THE ENVIRONMENT VS. TRADE RULES: DEFOGGING THE DEBATE

BY
STEVE CHARNOVITZ*

Although there is no inherent conflict between trade and the environment, there is a conflict between environmental protection and the rules of the General Agreement on Tariffs and Trade (GATT). The GATT has belatedly agreed to address this conflict, but its anti-environment reputation has already undermined support among environmentalists for the Uruguay Round of multilateral trade negotiations. Some of the conflict may be solvable by the adoption of a clear framework for analyzing environmental trade measures. Key terms like "discrimination" and "extraterritoriality" have also been subject to misunderstanding. Moreover, the current interpretations of GATT Articles XX (general exceptions) and XXIV:12 (subnational application) do not properly reflect the drafting history of these provisions. There is growing agreement that the GATT needs to put the environment near the top of its post-Uruguay Round agenda, but there is no consensus on what ought to be done. The GATT does not need systemic or organic reform regarding the environment. Instead, it needs to abandon recent decisions that have encroached upon the right of member governments to adopt their own environmental trade measures. In the long run, a trilateral International Environmental Organization should be established to propose international standards.

I. INTRODUCTION

During the past two years, the conflict between international trade rules and environmental regulation has drawn increasing attention and concern not only among policy makers, but also from

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* Policy Director, Competitiveness Policy Council, Washington, D.C.. The views expressed are the personal views of the author. Previously, Legislative Assistant, Steering and Policy Committee, U.S. House of Representatives and International Relations Officer, U.S. Department of Labor. The author wishes to thank Konrad von Moltke for his comments on an earlier draft of this article.

the general public.[1] Unfortunately, the debate has not been entirely edifying, and a great deal of fog surrounds the issues. This Article will cover most of the controversial points in the debate and attempt to clarify the issues involved, in particular those dealing with the General Agreement on Tariffs and Trade (GATT).[2]

A commonly held viewpoint among trade specialists is that there is no conflict between the environment and trade because trade stimulates efficiency and economic growth, generating wealth essential to environmental protection and restoration.[3] In addition, economic growth may engender consumer demand for reversing environmental degradation.[4] Yet, there can be circumstances where economic growth not only fails to help the environ-

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1. Robert Jerome characterizes the debate as between short-term, scientifically oriented, economically quantifiable, product-focused, deductive, multilateralist traders and long-term, value-oriented, economically unquantifiable, process-focused, inductive, unilateralist environmentalists. Robert Jerome, *Traders and Environmentalists*, J. COM., Dec. 27, 1991, at 4A.

2. The GATT is an international agreement or compact setting rules on trade restrictions. For the original agreement, see General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Part 5, 55 U.N.T.S. 187. All references to the text of the GATT are from *Text of the General Agreement*, *in* GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (Vol. IV, 1969) (General Agreement as in force Mar. 1, 1969). The GATT's official organizational status is somewhat tenuous as it was meant to be a temporary agreement pending the establishment of the International Trade Organization (ITO). Although the ITO was never established, the GATT remains. The GATT is not considered a treaty by the United States for purposes of Article II, Section II, Clause 2 of the U.S. Constitution. For most purposes, the governing body of the GATT is the GATT Council. The GATT has a Secretariat headed by a Director-General. GATT members are called "Contracting Parties." Actions related to the Agreement are carried out by the CONTRACTING PARTIES (parties acting collectively); Actions of an organizational nature are carried out by the Interim Commission for the International Trade Organization. *See generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 119-89 (1969) (explaining the organizational structure of the GATT).

3. *See, e.g.*, WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT 67 (1992) ("Liberalized trade fosters greater efficiency and higher productivity and may actually reduce pollution by encouraging the growth of less-polluting industries and the adoption and diffusion of cleaner technologies"). For an amusing critique of the World Bank viewpoint, see *Editorial*, 1 REV. EUR. COMMUNITY & INT'L L. 4-5 (1992).

4. For a discussion of the impact of economic growth on the popularity of environmental protection see Gene Grossman, *In Poor Regions, Environmental Laws . . . Should Be Appropriate*, N.Y. TIMES, Mar. 1, 1992, § 3, at 11.

ment, but where indiscriminate growth, fueled by trade, can actually harm the environment and waste irreplaceable resources.[5]

Whereas trade may have either positive or negative affects on the environment, protectionism is inherently destructive because it leads to economic inefficiency and thus deprives societies of the resources necessary for bettering the environment.[6] While there may be instances where protectionism could forestall environmentally sensitive trade, virtually any assault on the environment that can be accomplished through international commerce can be carried out just as insidiously through domestic commerce.

Although there is no inherent conflict between the environment and trade, such conflicts do arise between environmental protection and GATT rules.[7] These conflicts occur in five areas. First, many potential tools for environmental protection, such as subsidies to assist environmental cleanup, can run afoul of basic GATT principles. Even "economically correct" policy instruments, such as taxes to internalize external costs, can collide with the GATT. Second, any measure that targets uncooperative countries that do not participate in environmental treaties is apt to violate the GATT's unconditional most-favored-nation (MFN) principle.[8] Third, inconsistencies in environmental regulation can

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5. The GATT Secretariat has stated that if the policies necessary for sustainable development are not in place, a "country's international trade may contribute to a skewing of the country's development in an environmentally damaging direction, but then so will most of the other activities in the country." CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFF AND TRADE, INTERNATIONAL TRADE 20 (Vol. I, ch. III, 1990-91) [hereinafter GATT TRADE AND ENVIRONMENT REPORT].

6. By protectionism, I mean commercial restrictions designed to maintain or increase reliance on domestic production. Protectionism is likely to degrade the environment because developing countries hindered from exporting labor-intensive goods like textiles may turn to resource-intensive goods like timber. Industrial countries attempting to maintain agricultural production may overuse pesticides. *See* GATT TRADE AND ENVIRONMENT REPORT, *supra* note 5, at 36-37.

7. It should be noted that the GATT does not "govern" or regulate trade. It regulates statutory and administrative rules that restrict or distort trade. Thus, those environmentalists who want GATT to ban certain practices of dirty trade are figuratively barking up the wrong tree because the usual GATT perspective would be to forbid such banning of dirty trade.

8. Although MFN is one of the keystones of the GATT, the Agreement does not define the term. But the meaning of MFN was well understood because it had been extensively studied by the League of Nations during the 1920s and 1930s. *See* KHURSHID HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW 54-59 (1968). The MFN principle is simpler than it sounds: If

raise problems of trade fairness.[9] Fourth, the GATT and related trade agreements may lead to the downward harmonization of health and safety standards. This can occur when the countries enjoying relatively high standards have a burden of demonstrating that those standards are not unnecessary trade barriers. Fifth, the GATT imposes a discipline on the use of export controls to conserve resources. This discipline is consistent with the GATT preamble, which declares as a goal of the contracting parties "developing the full use of the resources of the world and expanding the production and exchange of goods."[10]

Not every environmental action, however, raises problems of GATT consistency. As a GATT panel recently pointed out, the GATT "imposes few constraints on a contracting party's implementation of domestic environmental policies."[11] But while there may be a few serious environmental problems amenable to purely domestic responses, most problems call for broader solutions. As the interdependence of economies increases, more and more economic instruments could potentially be constrained by the GATT.[12]

Country A grants MFN treatment to *Country B*, then *A* agrees to treat *B* as well as *A* treats its most-favored trading partner. Discrimination is the inconsistent treatment of countries contrary to the MFN principle which requires equal treatment with respect to like products. Yet, discrimination against countries not participating in environmental protection efforts may be highly desirable for at least two reasons. One is to gain the necessary cooperation needed to prevent irreversible damage like losing an endangered species. Another is to convince nations that they will not put themselves at a competitive disadvantage by elevating their environmental standards.

9. *See* Steve Charnovitz, *Environmental and Labor Standards in Trade*, 15 WORLD ECON. 335, 341-45 (May 1992). For example, a country may attempt to boost exports or attract investment by specializing in environmentally harmful production. But counter action against such "unfair" trade is likely to violate the GATT because special taxes on imports from "unfair" countries would violate the MFN principle.

10. The clause in the preamble is a bit ambiguous. "Full use" could mean anything ranging from overuse to sustainable use.

11. Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, para. 6.2, 30 I.L.M. 1594 [hereinafter Tuna-Dolphin Report].

12. Others argue that these constraints contribute to a better environment. In this view, GATT is seen as positive for the environment because in restraining trade policies that are not "first best" in dealing with environmental externalities, the GATT necessitates the search for more effective policies. Piritta Sorsa, *GATT and Environment*, 15 WORLD ECON. 115, 124, 132 (Jan. 1992).

Section II of this Article sets the stage for the trade versus environment debate, highlighting recent developments in GATT and other organizations and pointing out the stakes of the debate. Section III defines the key concepts of the debate and discusses the major misconceptions surrounding it. Section IV assesses the prospects of a "Green Round" of multilateral trade negotiations and concludes with a few recommendations for a new GATT policy regarding the environment.

II. SETTING THE STAGE FOR THE TRADE VERSUS ENVIRONMENT DEBATE

A. *Recent Developments in the GATT*

The organization most responsible for dealing with the trade and environment linkage is the GATT.[13] Unfortunately, GATT activities over the past two years have exacerbated the disagreements between environmental and trade groups. The GATT's work on trade and environment has proceeded on four main fronts.

1. *The Environmental Working Group*

In October 1991, the GATT Council agreed to establish a working group on the environment.[14] But, this was not a new idea. Nineteen years earlier, the GATT Council established a Group on Environmental Measures and International Trade to deal with the trade policy aspects of measures to control pollution and protect human environment. Unfortunately, the group never met.[15]

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13. At the London Economic Summit of 1991, the heads of state and government of the group of seven major industrial democracies (G-7) agreed to look to the GATT "to define how trade measures can properly be used for environmental purposes." 27 WKLY. COMPILATION. PRESIDENTIAL DOCS. 968, 969 (July 17, 1991). To his credit, GATT's Director-General Arthur Dunkel realized earlier than most observers that the environment would become important to trade issues in the 1990s. Alan Riding, *Top Official at GATT faces a Round in Crisis*, N.Y. TIMES, Dec. 3, 1990, at D10.

14. William Dullforce, *GATT Revives Its Working Group on Environment*, FIN. TIMES, Oct. 9, 1991, at 3.

15. The group's function was to examine specific matters upon request of GATT members. Thus, it can be argued that the group was not derelict in its duties because apparently no GATT member ever requested any examination. It

The suggestion by the European Free Trade Association (EFTA) in December 1990 that the working group be convened was not greeted with great enthusiasm, especially by developing countries.[16] The GATT Council met several times over ten months before deciding in October 1991 to convene the group and update its mandate.[17] The group held an organizational meeting in December 1991, and a substantive meeting in January 1992. It is not clear what progress, if any, this group has made since its discussions are secret and no work products have been released. The lack of reported results has led to increased skepticism of the GATT by environmentalists.

2. *The* Tuna-Dolphin *Dispute*

The second front of GATT activity was the conciliation panel for the United States-Mexico dispute regarding dolphins and tuna. This dispute concerned an import provision of the U.S. Marine Mammal Protection Act (MMPA).[18] The MMPA bans the importation of fish caught using techniques which result in an incidental kill of ocean mammals in excess of U.S. practices.[19] In 1990, following a court order,[20] the National Oceanic and Atmo-

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is interesting to note that the U.S. Marine Mammal Protection Act (MMPA) was originally enacted in 1972 and the CITES treaty was signed in 1973. MMPA, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988 & Supp. III 1991); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. Neither action was perceived to be sufficiently inconsistent with the GATT to lead to a request that the group be convened.

16. For the EFTA proposal for a ministerial statement at the conclusion of the Uruguay Round, see *Statement on Trade and the Environment*, GATT Doc. MTN.TNC/W/47 (Dec. 3, 1990).

17. *See GATT Council Delays Decision on Trade, Environment Committee*, Int'l Trade Daily (BNA) (July 15, 1991), *available in* LEXIS, Nexis Library, BNAITD File.

18. *See supra* note 15.

19. 16 U.S.C. § 1371 (1988 & Supp. III 1991). The first ban was imposed as part of the Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 88 Stat. 1030. In 1988, Congress tightened the import restrictions. Pub. L. No. 100-711, 102 Stat. 4765. Before the 1988 amendments, tuna had been embargoed from the Congo, El Salvador, Peru, Senegal, Spain, and the Soviet Union.

20. Earth Island Institute v. Mosbacher, 746 F. Supp. 964, 976 (N.D. Cal. 1990) (enjoining the U.S. government from certifying for importation yellowfin tuna and yellowfin tuna products caught in purse seine nets in the Eastern Tropical Pacific without first finding that incidental takings by foreign vessels do not

spheric Administration (NOAA) imposed a ban on imports of yellowfin tuna and tuna products caught by Mexican vessels using purse seine nets in the Eastern Tropical Pacific (ETP).[21] In response, Mexico lodged a complaint at the GATT, and in August 1991, a GATT panel ruled against the United States.[22]

The panel reached three main conclusions. First, the U.S. import prohibition on tuna could not be considered an internal regulation under GATT Article III because it was concerned with the process of tuna harvesting rather than tuna as a product.[23] Second, the MMPA violated GATT Article XI as an import prohibition other than a duty, tax, or other charge.[24] Third, the MMPA did not qualify for the Article XX(b) or (g) exceptions because these exceptions do not have "extrajurisdictional" application.[25] Article XX(b) provides an exception for measures designed for protection of human, animal, or plant life or health. Article XX(g) provides an exception for measures taken to preserve exhaustible natural resources if taken in conjunction with domestic restrictions. In other words, the exceptions could only be invoked by a country to protect living organisms or natural resources within that country's borders.

At first, word of the panel's decision merely disappointed advocates of marine mammal conservation.[26] But after the report was leaked and studied, it sent shock waves through the international environmental community.[27] In addition to ruling that the MMPA violated international trade rules, the GATT panel implicitly dropped a wide net over decades of environmental treaties

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exceed incidental takings by U.S. vessels by more than 2.0 times).

21. Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 56 Fed. Reg. 26,995 (1991).

22. Normally, GATT panel reports are kept secret until adopted by the GATT Council. After the *Tuna-Dolphin* decision was leaked to the press and published in INSIDE U.S. TRADE, the GATT Council agreed to release it publicly.

23. Tuna-Dolphin Report, *supra* note 11, paras. 5.8-5.16. Article III permits certain types of laws, regulations, and requirements affecting products "as such", but not ones affecting process, according to the panel deciding the *Tuna-Dolphin* case.

24. *Id.* para. 5.18.

25. *Id.* paras. 5.24-5.34.

26. *See, e.g.*, Keith Bradsher, *U.S. Ban on Mexican Tuna Is Overruled*, N.Y. TIMES, Aug. 23, 1991, at D1.

27. *See, e.g.*, Stuart Auerbach, *Raising a Roar over a Ruling; Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991, at D1.

and laws protecting everything from deep sea whales to stratospheric ozone.[28] Indeed, the panel seemed to go out of its way to validate the popular caricature of the GATT as an inflexible, myopic, moss-grown institution inherently indifferent, if not downright antagonistic, toward ecological protection.[29] There was also bitterness about the way in which the GATT operated. How could a secretive panel presume the right to issue such a sweeping ruling without any consultation with environmental institutions?[30] The fact that the panel had refused to hear the dolphin conservation experts who had come to Geneva for the oral arguments served to heighten the widespread view among environmentalists that the GATT was a hostile institution.[31]

The most straightforward course for the United States in this situation would have been to defend the validity of import prohibitions at the GATT Council, and to attack the panel's report for its weak evidence and reasoning.[32] The United States also

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28. In a brief filed in *Earth Island Institute v. Mosbacher*, Acting Secretary of Commerce Wendell L. Willkie II stated that "[A]doption of the GATT panel decision might also affect our ability to enforce other domestic legislation to protect resources beyond our jurisdiction, and to implement other international agreements." Federal Appellants' Emergency Motion for Stay of Injunction Pending Appeal, Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (D. Or. 1990) (No. C. 88 1380 TEH).

29. It remains unclear why the panel issued such a far-reaching decision rather than ruling against the U.S. law on more narrow grounds. Perhaps the panel may have been influenced by the unusually large number of contracting parties who appeared before it to argue against the United States. Eight nations or instrumentalities spoke against the MMPA and three offered neutral statements. No party sided with the United States. *See* Tuna-Dolphin Report, *supra* note 11, paras. 4.7-4.30.

30. GATT panels do occasionally consult with intergovernmental organizations as provided for in Article XXIII:2. No rule bars consultation with outside groups.

31. Had the panel listened to the marine mammal experts, it might have learned about the long history of U.S. government efforts to negotiate agreements to protect dolphins, as mandated by U.S. law in 1972. *See* Pub. L. No. 92-522, § 108(a), 86 Stat. 1038 (1972) (codified as amended at 16 U.S.C. § 1378 (1988)). Instead, in apparent ignorance of this information, the panel suggests the option of "international cooperative arrangements which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas." Tuna-Dolphin Report, *supra* note 11, para. 5.28.

32. For a good critique of the panel report, see Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, Envtl. L. Rep. 10,268 (Envtl. L. Inst.) (Apr. 1992).

could have attempted to rally other countries to its side, particularly those with strong environmental records.[33] But the Bush administration chose an entirely different course. Taking advantage of Mexico's eagerness for a trade agreement with the United States, the administration prevailed upon the Salinas Government not to seek adoption of the report by the GATT Council.[34] Belatedly recognizing that allowing its fishing fleets to slaughter about sixty dolphins a day was not the best way to garner support from American environmentalists, the Mexican government took out full page ads in six major newspapers trumpeting new conservation measures and announcing postponement of the GATT case "as a further demonstration of our good faith effort to develop better protection for the dolphin."[35]

By gaining an agreement with Mexico to delay the report's consideration, the administration headed off a domestic political backlash against both Mexico and the GATT. The administration also avoided putting itself in the position where it had to block adoption of the report by the GATT Council, a step which might have made it more difficult to conclude the Uruguay Round.[36] As a result, the *Tuna-Dolphin Report* was left in limbo.[37] It seems

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33. There is no indication that efforts along these lines were attempted. Indeed, the Bush administration indicated publicly its belief that it could not win. For example, the Under Secretary of State Robert Zoellick stated that action by the GATT Council on the *Tuna-Dolphin* case "will almost certainly be prejudicial to the interests of the United States, and may well entail retaliatory trade measures against this country." Federal Appellants' Reply Memorandum in Support of Emergency Motion for Stay Pending Appeal, Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (D. Or. 1990) (No. C. 88 1380 TEH).

34. *See Tight-Lipped About Tuna*, J. COM., Oct. 4, 1991, at A4. At the time that Mexico filed the complaint at the GATT, there was uncertainty as to whether the U.S. Congress would permit fast track authority for the trade negotiations.

35. For the advertisement, see *A long-standing commitment . . . Just Got Deeper*, N.Y. TIMES, Sept. 27, 1991, at A13.

36. As it happened, the Uruguay Round of negotiations remained stalled during the ensuing year over refractory agricultural issues.

37. GATT panels are not bound by the decisions of previous panels, but panel reports do operate as precedents for future panels. *See* Andrew W. Stuart, *'I Tell Ya I Don't Get No Respect!' The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals*, 23 LAW & POL'Y INT'L BUS. 749, 757 (1992). It should also be noted that GATT panels do occasionally cite unadopted reports as precedent. Consequently, the failure of the United States to challenge the conclusions of the *Tuna-Dolphin* panel could be interpreted as an indication that the United States viewed its case as weak and that the United states was willing to live with the panel's

doubtful that the *Tuna-Dolphin Report* will ever gain official GATT approval. In the meantime, the U.S. ban on Mexican tuna remains in effect.

In October 1992, Congress amended the MMPA so that an import ban on any country can be halted if that country agrees to implement a global moratorium by March 1994, to reduce dolphin mortality each year until then, and to require observers.[38] But if the country fails to meet these commitments, the ban on tuna would be reinstated. If this ban is not successful within sixty days, then the U.S. government will impose a trade sanction by excluding forty percent of the normal level of fish and fish product imports from that country.[39] The MMPA amendments also ban the sale or shipment in the United States of tuna that is not dolphin-safe beginning in June 1994.[40]

3. *The Uruguay Round*

A third ecological front within GATT is the Uruguay Round. Although the environment itself is not a topic of negotiation, a number of environmental issues have arisen in the course of the negotiations on subsidies, sanitary and phytosanitary measures, technical barriers to trade (that is, standards), and a few other areas.[41] Since the tenor of these agreements would be to tighten GATT's discipline on environmental trade measures (ETMs), some environmentalists are contemplating opposing the Uruguay Round.[42] Indeed, some environmentalists have argued against the institutional reforms proposed in the Uruguay Round in part because it is thought that a more efficient, better-organized GATT is a more hazardous one. Other environmentalists have suggested

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decision.

38. International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, § 2, 106 Stat. 3425 (1992). No country has yet to agree to these conditions.

39. For a further discussion of the new law, see Steve Charnovitz, *Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities*, 27 J. WORLD TRADE (forthcoming 1993).

40. The new import ban, the trade sanction, and the dolphin-safe process standard would be in conflict with the *Tuna-Dolphin* decision.

41. For an extensive review of the environmental aspects of the Uruguay Round, see Steve Charnovitz, *Trade Negotiations and the Environment*, 15 Int'l Envtl. Rep. (BNA) 144 (Mar. 11, 1992).

42. ETMs are laws or regulations that use trade controls for environmental or health purposes. For a discussion of ETMs, *see infra* Section III:(A).

that the Uruguay Round be broadened to deal directly with concerns like sustainable development. A more practical suggestion, which is gaining a wide base of support, is to make the environment a centerpiece of a new round of trade negotiations, sometimes tagged the "Green Round."[43]

4. *The Trade and Environment Report*

The fourth GATT activity related to the environment was the release of a major report on "Trade and the Environment" by the GATT Secretariat in February 1992.[44] The report adopted the perspective of the *Tuna-Dolphin* panel on Article XX, and hence was quite critical of the use of trade measures for environmental purposes, especially when done unilaterally.[45] Although the report was greeted warmly by the free trade choir, the Secretariat missed an opportunity to speak to a more important audience—environmentalists. By taking a hard line on unilateral ETMs and in adopting such alarmist tones—for example, in warning of "anarchy" and "chaos"—the report provoked further antipathy against the GATT.[46]

B. Developments in Other Organizations

In addition to the GATT, the interaction between the environment and trade has been considered in several other fora. Since 1990, the Organization for Economic Co-operation and Development (OECD) directorates on environment and trade have been analyzing the issues and developing a set of principles for determining when ETMs are appropriate. All of this work is being conducted behind closed doors, however, and only a few of the

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43. *See, e.g.*, Senator Max Baucus, Protecting the Global Commons: The Nexus Between Trade and Environmental Policy, Address Before the Institute for International Economics (Oct. 30, 1991) (on file with the Institute for International Economics).

44. GATT TRADE AND ENVIRONMENT REPORT, *supra* note 5. For a critique of the report, see generally Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203 (1992).

45. For reaction to this report, see *Trade and the Environment*, FIN. TIMES, Feb. 12, 1992, at 10; Pei-Tse Wu, *Environment Groups Blast GATT Report*, J. COM., Mar. 20, 1992, § 1, at 1.

46. The hard line on unilateral ETMs is evident throughout the GATT Trade and Environment Report. For the alarmist tones, see GATT TRADE AND ENVIRONMENT REPORT, *supra* note 5, at 24, 31.

papers have been released to the public.[47]

The United Nations Conference on Environment and Development (Rio Conference) of 1992 also considered the trade and environment nexus. Generally, the conference called for greater discipline on the use of trade measures for environmental purposes. For instance, the Rio Declaration's Principle 12 states that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[48] In addition, the conference responded negatively to proposals for cost equillibration taxes. Agenda 21 declares that governments should "[s]eek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environmental standards and regulations . . . ."[49] This might apply, for example, to Senator David Boren's proposal for countervailing duties against countries that fail to impose "effective" pollution controls.[50]

The Rio Conference also called for more discipline on domestic ETMs. Agenda 21 suggests several guidelines. For instance, it states that a trade measure "should be the least trade-restrictive necessary to achieve the objectives."[51] In addition, the Rio Conference seemed to retreat from a position taken by the United

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47. The U.S. government brought some environmental representatives to a couple of the meetings, but other OECD countries objected. The OECD has no regular process for environmental input, but it did host a first-ever meeting for nongovernmental environmental organizations in September 1992.

48. *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development (UNCED), U.N. Doc. A/Conf.151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992). The UNCED Forest Principles include a softer statement, namely, that "Unilateral measures, incompatible with international obligations or agreements, to restrict and/or ban international trade in timber or other forest products should be removed or avoided . . . ." *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, para. 14, UNCED, U.N. Doc. A/Conf.151/6/Rev.1, *reprinted in* 31 I.L.M. 881 (1992). *See also* UNCED, Agenda 21, ch. 11, sec. 11.24, ch. 17, sec. 17.118, ch. 39, sec. 39.3(d) (final advanced version as adopted June 14, 1992) [hereinafter Agenda 21].

49. Agenda 21, *supra* note 48, ch. 2, sec. 2.22(e).

50. S. 984, 102d Cong., 1st Sess. (1991). The proposed International Pollution Deterrence Act of 1991, would set a duty equal to the cost which would be incurred by the producer of the foreign article if the foreign government imposed the same environmental standards in existence for U.S. producers. This bill was not acted upon by the Senate.

51. Agenda 21, *supra* note 48, ch. 2, sec. 2.22(i).

Nations Conference on the Human Environment (Stockholm Conference) of 1972. The Stockholm Declaration stated that "[a]ll countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial processes or products except in cases where environmental disruption may constitute a concern to other countries."[52] In other words, the view in 1972 was that uniform product or process standards might be appropriate for global issues. But neither the Rio Declaration nor Agenda 21 took that stance in 1992.[53]

In other areas, however, the Rio Conference leaned toward environment rather than trade. For example, the Rio Declaration endorses a "precautionary" approach. Specifically, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[54] A precautionary approach could be applied in the determination as to whether an ETM is necessary, that is, scientifically necessary, under GATT Article XX(b). Agenda 21 also encourages the GATT and other institutions to examine the principle of ensuring "public input in the formation, negotiation and implementation of trade policies . . . ."[55] At present, there are no avenues for public input to the GATT.

Environmental concerns are also an important part of the negotiations for the North American Free Trade Agreement (NAFTA). The NAFTA includes "green language" that would subordinate the trade agreement to three international environmental treaties in areas where they may conflict.[56] An examina-

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52. *Report of the United Nations Conference on the Human Environment*, recommendation 103(e), U.N. Doc. A/Conf.48/14, *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].

53. The Rio Declaration is highly oriented toward cooperation; the text, in eight places calls for states to "cooperate." *See Rio Declaration*, *supra* note 48, princs. 5, 7, 9, 12, 13, 14, 24, 27.

54. *Rio Declaration*, *supra* note 48, princ. 15.

55. Agenda 21, *supra* note 48, ch. 2, sec. 2.22(k). It is interesting to note that unlike the work in the OECD and the GATT, many of the deliberations in UNCED were carried out in the presence of nongovernmental environmental observers, and sometimes with environmental participants.

56. The three treaties are CITES, the Montreal Protocol, and the Basel Convention. CITES, *supra* note 15; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY Doc. No. 10, 100th Cong., 1st Sess., 26

tion of NAFTA environmental provisions is beyond the scope of this Article, but many of the points discussed here are relevant to the NAFTA debate.[57]

C. *The Stakes of the Trade and Environment Debate*

The portrayal of the GATT as a serious ecological danger is an exaggeration. To date the only victims of the GATT are dolphins.[58] But the underlying concerns of the environmentalists are valid. There is too much secrecy in the GATT. The recent developments in the *Tuna-Dolphin* case and the new disciplines being devised in the Uruguay Round do threaten to undermine environmental and health rules in countries with high standards of protection. Indeed, the GATT has not taken even the basic steps to assure that its dispute panels have accurate environmental information.

Of course, the GATT can change its stance on the environment. The GATT has proven flexible enough to adapt to new political exigencies in the past, such as the creation of the European Common Market in the 1950s, a string of restrictive textile programs beginning in the 1960s, the Generalized System of Preferences (GSP) for developing countries in the 1970s, and new "voluntary" export restraints in the 1980s. Thus, it seems unlikely that the GATT would flirt with institutional suicide by directly challenging a major environmental treaty like the Montreal Protocol.

The latent threat to the world economy is not what GATT may do to the environment, but rather what the environmentalists may do to the GATT.[59] As the Uruguay Round nears conclu-

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I.L.M. 1541 (1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, S. TREATY DOC. No. 5, 102 Cong., 1st Sess., 28 I.L.M. 649 (1989) (4 U.N. Doc. UNEP/IG.80/3).

57. For a detailed review of the environmental provisions of NAFTA, see Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, 23 Envtl. L. Rep. 10067 (Envtl. L. Inst.) (Feb. 1993). *See also* Kurt Hofgard, *Is This Land Really Our Land?: Impacts of Free Trade Agreements on U.S. Environmental Protection*, 23 ENVTL. L. 635 (1993).

58. Had the United States won the *Tuna-Dolphin* case, Mexico and Venezuela would probably have signed on to the new dolphin protection agreement as much as one year earlier.

59. The political power of this issue can be seen in a recent episode in the

sion, the ability of governments—especially the United States—to implement it will require building a coalition of beneficiaries of trade liberalization. The support of environmentalists and consumer groups will be critical to the attainment of such a coalition. Yet, unless environmentalists are convinced that the GATT will change its stance toward the environment, such political support may not be forthcoming.[60] This problem is especially serious in the United States, largely because the American government leads the world in the use of trade instruments to achieve environmental goals.

The forward momentum of freer trade is important not just for economic growth, but for environmental quality as well. The usual argument, as noted above, is that trade liberalization enriches society and, therefore, empowers people to "demand" more environmental quality. A wealthier society may also devote greater resources to government, thus allowing more funding for public environmental programs. But, there is another important argument. By linking nations together in one of the most basic human activities—economic exchange—trade agreements establish an atmosphere for fruitful intergovernmental cooperation over a wide range of issues, the environment included.[61]

U.S. House of Representatives when a concurrent resolution was passed stating that the "Congress will not approve legislation to implement any trade agreement . . . if such agreement jeopardizes United States health, safety, labor or environmental laws (including the Federal Food, Drug, and Cosmetic Act and the Clean Air Act)." H.R. Con. Res. 246, 102d Cong., 2d Sess. 4 (1992). The vote was 362-0. 138 CONG. REC. H7699, 7707 (daily ed. Aug. 6, 1992).

60. For example, former Gov. Bruce Babbitt, then President of the League of Conservation Voters, has written that "the task for the next administration will be to extend the linkage between trade and the environment to the entire world system. GATT, the world trading organization, remains dead set against such change and it will take a few sticks of dynamite to blow that organization into the 21st century." Bruce Babbitt, *Next Step for Environmentalists: Redeeming 'Lost Opportunity' of This Year's Rio Summit*, ROLL CALL, Sept. 28, 1992, at 34.

61. It is interesting to note that one of the listed purposes in the ITO Charter was "[t]o facilitate through the promotion of mutual understanding, consultation and cooperation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy." U.S. DEP'T OF STATE, PUB. 3206, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, art. 1, para. 6 (Mar. 24, 1948) [hereinafter ITO CHARTER]. It was understood in 1948 that trade could not be promoted or carried out in isolation from other international concerns.

III. The Main Concepts of the Trade and Environment Debate

This Section attempts to clarify the main concepts in the trade and environment debate. Although there are some important disagreements about values that separate the different sides of the debate, much of the conflict may result from misunderstandings.[62]

A. *Taxonomy of Environmental Trade Measures (ETMs)*

The lack of a common framework for categorizing and analyzing the use of trade measures for environmental purposes impedes communication between traders and environmentalists, and among members of the disciplines of law, ecology, and economics. A taxonomy of ETMs is a useful place to build such a framework. There are eight different categories of ETMs:[63] import prohibitions, export prohibitions, product standards, process standards, subsidies, taxes and tariffs, sanctions, and conditionality.

Import prohibitions ban the importation of specific products. Export prohibitions ban the exportation of specific products. Both types of measures are inconsistent with GATT Article XI because they are prohibitions other than duties, taxes, or other charges.

Product standards are regulations on domestic sales or transportation that apply to goods *pari passu* in international trade. This type of trade measure can be consistent with the GATT if it meets the national treatment requirement of Article III:4 and is not viewed as affording protection to domestic production in contravention of Article III:1. Such a trade measure must also meet the MFN requirement of Article I:1.

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62. There is no easy way to characterize the sides of the debate. "Free traders versus environmentalists" is not satisfactory because many free traders (and fair traders) consider themselves environmentalists. "Commercial versus environmental" does not work either because many environmentalists fully support commerce. "Pro- and anti-GATT" is also unsuitable because some environmentalists are pro-GATT.

63. Environmental trade measures are sometimes categorized according to production, consumption, and disposal. These categories are not as useful as they may have been in the past because the externalities of each category spill beyond the country where that activity occurs.

Process standards are regulations on domestic production or consumption that apply *pari passu* to goods in international trade. The difference between product and process standards is that the latter relate to the method by which a product is manufactured, harvested or produced. This type of ETM is generally viewed as being inconsistent with the GATT Article III:4 because it relates to a process rather than a product.[64]

Subsidies are a bounty or benefit to domestic production. They can be used to meet the costs of new environmental regulations, to encourage conservation, or to promote new environmental technologies.[65] Subsidies are not prohibited by GATT Article XVI unless they are export subsidies.[66] But they may be countervailable if they cause material injury to another country.

Taxes and tariffs are levies on trade. For example, in the Superfund Revenue Act of 1986, the U.S. Congress imposed a tax on certain imported substances, such as styrene, that include chemicals which are taxed under federal law.[67] This type of tax measure can be consistent with the GATT if it meets the national treatment requirement in Article III:2 and is not viewed as affording protection to domestic products in contravention of Article III:1.[68] Taxes and Tariffs must also meet the MFN requirement in Article I:1. But taxes on products made in environmentally damaging ways or countervailing duties on products made under low regulatory standards are a different matter because such taxes relate to process. Applying such taxes to imports would run afoul of GATT Articles I:1, III:2, and II:1.

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64. *See, e.g.*, Tuna-Dolphin Report, *supra* note 11, paras. 5.14-5.15. Although the panel's conclusion was correct with regard to the MMPA, this author believes that there are process standards that can meet the requirements of Article III:4

65. Technically these are not trade measures but rather domestic measures. But because such measures can distort trade, they are increasingly coming under review by the international trading system. Actual export subsidies for environmental purposes are apparently nonexistent.

66. The draft Uruguay Round Agreement on Subsidies would apply new disciplines to domestic subsidies that are specific to an enterprise or industry. *See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, sec. I, arts. 2, 6, 8, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter *Dunkel Draft*].

67. 26 U.S.C. §§ 4671-4672 (1988 & Supp. II 1990).

68. *See United States—Taxes on Petroleum and Certain Imported Substances*, para. 5.2.4, GATT Doc. L/6175 (June 17, 1987).

Sanctions penalize other countries for environmentally harmful actions. There are very few environmental trade sanctions in law. To date, although authorized, none have been imposed. Perhaps the earliest example was the provision in the U.S. Trade Expansion Act of 1962 authorizing the President to raise duties on any fish from countries that refuse to participate in fishery conservation negotiations in good faith.[69] The common mischaracterization of prohibitions and standards as sanctions is one of the greatest sources of confusion in the current debate.[70] In general, sanctions apply to unrelated products. The misuse of the term complicates the analysis of GATT legality of various ETMs because sanctions are strongly disfavored by GATT. Sanctions are permissible only when justifiable under the general exceptions of Article XX or the security exceptions of Article XXI, or are authorized by the GATT Council under Article XXIII:2 as a remedy for GATT violations.

Conditionality is the extension or withholding of preferential treatment to a less developed country (LDC) depending on the environmental policies of that country. The GATT does permit preferential tariffs for LDCs, but such treatment is supposed to be nonreciprocal.[71] It is unclear what stance the GATT Council would take if any Generalized System of Preferences (GSP) program began to require environmental conditionality.[72]

B. Discrimination

The MFN principle is fundamental to the GATT and requires that trade restrictions be nondiscriminatory. Although the

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69. 19 U.S.C. § 1323 (1988). The President must be satisfied that the action is likely to induce the country to negotiate in good faith and that practices of that country affect the interests of the United States.

70. The muddle is exacerbated by the use of the term "sanction" as a synonym for giving approval. For example, the U.S. Pelly Amendment, which is a trade sanction, states that the President may order an import prohibition on unrelated products "to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade." 22 U.S.C. § 1978(a)(4) (1988).

71. *See Differential and More Favorable Treatment*, paras. 5-6, GATT Doc. L/4903 (Nov. 28, 1979).

72. The U.S. GSP program expires in 1993. Senator Baucus has suggested that Congress consider requiring products imported under the GSP be "produced in an environmentally sound manner." 137 CONG. REC. S13169-70 (daily ed. Sept. 17, 1991).

GATT does not define MFN or discrimination, it does state that MFN must be accorded unconditionally to the "like product" of another GATT member.[73] The GATT, however, does not define "like" product.

The absence of precise definitions for commonly used terms has led to considerable misunderstanding regarding GATT rules. Environmentalists sometimes contend that the Tuna-Dolphin provisions of the MMPA do not discriminate because the rules apply equally to all foreign countries. But nondiscrimination does not mean simply applying the same regulations to all GATT members. To meet the GATT's MFN requirement, regulations must have the same impact on all "like" products.

For example, consider the longtime U.S. ban on meat from any country where foot and mouth disease exists.[74] Because the law treats meat on a countrywide basis, a situation could arise where uncontaminated meat from regions of a country free of the disease could not be imported into the United States because other regions of the country were infested with the disease. At the same time, the uncontaminated meat from countries completely without the disease could be freely imported. In such a situation, the country whose uncontaminated meat was barred from the United States could protest to the GATT that the mere existence of disease in its country does not affect the "likeness" of its meat relative to the other country's meat. Although the law applies the same rule to both countries, it has differing impacts because of the differing conditions in each country. Thus, the law discriminates in the GATT sense of the term. Whether the law violates the GATT depends upon the application of Article XX. This Article permits "discrimination" so long as it is not "arbitrary" or "unjustifiable."

C. Interpretation of GATT Article XX

A full treatment of the application of Article XX to the eight categories of ETMs is beyond the scope of this Article and would be very difficult because Article XX adjudication is evolving rapidly. Instead, I will offer a few general observations about Article XX and then discuss several key issues of interpretation.

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73. GATT, *supra* note 2, art. I:1.

74. 19 U.S.C. § 1306(a)-(b) (1988).

First, it is important to note that not a single environmental or health measure has ever been adjudged to be in conformance with Article XX. Of course, this is mainly a reflection of the small number of disputes that have arisen—four. Yet there are hundreds of ETMs which have not been challenged either because they are perceived to be in compliance with Article XX or because they have not had much adverse trade impact.

Second, the trend in recent GATT adjudication has been to tighten the use of Article XX(b), (d), and (g).[75] Almost every Article XX decision since 1982 has done so. Viewed from a purely commercial perspective, the *Tuna-Dolphin* decision granted a big victory to exporters by abridging the right of importing countries to judge the suitability of imports on environmental grounds.[76]

Third, the myth that GATT has no provisions relating to the environment has been slow to die.[77] While it is true that the GATT does not mention the word "environment," the history of the life and health exceptions in trade agreements demonstrates that ETMs have been in use for more than a century. For example, the Commercial Convention between Egypt and Great Britain of 1889 provided an exception for "prohibitions occasioned by the necessity of protecting the safety of persons or of cattle, or of plants useful to agriculture."[78] The Article XX exceptions were

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75. Article XX(b) permits measures "necessary to protect human, animal or plant life or health." Article XX(d) permits measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement, including those relating to customs enforcement, the enforcement of monopolies . . . , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices." Article XX(g) permits measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These measures are permissible so long as they do not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade."

76. Tuna-Dolphin Report, *supra* note 11, para. 5.27.

77. *See, e.g.*, Kyle E. McSlarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 Envtl. L. Rep. 10,589, 10,595 (Envtl. L. Inst.) (Oct. 1991) (The structure and scope of the Article XX exceptions resulted from negotiations at the end of World War II, long before present environmental concerns and policies were even contemplated). One reason may be that some environmental activists prefer to portray the GATT as totally insensitive to the environment.

78. Commercial Convention, 1889, Egypt-U.K., art. II, 172 Consol. T.S. 290-92.

designed with such measures in mind.[79]

Fourth, the GATT seems very close to adding a "least trade restrictive" requirement to Article XX(b). Agenda 21 recommends this change; the Uruguay Round includes this requiremsnt in its agreements on Standards[80] and on Sanitary and Phytosanitary Measures[81]; and the GATT Council *Beer II* decision incorporates it with respect to Article XX(d).[82] Such a requirement could come in two forms. One would necessitate that alternatives to trade measures be used if they would be at least as effective in achieving a given environmental goal. For example, a label might replace an import ban. The other form would require that the costs from any trade measure be weighed against the environmental goal. This latter form is often called "proportionality." Both forms could rule out many common ETMs.

Fifth, although the authors of the GATT intended that measures covered by Article XX(b) have a scientific justification, the application of science to an environmental regulation will always be ambiguous. For instance, Venezuela argued in the *Tuna-Dolphin* case that the U.S. embargo was not justified because species of dolphins were not endangered.[83] While science can make risk assessments, it cannot tell us what an acceptable level of risk is. Can a preference for a zero risk have scientific justification?[84] Can there be a scientific justification for taking action even when benefits do not exceed costs? Neither GATT nor the Uruguay Round address these difficult questions.

1. Extraterritoriality

The "extraterritoriality" of trade measures is an important and frequently misunderstood concept. For instance, critics of the

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79. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 37, 55.

80. *Dunkel Draft*, *supra* note 66, sec. G, art. 2.2-2.3.

81. *Id.* sec. L, pt. C, paras. 19, 21.

82. *United States—Measures Affecting Alcoholic and Malt Beverages*, paras. 5.41-.43, 5.52, GATT Doc. DS23/R, paras. 5.41-5.43, 5.52 (Mar. 16, 1992) [hereinafter Beer II Report].

83. Tuna-Dolphin Report, *supra* note 11, para. 4.29. The life and health of individual dolphins, of course, was endangered.

84. Zero risk is not controversial when the object is to keep out a virus or insect pest from an island where it does not currently exist.

MMPA charge that it is extraterritorial in effect because it attempts to control foreign behavior. This criticism is misguided because the concept of extraterritoriality refers to laws that extend legal jurisdiction to a foreign territory. U.S. laws regulating the activities of "American" companies on foreign soil are examples of extraterritoriality.[85] Customs laws are not extraterritorial because they do not purport to control behavior outside the United States.[86] Customs laws merely establish rules for importation. To be sure, any product standard can have the effect of changing foreign behavior. But there is big difference between a law that mandates a change in behavior and a law which makes that change financially advantageous.

In 1906, when the United States prohibited the importation of any sponge taken by means of diving or diving apparatus, Congress hoped that foreign fishing practices would improve.[87] That does not, however, make the 1906 law any more extraterritorial than the tariff schedule itself. In 1906, the United States was simply exercising its own right to establish import standards. It was asserting nothing "against the sovereignty of any other nation," but merely closing U.S. ports to everybody who harvested sponges in a "needlessly wasteful and destructive method."[88] Fifty years later, Senator E. L. Bartlett also explained this distinction well when, in the course of Senate consideration of his amendment for trade sanctions against nations that fail to engage in fishery conservation negotiations, he declared that his amendment "did not place an American flag on every fish on the high seas . . . ."[89]

Perhaps recognizing that the MMPA was not extraterritorial, the *Tuna-Dolphin* panel condemned it as "extrajurisdictional"

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85. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 367-71 (1986). If the MMPA prohibited Canadian subsidiaries of American companies from buying Mexican tuna or if it prohibited foreign fisherman from fishing in a manner unsafe to dolphins, it would have extraterritorial effect.

86. It has been suggested that the MMPA is an attempt by the United States to regulate Mexico's production of tuna. But if that is true, then the filing of the GATT case by Mexico could be viewed as a Mexican attempt to deregulate U.S. *consumption* of tuna. Deregulation may be more in the spirit of the GATT, but requiring foreign deregulation is "extrajurisdictional."

87. Act of June 20, 1906, ch. 3442, 34 Stat. 313 (regulating sponge sales).

88. The Abby Dodge, 223 U.S. 166, 171 (1912) (quoting the U.S. Solicitor General and holding the 1906 Act constitutional).

89. 87 CONG. REC. 19,906 (1962).

instead.[90] Curiously, the panel did not offer any definition of an extrajurisdictional offense, even though the panel apparently invented this term.[91] Moreover, the panel's argument that the Article XX(g) exception does not cover extrajurisdictional laws is casuistic, resting upon a 1988 GATT case rather than on any legislative history from the ITO Conference that wrote the GATT.[92] In addition, the historical evidence on the Article XX(b) exception marshalled by the panel does not suggest, as the panel claims, that XX(b) does not apply to extrajurisdictional laws.[93]

Even if extrajurisdictionality were GATT-illegal, the panel made no attempt to distinguish between import standards on products from foreign countries and standards on products from the high seas.[94] The panel seems to imply that since the high seas are beyond every nation's jurisdiction, they cannot be reached by any nation's import standards. Furthermore, the panel fails to address the thesis of environmentalists that "Mexican" dolphins are part of one ecosystem that transcends all jurisdictions.[95] In defending its decision, the panel warns that extrajurisdictionality would undermine the multilateral trading system.[96] No doubt the panel is well-intentioned in its opinion,[97] but it comes about a

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90. Tuna-Dolphin Report, *supra* note, 11, paras. 5.26, 5.32.

91. One might presume by context that an "extrajurisdictional" law attempts to influence what goes on in a foreign country.

92. Tuna-Dolphin Report, *supra* note 11, para. 5.31. The 1988 case was *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268 (Mar. 22, 1988) [hereinafter *Herring and Salmon*]. This panel reinterpreted "relating to the conservation" in Article XX(g) to mean "primarily aimed at" such conservation. *See Herring and Salmon*, para. 4.6. It should be noted that the panel's argument, adopted by the GATT Council, rests solely on semantics. The suggestion by some commentators that "primarily aimed at" means "really aimed at," thereby implying a GATT review of intention, is equally unsupportable by the ITO documentation.

93. *See* Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV., 569, 583-85 (1991-92); *See also* Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, (1993).

94. Tuna-Dolphin Report, *supra* note 11, para. 6.4.

95. *See, e.g.*, Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A21. In reality, all dolphins are stateless.

96. Tuna-Dolphin Report, *supra* note 11, para. 5.27, 5.32.

97. An alternative thesis is that the panel intentionally perpetrated a hoax against the environment by ignoring the history of Article XX. It is interesting to

century too late to "save" world commerce from national actions to protect the global environment, which began in the 1890s.[98]

Finally, although this point goes beyond the panel's terms of reference, it should be noted that the sovereign rights of states over resources within their jurisdiction is not absolute.[99] According to the Stockholm Declaration on the Human Environment, nations have a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."[100] This tension between sovereign rights and international responsibilities underlies many of the difficult environmental problems the world faces.[101] While dolphins may roam in and out of national territory and thus be a jurisdictional concern as well as an extrajurisdictional one, trees in tropical forests do not. But Brazil may still have an obligation not to chop down its trees because of the impact on global warming.[102]

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note that the panel had the time needed to do a thorough search of GATT's preparatory history. Indeed, the panel submitted its report nearly a month earlier than it was due.

98. *See* THOMAS BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 536-37 (1974) (discussing fur seal controversy). It is unclear whether the panel was unaware of the long history of environmental trade measures.

99. Under the Law of the Sea Convention of 1982, "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." *Third United Nations Conference on the Law of the Sea*, art. 193, U.N. Doc. A/Conf. 62/122 (Oct. 7, 1982), *reprinted in* 21 I.L.M. 1261, 1308 (not in force).

100. *Stockholm Declaration*, *supra* note 52, princ. 21. Moreover, Recommendation 103(a) of the Stockholm Declaration states that "no country should solve or disregard its environmental problems at the expense of other countries." *See* 11 I.L.M. at 1462. For an early precedent, see *Trail Smelter Arbitral Tribunal Decision*, 35 AM. J. INT'L L. 684, 716 (1941).

101. There is also tension between the sovereign right of a nation to prevent its consumers from exacerbating ecological degradation, for example, by buying dolphin-unsafe tuna and the responsibility of that nation to adhere to an open trading regime.

102. If Brazil has "property rights" in its forests, then other countries might have to pay Brazil for the positive externalities (i.e., the reduction of carbon dioxide or the maintenance of habitat for biodiversity) from these forests. The economic, legal, and moral issues surrounding property rights are important to the trade and environment debate, but are beyond the scope of this Article. For a proposal to pay countries for reducing pollution, see GATT TRADE AND ENVIRONMENT REPORT, *supra* note 5, at 35.

2. Paternalism

Environmental Trade Measures are often criticized as being inconsistent with the GATT because such measures are paternalistic, while the GATT rests upon the principle of voluntary, mutually beneficial transactions under the ethic of economic efficiency. Such criticism seems misplaced since the main purpose of the GATT was to impose value judgments. Starting with the venerable MFN principle, the GATT establishes rules of competition for countries who might otherwise follow different paths according to their perception of their own interests. After all, what could be more paternalistic than telling countries benefiting from price discrimination that such "dumping" is "condemned" by the GATT.[103] From the perspective of the consumer who is happily buying inexpensive products, it seems doubtful that the costs of such purchases in the form of lost sales to domestic producers would justify the imposition of special import duties.[104]

Another criticism of ETMs is that they contravene the principle of comparative advantage. From this perspective, if certain countries pursue public or private policies that attach low values to environmental protection, then such nonuniformity in "taste" permits mutually beneficial market exchanges to occur.[105] In other words, the international trading system should be oblivious to how countries secure their comparative advantage.

Whether or not this would be a useful approach for the world economy to follow, it is clear that such an "anything goes" ap-

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103. GATT, *supra* note 2, art. VI:1 states that "dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury . . . ." In other words, the GATT condemns certain voluntary transactions when they threaten negative externalities on producers. Of course, the GATT does not require antidumping actions.

104. Although labeling environmentally sensitive goods is commonly suggested as an alternative to regulation, one never hears an analogous "consumer preference" recommendation for labeling dumped goods rather than imposing a special tax on them. Suppose goods on the shelf were labeled: "The U.S. Department of Commerce has found that this product is being sold at less than its cost of production." It seems likely that consumer interest would be boosted not dampened—which is why the decision is not left to the consumer.

105. *See, e.g.*, Patrick Low, *International Trade and the Environment: An Overview*, *in* INTERNATIONAL TRADE AND THE ENVIRONMENT (Patrick Low ed., 1992) (159 World Bank Discussion Papers 2).

proach was not the one agreed to by the U.N. Conference on Trade and Employment which wrote the GATT and the ITO Charter. The GATT allows members to counteract trade advantages achieved from practices such as dumping or subsidies.[106] The ITO Charter went further in prescribing limits on how countries could obtain comparative advantage. For example, the Charter contained a provision on "Fair Labor Standards" which declared that "unfair labor conditions . . . create difficulties in international trade" and provided for adjudication of disputes concerning social dumping.[107]

3. *Spillovers*

Some studies of trade and the environment treat the issue according to the extent to which problems spill over across national borders. Seen in this way, there are global problems, regional problems, transborder problems, and local problems which involve no spillover. Nevertheless, there are several reasons why this typology is not very helpful.

First, it is often difficult to agree upon a classification of specific environmental issues because there is no consensus on what constitutes a spillover. Economists have generally focused on physical spillovers, but psychological spillovers also occur too when public concern arises about environmental conditions inside other countries.[108] Second, many environmental problems that were once perceived as local, such as carbon emissions, increasingly are being viewed globally with the improvement of scientific information. None of the controversial trade and environment issues that are part of the current debate could be classified as merely local.

Third, distinctions based on the degree of spillover are not recognized by the GATT. A trade measure taken to combat a global problem is no more GATT-legal than a measure taken against a transborder problem. It is sometimes suggested that a

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106. GATT, *supra* note 2, art. VI. Dumping and subsidies may be countervailed only when they lead to material injury.

107. ITO CHARTER, *supra* note 61, arts. 7, 94, 95.

108. Richard Blackhurst & Arvind Subramanian, *Promoting Multilateral Cooperation on the Environment*, *in* THE GREENING OF WORLD TRADE ISSUES 247 (Kym Anderson & Richard Blackhurst eds., 1992).

trade measure enacted by one country to deal with local problems in another is by definition a violation of GATT, because there are no spillovers to justify an Article XX defense. But Article XX might be invoked in a roundabout way. Take, for example, a case where no one in *Country A* has a direct environmental reason to care that *Country B* is polluting its water. Nevertheless, if lower pollution abatement costs enable *Country B* to capture a greater market share for the sale of widgets in *Country A*, then *Country A* could be forced to lower its water pollution laws to stay competitive. Therefore, in order to protect against this threat to the human health of its own citizens, *Country A* invokes Article XX to prohibit the importation of widgets from *Country B*.[109]

D. Subnational Laws

One issue that is becoming increasingly controversial is the impact of GATT disciplines on nontariff barriers of subnational governments, such as states.[110] In theory, the GATT could interact with state and local laws in three ways. First, the GATT might not apply at all to state measures. Second, the GATT might impose the same standard on the states that it imposes on the national government. Third, the GATT might impose a higher standard on the states. Each of these possibilities will be discussed in turn.

The first view is clearly untrue.[111] Under Article XXIV:1, the GATT applies throughout the customs territory of its members. An international trade agreement could not possibly operate any other way because special exemptions for federal governments would be unfair to unitary governments.

The second view, that GATT imposes the same standard on state governments as it does on national governments, has been the traditional view of the GATT. But the GATT seems to be

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109. For a thoughtful discussion of this fairness argument, see Frederic L. Kirgis, *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 860, 901 (1972).

110. *See* Bruce Stokes, *State Rules and World Business*, NAT'L J., Oct. 27, 1990, at 2630.

111. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, S. TREATY DOC. No. 1, 92d Cong. 1st Sess., 8 I.L.M. 679, 691.

moving toward the third alternative.[112] For example, in the GATT *Beer II* case, the panel concluded that the "common carrier" requirements in five U.S. states violated the GATT (including Article XX) since the other forty-five states did not use them.[113] More generally, it has been suggested that in an increasingly integrated world economy, subnational standards are an anachronism.[114] Thus, for the United States to retain a system of inconsistent state standards may itself constitute a "disguised restriction" to international trade.

Whatever control the GATT has over states is derived through the national government.[115] Because the states are not contracting parties to the GATT, they have no direct obligations.[116] Therefore, the issue is whether the GATT requires national governments to bring state laws into conformity. The question of national government responsibility for subsidiary governments arose in the 1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions. In that treaty, the parties undertook to "*adopt the necessary measures* to ensure that the provisions of the present Convention are strictly observed by all authorities, central or local, and that no regulation is issued in contravention thereof."[117]

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112. The third alternative does exist in one technical area. The GATT Protocol of Provisional Application is generally viewed as not applying to state laws. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 116 (1969).

113. *See* Beer II Report, *supra* note 82, para. 5.52. This conclusion tracked the argument of the Government of Canada that the fact that not all 50 states maintained discriminatory distribution systems indicated that such alternative measures existed. *Id.* at para. 3.67. This is a particularly surprising argument coming from Canada whose own provinces do not always follow identical policies.

114. *See* Louis V. Gerstner, Jr., *Untangle the State Regulatory Web*, N.Y. TIMES, Nov. 25, 1990, § 3, at 13.

115. The GATT is an international obligation of the United States. *See* 19 U.S.C. §§ 3107, 3111 (1990).

116. This point differs from the recent decision of the *Beer I* panel. *See Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT Doc. DS17/R (Oct. 16, 1991) [hereinafter Beer I Report]. The panel claimed that the use of the term "observance" in Article XXIV:12 implies that the GATT is applicable to state governments. *Id.* para. 5.36.

117. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, art. 2, 46 Stat. 2461, T.S. No. 811. (emphasis added). Under Protocol Ad Article 2, 46 Stat. at 2490, this provision did not apply to Canadian provincial governments. But it did apply to the United States.

When the first draft of the ITO Charter was written in London in 1946, a proposal was made that "[e]ach member agrees that it will *take all measures open to it* to assure that the objectives of this Article are not impaired in any way by taxes, charges, laws, regulations or requirements of subsidiary governments within the territory of the member governments."[118]

The "take all measures open to it" language is weaker than the "adopt the necessary measures" commitment of 1927. The record from the London debate indicates that the words "open to it" reflected a concern about the constitutional capacity of federal states to control subsidiary governments.[119] Nevertheless, the London proposal was watered down in the ITO New York draft. It stated that "[e]ach accepting government shall *take such reasonable measures as may be available to it* to assure observance of the provisions of this Charter by subsidiary governments within its territory."[120]

This provision differs from the London proposal in requiring only "reasonable" measures as opposed to "all" measures. Does "reasonable" mean that nations may take political factors into account? Unfortunately, the drafting history offers little guidance. Ultimately, this provision was slightly modified to arrive at the form in which it currently appears in GATT Article XXIV:12: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."[121]

In examining U.S. responsibilities under GATT regarding state law, it will be useful to consider the three branches of government separately. No one disputes that the president has a responsibility to try to persuade states to follow GATT rules.[122] But

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118. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 305-306 (1967) (citing U.N. Doc. EPCT/C.II/54, at 6 (1946)).

119. *Id.*

120. *Id.* (citing U.N. Doc. EPCT/34, art. 88:5 (1947)) (emphasis added).

121. There is an additional provision relating to the states in a GATT interpretative note (see Ad Article III:1), but according to Jackson, it is doubtful that this note was intended to modify the language in Article XXIV:12. *See* Jackson, *supra* note 118, at 306-08.

122. *See* 19 U.S.C. §§ 2532-2533 (1988). Section 2532 directs federal agencies not to create unnecessary obstacles to foreign commerce. Section 2533 directs the

the obligations for federal legislative action are far less clear.[123] There are two views regarding the responsibilities of Congress in obtaining state compliance with GATT. One view holds that the central government must do everything within its power to require local observance of the GATT. The second view is that even when the central government has legal power to require local observance, there is no GATT obligation to do so. After analyzing the fragmentary evidence and weighing the arguments, GATT scholars John H. Jackson and Robert E. Hudec side with the first view.[124] Nevertheless, there is a lot to be said for the second view. If the authors of the ITO and GATT intended central government domination over state laws, why did they not just use the tough language in the 1927 treaty? Moreover, why was the clearly weaker London language watered down even more in the ITO draft if the authors did not intend to allow federal governments some flexibility?[125]

Whichever view one accepts, it is important to know whether Congress has the power under the Constitution to require changes in state law because there is general consensus that federal nations are not required under the GATT to take legislative or executive action to conform state laws on issues where the central government lacks the constitutional competence to do so.[126] Because the authorization of Congress to regulate commerce with foreign nations in article I is an unqualified grant of power, there is little question as to whether the U.S. government may require states to bring their laws into conformity with GATT.[127]

President to take reasonable steps to promote state agencies and persons not to create unnecessary obstacles to foreign commerce.

123. For a discussion of the two conflicting views of federal responsibility, see Jackson, *supra* note 118, at 302.

124. *Id.* at 302-08; Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, *in* THE EUROPEAN COMMUNITY AND GATT 187, 219-21 (Meinhard Hilf et al. eds., 1986).

125. During the Havana Conference, an amendment was offered and withdrawn to make member nations "responsible for any act or omission to act" contrary to the Charter by subsidiary governments. *See Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, GATT Doc. L/6304, para. 3.59 (Mar. 22, 1988) (noting proposal for amendment at Havana Conference).

126. In other words, no country need amend its constitution.

127. U.S. CONST. art. I, § 8. *See* Brown v. Maryland, 25 U.S. (Wheat. 12) 419, 448-49 (1827) (holding unconstitutional a Maryland statute requiring importers to purchase licenses because Maryland's exercise of its taxing power could not "in-

Thus, the issue becomes: what does GATT require the federal government to do? This issue has been addressed in three recent GATT decisions.[128] In the first, the panel considered Canada's contention that it was up to each country to judge the reasonableness of its own efforts under Article XXIV:12 to influence subnational laws.[129] The panel rejected this contention, stating that it was up to the CONTRACTING PARTIES to make that decision.[130] After examining the facts of the case involving provincial liquor boards, the panel concluded that Canada had not taken reasonable measures.[131]

In the next GATT decision, the *Beer I* panel interpreted the term "reasonable measures" in Article XXIV:12 to mean "a serious, persistent and convincing effort to secure compliance . . . ."[132] After examining the facts of the case involving provincial liquor boards, private distribution systems, and differential markups, the panel concluded that Canada had not taken reasonable measures.[133] In the most recent case, which involved the United States, the *Beer II* panel did not follow the *Beer I* panel's approach to making a factual judgment using the "serious, persistent and convincing" test. Instead, the panel took a hard-line stance and declared a "general obligation of contracting parties to withdraw measures" inconsistent with the GATT.[134] Therefore, the national government was required to bring the state laws at issue into compliance with GATT.[135]

The speed with which the GATT Council has eviscerated Article XXIV:12 is astonishing. Just four years after asserting the power to determine what is "reasonable," the Council has, in effect, declared that no factual determination is needed since na-

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terfere with any regulation of commerce.").

128. An earlier dispute in 1983, which preceded the three cases, involved a Canadian restrictions on gold coins. But this panel report has not be released by the GATT or adopted by the GATT Council.

129. *Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, *supra* note 125, para. 3.69.

130. *Id.* para. 4.34.

131. *Id.* para. 4.35.

132. Beer I Report, *supra* note 116, para. 5.37.

133. *Id.* paras. 5.37-5.39.

134. Beer II Report, *supra* note 82, para. 5.80.

135. *Id.* para. 6.2. The offending laws included excise tax credits and preferences, wholesaler requirements, licensing fees, common carrier requirements, sales restrictions, price affirmation requirements, and listing and delisting practices.

tional authorities must act up to the limits of their constitutional authority.[136] Although an effort has been underway in the Uruguay Round to use a tighter discipline than Article XXIV:12 in the Sanitary and Phytosanitary Decision[137] and in the Standards Code,[138] the *Beer II* decision leapfrogs over these negotiations to amend Article XXIV:12 by dispute panel interpretation. Although this new approach to Article XXIV:12 would prescribe legislative action to change offending state laws, in the final analysis it would still be up to elected authorities to decide what action to take.[139] Noncompliance with the GATT might involve costs such as trade compensation, but the balancing of delicate federal-state relations would remain in the political sphere.

Nevertheless, the *Beer II* decision seemingly goes further. Indeed, the panel implies a wholly new avenue for GATT adjudication in the federal courts. Although the panel says nothing about the courts, its finding that the GATT may have "already overruled" certain state laws is an open door to a test case as to whether the GATT itself preempts inconsistent state law.[140]

The issue of whether the GATT prevails over state law has implications for the balance of power between the President and the Congress and between the federal government and the states. The U.S. Constitution makes treaties the "supreme law of the

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136. The only fact which would need to be determined is what constitutional authority a central government has. In the *Beer II* case, there was a question as to whether the federal government had the power to compel states to revise their liquor importation laws in view of section 2 of the twenty-first amendment to the U.S. Constitution. The panel, citing several Supreme Court decisions, took the position that the federal government can. *See* Beer II Report, *supra* note 82, paras. 5.46-5.48. But these citations are somewhat selective. The panel might have considered, for example, *Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966); or *Capital Cities Cable v. Crisp*, 467 U.S. 691, 715 (1984).

137. *See Dunkel Draft*, *supra* note 66, sec. L, pt. C, para. 45 which states that: "Contracting parties are fully responsible under this decision for the observance of all obligations set forth herein. Contracting parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this decision by other than central government bodies." Paragraph 20 may also have implications for state laws.

138. *Id.* sec. G, art. 3, para. 5.

139. There is a special fast track procedure for changing federal law in order to implement a requirement, amendment, or recommendation under a U.S. trade agreement. *See* 19 U.S.C. § 2504(c). This procedure is available only for specified trade agreements such as the GATT Tokyo Round agreements of 1979.

140. *See Beer II Report*, *supra* note 82, para. 5.48.

land."[141] The Constitution further provides the President with the power to make treaties with the advice and consent of the Senate, provided two thirds of the Senate concurs.[142] There is no doubt that such treaties override inconsistent state laws.[143] The requirement that two thirds of the Senate concur serves to safeguard the rights of states.

It is generally held that as a valid executive agreement authorized by Congress the GATT has domestic effect in the United States and supersedes inconsistent state law.[144] This is based on the view that an executive agreement has the same stature under the Constitution as a treaty and, therefore, is covered by the Supremecy Clause.[145]

In the few state court cases which have directly applied the GATT, the Supreme Court decisions in *United States v. Pink* and *United States v. Belmont* are usually cited. In *Belmont*, the Court held that "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."[146] In *Pink*, the Court held that "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement."[147] Although these rulings are unremarkable with respect to treaties, *Belmont* held that international compacts not approved by the Senate could be treaties, citing *Altman v. United States*.[148]

The *Altman* case concerned a trade agreement entered into by President McKinley pursuant to Congressional authoriza-

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141. U.S. CONST. art. VI, § 2.

142. U.S. CONST. art. II, § 2, cl. 2.

143. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) ("All treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

144. Jackson, *supra* note 118, at 290-292, 303-03; Hudec, *supra* note 124, at 202, 211. This would apply only to the parts of GATT that have been proclaimed by the President. But it is not clear whether the President's negotiating authority in 1945 included the preemption of state laws. *See* 19 U.S.C. § 1351(a) (1988).

145. For an excellent discussion, see ELBERT M. BYRD, JR. TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES, 151-57 (1960). *But see* Hudec, *supra* note 124, at 221 (it must be admitted that the issue is not firmly settled) and at 224 regarding a New Jersey case in 1983.

146. United States v. Belmont, 301 U.S. 324, 331 (1937).

147. United States v. Pink, 315 U.S. 203, 230-31 (1942).

148. *Belmont*, 301 U.S. at 331.

tion.[149] In considering whether the Court had jurisdiction to review the agreement under the Circuit Court of Appeals Act of 1891, the Supreme Court had to decide whether the agreement was a "treaty" within the meaning of that Act.[150] The Court held that although the agreement did not have the "dignity of one requiring ratification by the Senate," it would nevertheless be considered a"treaty under the Circuit Court of Appeals Act."[151] Thus, the Court did not rule that international compacts supersede state law, but rather that controversies under such agreements could be appealed to the Supreme Court.[152] Nevertheless, this case has generally been taken by scholars to mean that executive agreements qualify as treaties.[153] A recent Supreme Court case, *Weinberger v. Rossi*, reiterates that view, but in somewhat softer language that *Belmont* and *Pink*.[154] It should be noted that the *Weinberger* case, like *Altman*, concerned what the Congress meant in using the word "treaty" in a U.S. statute, not what the word "treaty" means in the U.S. Constitution.

By viewing the GATT as a treaty, the *Beer II* panel infers that the GATT may have "already overruled" state laws. Consequently, the adoption of the *Beer II* panel report by the GATT Council is a direct challenge to state environmental regulations. If the GATT Council rules that a state law is inconsistent with the General Agreement, then interested parties may be able to gain an injunction.[155] In other words, the U.S. Trade Representative

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149. Altman & Co. v. United States, 224 U.S. 583 (1912).

150. *Id.* at 600. The Act, which sought to cut back appeals, provided for an appeal to the Supreme Court in cases involving treaties.

151. *Id.* at 601.

152. The argument by the United States for why such trade agreements should not be considered treaties reads well 80 years later. *Id.* at 591-593. Although the U.S. Department of Justice lost the case, it may have been satisfied with a ruling that greatly expanded the impact of executive agreements.

153. *See* 1 RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 cmts. d, e, reporters' note 2; § 303 reporters' notes 1, 8. *But see* Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in the United States Domestic Law*, STAN. J. INT'L. L., Spring 1990, at 479, 486-97.

154. Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1982) (Even though such agreements are not treaties under the Treaty Clause of the U.S. Constitution, they may in appropriate circumstances have an effect similar to treaties in some areas of domestic law.

155. *See* Hudec, *supra* note 124, at 192. Hudec states that courts will entertain suits, under the Supremacy Clause, to declare invalid state law in conflict

(USTR) would no longer need Congressional approval to implement a GATT panel decision regarding a state law, but rather could obtain the assistance of the courts.[156] By giving the GATT Council the go-ahead to adopt the *Beer II* report, the Bush administration has opened a Pandora's Box for the United States.

To appreciate fully the impact of the *Beer II* ruling, one must also consider the relationship between Article XXIV:12 and the GATT's status as domestic law. In the earliest state case involving the GATT, the legal advisor of the U.S. Department of State indicated that the view that the GATT invalidated state legislation "would appear to have been based on a misconception of the General Agreement . . . not appropriate in view of paragraph 12 of Article XXIV."[157] What he meant, apparently, is that the general rule regarding the supremacy of treaties or international agreements entered into under the authority of the Congress would be inapplicable given GATT's special provision regarding the states.[158] But in hollowing out the "reasonable" test in Article XXIV:12, the *Beer II* panel removes any barrier to the full sweep of the Supremacy Clause.[159] Whether elected officials across the United States are ready for such a supreme GATT re-

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with the international obligations of the United States.

156. *See* Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems*, *in* THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33, 113 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1991). Petersmann, a former GATT Secretariat official and member of the *Beer II* panel, notes a proposal to allow individual traders to invoke certain precise and unconditional GATT prohibitions before domestic courts.

157. Jackson, *supra* note 118, at 303 (quoting from letter written by Herman Phleger). Jackson notes that this letter is consistent with the 1949 congressional testimony of a State Department official, who was an expert on the ITO Charter. *Id.* at 303-04.

158. In other words, while the GATT is an international obligation of the United States, its particular obligations do not involve overriding state law.

159. In a recent hearing before the House Science Committee, Assistant USTR Charles Roh was asked by Rep. Jim Bacchus whether the Bush administration believed that the Supremacy Clause could be invoked to require a state to change its law following an adverse ruling under a trade agreement. Mr. Roh responded: "No. We do not take that view, and traditionally, in implementing legislation we have not taken that view." *See The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the Committee on Science, Space and Technology, U.S. House of Representatives*, 102d Cong., 2d Sess. 86 (1992).

mains to be seen.[160]

IV. A GATT AGENDA FOR THE FUTURE

A. *Toward a Green Round*

The environment is not one of the fifteen issues on the negotiating table in the Uruguay Round. Although the trade and environment statement proposed by the EFTA countries at the Brussels Ministerial in 1990 was not adopted, the GATT has subsequently taken action on all three EFTA proposals to (1) study the issue, (2) submit a GATT contribution to the Rio Conference, and (3) convene the nineteen year-old GATT Working Group with an updated mandate. The issue now is: what else can and should be done as part of the Uruguay Round?

Several approaches are available. First, a special GATT group could be set up to review all pending agreements from an environmental perspective to see whether any changes are warranted and feasible. For example, the complaints by food safety and environmental groups about the pending GATT Sanitary and Phytosanitary Decision might be addressed. Consideration should be given to reinstating the provision in the Brussels text that made certain environmental subsidies nonactionable.[161]

Second, the issue of Article XX interpretation could be raised at the ministerial level with the goal of restoring Contracting Party rights under Article XX(b) and (g) that have been chipped away by recent GATT panels.[162] This seems to be the position of the U.S. House of Representatives, which recently called upon the President to initiate and complete negotiations during the Uruguay Round of GATT negotiations to make the GATT compatible with the MMPA and other U.S. health, safety, labor, and environmental laws, including those laws that are designed to protect the environment outside the geographic bor-

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160. *See* Edmund G. Brown Jr., *Free Trade Fetish*, WASH. POST, Sept. 14, 1992, at A15. *See also* Letter from Ira Goldman, California Governor's Trade Representative, to Carla Hills, USTR (June 9, 1992), *reprinted in* INSIDE U.S. TRADE, June 26, 1992, at S-3.

161. *See* Charnovitz, *supra* note 41, at 146-47.

162. *See Herring and Salmon*, *supra* note 92; *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R (Nov. 7, 1990) [hereinafter *Thai Cigarette*]; Tuna-Dolphin Report, *supra* note 11.

ders of the United States.[163] The American negotiators would not have an easy time achieving this objective. While the United States can argue that it seeks nothing more than to return Article XX to its original intent, there are many countries in the GATT that are happy to see Article XX vitiated. These countries want less GATT acceptance of national environmental policies.

Third, the GATT could agree to making some institutional changes desired by environmentalists, but leave the more substantive problems to a Green Round. The institutional changes could include: (1) a new policy for public release of GATT documents related to the environment, including the minutes of GATT Council meetings; (2) a new policy for dispute settlement to assure that GATT panels considering environmental issues have at least one panelist with environmental expertise; and (3) a change in GATT procedures to require panels to give nongovernmental environmental groups an opportunity for meaningful input.[164] Although the option of "Doing Nothing" is theoretically available, it would be a very risky one. If the six-plus years of the multilateral trade negotiations are to come to fruition, the agreement must be implemented by the U.S. Congress, and that would be difficult with opposition from environmentalists.

B. GATT's Mission

In considering what a Green Round might accomplish, it is important to recall what the GATT's mission is and how this relates to environmental standards. The role of the GATT is to reduce protectionism.[165] GATT policy impacts the environment because the GATT must decide whether ETMs are protectionist. One task that should be relatively easy is an official acknowledgement of international standards, such as the trade rules in CITES, the Montreal Protocol, and the Basel Convention. Al-

163. 138 CONG. REC. H7698 (daily ed. Aug. 6, 1992).

164. It is interesting to note that the ITO Charter authorized the Organization to "make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of this Charter." ITO CHARTER, *supra* note 61, art. 87, para. 2. But the GATT lacks such a provision.

165. The Preamble to the GATT refers to "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." The preamble says nothing about "free trade."

though at present the GATT does not provide for yielding to such treaties, the GATT could be modified to do so. There is little reason for the GATT to spend its time reviewing treaties that have been approved in other fora, especially under U.N. auspices.

A far harder task is the consideration of domestic environmental standards. When such unilateral measures are protectionist, the GATT has a responsibility to address them. But, ETMs are often abnegatory rather than protectionist, in the sense that they involve a refusal to consume something such as tuna that is harvested by methods that are unsafe for dolphins. The GATT should rethink whether its efforts to combat legitimate environmental measures might be better channelled toward combating real protectionism.

Of course, a world in which each country had its own tuna-dolphin standard would be confusing and inefficient. Harmonizing environmental standards is, therefore, a reasonable long-term goal. Before nations can negotiate common ETMs, however, there must be an agreement as to their current status under the GATT. The *Tuna-Dolphin* decision undermines the possibility of such international cooperation to devise standards because it throws into question what rights that nations currently have to enforce ETMs. Although this may seem paradoxical, the GATT must first affirm Article XX rights of unilateral action before countries such as the United States will be able to talk about forgoing such rights. Otherwise, there is no common basis for a negotiation.

C. Reforming the GATT

The need for trade rules has long been recognized. Although GATT does not have rules relating to the composition of trade, it does have rules about trade distortions and unfair trade.[166] For example, dumping is "condemned" by the GATT. Certain nonagricultural export subsidies are prohibited.[167] The GATT permits members to take unilateral action against imports of goods produced using prison labor.[168] The Uruguay Round draft requires

166. The GATT rules could be stretched to fit environmental concerns. Just as selling below actual or constructed costs (dumping) is viewed as a trade distortion, selling below full cost internalization could also be viewed as a distortion.

167. GATT, *supra* note 2, art. XVI:4.

168. *Id.* art. XX(e).

parties to enforce intellectual property rights at the border by preventing the circulation of goods with counterfeit trademarks or pirated copyrights.[169] Beyond the GATT, there are rules on the composition of trade relating to human health such as the Opium Convention, traffic in endangered species such as CITES, and waste transportation such the Basel Convention.[170]

Some environmentalists have suggested that a new regime of environmental trade rules would be desirable.[171] Although a number of rules do exist in various treaties, what is needed is a systematic codification of these rules and a process for updating them with new scientific data. A model for an institution to do this would be the International Labour Organization (ILO), which is a specialized U.N. agency.[172] The ILO has a unique tripartite structure, consisting of government, worker, and employer delegates, and produces two to three labor treaties each year.[173]

Based on this model, an International Environment Organization (IEO) could be composed of representatives from governments, businesses, and environmental groups. The later might include ecologists, naturalists, conservationists, consumers, and private citizens. An IEO would propose new treaties and international standards, adjudicate member complaints, conduct research, provide technical assistance, and support the GATT in reviewing the legitimacy of ETMs. In the absence of an IEO, and in the recognition that such a new institution is unlikely, the world must make do with the GATT. There are two options for reforming the GATT to deal with environmental problems. The first involves minor change; the second, major change.

Minor change would entail a reinvigoration of Article XX

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169. *Dunkel Draft*, *supra* note 66, sec. Y, annex III, art. 51. Specifically, parties must adopt procedures to enable a right holder to lodge an application for the suspension by the customs authorities of the release into free circulation of such goods.

170. In addition, the GATT recognizes, on varying terms, certain international commodity and quota arrangements on products such as textiles.

171. *See, e.g.*, Hilary F. French, *Strengthening Global Environmental Governance*, *in* STATE OF THE WORLD 155, 166-69 (Lester R. Brown et al. eds., 1992).

172. For a thoughtful proposal for an International Environment Organization modeled on the ILO, see Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 280-82 (1992).

173. *See generally* INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1982).

and a return to a rules-based approach. Basically, the GATT would leave to each member the right to determine what ETMs it wants to use so long as the measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,"[174] and the measure meets the specific conditions of Article XX(b) or (g). Instituting this reform would require abandoning the *Tuna-Dolphin* panel's theory of extrajurisdictionality, the *Thai Cigarette* panel's definition of "necessary" in Article XX(b) as the least GATT inconsistent approach,[175] and the *Beer II* panel's definition of "necessary" in Article XX(d) as the "least trade restrictive" measure available.[176] The GATT also needs to abandon two previous decisions that eviscerated the "disguised restriction" provision in the Article XX headnote.[177] Under current interpretation, the GATT is too tough on legitimate environmental measures and too easy on illegitimate protectionism.

Major change would require amending the GATT to broaden its mission to include "sustainable development," cost internalization, and other environmental goals. Several proposals exist for how various GATT articles might be amended.[178] Some proposals call for the GATT to balance commercial and environmental values by embracing a principle of "proportionality."

Minor change is preferable to major change for four reasons. First, adding new objectives for the GATT would hinder it from accomplishing the purpose for which it was established—reducing protectionism. Moreover, the difficulty of agreeing to such objectives would stall trade liberalization. Second, the task of balanc-

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174. GATT, *supra* note 2, art. XX.

175. *Thai Cigarette*, *supra* note 162, para. 75.

176. Beer II Report, *supra* note 82, para. 5.52. The least trade restrictive interpretation may actually be appropriate for Article XX(d), but it must be quarantined so that it will not spread to Article XX(b) like the least-GATT-inconsistent test did.

177. *See* Charnovitz, *supra* note 79, at 47-48. The two decisions were *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, paras. 4.8-4.16, GATT Doc. L/5198 (Feb. 22, 1982), and *United States—Imports of Certain Automotive Spring Assemblies*, paras. 55-56 GATT Doc. L/5333 (May 26, 1983).

178. *See, e.g.*, Eliza Patterson, *GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects*, J. WORLD TRADE, June 1992, at 35.

ing commercial and environmental considerations is an extremely difficult one that single nations such as the United States have a hard time doing. Longtime economic unions such as the European Community (EC) have a difficult time with this as well.[179] Even the OECD, which is composed of industrial countries, has been stymied over the past three years in developing trade and environment proposals. Thus, it is difficult to conceive of how the heterogeneous GATT, with 105 member countries would be able to do any better. Third, the GATT does not have robust decision making procedures needed to set controversial policies. The Agreement is virtually unamendable and decisions are reached by consensus.[180] Fourth, and perhaps most important, it is not clear how even a perfectly functioning GATT could handle this task. The determination of whether an environmental measure is warranted boils down to attitude toward risk. While an elected government can logically decide to allow a level of risk on its people, it is unclear on what moral basis an international institution can override a nation's unwillingness or willingness to be exposed to certain risks. When nations use trade measures for protectionist purposes, and in reality impoverish themselves, that is the business of the GATT. When nations use trade measures for unwise environmental purposes, and in reality impoverish themselves, that is their own business, not the GATT's.[181]

Of course, there is also a no-change option. This option is based on the view that most ETMs are undesirable, with the possible exception of domestic sanitary measures.[182] In this author's opinion, delaying the needed minor change increases the likelihood of greater change in the future.

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179. *See, e.g.*, Colin Hines, *The Green View of Subsidiarity*, FIN. TIMES, Sept. 16, 1992, at 11.

180. *See* GATT, *supra* note 2, art. XXX. The GATT has not been amended since 1965.

181. This assumes that a trade measure is in compliance with the principle of national treatment, meaning that imported products are "accorded treatment no less favorable than that accorded to like products of national origin." *See* GATT, *supra* note 2, art. III:4. Conversely, it can be argued that in an increasingly interdependent world, national treatment is necessary but not sufficient. Countries need to be open. From this perspective, unwise environmental measures or even wise ones that close a market should be dismantled.

182. Even CITES rules are considered undesirable in some quarters. *See, e.g.*, Richard Littell, *'Culling' Ivory, Saving Elephants, Relaxing the Trade Ban Can Only Help Africa's Dwindling Herds*, WASH. POST, Feb. 23, 1992, at C5.

D. The Green Round Declaration

If the Uruguay Round reaches a conclusion in 1993, the trade ministers might agree to an environmental declaration as a way of committing themselves to dealing with environmental issues. Such a declaration might have the following points:

- New negotiations on trade and the environment will begin immediately.
- The right of nations to rely upon Article XX for environmental import prohibitions, products standards, and process standards is affirmed.
- The use of Article XX for environmental taxes and sanctions will be negotiated.
- Action taken under international environmental treaties will not be held in violation of the GATT.
- The GATT Council will increase the transparency of its decision making and assure that dispute panels make use of substantive input from environmentalists.[183]
- The GATT Council will explore the feasibility of launching a new international institution to develop minimum environmental standards (and perhaps maximum standards) for international trade.

The biggest single obstacle to achieving such a Declaration is the absence of U.S. leadership in the trade and environment debate. The USTR lost the *Tuna-Dolphin* case in 1991, and then lost and conceded the *Beer II* case in 1992. Whether the USTR will do better in *Tuna-Dolphin II* remains to be seen.[184] The Bush administration was ineffectual in gaining support from other countries on the *Tuna-Dolphin* case—even from those countries, such as the EC member nations, that also use unilateral and extrajurisdictional ETMs.[185] The administration opposed

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183. The Business and Industry Advisory Committee (BIAC) to the OCED recently recommended that GATT panels "should be permitted to invite comments by interested nongovernmental experts at the start of the process and to provide an opportunity for comment before any final report is submitted for adoption." *See BIAC Statement on International Trade and the Environment, Special Report*, INSIDE U.S. TRADE, Nov. 27, 1992, at S-6.

184. This case involves a European Community challenge to the intermediary embargo which is now pending before the dispute panel.

185. One of the statutory functions of the U.S. Trade Representative is "coordinating United States discussions and negotiations with foreign countries for the purposes of establishing mutual arrangements with respect to standards-related

implementing the primary and intermediary embargo provisions of the MMPA until after it was forced to do so by court orders. The administration opposed the green light for environmental subsidies in the Brussels Text. The administration concurred in the antiunilateral language in the Rio Declaration.

If the USTR has any vision for what the GATT Working Group and the OECD committees should accomplish, or has any strategy for undoing the damage caused by the *Tuna-Dolphin* panel, it is not apparent to close observers. Indeed, some analysts have charged that the Bush administration welcomes the outside pressure which the new GATT disciplines in the Uruguay Round will bring to the consideration of federal and state health laws.[186]

In 1993, the Clinton administration will have an opportunity to improve these policies. The challenge will commence immediately regarding the Uruguay Round and the NAFTA. It is hoped that this Article will prove timely and useful in defogging the debate.

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activities." *See* 19 U.S.C. § 2541(b) (1988).

186. *See e.g.*, William Greider, WHO WILL TELL THE PEOPLE 388-403 (1992). *See also* Walter Russell Mead, *Bushism Found: A Second-Term Agenda Hidden in Trade Agreements*, HARPER'S MAG., Sept. 1992, at 37-45.