] First, the col restricts parties from trading in CFCs and CFC-related produc non-parties.[214] Second, the Protocol restricts trade in CFCs and related products between parties.[215] Third, the Protocol cont number of provisions assisting developing countries in meeting the gations under the Protocol, including lengthened timetables f phase-out of controlled substances, financial assistance, and tech transfer incentives.[216]

#### a. *Trade with Non-Parties*

To encourage countries to participate in the Protocol and courage industries that produce and use CFCs from migrating t party states, the Protocol establishes three tiers of trade regula restricted products between parties and non-parties. The first tie strictions applies directly to trade in the controlled substances, b parties from importing controlled substances from non-parties.

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209. This section is substantially derived from Donald M. Goldburg, Provisior Montreal Protocol Affecting Trade (Jan. 16, 1992), CIEL-US Working Paper.

210. The Montreal Protocol on Substances That Deplete the Ozone Layer, ado opened for signature Sept. 16, 1987, *entered into force* Jan. 1, 1989, 26 I.L.M. 154 [hereinafter Protocol].

211. *See* Dale A. Bryk, *The Montreal Protocol and Recent Developments to Pr Ozone Layer*, 15 HARV. ENVTL. L. REV. 275, 283-297 (1991).

212. *See* WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-1991, at 62-6

213. *See* Goldburg, *supra* note 209.

214. *See* Protocol, *supra* note 210, art. 4, 26 I.L.M. at 1554-55.

215. *Id.* art. 2, 26 I.L.M. at 1553.

216. *Id.* art. 5, 26 I.L.M. at 1555-56.

January 1, 1993, parties to the Protocol also may not export control substances to non-parties.[217] The Protocol's second tier of restricti applies to products that contain controlled substances.[218] In June 1991, the parties adopted an annex, which lists products containing c trolled substances.[219] This annex became effective in December of 19 and those parties that did not object must ban import of such prod by June 1992. The third tier of restrictions envisioned by the Protc would apply to products made with, but not containing, controlled s stances. The Protocol requires the parties to conduct a feasibility st on banning imports from non-parties of substances made with, but containing, controlled substances by January 1, 1994.[220]

Because the Protocol phases out trade in controlled substan among the member states while simultaneously banning the import "like" products from non-party states, there is a period during wh non-party states will be precluded from exporting products contain controlled substances to party states that continue to be able to tr such products among themselves. Thus, if the GATT contracting par apply the Protocol's import restrictions against imports from other c tracting parties that are not parties to the Protocol, these import pr sions would appear to violate GATT's non-discrimination obligations Similar GATT non-discrimination issues arise from the Protocol's on exports of controlled substances to non-parties. Moreover, should parties enact restrictions that apply to imported products made with, not containing, controlled substances, such restrictions would be P restrictions that could violate GATT's article III (governing natic treatment) and article XI (prohibiting quantitative restrictions).[222]

Using these trade restrictions to accomplish the Protocol's goals discussed extensively during the Protocol's negotiation in 1987.[223] parties agreed to use trade restrictions because they feared that the p ties' industries could not internalize the costs of complying with agreement while competing with industries in non-party countries t did not have to bear these costs. In practice, however, efforts to eli

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217. *Id.* art. 4(2), 26 I.L.M. at 1554.

218. *Id.* art. 4(3), 26 I.L.M. at 1554.

219. Montreal Protocol on Substances that Deplete the Ozone Layer, London 1990, nexes A, B, UNEP/OzL.Pro.2/3 at 31.

220. *See* Protocol, *supra* note 210, art. 4(4); 26 I.L.M. at 1555.

221. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 11; OECD, Session, *supra* note 21, at 23; Goldburg, *supra* note 209.

222. *See supra* note 164.

223. *See Report of the Ad Hoc Workup Group on the Work of its Third Session*, U.N. E ronment Program, at 17-18, UNEP/WG.172/2 (1987).

nate the use of CFCs and other controlled substances in many ir have led to the discovery of less expensive and more efficient sul for these products. Nevertheless, at the time of the agreemen trade restrictions were deemed essential incentives to encourag tries to join the Protocol, and they continue to play a major role serving the integrity of the Protocol.

These discussions also addressed the compatibility of these t strictions with the GATT.[224] A legal expert from the GATT Sec advised the Protocol's negotiators that these measures would be c ble with the GATT by virtue of article XX's exceptions because t ditions present in the party nations would be substantially differe those in non-party nations—allowing the parties to draw non-a distinctions between products from party nations and non-pa tions.[225] In light of the findings of the Tuna/Dolphin Panel Rep conclusion may have to be reexamined.

b. *Special Provisions for Developing Countries*

The Protocol contains a number of provisions with trade i tions to assist developing countries in meeting their obligations ur Protocol. First, the Protocol permits developing countries to d ten years their phase-out of controlled substances.[226] Second, the col establishes a Multilateral Fund to provide developing countr their industries with technical and financial assistance necessary f pliance with the Protocol.[227]

These special provisions for developing countries could run certain GATT obligations, especially in view of the Uruguay Rou phasis on eliminating preferences to developing countries.[228] Fo ple, a developing nation receiving financial assistance fr Multilateral Fund and then passing it on to its industries to p "clean" technologies could be in violation of the GATT's pr against subsidies.

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

In recognition of global threats to the world's biodiversity, t

224. *Id.* at 18.
225. *Id.*
226. *See* Protocol, *supra* note 210, art. 5(1), 26 I.L.M. at 1555.
227. *See id.*, art. 5(3), 26 I.L.M. at 1555.
228. *See* Frictions Between International Trade Agreements and Environment tions, *supra* note 20, at 20.

vention on International Trade in Endangered Species of Wild Fa and Flora[229] (CITES) seeks to control or eliminate trade in plant animal species which are now, or may become, threatened with ext tion. Because the intent of CITES is to alleviate trade-driven pressu on a species, its trade-related provisions are necessary to the achievem of its goal.

The level of the trade restriction CITES places on trade in a spe is proportional to the degree of the threat to the species. CITES classi each regulated species by its degree of "endangeredness" and establis corresponding levels of trade restrictions through a listing system c sisting of three Appendices.[230] Parties may propose changes to the c gorization of a species as well as additions and deletions to Appendices.[231]

Appendix I includes species that currently are threatened with tinction.[232] The threat of extinction to an Appendix I species need no linked with trade demands on the species. CITES defines commer trade broadly to include transactions in the species and species-deri products that have even nominal commercial aspects.[233] Such comn cial trade is prohibited.[234] Noncommercial trade is allowed only if m ing the species will not be detrimental to the survival of the specie Before an export country may grant a permit for non-commercial t in a species, the import country must issue an import permit.[236]

Appendix II lists species which are not currently threatened v extinction but may become threatened unless trade in the specie strictly regulated.[237] The exporting country may grant export per for Appendix II species where the country's scientific authorities de mine that the export will not be detrimental to the survival of species.[238]

Appendix III consists of those species that any party has identi as requiring protection to prevent the species' demise from trade-dr

229. Convention on International Trade in Endangered Species of Wild Fauna and F Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, [hereinafter CITES]. CITES currentl 113 parties. *See* Fish & Wildlife Service, U.S. Dept. of Interior, *CITES Update #12: Feb 1992*, at 1, FWS/OMA TRE 1-02g (Feb. 1992).

230. *See* CITES art. II.

231. *See id.* arts. XV, XVI.

232. *Id.* art. II(1).

233. *Id.* art. I(b),(c).

234. *Id.* art. III(3).

235. *Id.*

236. *Id.* art. III(3).

237. *Id.* art. II(2).

238. *Id.* art. IV(2).

overexploitation and for which the co-operation of the other pa needed to control the threat to the species.[239] Appendix III list plies to only those populations of a species found within those co that have classified the species as an Appendix III species.[240] Ap III listing enables the contracting parties to address localized th extinction to sub-populations of species where these threats do no other sub-populations of the species. Trade in Appendix III spe tween parties that have not listed the species as Appendix III sp allowed so long as a certificate of origin accompanies the spe product.[241]

While parties must conform to these mandates, the agreeme not limit the ability of a party to adopt unilaterally stricter pro standards. Parties are required to enforce the provisions of CI their dealings with non-parties.[242]

A number of CITES provisions pose potential areas of fricti the GATT's obligations.[243] Because CITES allows a party to non-domestic species through trade restrictions, such trade restr in light of the Tuna/Dolphin Panel Report, would not appear to for article XX's exceptions for conservation of exhaustible natu sources and protection of species health and life. If the provisions not qualify for an article XX exception, then a CITES party in trade restrictions against products of a GATT party that is not a party could be violating the GATT's prohibition against quan restrictions.[244]

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

To avoid the high costs of domestic disposal of hazardous caused by stringent environmental laws and regulations, industrie veloped countries increasingly have sought to export these waste veloping countries with lower environmental standards. Interr negotiations to address the environmental and social implications practice led to the Basel Convention on the Control of Transbo Movements of Hazardous Wastes and Their Disposal[245] (the Bas

239. *Id.* art. II(3).
240. *Id.*
241. *Id.* art. V(3).
242. *Id.* art. X.
243. *See* Frictions Between International Trade Agreements and Environmenta tions, *supra* note 20, at 21.
244. *Id.*
245. Convention on the Control of Transboundary Movements of Hazardous W

vention). The Basel Convention seeks to control international trade hazardous wastes so that baseline health and safety standards are met all countries. Because the Convention is intended to restrict trade wastes, the trade provisions are central to achieving the Convention goals.

The Basel Convention permits the parties' transboundary moveme of hazardous wastes in only three circumstances: (1) where the exporti party lacks the technical capacity, necessary facilities, or siting capac to ensure the environmentally sound disposal of the wastes in questic (2) where the wastes in question are required as a raw material for cycling and recovery industries in the importing nation; or (3) where t party performs transboundary shipment and disposal in accordance w the particular requirements established in the convention.[246]

The Basel Convention prohibits the export of wastes to nations tl have prohibited the import of such hazardous wastes, to non-parties, a to the Antarctic region. Parties that choose to prohibit the import hazardous wastes must inform the other parties of this decision.[247] P ties may only permit the shipment of hazardous wastes if the shipmen authorized in writing by the importing country.[248] The exporting part must provide prior notification of any shipment.[249] A party that choo instead to allow the import of such wastes must not allow the import any wastes that it has reason to believe will not be managed in an en ronmentally-sound manner.[250] The exporting party has the burden ensuring that any exports of wastes that it permits are, in fact, manag in an environmentally-sound manner.[251]

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

The requirements that the Basel Convention places on trade in h ardous and toxic wastes impose conditions on trade in such wastes t

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Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649 (1989) (The agreement enter into force May 1992) [hereinafter Basel].

246. *Id.* art. 4(9)(a).
247. *Id.* art. 4(1)(a).
248. *Id.* art. 4(1),(5),(6).
249. *Id.* art. 6(1).
250. *Id.* art. 4(2)(g).
251. *Id.* art. 4(2)(e),(8).
252. *Id.* art. 9(2).

appear to violate the GATT's trade obligations.[253] Additionally, t many of the conditions imposed on exporting countries are desig protect the welfare of individuals and the environment in im countries "extrajurisdictionally," they would appear to fall outs scope of the article XX exceptions. Similarly, the prohibition on e to the Antarctic region may not be justifiable under article XX. T on trade with non-parties is most troublesome. For this provi come within article XX, the discrimination against non-parties need to be justified on the basis of domestic health, safety, or co tion concerns in the exporting country.

4. Proposed International Agreements[254]

The interaction between the spheres of international trade an ronmental protection is becoming a topic of discussion in a nun international fora, including the United Nations Conference on En ment and Development (UNCED) and the inter-governmental n tions on climate change and protection of biodiversity. This s summarizes the current discussions within the biodiversity and c change negotiations and UNCED, which will culminate at the 1992 conference in Rio de Janeiro.

a. *The United Nations Conference on Environment and Development*

The UN General Assembly uses UNCED to devise strateg reversing environmental degradation while promoting "sustainab environmentally sound development in all countries." Envisione follow-up to the landmark 1972 UN Conference on the Human En ment in Stockholm, the conference is intended to produce two nor ing comprehensive documents to guide the world towards environ clean-up and sustainable development. "Agenda 21" is to be a p action—covering a panoply of topics from desertification to enviro tal accounting—for dealing with environmental degradation and pr ing sustainable development over the next twenty years. The parti planned to draft an "Earth Charter" that would serve as a set o principles governing human behavior in the biosphere. Discuss trade issues in the UNCED process has been limited. Only in the and final Preparatory Committee (PrepCom IV) meeting, held in

253. *See* Frictions Between International Trade Agreements and Environmental tions, *supra* note 20, at 22.

254. This section was substantially derived from a research memorandum prep David Downes, General Counsel, CIEL-US.

York from March 2 to April 3, 1992, did the parties attempt to deal w the issues in draft decision documents.

At PrepCom IV, delegates still could not come up with unbracke texts. Indeed, delegates could not even agree on "Earth Charter" a title for the statement of principles; the draft is entitled the "Rio Decla tion." Many major issues remain unsettled. Among the biggest obstac to agreement is conflict over the extent to which developed countı should provide additional financial resources and should take spe measures for transferring environmentally appropriate technology to developing world.

In the closing sessions of PrepCom IV, language explicitly deal with the interrelationship of trade and environment made its way i the proposed texts. This language may yet be revised, since informal cussions of the contents of documents will continue sporadically throu April and May and since delegations will continue to negotiate dur their first days in Rio.

### i. UN Background Studies Prepared for UNCED

Two UNCED background studies explicitly discuss trade and er ronment.[255] The first is a briefing text prepared for government dele tions by the UNCED Secretariat on the international economy environment and development, which includes discussions of the r tionship of international trade and sustainable development, as well several of the major areas of potential conflict between internatic trade and environmental law.[256] The report begins by acknowledging "underlying presumption of trade theory" that trade "at prices wh reflect real resource cost" leads to the most efficient allocation of sources and the maximization of economic welfare generally.[257] As aside, it notes that there are exceptions to this rule, including trad hazardous products, but it does not assess the validity of measures straining the export of hazardous substances under the GATT.[258]

The report notes that it is unclear whether provisions in inte

255. A third background report, focusing on the impact of international environm regulation on trade, is being prepared by C&M International Ltd. of Washington D.C. was not yet available as of this writing. *See* LEGAL TIMES, Jan. 13, 1992, at 5; Telep Interview with Offices of C&M International Ltd. (Feb. 5, 1992).

256. *The International Economy and Environment and Development: Report of the S tary-General of the Conference*, Preparatory Committee for United Nations Conference or vironment and Development, 3d Sess., UN Doc. A/CONF.151/PC/47 (1991) [herein UNCED Sec't Int'l Econ. Report].

257. *Id.* at 4.

258. *Id.*

tional environmental agreements for trade measures against nc ties—aimed at discouraging "free riders" who benefit fro agreement's success without paying the costs of compliance—are tent with GATT obligations.[259] It also acknowledges the related i determining "the appropriate forum for the resolution of trade disputes arising from the application of such global agreements." concludes that at least one issue appears settled: that the GATT r such trade measures to be "proportional to the environmental obj which are sought to be achieved."[261]

Regarding domestic environmental laws, the report states tha "generally accepted proposition" that environmental standards m fer among countries and that therefore "differences in standards cannot be a basis for valid trade restraint."[262] It supports this v arguing that differences in environmental "conditions" make up international specialization in production and thus contribute ciency and to "sustainability."[263] Obviously, this argument does n into account the externalization of environmental costs under one try's environmental standards that could result in a production p which, although it produces products that appear to be cheaper, i all more costly and less efficient than production in a countr stricter environmental standards.

In discussing the trade implications of national standards tha late the process by which a product is produced, however, the concludes that it is reasonable to impose such standards on impc least where the production process degrades common resources an affects the importing as well as the exporting country.[264] As to w such measures are consistent with GATT, the report merely not GATT does not "explicitly" allow them.[265]

The second UNCED background study discussing trade and vironment was prepared at the request of the UN General Assem the United Nations Conference on Trade and Development (UNC for the UNCED PrepCom.[266] The report states that "trade liberal will induce shifts in production, leading to a more efficient and su

259. *Id.* at 7.
260. *Id.*
261. *Id.*
262. *Id.* at 6.
263. *Id.*
264. *Id.* at 7.
265. *Id.* at 8.
266. *Report of the Secretary-General of the UNCTAD, submitted to the Secretary-G the Conference Pursuant to General Assembly Resolution 45/210*, Preparatory Comm

ble use of environmental resources throughout the world," *if* "in countries production and end-use prices incorporate the full cost of source use (the Polluter-Pays and User-Pays Principles)."[267] Thus, a tional trade policy ultimately may include, for example, increa intervention in energy markets in order to address global warming By the same token, it will mandate removing some trade barriers t prevent allocating the real costs of resource use, such as the agricultu protectionism of developed countries.[269]

The UNCTAD trade report urges further study of the interrelati ship of trade and environment, including both "the effects of trade lib alization on the environment," particularly with regard to remov developed countries' agricultural subsidies, and the "impact of envir mental regulations on trade," including trade-related provisions of in national environmental agreements, particularly in light of develop countries aspiring to further development.[270] The report tentatively c cludes that trade measures based on environmental grounds should c form to three principles. First, they should not result in arbitr discrimination between countries "where the same conditions prev and should not serve as disguised trade barriers.[271] Second, trade-rest tive measures should be "proportional" to the environmental objecti of those measures.[272] Third, the "precautionary principle "tighten[ing] acceptable risk margins"—should guide the setting of e ronmental standards and "corresponding trade measures" so that "lack of full scientific certainty" does not hinder "the prevention of e ronmental hazards."[273]

### ii. General Positions of Governments

Although trade policy is an aspect of the "cross-sectoral" issu the international economy which PrepCom IV is to consider, in the e stages, governmental delegations to UNCED have devoted relatively tle attention to the interrelationship of international trade and envi mental policy.[274] Developed countries, especially the United States, h

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the U.N. Conference on Environment and Development, 3d Sess., Agenda Item 2B, U.N. A/Conf.151/PC/48 (1991).

267. *Id.* at 14 (emphasis added).
268. *Id.*
269. *Id.*
270. *Id.* at 15.
271. *Id.* at 16.
272. *Id.*
273. *Id.* at 7, 16.
274. Telephone interview with Tahar Sadoc, UNCED Secretariat (Jan. 3, 1991).

tended to argue that trade issues should be addressed at GATT. the United States has stated that, "We look to the GATT to defi trade measures can properly be used for environmental purposes." the extent that they have addressed the issue, developing countri particular, countries sometimes termed "newly industrialized tries"—have expressed concern that stringent environmental reg may function as protectionist trade barriers, with a particularly n effect on the exports of developing countries.[276]

India, for instance, has argued for strict limits on the imposi trade restrictions on environmental grounds, stating that even "g environmental considerations "cannot justify restrictive trade pra except when these are introduced in terms of specific provisions in a ally accepted environmental convention."[277] A UN General Ass resolution on UNCED reflects this concern, stating that incorpo environmental considerations into development policy should not as a pretext for creating unjustified barriers to trade."[278]

At PrepCom IV, language was inserted into draft documents approved, would significantly implicate the interrelationship of in tional trade policy and measures for environmental protection. A the twenty-seven principles enunciated in the "Rio Declaration," was pushed through in the closing hours of the session, was Princi on trade and environment, which expresses a viewpoint with on consequences for global environmental protection.[279] Principle 12 uncontroversially by noting that "[t]rade policy measures for en mental purposes should not constitute a means of arbitrary or un able discrimination or a disguised restriction on international tra

275. Preparatory Committee for the 1992 UN Conference on Environment and I ment, Statement by the U.S. Delegation on International Economics and Trade, In Economic-Environmental Accounting, and Economic Instruments (Aug. 1991) (on authors).

276. *See, e.g., Principles on General Rights and Obligations: Chairman's Cons Draft*, Preparatory Committee for the United Nations Conference on Environment an opment, ¶¶ 86, 89, U.N. Doc. A/Conf.151/PC/WG.III/L.8 (1991) (statements of So rea and Singapore).

277. *Id.* ¶ 85.

278. *See* G.A. Res. 228, U.N. GAOR, 44th Sess., U.N. Doc. (1989).

279. Late drafts of some sections of Agenda 21 contained similar proposed langua *e.g., Protection of Oceans, All Kinds of Seas Including Enclosed and Semi-Enclos Coastal Areas and the Protection, Rational Use and Development of Their Living Re* Preparatory Committee for the United Nations Conference on Environment and I ment, 4th Sess., Agenda Item 2, at 35, U.N. Doc. A/Conf. 151/PC/WG.II/L.25/Rev. (including handwritten amendments "as adopted at Plenary April 3, 1992, 9:30 p.m.

280. *Principles on General Rights and Obligations: Draft Principles Proposed by th man: Rio Declaration on Environment and Development*, Preparatory Committee

The next sentence reflects the holding of the GATT panel in the Tun Dolphin Panel decision, stating that "[u]nilateral actions to deal w environmental challenges outside the jurisdiction of the importing cou try should be avoided."[281] Similarly, the final sentence, drawing or again from the Tuna/Dolphin Panel's rationale, states tl "[e]nvironmental measures addressing transboundary or global envir mental problems should, as far as possible, be based on an internatio consensus." This language, taken literally, places an almost impossi burden on the proponents of international environmental agreeme containing trade-related enforcement measures since it is almost impo ble to achieve an international consensus.[282] Indeed, even the United N tions does not include every nation-state.

iii. General Comments of Non-Governmental Organizations (NGOs)

A number of NGOs involved in UNCED from both North a South strongly criticize the ramifications of current trade policy tre for environmental protection and sustainable development. The Wo Wide Fund for Nature complained that GATT's "narrow focus" on "l eralization of world trade" blinds it to environmental and natural source costs of traded products that are currently externalized.[283] called on the PrepCom to analyze the GATT's potential impact on c rent and future international agreements for environmental protect and to suggest GATT reforms that will ensure that GATT provisions not hamper countries' ability to protect the environment and deve sustainably.[284] The Poverty and Affluence Working Group, a coalit of seventy NGOs, has also urged that UNCED analyze "how trade pr tices distort the environment and development . . . [and] ensure that en ronmental and development policy [supersede] trade policy" so as correct current trade practices that encourage uneconomic and envir mentally destructive exploitation of the natural resources of the South

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United Nations Conference on Environment and Development, 4th Sess., Agenda Item 3, U.N. Doc. A/Conf. 151/PC/WG.III/L.33/Rev.1 (1992).

281. *Id.*

282. Although the sentence by its terms includes *all* environmental measures, wheth not they pertain to trade, the context within Principle 12 suggests that it is intended to re only those environmental measures that relate to trade.

283. *See UNCED Must Recognize Role of Trade* (Sept. 3, 1991) (press release from W Wildlife Fund).

284. *Id.*

285. *See* Third World Resurgence, No. 14/15 at 34 (1991). The term "south" is us refer to developing countries and the term "north" refers to developed countries.

Similarly, in a statement to UNCED, thirty-eight environment a velopment NGOs from twenty-five countries ask that any decision at the Uruguay Round conform to "the principles of sustainable d ment which will hopefully [sic] be elaborated at the U meeting."[286]

iv. Forestry Principles

Originally, delegations to the PrepCom were to negotiate a c tion to preserve forests, to be ready for UNCED's consideration in June, 1992. It is extremely unlikely, however, that anything more non-binding statement of general principles on forests will be re that time. While the discussion of timber trade has raised the issue interrelation of trade and environment more explicitly than in mos contexts, mutually inconsistent provisions on trade policy in a h bracketed draft text that came out of the third PrepCom meeting c strate that there is as yet no agreement on how to deal with trade with regard to forests.[287] Some proposed language would, for in encourage "subsidies or incentives encouraging sound practices,' another proposed clause would provide that "[t]rade on forest pr must be consistent with international trade law and practices as e ied for example in [GATT] and its subsidiary agreements."[288] NGOs have commented on trade-related issues, with one Malaysia group arguing that UNCED "must ensure that countries reser right and freedom to ban the export of forest products for conse purposes, and not support efforts to label such moves as an obst trade."[289]

v. Technology Transfer and Intellectual Property Rights

The terms for transfer of environmentally appropriate tech from North to South have been intensely debated in the UNCE cess, with little progress toward agreement so far. Developing co

286. *See* Third World Network, NGO Statement on Some Key Issues for UNCED 1991) (statement to UNCED from 38 environment and development NGOs from 25 c drafted at a meeting in Penong, Malaysia, 25-30 July 1991).

287. *See, e.g., Land Resources: Deforestation, A non-legally binding authoritative s of principles for a global consensus on the management, conservation and sustainable ment of all types of forests*, Preparatory Committee for the United Nations Confe Environment and Development, 3d Sess., Agenda Item 3, ¶ 14 U.N. Doc. A/Conf. WG.I/CRP/14/Rev.1 (1991) [hereinafter *Land Resources: Deforestation*].

288. *See id.*

289. *See* Ling & Khor, Principles for an UNCED Consensus on Forests, Thir Network Briefing Papers for UNCED No. 4, at 16 (1991).

insist that developed countries must help them obtain the technol needed to comply with obligations under any new international agr ments for environmental protection. In general, they ask that develo countries make special efforts to transfer appropriate technology by p viding funds and by transferring such technology on preferential a non-commercial terms.[290] Developed countries are reluctant to m commitments to any more funding, especially in the absence of devel ing countries clearly committing to new environmental protection me ures. And preferential technology transfer or funding potenti conflicts with GATT obligations barring discriminatory treatment in form of subsidies.

In this context, developing countries are concerned that protect intellectual property rights (IPR), an issue now under discussion in Uruguay Round's TRIPS negotiations, may hamper the transfer of en ronmentally appropriate technology. These concerns implicitly conf with the United States' effort in GATT negotiations and in bilateral n tions to strengthen IPR protection worldwide,[291] an effort reflected in United States' comments in the UNCED process.[292] A number of de oping countries, as well as many NGOs, also are increasingly concer that genetic resources from wild and domesticated tropical ecosyste

290. *See, e.g., Draft Decision proposed by the Vice-Chairman, Mr. B.S. Utheim (Norwa the basis on informal consultations: Transfer of Technology*, Preparatory Committee for United Nations Conference on Environment and Development, 3d Sess., Agenda Item 2 2(a):(d), 2(a):(g), 8, U.N. Doc. A/Conf. 151/PC/L.53 (1991) (bracketed text calling for ous measures to transfer patents on environmentally sound technology to developing coun on non-commercial terms); *China and Ghana: Draft decision: Financial resources*, Prepara Committee for the United Nations Conference on Environment and Development, 3d S Agenda Item 2(c), ¶¶ (b), (g), U.N. Doc. A/Conf. 151/PC/L.41 (1991) (G-77 proposa provision of financial resources and transfer of technology).

291. *See* Keith Bradsher, *U.S. and China Reach Accord on Copying*, N.Y. TIMES, Jan 1992, at D1, D14 (reporting that China agreed to United States demands for strengthe intellectual property protection); Hans Peter Kunz-Hallstein, *The United States Proposal GATT Agreement on Intellectual Property and the Paris Convention for the Protection of In trial Property*, 22 VAND. J. TRANSNAT'L L. 265, 267 (1989); Richard A. Morford, *Intellec Property Protection: A United States Priority*, 19 GA. J. INT'L & COMP. L. 336, 337-39 (1 (describing United States pursuit of improved protection of intellectual property in for countries through bilateral consultations and Section 301 actions under United States inte tional trade law).

292. *See* Preparatory Committee for the 1992 UN Conference on Environment and D opment, Statement by the U.S. Delegation on Technolology Cooperation (Aug. 30, 1991) ( ing that "[t]echnology has been adapted most successfully in those countries where business environment . . . offer[s] adequate protection for intellectual property"); UN Co ence on Environment and Development, U.S. Statement on UNGA U.N. Doc. A/Conf. PC/67 "Environmentally Sound Management of Biotechnolology: Background and Iss (Aug. 22, 1991) (stating that "intellectual property rights have been key to advances in technology . . . [and] must be respected").

are transferred freely to developed countries, while commercially
ble substances and technology derived from those resources by N
industry are rendered expensive or unaffordable for developing c
by IPR. Some developing countries are calling for the reduction
ination of IPR, at least in the South, over products derived from
ern genetic resources.[293]

On the other hand, legal and economic scholars, as well as e
mental and human rights NGOs and representatives of indigeno
ples, have called for the creation of property rights over bi
resources that would enable governments or individuals with biol
diverse territory to earn some return from the use of that biodive
create new products—a creative use of IPR-like concepts that m
lieve could stimulate preservation of natural resources that are c
imperilled. Advocates for indigenous peoples also have urged
ments to recognize some form of intellectual property rights i
traditional knowledge of the biological resources of their natural e
ment—so far without success.[294]

b. *Negotiations on a Biodiversity Convention*

In a process paralleling the preparations for UNCED, an Int
ernmental Negotiating Committee with a Secretariat staffed t
UNEP is overseeing negotiations on a convention to protect bi
diversity. These negotiations were supposed to result in a draft
tion ready for the consideration of delegates in Rio in June, 1992,
betting is fifty-fifty that a convention of any significance will be
by that time.[295] In large part, negotiations appear to have snagge
same two issues that have hampered progress at UNCED: tra
technology (although its relevance in the context of conservatio
odiversity is less clear than in other areas) and allocating finan
sources for conservation measures.

So far, there has been little discussion of trade issues in the
tions.[296] Trade policy has arisen only implicitly in discussions of

293. *See Land Resources: Deforestation*, *supra* note 287, ¶ 8(h) (draft of forest
including bracketed text calling for "sharing of technology and profits of bio-technol
ucts, for example pharmaceutical, derived from [biological resources of forests]").

294. *See, e.g.*, Intellectual Property Rights for Indigenous Peoples in the Conte
tainable Development, Trade, and Conservation of Biodiversity (1991) (proposed res
be presented to UNCED PrepCom III in Geneva).

295. Interview with UNEP Inter-Governmental Negotiating Committee for a C
on Biological Diversity Secretariat for Working Group II (January 6, 1992).

296. Telephone Interview with Eleanor Savage, Department Negotiator, United S
partment of State (Dec. 12, 1991); Interview with UNEP Inter-Governmental N

ing or compensating for the use of developing countries' gene resources, i.e., the genetic variety found in wild and domesticated pl and animal species which may have commercial value in pharmaceuti agricultural, and other applications. For instance, the Mexican dele tion has suggested that the rights to any product derived from the biol ical resources of a developing country should be in the public domain, least in the source country. The fourth draft convention, dated Dece ber 16, 1991, reflects this view, providing that "countries of origin genetic material or providing genetic material subject to biotechnologi research [should] be exempted from royalties on patents relating to products of such research."[297] As such a rule would create differ levels of IPR protection for similar imports from different countries, validity in light of GATT's prohibition of discriminatory treatment unclear. The fifth draft of the convention takes a more ambiguous po tion, including bracketed language providing that contracting part shall promote "priority access" to biotechnology for the countries up whose genetic resources that biotechnology is based. Whether provid for such priority access violates the GATT's trade rules would depend the nature of the measures taken.[298]

There are several other provisions in the fifth draft convent which implicate trade. Article 16 provides that contracting parties sh facilitate other parties' access to natural genetic resources on mutua agreed-upon terms and conversely that parties shall promote access countries that are sources of natural genetic resources to commercial rivatives of those resources. This language appears to provide for f trade in biological resources and their derivatives. Bracketed language article 17, which covers technology transfer, provides for "preferen and concessional" transfer of technology—an approach which, as m tioned above,[299] raises questions under GATT standards.

In past years, a number of developing countries have attempted restrict the export of plant samples from developing countries to the

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Committee for a Convention on Biological Diversity Secretariat for Working Group II (Ja ary 6, 1992).

297. *Fourth Revised Draft Convention on Biological Diversity*, UNEP Inter-Governme Negotiating Committee for a Convention on Biological Diversity, Art. 17 bis, ¶ 1 [hereina 4th Draft Biol. Diversity Conv.]. This draft was prepared for use in the negotiations in N robi on Feb. 6-15, 1992.

298. *See Fifth Revised Draft Convention on Biological Diversity*, UNEP Inter-Governme Negotiating Committee for a Convention on Biological Diversity, UNEP/Bio.Div./ INC.5/2, art. 20, ¶ 2 [hereinafter 5th Draft Biol. Diversity Conv.]. This draft was preparec use in the negotiations in Nairobi in May 1992.

299. *See supra* Part I.E.

veloped world. These countries are concerned that such exports ing used to create improved strains of commercially valuable crc are then sold back to developing countries at a vastly higher price- out compensing the contributor of the genetic resources.[300] Devel well as developing countries have imposed both de jure and de fa strictions on export of plant genetic resources.[301] As yet, these related issues have been addressed through little more than gene guage requiring parties to "facilitate access [for other parties] to resources for environmentally sound purposes."[302]

c. Negotiations on a Climate Change Convention

Like the biodiversity convention negotiations, the goal of th gotiations (organized by an Intergovernmental Negotiating Cor for a Framework Convention on Climate Change) is to produce vention ready for delegates' consideration at Rio in June. As i UNCED-related contexts, little explicit discussion of trade has o so far. Trade has been implicated for the most part only in the co requests for technology transfer on "preferential, concessional ar commercial terms," including the waiver of patents as against dev countries—policies which would raise questions under GATT's p tion of discrimination and subsidies.[303] Of particular interest, h is that the draft negotiating text includes language drastically cu the possibility of enforcing a climate change control agreement t trade-related sanctions of the kind employed by the Montreal Pr Article II, Principle 6 of the draft would allow "barriers to trade basis of claims related to climate change" only if based on a deci the Conference of the Parties and only if "consistent with GA Even broader is the language of draft Principle 7, which provic "[m]easures taken to combat climate change should not introduc distortions inconsistent with GATT or hinder the promotion of a and multilateral trading system."[305] In light of the GATT burea

300. *See* Eric Christensen, *Genetic Ark: A Proposal to Preserve Genetic Diversity f Generations*, 40 STAN. L. REV. 279, 301 (1987) (quoting Mooney, *The Law of the other Development and Plant Genetic Resources*, 1983: DEV. DIALOGUE 24, 39).

301. *See* C. FOWLER & PAT MOONEY, SHATTERING: FOOD, POLITICS & THE GENETIC DIVERSITY 193-96 (1990).

302. *See* 5th Draft Biol. Diversity Conv., *supra* note 298, art. 16, ¶ 2.

303. *See Revised Consolidated Text Under Negotiation*, Intergovernmental N Committee for a Framework Convention on Climate Change, 5th Sess., Agenda It IV.2.3, U.N. Doc. No. A/AC.237/Misc.20 (1992).

304. *See id.* at art. II, ¶ 6.

305. *Id.* art. II, ¶ 7.

current interpretation of the GATT, such language could seriously ha per international efforts to control global warming.[306]

## B. Unilateral Environmental Protections

Many domestic environmental protections in the United States a other countries rely heavily upon trade measures to ensure their effecti ness or to ensure that domestic industries that must meet more string environmental standards are not disadvantaged competitively by th standards.[307] Certain of these measures are summarized below.

### 1. Current Environmental Laws

#### a. *The Endangered Species Act*

To friend and foe alike, the Endangered Species Act[308] (ESA) is ( of the strongest U.S. laws protecting the environment. The ESA is b known for its provisions proscribing the domestic "taking" of an end gered species or the destruction of such species' habitat.[309] The ESA a bars any person or entity subject to U.S. jurisdiction from importing exporting any species listed by the Secretary of the Interior as end gered or any product derived from such a species.[310] While the ES. prohibitions applying to endangered species generally apply threatened species as well, the Secretary of the Interior, through the F and Wildlife Service, may promulgate special rules excepting threate species from some or all of these provisions.[311] Listing of a species the purposes of the ESA does not necessarily correspond to the inter tional listing of a species under CITES. Species listed as endangered threatened include both domestic and extraterritorial species, and a s cies need not be protected in its habitat country for the species to rece protection under the ESA.[312]

The ESA's import and export bans may conflict with the GAT non-discrimination obligations in terms of the ESA's treatment of ( tinct population segments. For these provisions to comply with GATT, they would have to be justified under article XX. If, howe

306. *See* Donald Goldberg, *INC: Watch Out for GATTzilla*, ECO, Feb. 27, 1992 at 4

307. *See* Melinda Chandler, *Recent Developments in the Use of International Trade Res tions as a Conservation Measure for Marine Reources, in* FREEDOM FOR THE SEAS IN THE CENTURY: A NEW LOOK AT OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (J Van Dyke et al. eds., forthcoming 1992).

308. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1534 (1988).

309. *Id.* § 1538(a).

310. *Id.* § 1538(d).

311. *Id.* § 1533(a)(3).

312. *Id.* § 1533(b).

the species being protected is not found in the United States, thes sions would seem to violate the United States' GATT obligatio article XX has been read as not extending "extrajurisdictionally

b. *The Marine Mammal Protection Act*

One of the primary goals of the Marine Mammal Protectio (the MMPA) is to reduce the incidental killing of marine mamm ticularly dolphins, during commercial fishing operations. To achi goal, the MMPA establishes a regulatory program that sets in wide standards for U.S. tuna fleet fishing practices.[314] This reg program is strictest in the Eastern Tropical Pacific Ocean (ETP) schools of tuna tend to swim in the waters below pods of dolphin. this program, foreign tuna fishing fleets operating in the ETP mu similar standards to be able to import their tuna to the United For a foreign tuna fleet to be able to export its tuna and tuna pro the United States, the Secretary of Commerce must certify: one, foreign fleet operates under a regulatory program that is compa that of the United States and two, that during a given period of t foreign fleet's adjusted average rate of incidental taking of marin mals did not exceed 1.25 times the unweighted average of the U for that same period of time.[315] Additionally, intermediary nati import tuna from nations that have not obtained comparability cannot import their tuna and tuna products into the United Sta

The recent Tuna/Dolphin Panel Report found these MMPA and intermediary restrictions to violate the GATT's prohibitio tained in article III (national treatment) and article XI (quantita strictions). Additionally, the Panel Report held the MMPA's pr to fall outside the scope of article XX because they were both ex dictional in nature and not "necessary" within the meaning o XX.[317]

c. *The Magnuson Fishery Conservation and Management*

The Magnuson Fishery Conservation and Management Act Magnuson Act) establishes a national program for conserving an

313. Marine Mammal Protection Act of 1972 (current version at 16 U.S.C. §§ (1988)).

314. *Id.* § 1374(h).

315. *Id.* § 1371(a)(2)(B)(II).

316. *Id.* § 1371(a)(2)(C).

317. *See* Housman & Zaelke, *supra* note 13, at 10,272-73.

318. 16 U.S.C. §§ 1801-1882 (1988).

aging fisheries resources, including domestic, migratory, and anad mous stocks. To a large extent, the Magnuson Act was motivated fears that foreign fishing fleets were depleting U.S. fisheries.[319] The establishes for the United States a 197-mile-wide exclusive fishery z abutting the United States' territorial sea.[320]

Under the Magnuson Act, trade figures most directly in the pr sions govern foreign fleets' access to fishery stocks claimed by the U No foreign vessel may fish in U.S. waters unless it has obtained a per to do so.[321] Foreign vessels operating in United States waters are quired to, *inter alia*: 1) have a U.S. observer on board the vessel dur their time in these waters; 2) reimburse the United States for the cos the observers; 3) take no more than their allocated share of the fishe resource; and, 4) abide by all other rules and regulations applying them promulgated under the Act.[322] The Act requires the Secretary Commerce to establish total allowable levels for foreign fishing f catches from U.S. fisheries.[323] In establishing these levels, the Secret is to look at several factors, including the extent to which the fore government helps or hinders the United States' development of exp markets for its fishery products.[324] Foreign fleets that violate the A provisions may be subject to an embargo on all fishery imports to United States pursuant to section 8 of the Fishermen's Protective Act

The Magnuson Act appears to establish conditions for trade violate GATT's non-discrimination obligations and quantitative rest tion prohibition. While these measures at first glance would seem qualify for article XX's exception for measures to conserve a dome exhaustible resource, to qualify for article XX a measure must no applied in a discriminatory or arbitrary manner. Because the Act li certain of its conservation conditions with what seem to be trade pro tionist standards, these provisions may not come within article XX thus may violate the GATT.

### d. *The Dolphin Protection Consumer Information Act*

In an effort to encourage consumer-driven, market-based protec

319. *Id.* § 1801(a)(4); *see also* MICHEAL BEAN, THE EVOLUTION OF NATIONAL WILD LAW 387-88 (1983).
320. 16 U.S.C. § 1811.
321. *Id.* § 1821(a).
322. *Id.* § 1821(c)(2)(D).
323. *Id.* § 1821(e)(1).
324. *Id.*
325. *Id.* § 1821(e)(2).

of dolphins, the Dolphin Protection Consumer Information Act DPCIA) specifies labeling standards that allow qualifying tuna p to carry the terms "dolphin safe" on their packaging. The l makes it a violation of section 5 of the Federal Trade Commissi for any producer, importer, distributor, or seller of tuna product clude on its label the terms "dolphin safe" or any equivalent sta unless the manner in which the tuna was harvested meets certai dards for dolphin protection.[327]

The recent Tuna/Dolphin Panel Report decision found t DPCIA complied with the GATT because the DPCIA establish untary standards that did not restrict a product's access to the and did not provide a government-supplied market advantage.[328] trast, labeling provisions that require an imported product to car bel that can only be obtained by meeting certain standards that apply directly to the product but instead to the product's PPM appear to violate the GATT's obligations.[329]

e. *The Pelly Amendment*

The Pelly Amendment,[330] also known as section 8 of the men's Protective Act,[331] seeks, *inter alia*, to provide a means to that the unsustainable fishing practices of foreign fishing fleets jeopardize American fishery stocks or harm American fishing fle provide added protection to American fishing fleets and fisher Pelly Amendment works in conjunction with certain other Ar laws, such as the MMPA and the Magnuson Act, which are desi ensure the use of sustainable fishing practices by enabling the Pr to increase the trade sanctions against foreign fishing fleets that c ally violate these laws. Under the Pelly Amendment, the Presiden United States has the discretionary authority to embargo all fish ports from another nation upon notice from the Secretary of Cor that that nation has violated one or more of these American law certain period of time.[332]

The Tuna/Dolphin Panel Report found that the Pelly Amer complied with the GATT's provisions only because the Preside

326. *Id.* §§ 1361, 1385 (Supp. 1991).
327. *Id.* § 1385(d).
328. *Tuna/Dolphin Panel Report*, *supra* note 13, at 49-50.
329. *See* Housman & Zaelke, *supra* note 13, at 10,271.
330. *codified at* 22 U.S.C. § 1978 (1988).
331. Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-1980 (1988).
332. *Id.* § 1978.

not invoked his powers under the Amendment.[333] Actually applying Pelly Amendment's embargo provisions to another party's fisheries i ports, however, would appear to violate GATT nondiscriminat obligations.

2. Pending Environmental Legislation

In addition to existing United States environmental laws that imp trade, a number of pending bills and resolutions raise trade concer Certain of these measures are summarized below.

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

The General Agreement on Tariffs and Trade for the Environm Act of 1991 (S.59) was introduced by Senator Moynihan. It would quire a comprehensive study of the impact of international trade on ternational environmental agreements. S.59 would also require a st of foreign environmental laws, foreign governments' compliance with ternational environmental agreements, and foreign environmental l that restrict trade. Further, S.59 would require the United States Tr Representative to provide a statement of the efforts being undertaker make the GATT more environmentally sound. Additionally, S.59 quires that foreign trade practices diminishing the effectiveness of in national agreements aimed at preserving species be treated unjustifiable trade practices under the Trade Act of 1974, and it all the United States to adopt measures to retaliate against the fore party's practices.

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

b. *House Concurrent Resolution 246*

House Concurrent Resolution 246 (H.Con.Res. 246), introduce Representative Waxman for himself and 25 other representatives, w express the will of the House and Senate regarding the relationship tween trade agreements and U.S. health, safety, labor, and environme laws. H.Con.Res. 246 calls upon the President to initiate and comp discussions within the Uruguay Round to make GATT compatible the MMPA and other American health, safety, labor, and environme

333. *Tuna/Dolphin Panel Report*, *supra* note 13, at 43.

laws. H.Con.Res. 246 also expresses Congress' resolve to reject l tion implementing any trade agreement, including both the Ur Round and the NAFTA, if such agreement jeopardizes U.S. l safety, labor, or environmental laws.

Because H.Con.Res. 246 is merely a statement of congressio solve, it cannot conflict with the GATT. Nevertheless, H.Con.Res provisions do raise substantial implications for the GATT and fo policy generally. H.Con.Res. 246 calls upon the President to expa scope of the debate in the Uruguay Round negotiations, which a along and already fraught with difficulty. Moreover, this statemen Congress that it will not adopt any trade legislation that could mine American social protections places additional burdens on the tiation of NAFTA and the Uruguay Round instruments. Despi concerns of the trade community, adopting H.Con.Res. 246 would important statement that Congress does not intend to allow free tr jeopardize the U.S.' commitment to environmental protection at hc abroad.

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

The International Pollution Deterrence Act of 1991 (S.984), duced by Senator Boren, seeks to level the playing field for interna trade by removing what many perceive to be subsidies to foreign tries in the form of lower national environmental standards. The g S.984 is to ensure that all products sold in U.S. markets fully reflec environmental costs, at least to the extent that U.S. laws requir internalization.

S.984 amends the countervailing duty provisions of U.S. trac to establish that the failure to impose and enforce effective environr protections amounts to a subsidy which can be subjected to a co vailing duty. The costs the manufacturer or producer would have t to comply with the U.S. environmental laws imposed on like do products would determine the amount of the subsidy provided by environmental standards. Additionally, S.984 would allocate fift cent of the monies paid through the countervailing duty provisior fund that would be distributed by the Agency for International De ment to assist developing countries in purchasing U.S. pollution c equipment. The other fifty percent of the countervailing revenues be allocated to a fund administered by the Environmental Prot Agency ("EPA") that would assist U.S. companies researching a veloping pollution control technologies. S.984 would require the E

create an index for the top fifty U.S. trading partners to compare ea country's pollution control standards to U.S. standards.

S.984 would have a number of trade ramifications. Using count vailing duties to mitigate environmental standards subsidies appears violate GATT articles I, II, and III, as well as the countervailing du provisions of the GATT and the Subsidies Code. And subsidies pa both to U.S. companies to create environmental technologies and to veloping countries to purchase U.S. environmental technologies could low other parties to institute countervailing measures to mitigate th subsidies.

### 3. Sub-National Level Environmental Laws

In addition to the national-level environmental protections implic ing trade, the United States system of governance reserves a wide latitu of powers to state and local governments to legislate environmental p tections. Certain of these sub-national level protections implicate tra as well. For example, at least nine states and twenty-five municipaliti have adopted legislation that restricts the sale and use of CFCs as pr ucts or in consumer products.[334] A number of states have introdu legislation to control the flow of agricultural research information a products, including ten states that have enacted controls over Bovine matropin (BST) or beef hormones.[335] Hawaii has enacted legislation provide funds to help establish and operate small business medical in bator research facilities.[336]

Many of these sub-national provisions seem to be inconsistent w the GATT's obligations. As discussed above,[337] a recent GATT pa found that U.S. state laws regulating imported beer violated GATT It would appear that state environmental laws conflicting with GATT's obligations would suffer the same fate.

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334. *See* Special Committee on Global Climate, *1990 Annual Report on Global Climat* ABA SECTION ON NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, NATU RESOURCES, ENERGY AND ENVIRONMENTAL LAW: 1990 THE YEAR IN REVIEW 237 (19

335. *See* Biotechnology Special Committee, *1990 Annual Report on Biotechnology, in A* SECTION ON NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, *supra* note at 203, 207-10 (1991) [hereinafter *Biotechnology Report*].

336. H.B. 1144, 15th Leg., 1990 Sess., 1990 Haw. Sess. Laws Act 290 (to be codifie Haw. Rev. Stat. §§ 137-93; *see also Biotechnology Report*, *supra* note 335, at 209.

337. *See supra* section II.A.2.i.

338. *See supra* note 69 and accompanying text.

## IV. OPTIONS FOR REDUCING OR ELIMINATIN FRICTION BETWEEN ENVIRONMENTAL PROTECTIONS AND TRADE AGREEMENTS

Again, the goal of free trade policy is to allow markets to a the use of resources, while the general goal of environmental polic manage and maintain the earth's resources efficiently. This arti demonstrated that when the same resources are the subject of botl and environmental policies, conflict often results. Yet the ability free trade and environmental policy to accomplish their respectiv largely depends on their mutual ability to reconcile these conflic the long term, if economic development from expanded trade end the world's resource base, trade may find itself with no natural res left to allocate. Contemporaneously, improving environmental and the standard of living around the globe in many instances re economic resources that economic growth attended by expande trade can provide. Moreover, the ability of the global commu adopt international agreements that encourage state participatic discourage "free riders" appears at this time to depend on the trade measures within these agreements.

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

### A. Application of Treaty Law

Perhaps the most obvious question that arises regarding how duce or eliminate the friction described above is whether there is ar to reconcile conflicting terms of international trade agreements and national environmental agreements.[339]

339. This analysis assumes that GATT is an international treaty. *See* RESTA (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 55, (defining international agreement). If the GATT is not, in fact, an international treat tion, then the most that could be said for the GATT's role in international law is that i to the extent that states abide by them, are customary law. *See id.* § 102 (1)(a), (2); *id.* If frictions arise between a customary law, GATT, and an international environment ment, the agreement would modify the customary law among the parties. *Id.* reporter' Moreover, because the United States, and other states have repeatedly refused to stric ply with the GATT, its status as customary law, especially as to these dissenting state unclear. *Id.* cmt. d. Regardless of whether or not GATT is customary law, unless the

Article 30 of the Vienna Convention on the Law of Treaties p vides general rules governing the relationship of successive treaties. Under article 30, when the provisions of two treaties conflict, the lat in-time provision prevails as between parties to both unless one tre expressly specifies otherwise.[341] If a State is party to only one trea then under article 30(4)(b) only that treaty governs.[342]

Thus, as between States that are parties to both the GATT and Montreal Protocol, paragraphs 4 and 4 *bis* of the Montreal Proto which ban the import of substances produced with, but not containi the controlled substances listed in Annexes A and B of the Proto would prevail over inconsistent provisions of the GATT. (This igno of course, the legal opinion the negotiators of the Montreal Protocol tained from the member of the GATT Secretariat regarding the con tency of the proposed provisions of the Protocol with the GATT.) N that paragraphs 1 through 3 *bis* of the Protocol presumably would no inconsistent with the GATT even when applied against States that not parties to the Protocol because the paragraphs pertain to produ rather than processes.

This leaves the problem of non-parties. Specifically, the issu whether a party to the GATT can be bound by a subsequent envir mental agreement to which it is not a party that contains inconsist trade provisions. Article 34 of the Vienna Convention states that a s sequent treaty cannot bind non-party States without their consent Article 38 recognizes a limited exception to article 34 if the treaty becomes customary international law.[344] Thus, a GATT contract party that has not signed the Montreal Protocol very well may ha legitimate dispute under the GATT if another contracting party tha

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is an international treaty, it would occupy a lower place on the totem pole of internationa than an international environmental agreement.

340. Vienna Convention on the Law of Treaties, *opened for signature* May 23, U.N.Doc. A/CONF.39/27, 8 I.L.M. 679 (entered into force Jan. 27, 1980), art. 30, 8 I.L.M 691 [hereinafter Vienna Convention]. For a discussion of the problem of reconciling con between interrelated trade agreements, see Henry R. Zheng, *Defining Relationships Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experien the MFA and the GATT*, 25 STAN. J. INT'L L. 45 (1988).

341. *See* Vienna Convention, *supra* note 340, art. 30, 8 I.L.M. at 691. This rule ap where the two treaties address the same subject matter—which is generally the only situ in which conflicts would arise. The date of a treaty for conflicts purposes is determined b effective date of the treaty.

342. *Id.* art. 30(4)(b), 8 I.L.M. at 691.

343. *Id.* art. 34, 8 I.L.M. at 693.

344. *Id.* art. 38, 8 I.L.M. at 695; *see also* RESTATEMENT (THIRD) OF THE FOREIGN R TIONS LAW OF THE UNITED STATES, *supra* note 55, § 102, cmt. j (discussing treaty incor tion into customary law can bind non-signatories).

also a party to the Protocol bans its products made with CFCs ( the Montreal Protocol has become customary law).

## B. Application of International Law: Extrajurisdictional Action

Because the GATT's article XX exceptions now only allow fo dictional actions, there is concern as to who has the jurisdictional to take actions to preserve the global commons. Under principles ternational law, such as the Law of the Sea and the Law of Space diction over the commons areas is *sui generis* to the interna community; the international community has reserved jurisdictio these commons areas.[345] Thus, actions taken pursuant to multi agreements to protect resources in the global commons should fall article XX. The Tuna/Dolphin Panel Report recognized this pri in a very limited sense by allowing parties to act "jointly to address national environmental problems which can only be resolved th measures in conflict with the present rules of the General Agreeme

Additionally, it may be argued under international law that eral trade actions not specifically provided for in an international ment are permitted under article XX if they are necessary for the to meet its general obligations under an international agreement.[34 example, although the Law of the Sea III does not specifically aut or provide for trade restrictions, if a party adopts a trade restrict fulfill its obligations to preserve the sea, this trade restriction shou conflict with article XX's jurisdictional requirements.

## C. Advancing the Discourse

Obviously, the foregoing analysis is not an adequate long-term

345. *See, e.g.*, United Nations Convention on the Law of the Sea, Dec. 20, 198 Doc.A/CONF 62/122, 21 I.L.M. 1261 (1982) (noting all rights to the sea are vested kind on whose behalf the international community acts) [hereinafter the Law of the Sea the Law of the Sea has not been entered into force, it is accepted by most countries ir the United States as customary international law, with the exception of Part XI gover deep seabed); Treaty on Principles Governing the Activities of States in the Explorat Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 1 2410, 610 U.N.T.S. 205, arts. I-III (noting that states acting within outer space are su the principles of international law) [hereinafter Space Treaty]. This argument might more broadly phrased to provide that the international community not only has juri over the global commons, but also has jurisdiction over the global environment.

346. *See Tuna/Dolphin Panel Report*, *supra* note 13, at 50.

347. *See, e.g.*, Law of the Sea, *supra* note 345 (placing responsibilities for preserv developing the high seas on the parties); Space Treaty, *supra* note 345, art. IX (placing sibility on parties to conduct their activities in outer space so as to avoid "adverse cha the environment of Earth").

tion. The law of treaties applies only after two treaties or other inter tional agreements have come into conflict and so does not help avoiding those conflicts in the first place. Moreover, it offers no mecl nism for reconciling the legitimate goals of prior treaties with those c flicting treaties coming later in time. Finally, and perhaps m important, it leaves open the question of what to do in disputes where States are not parties to both treaties or agreements.

Some individuals have called for a reexamination of various ter assumptions, and principles relating to trade and the environment a way of at least advancing the discourse, if not reconciling the two pol areas. A change in any of the following terms, assumptions, and prir ples would radically reshape views of trade and environment issues.

1. Internalization of Environmental Costs

Many of the options proposed to date to reduce or eliminate fric between trade and environmental concerns have focused on modify the GATT to permit greater use of trade restrictions to force countrie internalize environmental costs. Any modification to the GATT m overcome considerable procedural and substantive obstacles.[348] Uni States' environmental laws however, increasingly are turning to envir mental cost internalization for both foreign and domestic products. less changes are made to the GATT, these U.S. initiatives co precipitate additional conflicts.

a. *"Like Products"*

As noted earlier, GATT articles I, III, XI, and XX pose obstacle using discriminatory tariffs and quantitative restrictions against ot countries' PPMs that are perceived to be environmentally unsound These obstacles could be overcome by reinterpreting the concept of " products" in the GATT to allow product standards based on PPMs. vironmentalists, who are in favor of allowing environmental PPMs, gue that the contemporary meaning of "product" includes the produ life cycle and thus that products with different PPMs are not "like pr ucts." For such a reinterpretation to occur, the GATT would have t amended, or a side agreement or understanding to GATT adopted, ting out the extensive procedural and substantive requirements neces to implement such a program.[350]

348. *See generally* Changing GATT Rules, *supra* note 7.
349. *See supra* notes 10-34, 42-61, and accompanying text.
350. *See generally* Changing GATT Rules, *supra* note 7.

b. *Countervailing Duties or Antidumping Duties*

The GATT in its current form does not view a party's applica lower standards of domestic environmental protections, allowi party's industries to externalize their environmental costs, as a s (or dumping when the product is exported). As a subsidy, it co countervailed by another party whose industries are harmed by tl sidy (or dumping).[351] A number of options have been presented t ify or interpret GATT articles VI and XVI and the Subsidies C permit the imposition of countervailing duties or antidumping du counter such practices.[352] Quantifying the effect of differing enviro tal standards, however, could pose additional administrative pr beyond those already associated with countervailing and antidu statutes.

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

As noted earlier, GATT article XX(b) provides a general exc only to those trade measures that are *necessary* to protect human, or plant life or health. One way to permit greater use of trade r tions to enforce internalization of environmental costs might be t greater consideration to whether a trade restriction is proportiona environmental benefit in determining whether it is "necessary" un ticle XX(b).[353] Many trade specialists argue that this approach sents a "slippery slope" that would likely spawn a flood of dis protectionist measures.[354] At the very least, it would likely sharp debate over whether import restrictions based on "consumer prefe rather than "sound science" are ever legitimate. Environmer counter that requiring environmental protections to be justified as essary" places too high a burden on environmental actions and diminish the ability of nations under the precautionary principle proactively in the face of scientific uncertainty.[355]

3. Harmonization of Standards

The GATT Standards Code clearly demonstrates that harmo standards is a very important goal of the GATT process. Negotiat

351. *See supra* notes 34-35 and accompanying text; *see also* Komoroski, *supra* no

352. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 12; OEC Session, *supra* note 21, at 14.

353. *See* OECD, JOINT REPORT ON TRADE AND ENVIRONMENT 11 (June 1991)

354. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 5.

355. *See* Eliza Patterson, *International Trade and the Environment: Institutional S* 21 E.L.R. 10,599, 10,602-03 (1991).

the Uruguay Round have also made harmonization a high priority, p ticularly with respect to phytosanitary and sanitary regulations a measures. As discussed above, the effects of harmonizing environmer standards on international trade and the environment largely will be termined by the manner in which harmonization occurs.[356]

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

4. Procedure

a. *Dispute Resolution*

There have been a number of proposals for improving GATT's pute resolution procedures, including expanding GATT dispute reso tion panels to include experts from other disciplines such environmental scientists and law scholars; creating a "cut-out" mec nism to move trade and environment disputes to an alternative forum dispute resolution; and improving the ability of trade panels to take i account other areas of concern that relate to trade policy, such as environment.[357] Expanding the membership of dispute resolution par to include other disciplines could be achieved under the existing GA framework and would provide input as to the non-trade effects of GA decisions. Existing GATT rules, however, would bind these multi ciplinary panels in formulating decisions. Creating new procedures dispute resolution that would allow GATT panels to take into acco other areas of concern, such as the environment, could turn GATT's pute resolution panels into international overcourts—a role their creat never envisioned for them and to which they consequently are not w suited. Establishing a "cut-out" mechanism for environmental trade putes would require an agreement of the parties and the creation of a r international tribunal—a difficult process, to say the least.

356. *See supra* notes 143-56, and accompanying text; *see generally* Charles Pearson & I ert Repetto, Reconciling Trade and Environment: The Next Steps (1991) (paper preparec the Trade and Environment Committee of the EPA); Wallach, *supra* note 95.

357. *See generally* von Moltke, *supra* note 92; Patterson, *supra* note 355, at 10,600; ST ART HUDSON, TRADE, ENVIRONMENT AND THE PURSUIT OF SUSTAINABLE DEVELOPM 5-6 (1991).

b. *Transparency and Public Participation*

The relative secrecy and isolation in which GATT official decisions concerns many critics. They argue that the GATT d making process should be more open to the international public individuals and NGOs can participate in GATT decisionmaking ing timely access to GATT documents and decisions[358] and by p ing evidence and arguments to the GATT Council and to resolution panels. Environmentalists view transparency and pub ticipation as integral to the democratic process and to rational d making.[359] On the other hand, traditional GATT proponents arg great force that nations have a significant interest in preservin order through negotiated settlements of international disputes in from the influence of publicity. To provide for increased transp and public participation, the Parties would have to either amend or agree to a new understanding or side agreement.[360]

5. Trade Restrictions as a Tool for Enforcing Environmen Protections

Many policymakers see trade restrictions as a legitimate tool forcing international environmental agreements and even for p unilateral environmental objectives. Free trade advocates, on th hand, argue that trade restrictions are ill-suited as environmental tion devices.[361] They point out that imposing trade restrictions in international tensions and skews the efficient allocation of resour as failing to internalize environmental costs does.[362] Both, they reduce overall welfare. They cannot see using one economic disto fight another. Moreover, they find no guarantee that imposing restriction to force internalization of environmental costs will not greater distortive effect than the lack of cost internalization. Am alternatives they suggest are using side payments and trade conc to induce adherence to international environmental agreements.[3

Environmental advocates respond that the effectiveness of e

358. *See* von Moltke, *supra* note 92, at 26.

359. *See* Hudson, *supra* note 357, at 5-6.

360. For a more complete discussion of the options for increasing transparency a participation in GATT's decisionmaking see von Moltke, *supra* note 92.

361. GATT Secretariat, Trade and the Environment, *supra* note 1, at 16, 34 ("j the basis of economic efficency, there are almost no circumstances in which such a tra measure would be the 'first best' tool for dealing with such problems.")

362. *See* Pearson & Repetto, *supra* note 356, at 44-49.

363. *See* GATT Secretariat, Trade and the Environment, *supra* note 1, at 30-31

mental restrictions is a highly complex question that usually is de mined on a case-by-case basis and which does not lend itself well generalizations. They note that relatively few methods are available nations to influence the behavior of other nations and conclude that sent substantial changes to the central principles of the international and the international order of nation-states, trade measures offer most cost-effective means of securing compliance with internatic agreements.[364] Moreover, they note that compensation schemes req ing the international community to purchase protections effectively in developing countries are not appropriate in every instance, and that r ing too much on these schemes could prohibit environmental protecti from developing effectively.

In an effort to reconcile the trade and environment perspectives, s eral proposals seek to provide frameworks for determining when tr restrictions are appropriate mechanisms for securing environme objectives. These frameworks focus on delineating certain factors, s as how integral the trade measure is to the environmental protection the proportionality of the trade measure to the environmental protect sought, to help make such determinations.[365]

Over the past twenty years, a number of alternative proposals t do not focus upon trade sanctions as the primary enforcement de have been advanced for the enforcement of environmental obligati Perhaps the most ambitious of these proposals is creating an inte tional environmental court, with all nations submitting to its juris tion.[366] A more recent proposal seeks to facilitate the ability of dome and foreign parties to bring suit in domestic courts of all nations for lations of national and international environmental laws and obl tions.[367] These proposals lack substantial backing within international community, and so trade restrictions continue to be on the more, if not the most, attractive mechanisms for enforcing envi mental obligations.

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364. *See* Shrybman, *supra* note 157, at 108.

365. *Id.*

366. *See generally* Amadeo Postiglione, *A More Efficient International Law on the Env ment and Setting up an International Court for the Environment Within the United Nation* ENVT'L L. 321 (1990).

367. *See Gephardt Proposes Enforcement of Foreign Environmental Laws in U.S. Co* INSIDE U.S. TRADE, Sept. 13, 1991, at 3; Convention for the Protection of the Environ Feb. 19, 1974, 1092 U.N.T.S. 279 (establishing equal access and remedy legal regime bet Denmark, Finland, Norway and Sweden); Joel Gallob, *Birth of the North American T boundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treat Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991).

### 6. Mutually Reinforcing Market-Based Protections

Both the trade and environment communities embrace cost ir ization through the "polluter pays" principle and through elim subsidies, particularly those that directly and negatively affect th ronment. Allowing greater opportunity in the GATT for the pa adopt such market-based measures and increasing the reliance o ronmental policies that utilize market-based strategies may be th immediate means to begin reconciling trade and environment co Caution should be exercised, however, in placing too great a r upon market-based strategies.[368] Environmentalists stress that market-based strategies are effective for addressing conventiona ronmental threats, markets are not effective in dealing with uncert such as setting values for natural resources that do not have reac parent economic uses; in dealing with the risk of irreversible loss cannot be countered through the use of economic resources; or in the costs of unconventional threats whose real harms cannot be lished scientifically with sufficent certainty.

Weighing the need for increased reliance upon market-based gies against the limitations of such strategies, developing marke strategies probably should be facilitated where they apply to c tional environmental threats, such as conventional nontoxic poll and to the protection of species that are not threatened with exti Where, however, environmental protections apply to unconve threats (such as the Montreal Protocol or the Basel Convention o ardous Wastes), to irreversible effects (such as CITES), or to re that cannot be easily valued in economic terms (such as wetlands cies), other protections designed to protect against harms caused b ket failures should complement market-based strategies.

While market-based strategies increasingly are being incor into domestic and international environmental law, full incorpora these strategies in even conventional areas will require substantial to United States environmental laws and to the frameworks of i tional agreements. Furthermore, for market-based environment tections to be altogether compatible with the GATT, the GAT have to be changed to provide the Parties with mechanisms to environmental costs internalization.

368. *See generally* Joel Mintz, *Economic Reform of Environmental Protection: A B ment on a Recent Debate*, 15 HARV. ENVT'L L.REV. 149, 156-60 (1991).

## V. CONCLUSION

The rate of ozone layer loss is now believed to be occurring twice fast as scientists estimated only a few years ago. It is estimated tl every year over 50,000 species—over 140 per day—vanish from the f of the earth.[369] Over 17 million hectares of forests, an area equivalent half the size of Finland, are lost each year.[370] Meanwhile, the worl population increases at a rate of approximately 92 million people year—roughly the population of Mexico—with 88 million of these n inhabitants born into the developing world.[371] It is estimated that tween 500 million and 1 billion people are under-nourished.[372]

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

Past efforts at free trade have paid little attention to the goal of s tainable development. Now free trade must become synonymous w "sustainable trade."[373] In principle, free trade seeks to address so concerns, such as environmental degradation, by applying expanded e nomic resources gained through increased and more efficient econor activity. But this is no longer sufficent. As World Bank economist H man Daly has noted, "[F]urther growth beyond the present scale is ov whelmingly likely to increase costs more rapidly than it increa benefits, thus ushering in a new era of 'uneconomic growth' that imp erishes rather than enriches."[374] Any growth, including growth fr trade, that is not sustainable must be rejected.

While environmentalists have only recently begun to study tr law and policy, they are mastering the subject and offering construct

369. *See* Sandra Postel, *Denial in the Decisive Decade*, *in* LESTER BROWN, STATE OF WORLD 1992, at 3 (1991).

370. *Id.*

371. *Id.*

372. *Id.* at 4.

373. Sustainable trade, as a sub-part of sustainable development, is trade and trade poli that meet the needs of the current generation without jeopardizing the resource base for fu generations.

374. DALY & COBB, *supra* note 5, at 2.

suggestions for moving trade into the parameters of sustainable d
ment. If the experience in the U.S. is any example, however, man
trade community are resisting the need to learn environmental e
ics, policy, and law. Yet until the trade community makes the e
understand environmental imperatives and until they embrace s
ble development, trade and the environment will remain at odds
world will suffer for it.