GATT and the Environment

Examining the Issues

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EDITOR'S NOTE. *This article is based on a paper presented at a conference, International Trade and Sustainable Development, jointly sponsored by the Centre for Trade Policy and the University of Ottawa Faculty of Law, May 14, 1992.*

One year ago, a dispute panel under the General Agreement on Tariffs and Trade (GATT) found that a U.S. marine mammal conservation law violated international trade rules.[1] This decision[2]—probably the most controversial in GATT's 44-year history—confirmed the fears in some camps that trade rules could hinder environmental efforts. So far, this "Tuna-Dolphin" decision has not been adopted by the GATT Council. But its reverberations continue to be felt in both international trade and environmental policy-making.

The Tuna-Dolphin case has assumed an importance beyond the American dolphin conservation program. In raising the issue of what ecological measures are permitted under the GATT, the panel decision concretizes many of the issues and concerns that underlie the "trade and environment" debate. For example, how does one distinguish between economic protectionism and legitimate environmentalism? May governments be paternalistic about the environments of other countries? Who has competence to impose regulations related to the global commons? Should an international organization be able to override national sovereignty in health or environmental matters? Where does the GATT fit into the hierarchy of international law? What forms of adjudication are appropriate for disputes with important non-commercial dimensions? Is there any way to accommodate the differing points of view about the environment between wealthy and poor countries?

Much has been said about trade and the environment over the past two years. But little progress is being made in reconciling the competing positions.

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While the debate has generally been constructive, sometimes the trade and environmental policy communities talk past one another.[3] The burgeoning theoretical literature—in economics, law, and ecology—complicates a bridging of the various perspectives.

The ongoing multilateral trade talks add a normative layer to this debate: If GATT rules interfere with environmental protection, how should those rules be changed? If environmental vehicles are being hijacked by protectionists, how can this be prevented?

The purpose of this article is to seek a modicum of synthesis by focusing on a few of the central propositions in the debate. It is my contention that some of the most strongly held views (particularly the Geneva orthodoxy) are incorrect and, in fact, are barriers to resolving the conflicts between GATT and the environment. To support this point, I will analyze and critique several of these key assumptions and arguments—especially those in the Tuna-Dolphin decision and in the GATT Secretariat's recent Report on Trade and the Environment. I will also offer my own recommendations for improving GATT's interaction with environmental issues.

I. Using Trade to Influence Other Countries

> What the [GATT] rules do constrain is attempts by one or a small number of countries to influence environmental policies in other countries not by persuasion and negotiation, but by unilateral reductions in access to their markets.[4]

In February 1992, the GATT Secretariat issued its second major report on trade and the environment. Lauded in trade policy circles, the GATT report, according to *The Economist,* shows that the GATT is "fighting back" against "often ill-informed criticism from environmentalists, especially in America."[5] The GATT's attack begins with a salvo against the use of trade measures to influence environmental policies in other countries. Whether in the form of laws that seek "to change another's environmental behaviour" or that "attempt to force other countries to adopt domestically-favoured practices and policies," such measures (according to the report) violate the GATT.[6]

The most important point to note about this proposition is its iconoclasm. Twenty-one years ago, in the GATT's first major report on trade and the environment, the Secretariat propounded a different view.[7] That report states that a

> shared resource, such as a lake or the atmosphere, which is being polluted by foreign producers may give rise to restrictions on trade in the product *of that process* justifiable on grounds of the public interest in the *importing* country of *control* over a process *carried out* in an *adjacent or nearby country.*[8] [Emphasis in this and all other extracts and citations is added.]

The iconoclasm of the new GATT thesis becomes more striking when it is recalled that national trade measures have long been used to influence other countries. In 1906, for example, the United States banned the landing and sale of sponges from the Gulf of Mexico gathered by certain harmful methods—namely, diving or using a diving apparatus.[9] The purpose of this law was to conserve sponge beds in international waters that were vital to American industry. In 1921, Great Britain prohibited the importation of plumage of any bird.[10] The purpose of this law was to stem the widespread destruction of birds due to the feather trade. In both cases, a nation used trade restrictions to influence environmentally sensitive actions beyond its territorial borders.

Until recently, few would have thought that laws of this type were GATT-illegal. There is, after all, very little in the GATT concerning the *intent* of a law.[11] It would not seem to matter who might be influenced by a border measure so long as the method of regulation meets the relevant GATT rules (that is, Articles I, II, III, and XI).

What makes the GATT report so unsettling is the suggestion that any environmental import standard that influences foreign behavior may be GATT-inconsistent. It would be one thing for the GATT Secretariat to criticize trade sanctions (for example, penalties on unrelated products) used to change environmental behavior.[12] It is quite another to denounce *standards* establishing non-discriminatory conditions for importation. Because virtually every environmental regulation or standard can influence foreign exporters, the new GATT thesis has radical implications.

If unilateral trade measures used to achieve environmental aims are GATT-illegal, then unilateral trade measures used for other aims are GATT-questionable. For instance, antidumping duties are employed to dissuade the practice of price discrimination.[13] Countervailing duties are employed to influence foreign subsidy policies. Long before the GATT existed, many countries had laws promoting respect for intellectual property rights by threatening an embargo against infringing imports.[14] Why are these kinds of influence appropriate while environmental influence is not?

The U.S. ban on goat cheese from unpasteurized milk is a simple product standard. But it also influences the production patterns of European cheese producers. Is that improper? Actually, any of the minute distinctions in a country's tariff schedule could be construed as an attempt to influence the investment and production decisions of potential foreign exporters.

It can be argued that all of the trade measures illustrated above are intended to influence foreign behavior. It can also be argued that *none* of them is. The problem with the GATT Secretariat's thesis is that there is no consistent way to draw a line between standards that seek influence and standards that don't.[15] The reason why such a line cannot be drawn is that any tax, standard, or regulation can change the incentive structure for foreign exporters (as well as for domestic producers).[16]

Classifying trade measures

Separating trade measures into two groups—influencing and non-influencing—is not feasible.[17] But distinguishing trade measures by the degree of influence can be a useful avenue for classifying process standards. Three categories might be used:

- ***defiled item*** (for example, no tuna caught in a dolphin-unsafe way),[18]
- ***production practice*** (for example, no tuna from countries whose fishermen rely on dolphin-unsafe practices), and
- ***government policy*** (for example, no tuna from countries whose governments fail to prohibit dolphin-unsafe practices).[19]

In the latter two categories, *no* tuna is allowed, even when a particular catch is fished benignly.[20]

Some analysts have suggested that all trade restrictions based on process standards (sometimes called PPMs[21]) should be disallowed by the GATT. But it won't do merely to invalidate process standards in favor of simple product standards. While there is a basic difference between standards relating to the *processing* of a product (for example, how it is grown, manufactured, or extracted) and standards relating to the *characteristics* of a product (that is, purity, size, design, etc.), process standards are sometimes needed to screen the quality of products for health or religious reasons. Nor would it help to try to gauge the *intrusiveness* of a standard since that is totally subjective. Any product specification—for example, using the metric system—may be too intrusive for someone.

Although it is commonly presented as a pivotal distinction in the trade-and-environment debate, the issue of "influence" shrinks upon close examination. The next two sections will discuss issues that really are pivotal: unilateralism and extrajurisdictionality.

II. Unilateralism

> [The GATT] protects trade relations from degenerating into anarchy through unilateral actions in pursuit of unilaterally defined objectives, however valid they may appear.[22]

The GATT Secretariat dislikes unilateralism. In its 35-page report, the term "unilateral" appears 25 times, and never in a favorable light. The GATT's campaign against unilateralism is having some impact. Earlier this year, the UN Conference on Trade and Development adopted a resolution stating that "Unilateral actions to deal with environmental challenges outside the jurisdic-

tion of the importing country should be avoided."[23] The Rio Declaration repeats this statement.[24]

There is an important difference between unilaterally defined and multilaterally defined standards.[25] Nearly everyone would agree that, ceteris paribus, multilateral standards are much better. The continuing progress in attaining harmonized policies for the environment (for example, the Montreal Protocol) and for international commerce (for example, the Brussels Tariff Nomenclature) are certainly very positive developments.

But glorifying multilateral agreements is easier than obtaining them.[26] Since the enactment of the Marine Mammal Protection Act in 1972, the United States has sought an international agreement to protect dolphins from dangerous fishing practices.[27] Until recently, little progress was made.[28] The difficulty in achieving these kinds of treaties has long been recognized.[29]

Faced with a choice between doing nothing (while waiting for an international consensus) and taking action, many nations have opted to impose unilaterally defined standards for internal and external commerce.[30] One can characterize such action as "eco-imperialism," "gunboat environmentalism," economic "righteousness," or "green vigilantism."[31] But name-calling is not likely to stem the incidence of standard-setting. It is probably true that larger countries (with larger markets) are more likely to see their standards attained than are smaller countries.[32] This asymmetry may seem unfair to the smaller countries. But it can also lead the larger countries to feel more responsible for the impact of their consumption patterns.

It is fortunate—since national standards are inevitable—that unilateralism can be good for the environment. For nearly 100 years, there has been a fruitful interplay between unilateral measures and international environmental treaties. For example, the U.S. ban of 1897 on fur seal imports led to the international treaty on seals and sea otters (enforced by trade controls) of 1911.[33] The U.S. ban of 1969 on the importation of endangered species—along with similar action by other nations—spurred the Washington Convention (on International Trade in Endangered Species of Wild Fauna and Flora, or CITES) of 1973.[34] The U.S. government threat (beginning in 1988) to impose trade sanctions against Korea and Taiwan for failing to cooperate in driftnet fishing negotiations and the U.S. ban on the importation of driftnet-caught fish (beginning in 1991) were instrumental in gaining support for and adherence to three U.N. resolutions calling for a moratorium on the use of large-scale drifnets.[35]

The U.S. embargo on Mexican tuna has contributed to the reversal of Mexico's longtime intransigence regarding an intergovernmental agreement on dolphin protection.[36]

Although one might anticipate that unilateralism will continue to be good for the environment, the future is always an open question. The GATT report states that the unilateral use of "negative incentives . . . reduces the prospects

for inter-governmental cooperation on future problems."[37] But the report offers little evidence to support that conclusion. Still, there is a danger that such predictions can be self-fulfilling.

Unilateralism is also good for the environment because it assists sovereign nations in achieving their own ecological goals. Since nations face different environmental challenges and have different values and temporal preferences, it is natural that countries will want to formulate their own standards for production, consumption, and disposal—which could apply to imported as well as domestically produced goods. A world where countries marched in environmental lockstep would depress standards to the lowest common denominator.[38]

There is also another reason to allow each country to fashion its own standards for what its citizens produce and consume—namely, the value of competition (that is, competing on the quality of governmental regulation). Since the "proper" level of environmental protection is rarely apparent, one way to determine it is by "letting a hundred flowers blossom." Any country that strategically manipulates imports by imposing unreasonably high environmental regulations should see its standard of living fall.

III. Extrajurisdictionality

The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).[39]

Last year, in the Tuna-Dolphin dispute, the GATT panel determined that "extrajurisdictional" trade restrictions were not included within the scope of GATT Article XX (General Exceptions).[40] In addition to its impact on the vitality of dolphins, this decision has implications for a broad range of environmental treaties and laws that are equally extrajurisdictional.

What is extrajurisdictionality?

Because the core of its decision rests on the concept of extrajurisdictionality, one might think that the GATT panel—in inventing the term—would have paused to define it. Since the panel did not, one can only induce from context that "extrajurisdictionality" means a law concerning activities that occur outside one's country.[41] Whether the term covers a law applying simultaneously to domestic and non-domestic activities remains unclear.[42] Also unclear is the exact boundary of a "domestic" or "jurisdictional" objective.[43]

One thing that extrajurisdictionality does not mean is *extraterritoriality*.[44] Extraterritorial laws *impose* domestic standards on transactions occurring in foreign countries. For example, the recent decision by the administration of President George Bush to apply U.S. antitrust law to Japanese companies in

Japan is an application of extraterritoriality. In addition, laws that regulate foreign use of domestic-origin goods or the behavior of domestic corporations abroad are extraterritorial.[45] Although the Tuna-Dolphin panel did not confuse the two issues, "extraterritoriality" is commonly misused to describe standards or conditions for voluntary commerce.[46]

Article XX(b)

As the Tuna-Dolphin panel stated, Article XX(b) "refers to life and health protection generally *without expressly limiting* that protection to the jurisdiction of the contracting party concerned."[47] The panel could have stopped with that textual explication. Instead, the panel decided to examine the history of Article XX(b). Unfortunately, the panel presented an incomplete and misleading reading of that history.

The panel's conclusion that Article XX(b) cannot be extrajurisdictional is based on the fact that during one of the preparatory sessions of the UN Conference on Trade and Employment, a proposed amendment to Article XX(b) that might have precluded extrajurisdictionality *was dropped.*[48] (The UN Conference of 1946–1948 wrote the Charter for the International Trade Organization (ITO), as well as the GATT.[49]) As several commentators have noted, this line of reasoning is weak.[50] More importantly, the panel fails to take into account either the historical context of the "life and health" exception in trade treaties or the laws in existence in 1947 that might have motivated such an exception.

Trade treaties have provided exceptions for the protection of humans, animals, and plants since the late 19th century.[51] There is ample indication that these exceptions were understood as applying to extrajurisdictional laws. For example, in the International Convention for the Abolition of Import and Export Prohibitions and Restrictions (of 1927), the article listing exceptions (on which GATT Article XX is based) includes measures to preserve animals and plants from "degeneration or *extinction.*"[52] This language was needed to assure that the "abolition" would *not* apply to the contemporaneous controls on the importation of birds, seals, salmon, halibut, wildlife trophies, etc.

There was very little ITO preparatory debate on the scope of Article XX. It is sometimes suggested that the GATT's authors never contemplated extrajurisdictional use. A better interpretation, I believe, is that they understood that Article XX(b) would apply to extrajurisdictional measures, but considered that point so obvious that it did not engender debate. Certainly, the record fails to show anyone at the UN Conference suggesting that Article XX(b) should *not* apply extrajurisdictionally. Moreover, it seems evident that the United States—whose 1946 draft of Article XX(b) emerged unscathed in the GATT—perceived its text as covering U.S. import prohibitions in effect at that time, which included extrajurisdictional measures. For instance, the

United States had enacted a law in 1936 to ban the importation of certain whale species.[53]

In light of the criticism of the Tuna-Dolphin report, some trade officials have proposed a broader version of jurisdictionality. That is, Country A can invoke Article XX(b) to cover any production (no matter where it is located) that directly affects the life or health of people in Country A, to cover any production in Country A (even when exported), or to cover living organisms in the global commons. Conversely, Article XX(b) ***cannot*** be invoked to cover production occurring in foreign jurisdictions that does not directly affect the people of Country A. Although this alternative would be far better than the Tuna-Dolphin decision, there would continue to be disagreements as to what directly affects the people of Country A.[54]

Article XX(g)

The Tuna-Dolphin panel's conclusion that there is no extrajurisdictionality in Article XX(g) was not premised upon an analysis of the GATT's preparatory history. Instead, the panel relied upon a scholastic argument based on an interpretation of Article XX(g) suggested in a previous GATT case.[55] One can object to the panel's argument,[56] but more revealing is what the panel did ***not*** say.

The panel ignored the ITO preparatory history of Article XX(g), which demonstrates rather clearly that the GATT's authors did not want to hinder international fish and wildlife conservation efforts.[57] It is true that almost all of this history was in the context of the provision similar to Article XX(g) in the commodities chapter (of the ITO Charter). But in considering its scope, there is no reason to presume that the drafters were environmentally cosmopolitan in one part of the ITO Charter and environmentally nativistic in another.

Ecological objections

Even if the Tuna-Dolphin panel were correct about the original meaning of Article XX, there would still be good ecological reasons to reject jurisdictionality as a GATT principle. Although both the Tuna-Dolphin decision and the GATT Report attempt to distinguish between a nation's own environment and the rest of the world's environment, this segregation is unhelpful in dealing with natural resources not located in any country's jurisdiction (for example, the ozone layer) or with resources that migrate (for example, birds).[58] If no country is permitted to take extrajurisdictional action, then much of our biosphere would be unreachable by environmental trade measures.[59]

Environmentalists also argue that even when living organisms lie within the territory of a particular country, other countries ought to be able to ensure that their own actions (for example, importing) do not indirectly harm endan-

gered animals and plants. There are important medical reasons to preserve biodiversity. But there are also important moral reasons. Geopolitical boundaries should not override the word of God who directed Noah to take two of every living creature into the Ark "to keep them alive with you."[60]

IV. GATT Rights

The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.[61]

In determining the scope of Article XX, the Tuna-Dolphin panel took into consideration the "consequences" of accepting the U.S. government's interpretation.[62] One serious consequence, according to the panel, would be that the United States could unilaterally set standards for other countries from which they "could not deviate without jeopardizing their *rights* under the General Agreement." But the panel's analysis rests on a petitio principii fallacy. That is, the panel assumes what it tries to prove.

If contracting parties had GATT *rights* to export without impediment, then it would be clear that unilaterally minded nations could not impose their own import standards. But the GATT does not guarantee the acceptability of one's exports. The GATT has rules against import bans (Article XI), but also has exceptions to those rules (Article XX). Both the rules and the exceptions have to be considered together to ascertain, in any particular dispute, whose "rights" should be upheld. Thus, the Tuna-Dolphin panel errs in assuming that a country facing foreign import standards automatically has rights being violated.

The ease in which the Tuna-Dolphin panel slips into this logical fallacy betrays a serious problem of Article XX adjudication over the past several years—that is, the practice of assigning the burden of proof to the party relying upon an Article XX exception.[63] This is not the only way to conduct adjudication.[64] The burden of proof could be shifted to the party alleging an improper trade barrier.

Regardless of which side should have the burden of proof, the current procedures have been unfair. In case after case, GATT panels have narrowed the Article XX defense while ruling against each defendant on the grounds that it "had not demonstrated to the panel" one or another of the ever-expanding list of qualifications for using Article XX.[65] Since these increasingly stringent tests are being created by panels on an ad hoc basis, national authorities may not know whether, at any given time, their environmental policies conform to the Article XX standards. This unpredictability also makes it difficult for governments to defend their policies to GATT panels.

In considering how the GATT's General Exceptions ought to be properly applied, it should be recognized that Article XX does not create or confer rights to restrict trade. It acknowledges such rights. The categories in Article XX are not potential *exemptions* to GATT discipline. They are *exceptions* to GATT dominion.[66]

Although the parties signing the GATT agreed to curb their trade restrictions, they drew a line at health-related controls so long as these were neither discriminatory nor protectionism in disguise. Had Article XX not been part of the GATT, the GATT would not have existed. The fact that nearly every treaty on trade in this century has included an exception for health measures demonstrates the unwillingness of nations to yield sovereignty in this area.[67] When U.S. Secretary of State Cordell Hull, in 1933, first suggested an international agreement to reduce tariffs and other trade barriers, his plan provided for the "exceptions generally admitted in existing treaties, for purposes of safety, sanitation, plant and animal protection, morals, etc. . . ."[68] In their efforts to delimit Article XX, several recent GATT panels have blasted at the foundations on which the GATT was built.

V. National Environmental Measures

. . . the provisions of the General Agreement impose few constraints on a contracting party's implementation of domestic environmental policies.[69]

GATT rules, therefore, place essentially no constraints on a country's right to protect its own environment. . . .[70]

It is said that the GATT does not impose very many constraints on national environmental laws. Yet the few that the GATT does impose could interfere with scores of existing laws that rely on trade instruments. Furthermore, the GATT's few constraints are rapidly tightening.

The mutating "necessary" test

GATT Article XX(b) provides an exception for measures "*necessary* to protect human, animal or plant life or health."[71] The term "necessary" received little attention at the ITO preparatory meetings.[72] There is no indication that the drafters contemplated disputes regarding sanitary measures turning on the meaning of "necessary." Although the importance of guarding against an abuse of health standards was certainly a topic of discussion, it was Article XX's headnote that was viewed as providing most of the needed discipline.[73]

The ITO documentation suggests that disputes under Article XX(b) were to be resolved on the basis of a *scientific* test.[74] A recent legal challenge against

a U.S. Environmental Protection Agency (EPA) regulation on asbestos presents a good example of the way GATT's authors seemed to anticipate that disputes over health restrictions would be framed. Canada claimed that the EPA ban on asbestos (which also applies to imports) "is not supported by the international scientific evidence, and is therefore not 'necessary' within the meaning of Article XX of the GATT."[75] (The point here is not the scientific merit, or lack thereof, of the Canadian position, but rather that Canada presented a science-based argument.)

How should the GATT Council deal with situations of this type where there is significant scientific uncertainty? So far, Canada has not taken this complaint to the GATT.[76] If Canada does, then a GATT panel could be asked to decide whether there is enough evidence that asbestos is harmful. Yet the GATT lacks criteria for making such a determination. A few months ago, the Business Council for Sustainable Development recommended that "where environmental threats are particularly serious or irreversible, GATT should adopt the precautionary principle, erring on the side of prudence."[77]

For the first four decades of GATT history, the discipline for the health exception, insofar as it existed, was assumed to be science-based. But a few years ago, a GATT panel invented a new scheme for interpreting "necessary."[78] Under this test, a health-related trade measure would be considered "necessary" under Article XX(b) only if there were no alternative measures less inconsistent with the GATT which a country could reasonably be expected to employ to achieve its policy objectives.[79] This parsing has come to be known as the *least GATT-inconsistent* test.[80]

Applying this test requires policy analysis.[81] First, the panel needs to determine whether there are alternative measures that would be at least as effective in achieving the country's environmental goals. Then the panel must examine such alternatives to see if any of them are *less* GATT-inconsistent than the trade measure in dispute. If so, then the disputed measure will not qualify under Article XX(b).

Because this test is so open-ended, there is a danger of "runaway" GATT panels second-guessing national laws. Virtually any trade measure (for example, a ban on hormone-fed beef) could be replaced by a labeling requirement on the grounds that "consumer choice" is less GATT-inconsistent.[82] There are two main problems with relying on labels to achieve environmental or health goals. One is that consumers may act *rationally* in calculating that their individual purchase of environmentally unfriendly products (for example, chlorofluorocarbons, or CFCs) would have only a negligible effect on the ecosystem.[83] The other is that consumers may act *irrationally* by not properly weighing the implications of low probability events. Although there are some instances where governments mandate labels for unsafe food or drugs (for example, cigarettes), the more common approach is proscription.

The Uruguay Round is considering a third hurdle for environmental trade measures—a *least trade-restrictive* test.[84] Two of the proposed agreements in

the round, the "Standards Code" and the "Sanitary and Phytosanitary Decision," would impose this type of test for product standards and regulations.[85] Under the draft Standards Code, regulations "shall not be more trade restrictive than necessary to fulfil a legitimate objective . . ." The difference between the *least GATT-inconsistent* and the *least trade-restrictive* tests is that the former uses a legal scale while the latter uses an economic scale. Imposing these two tests interdependently would significantly tighten GATT's discipline.

Perhaps out of impatience with sluggish multilateral negotiations, a recent GATT panel decided to adopt the least trade-restrictive test. In the U.S. Alcoholic Beverages case (Beer II), the panel found that certain state laws could not meet the "necessary" test under Article XX(d)[86] because they were not the "least-trade restrictive" enforcement measures available.[87]

Although the panel's unilateral attempt to create a new GATT standard is disturbing, even more disturbing is the manner in which the panel administers its newly minted standard. Consider one example: the issue is whether the laws of five states violate the GATT by requiring that alcoholic beverages be imported into the state by common carrier. The Bush administration did not contest that these state laws violate GATT Article III (since in-state producers can use their own transportation), but argued that these laws could be justified under Article XX(d). The panel rejected this Article XX(d) defense by declaring that

> the United States has not demonstrated that the common carrier requirement is the least trade restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes.[88]

But the panel rationalized that since "not all fifty states of the United States maintain common carrier requirements. . . [i]t thus appeared to the panel that some states have found alternative, and *possibly* less trade-restrictive, and GATT-inconsistent, ways of enforcing *their* tax laws."[89]

In other words, the panel concludes that the mere existence of unharmonized state laws shows that alternative methods are available for enforcement. The panel did not consider whether the five states had the same tax goals, or the same alcohol policy goals, as the 45 other states. The panel did not consider whether the five states might have special needs for their laws that do not exist in the 45 other states. The panel did not consider whether the alternative methods used in the 45 other states would be effective in achieving the policy goals of the five states. The panel did not consider any differences in health objectives among the five states. The panel did not even consider whether any of the 45 alternative state measures were, *in actuality,* less trade-restrictive. One can only hope that this panel's cursory technique will not become the model for implementing the "least trade-restrictive" rule of the Uruguay Round.

Proportionality[90]

Another GATT constraint on national environmental measures is the principle of proportionality, especially as it has developed in the European Communities (EC).[91] Traditionally, the European Court of Justice has used a ***relative proportionality*** approach to require the means which least restricts the free movement of goods.[92] Yet in more recent adjudication (that is, the Danish bottle case), the court has moved toward an ***absolute proportionality*** test which considers a "balancing of interests between the free movement of goods and environmental protection . . ."[93]

EC jurisprudence has no automatic transferability to the GATT. Nevertheless, the concept of weighing commercial versus environmental objectives is gaining influence among trade policy specialists.[94] It has also appeared in adjudication under the Canada-U.S. Free Trade Agreement.[95] The Dunkel Text for the Standards Code would formally introduce the concept of "proportionality" into the GATT.[96]

Under the principle of absolute proportionality, the GATT would judge the acceptability of a national trade restriction by weighing its commercial costs against the environmental benefits.[97] There are two ways the GATT could do this.[98] First, by entering the minds of that country's policy-makers and using their national preference function.[99] Second, by using a transnational preference function in the manner of the EC.[100] Under either method, the GATT would be setting a ***maximum*** standard by deciding that a country could not value an environmental improvement any more than X cost in trade.[101]

A GATT omniscient enough to prescribe a maximum standard for environmental protection could also prescribe a ***minimum*** one. Certainly, a minimum standard would not be a necessary implication. But if the GATT tells some countries what they ***cannot*** do to protect the environment, there will be countervailing pressure to dictate to other countries what they ***must*** do to protect it. If the GATT follows this approach, it would be deciding that a country could not value an increase in trade any more than Y cost in environmental degradation. Although this falls far short of harmonization, it would be a significant step toward policy convergence.

The issue of whether it is desirable to transform the GATT into an institution that would foster the coordination of environmental policies is beyond the scope of this article.[102] But the difference between international harmonization and regional harmonization should be noted. Even if one doubts the practicality of a GATT role in harmonization, one could still favor steps toward the convergence of environmental policies within any plurilateral trade agreement. Although environmental convergence is not a precondition of a regional trade agreement or customs union (or, for that matter, of a federal nation of states or provinces), the benefits of such convergence are becoming increasingly apparent.

VI. Multilateral Environmental Measures

GATT rules could never block the adoption of environmental policies which have broad support in the world community.[103]

Although a multilateral treaty is unlikely to violate the GATT, action by parties to implement such a treaty could be inconsistent with GATT obligations.[104] One reason why the Tuna-Dolphin panel invoked such an outcry among environmentalists is that the logic of the decision applies equally to numerous environmental treaties. Sometimes the GATT Secretariat has tried to play down this problem. For example, earlier this year, GATT's director general explained that: "If, in Rio, governments can negotiate environmental agreements with *universal* participation, then whatever trade provisions may be included in those agreements, no controversy *need arise* over them in GATT."[105] (Of course few, if any, multilateral agreements have universal participation.) At other times, GATT officials have acknowledged the latent conflicts. For example, the GATT report admits that the availability of Article XX for treaties like the Montreal Protocol is untested, and opines that the discriminatory provisions in such treaties may not be "necessary."[106]

The potential GATT inconsistencies of international environmental agreements like the Montreal Protocol, the Basel Convention, and the International Whaling Commission are too lengthy to be detailed here.[107] It should be noted, however, that despite the Tuna-Dolphin report, some discriminatory provisions continue to be adopted. At the 1992 CITES Conference, the parties recommended that endangered species trade with *non-parties* occur "only in special cases" and "only after consultation with the [CITES] Secretariat."[108] Yet in other arenas, the Tuna-Dolphin report seems to be having a chilling effect. For example, the International Convention for the Conservation of Atlantic Tunas recently backed away from a new trade-based enforcement mechanism because of potential GATT complications.[109]

Several approaches are being suggested for how environmental treaties might be reconciled with the GATT. None of them offers much promise for escaping the dilemma created by the Tuna-Dolphin report. Four will be discussed briefly:

1. ARTICLE XX(H).[110] This provision provides an exception from GATT rules for measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement" if the agreement either conforms to a United Nations Economic and Social Council resolution of 1947 or is submitted to the GATT and *not* disapproved.[111] (A third option would exist if the GATT adopted criteria for commodity agreements, but this has not happened.[112]) No disputes have occurred regarding this exception.[113]

The term "commodity agreement" is not defined in the GATT. One of the various purposes for commodity agreements, according to the ITO Charter,

is "to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion."[114] Most international environmental treaties could be construed as commodity agreements. For instance, CITES could be viewed as regulating trade in the "commodity" of endangered species. The Montreal Protocol could be viewed as regulating trade in the "commodity" of CFCs and halons.

What makes this approach unsuitable is that it is so clearly inconsistent with the framework of the ITO, which sought to *exclude* wildlife treaties from being disciplined as commodity agreements.[115] Since the GATT's General Exception for commodity agreements was to be available only for agreements that met the disciplines of the ITO Commodities chapter, it would seem contradictory to grant exceptions for wildlife treaties without regard to that discipline.[116] In addition, a future panel might question why Article XX(h) can be any more extrajurisdictional than Article XX(b) or (g).

2. GATT WAIVER. Under Article XXV:5, the GATT may grant a waiver "in exceptional circumstances" by a supermajority consisting of more than half of all contracting parties and two-thirds of those voting. There are several problems with trying to accredit environmental treaties through waivers.

First, a GATT waiver is meant only for exceptional circumstances. Environmental treaties are increasingly unexceptional.

Second, a pending Uruguay Round "Understanding" would clarify the right of a GATT member to lodge a complaint even when a waiver exists.[117]

Third, the supermajority voting requirement is a high hurdle. Various forms of side payment might be needed to garner the requisite vote, and this may further polarize the GATT along North-South lines. The Uruguay Round provision that waivers be renewed annually could multiply the cost of such side payments.

Fourth, international environmental agreements often go into force with a small nucleus of countries that may fall far short of two-thirds of the GATT. For example, CITES went into force in 1975 with just ten countries. Now it has 115. Regional agreements might also have a difficult time gaining a GATT supermajority.

Fifth, although it is commonly suggested that widespread adherence to an environmental treaty (like CITES) would automatically translate into GATT approval, there may be situations when a government's environmental or fisheries ministry holds different views than its commercial or external affairs ministry.[118] Yet it will be *trade* officials who cast each country's vote in the GATT.

In addition to these procedural problems, there is a serious substantive concern—namely, how GATT determines whether a waiver is warranted. Is GATT going to weigh each treaty's objectives against other economic goals? Is GATT going to decide whether a treaty is "necessary"? Another troubling aspect of the waiver approach is the suggestion in the secretariat's report that the GATT should set "conditions designed to avoid abuse."[119] Since it is hard to apply conditions to an already-negotiated treaty, the GATT council may

seek to insert itself into treaty negotiations. But the Council is ill-suited for such a role, for both political and institutional reasons.

3. GATT AMENDMENT. Many observers have inferred from the Tuna-Dolphin report that the panel invites an amendment to solve the GATT-environment conflict.[120] The panel's ambiguous comment has spurred numerous proposals for GATT amendments from environmental and trade experts.[121] But amending the GATT is difficult. It has not happened since 1965 and the requirement for unanimity is a formidable one.[122] By implying that amendments are a feasible course, GATT officials have raised environmentalists' expectations that are unlikely to be fulfilled. This may lead to further frustration and cynicism about the GATT.

4. OVERRIDING TREATIES. Another way out of the dilemma would be to determine that obligations of certain environmental treaties (like CITES) override obligations of the GATT. This could occur under the rules of international law regarding more recent treaties.[123] There are three main problems with this "trumping" approach. First, the legal issues are too complicated to settle the conflict in the public's mind.[124] Second, GATT members who are not parties to a particular environmental treaty cannot have their GATT rights revoked.[125] For example, there are 20 parties to GATT that are not parties to CITES.[126] Third, the Uruguay Round would reset GATT's effective date to 1993, thus making it the most recent "treaty."

VII. The Need for Limits

> If the GATT contracting parties wished to permit environmental trade restrictions . . . they would need to agree on limits to prevent abuse. Since Article XX does not provide such limits, the Panel stated that it would be better to amend or supplement the provisions of the General Agreement or to provide a waiver . . .[127]

It is only a little surprising that the Tuna-Dolphin panel was unable to locate any limits in Article XX. After all, one of the most important limits—the "disguised restriction" proviso—has atrophied from inattention.[128] Various GATT panels have been so busy devising new interpretations that they have given short shrift to enforcing the limits already on the books. Yet the requirements in the Article XX headnote—namely, non-discrimination, national treatment, and no disguised restrictions—would, if properly policed, be perficient in weeding out illegitimate use of environmental trade measures. No additional limits, such as proportionality, are needed.[129]

Admittedly, this purist view of Article XX would lead to all kinds of unilateral, extrajurisdictional, and intrusive trade measures. But the GATT and the world economy would survive.[130] Indeed, the GATT might be strength-

ened if it did more to combat disguised protectionism and less to antagonize environmentalists. The unwillingness of the GATT Council to recognize the deep flaws in its parochial Article XX interpretation is undermining political support for the Uruguay Round.[131] It should be clear by now that preaching environmental abstinence is thinning the ranks of free traders.[132]

The United States has been the leading user of environmental trade measures. What would the world be like if all countries acted like the United States in this regard? For example, what if the EC blocked imports of fur from countries permitting the use of leg-hold traps?[133] Or if Country B banned cosmetics made using the Draize test (which squirts irritating liquids into the eyes of a helpless rabbit)? Or if Country C banned tuna from nations that kill *any* dolphins? Here is one answer: so long as such laws are non-discriminatory and national treatment is applied, the world would be a more salutary place for beavers, rabbits, and dolphins—at a cost consuming nations are willing to bear.[134]

Since the meaning of the limits in Article XX's headnote are not well defined, it would be useful for the GATT Council to develop guidelines on interpreting these rules.[135] The key issue is whether a questionable measure is crafted in such a way as to favor domestic over foreign suppliers. Several factors might be considered:

First, is the national measure applied to an unduly narrow range of products? For example, Ontario imposes a 10 cent tax on beer *cans,* but not on beer bottles, which Canadian producers predominantly use.[136] There could be a reasonable environmental distinction between cans and bottles. But if so, why does Ontario's tax *not* apply to cans of soft drinks, juice, soup, etc.?

Second, is the national measure restricted geographically? Mexico and Venezuela raised a valid concern about "discrimination" in pointing out that the U.S. tuna import ban applies only in the eastern tropical Pacific.[137] A similar concern could arise with a ban on the importation of unsustainably harvested timber.[138] Is the country that is interested in sustainable timber abroad doing all it can to sustain timber at home?

Third, do national environmental standards imply a greater risk aversion for goods that are imported? The new provision in the draft Sanitary and Phytosanitary Decision relating to the internal consistency of national risk-avoidance goals could be a useful approach to dealing with this problem.[139] But a foolish *inconsistency* is not necessarily protectionism.[140]

Fourth, is the environmental measure—in actuality—more burdensome to foreign producers and consumers than to domestic ones?[141] The more that a national measure shifts the costs abroad, the more questionable such a regulation becomes. This economic distinction can be illustrated by looking at three examples. Start with a U.S. law prohibiting the importation and domestic sale of dolphin-unsafe tuna. Such a law (if the standard is met) raises the cost of tuna to American consumers. Since the law applies only to foreign

production bound for the American market, there would be no increase in the cost of tuna to foreign consumers.[142] Next, consider a U.S. law prohibiting the importation of tuna from any country that uses dolphin-unsafe fishing methods. Such a law (if the standard is met) raises costs for foreign as well as American tuna consumers. Last, consider a U.S. law threatening an embargo of widgets from any country that allows the internal sale of dolphin-unsafe tuna. Such a sanction (if the threat were effective) raises costs only for foreign tuna consumers.

Fifth, does a process standard include de facto trade performance requirements? For example, the Canadian forest products industry has complained that U.S. (state government) recycled content laws—which require that virgin pulp be mixed with waste paper—disproportionately affect countries like Canada with low quantities of waste paper output. In order to comply, Canada has to *import* waste paper for mixing.[143]

VIII. Recommendations

There are several steps the GATT should take to improve its interface with the environment.

Procedural

1. The GATT should increase the transparency of its operations. The public should not have to depend on samizdat to read GATT debates, or subscribe to *Inside U.S. Trade* to see GATT panel reports *before* they are adopted.[144]

2. The recently activated GATT Group on Environmental Measures and International Trade should open its sessions to public observation. A group that took 20 years to hold its first meeting can scarcely complain that its work would be slowed down by a little sunshine.

3. GATT panels should return to more strict construction, especially of Article XX. Perhaps the new appeals mechanism in the Dunkel Text will supply sufficient accountability to check the unrestrained activism of recent GATT panels.[145]

4. GATT panels should never cite *unadopted* panel reports as "authority" in the way a recent panel did.[146] Otherwise, the Tuna-Dolphin report will soon appear as GATT precedent.[147]

5. For disputes involving health or conservation, GATT should authorize an *environmental defender* to improve the quality of information available to a panel about the environmental aspect of a dispute.[148] By agreeing to hear such a defender, the GATT would be recognizing that a dispute about dolphins is different from a dispute about, say, automotive spring assemblies.[149] An en-

vironmental defender making a factual presentation—for example, concerning the longtime U.S. efforts to achieve a dolphin protection treaty—might be viewed as having more credibility than trade officials from the country involved.[150]

Tuna-Dolphin dispute

The Tuna-Dolphin decision should not be left in limbo. Delaying action on any report encourages other parties to do the same, and thereby weakens the dispute settlement process. The single most important action the GATT can take to improve the environment is to reject the Tuna-Dolphin report. Rejecting the report would not imply that the U.S. law is GATT-consistent, since surely it is not. Rather, it would be an admission that the panel's decision is fatally flawed. Unfortunately, this is unlikely to happen. For one thing, the GATT Council has never rejected a report. But more importantly, no nation has sided with the United States at the GATT Council.[151]

The recent suggestion by the EC that they will file a Tuna-Dolphin complaint against the United States offers an opportunity to secure a newly appointed panel to reconsider this dispute in light of what has been learned during the past year.[152] The United States could demonstrate its respect for the GATT by amending the Marine Mammal Protection Act to reform the dolphin kill-rate calculation procedures that clearly violate GATT rules.[153] This could be done without diminishing protection for dolphins. Alternatively, the import prohibition could be rewritten as a defiled-item standard.

New GATT rules

Although a resuscitated Article XX could cover most legitimate environmental trade measures, there are a few areas—beyond the scope of this article—where a revision in GATT rules might be desirable:

1. The GATT is generally interpreted as allowing border adjustments for taxes on products, but not for taxes on processes (for example, an effluent tax).[154] Since the latter may be more useful in achieving internalization of social costs, a reexamination of GATT's stance on taxes occultes would seem warranted.
2. The new Subsidies Code does not explicitly allow environmental subsidies either to encourage new technology or to accelerate the rapid achievement of higher environmental standards.[155] There was a limited green light for environmental subsidies in the Uruguay Round Brussels Draft, but it was deleted in the Dunkel Text.[156] Subsidies might also be reasonable to remedy gross mismanagement of the environment (for example, in Eastern Europe).

3. The GATT may need to legalize the use of trade *sanctions* on nations that refuse to ratify or comply with important environmental treaties.[157]
4. The GATT should *consider* whether the definition of "like product"—with respect to its rules on non-discrimination and national treatment—may reflect whether a product is made in an environmentally sound way. If a country can ban all tuna (under Article III), why shouldn't it be able to ban just driftnet-caught tuna? There may be good reasons not to open such a Pandora's box, but this issue deserves reflection.[158]

A consensus is building that after the Uruguay Round, the GATT should move quickly to address environmental issues.[159] But there is no consensus on what needs to be done. At one end of the spectrum is the idea of broadening GATT's mission to include the goal of "sustainable development."[160] At the other end is the idea of tightening the GATT so that (nth-best) trade instruments cannot be used for environmental protection. In between are numerous proposals to make GATT either more environmentally friendly or less susceptible to eco-protection. Suggestions have also been made for increases in the transfer of technology, financial resources, and property rights to developing countries. If a Green Round commences without greater agreement, it will be a painful negotiation.

IX. Conclusion

Although this article has been critical of the GATT Secretariat's report, it should be noted that much of the report offers a useful message. That is, open trade and environmental protection can be mutually reinforcing goals, especially in democratic, market-based societies.[161] Unfortunately, that message is being drowned out by the authoritarian drumbeats in the report that deny the importance of national environmental leadership and the benefits of competing unilateral standards. Countries are not clones of one another, and need not predicate their environmental protection policies on multilateral approval.

The irony in the "GATT and Environment" debate is not that ecological measures are being evaluated on the basis of a 45-year-old agreement. As we have seen, the authors of the GATT were well aware of the need for unilateral environmental action and allowed for it. The irony is that the GATT Council of the 1990s has been slow to comprehend the connection between trade instruments and environmental protection and the reasons why the GATT is viewed in some quarters as being anti-environment. Thus, the real threat to the future of the GATT is not hordes of Greens trying to ram (or, more accurately, peek) through GATT's gates. The real threat may be the myopia and dogmatism of some of those inside.

Notes

1. The GATT is an international agreement governing the use of trade restrictions. The GATT is not quite a treaty and not quite an organization, but is commonly treated as both. References herein to the General Agreement are from GATT, *Basic Instruments and Selected Documents* (BISD), Volume IV, p. 1. The GATT is located in Geneva, Switzerland. The signatories to and members of the GATT are known as "contracting parties."
2. "United States–Restrictions on Imports of Tuna," GATT Doc. DS21/R, 30 I.L.M. 1594 [hereinafter, the Tuna-Dolphin report]. The decision was reprinted in *Inside U.S. Trade* several weeks before it was publicly released by the GATT.
3. For a short analysis of the conflicting paradigms, see Robert Jerome, "Traders and Environmentalists," *The Journal of Commerce,* December 27, 1991, p. 4A.
4. GATT, "Trade and the Environment," in GATT, *International Trade 90–91,* Volume I (Part III), 1992 [hereinafter GATT Report], p. 22.
5. *The Economist,* February 15, 1992, p. 78.
6. GATT Report pp. 22–23.
7. GATT, "Industrial Pollution Control and International Trade," *GATT Studies in International Trade* 1, July 1971. The report was written by the late Jan Tumlir—hardly a unilateralist.
8. See note 7, p. 16. Note that the 1971 Report is not discussed, or even referenced in the 1992 Report.
9. 34 U.S. Statutes at Large 313 (repealed). In particular, there was a concern about so-called Greek diving methods.
10. An Act to Prohibit the Importation of Plumage, 1921, 39 & 40 Vict. ch. 36, §1 (repealed).
11. The headnote of Article XX excludes measures that are "disguised restrictions on international trade." But this provision has not been invoked.
12. Although the possibility of such sanctions has been the focus of considerable concern, no such action has been taken. The GATT status of sanctions is not treated in this article.
13. Antidumping duties are used to offset or "prevent" dumping. See GATT Article VI: 2.
14. For example, see the United Kingdom Imperial Copyright Act, 1911, §14. The traditional argument for intellectual property is that the enforcement of such "rights" sustains commerce. But the enforcement of certain environmental "rights" (like clean air) might also sustain commerce.
15. Even if someone did create an "intent-o-meter," that would not settle the issue. For example, imagine that a ban on importing prison-made goods was determined to be 100 percent intended to influence foreign prison practices. There would still be no reason to consider such an import ban to be GATT-illegal—in view of Article XX(e).
16. Moreover, trade laws emerge from a political process in which legislators may support the same measure but for different reasons. Whose intent counts?
17. Recent analyses by the Secretariat of the OECD have attempted to distinguish between "complementary," "coercive," and "countervailing" environmental trade measures. See OECD Environmental Directorate, "Synthesis Report: The Environmental Effects of Trade," OECD Doc. COM/ENV/TD(92)5, 24 January 1992, pp. 16–19. This and other OECD documents referenced here are "restricted," but are widely circulating in Washington.
18. For one definition of "dolphin-safe" tuna, see "Revised [Bush] Administration Proposal on Tuna Ban," *Inside U.S. Trade,* June 5, 1992, p. 15.

19. The Tuna-Dolphin panel addresses this category by stating that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." See Tuna-Dolphin report, 6.2.
20. Some laws overlap these two categories. For example, current U.S. regulations ban the importation of shrimp from countries whose vessels have a higher "taking" rate of sea turtles than American vessels, or whose governments have not required the use of turtle excluder devices by 1994. In May 1991, the State Department banned shrimp from Suriname until that government committed to a program for turtle protection. Suriname did so several months later. In May 1992, the State Department banned shrimp from French Guiana.
21. PPMs are standard or regulations based on "processes and production methods rather than in terms of characteristics of products." See "Agreement (1979) on Technical Barriers to Trade," GATT, BISD 26S/8, Article 14.25.
22. GATT Report, p. 24.
23. UNCTAD, "A New Partnership for Development: The Cartagena Commitment," para. 152, February 1992.
24. UNCED, "Rio Declaration on Environment and Development," Principle 12, of April 2, 1992.
25. There is also a difference between unilateral enforcement of trade controls and multilateral enforcement. But except in rare circumstances—such as the recent U.N. sanctions against Iraq—trade controls are enforced unilaterally. See chart 1. Of course with treaties, there is an agreement by nations to harmonize national enforcement actions.
26. The GATT Report declares that "by offering each country the opportunity to explain and defend its view of the problem, the negotiating process increases the chances of uncovering solutions acceptable to all the affected parties." See GATT Report p. 24. Some observers have suggested that the GATT—now mired in its sixth year of the Uruguay Round—should show more humility in lecturing the world about how to deal with international problems.
27. U.S. Public Law 92–522, §108(a).
28. See John Maggs, "Mexico, Venezuela and US Reach Tuna-Dolphin Accord," *Journal of Commerce*, June 18, 1992, p. 3A. This new agreement has not been signed.

	Unilaterally defined standards	**Multilaterally defined standards**
Unilateral enforcement of controls	Tuna-dolphin, shrimp-turtle	CITES, COCOM technology export regulations
Multilateral enforcement of controls		U.N. Iraq sanction

Chart 1.

29. For example, see Charles Edward Fryer, "International Regulations of the Fisheries on the High Seas," in U.S. Department of Commerce and Labor, *Bulletin of the Bureau of Fisheries,* Volume XXVIII, 1908, p. 95.
30. The choice is not quite that stark. Victim nations could also compensate polluting countries for the cost of making environmental improvements.
31. For example, see Gijs M. de Vries, "How to Banish Eco-Imperialism," *The Journal of Commerce,* April 30, 1992, p. 8A.
32. There is probably no difference with respect to *defiled product* standards. No matter how unusual the standard is, someone will supply the market, even for a small country with very limited demand. Yet smaller countries are at a disadvantage in imposing *production practice* or *government policy* standards.
33. Convention Respecting Measures for the Preservation and Protection of Fur Seals, 214 Consolidated Treaty Series 80 (no longer in force).
34. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 993 UNTS 243.
35. See U.S. Public Law 100–220, Title IV; U.S. Public Law 101–627, §901 (g); and UN General Assembly Resolutions 44/225, 45/197, and 46/215.
36. See the advertisement, "A long-standing commitment . . . just got deeper," *The New York Times,* September 27, 1991, p. A13. The lure of a free trade agreement with the United States was an even more important factor.
37. GATT Report at 36.
38. Imagine a world where the only trade controls allowed for environmental purposes were those included in treaties. Such a world (in my opinion) would have a lower level of environmental protection.
39. Tuna-Dolphin report, 5.32
40. Tuna-Dolphin report, 5.26–5.28 and 5.31–5.32. GATT Article XX provides that

> Subject to the requirement that such 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

41. Although most of this discussion relates to *import* restrictions, the same issues apply to export restrictions. If a country prohibits certain exports to avoid harming other countries, such a law could be characterized as "extrajurisdictional."
42. For example, should a ban on timber imports from tropical rain forests be viewed as protecting an extrajurisdictional *plant* or as safeguarding domestic *human* health?
43. The same ambiguity exists in Article 603 of the Canada–U.S. Free Trade Agreement. (See 27 International Legal Materials, 21.) This Article states that "standards-related measures" shall not be deemed "unnecessary obstacles to trade" if the demonstrable purpose of such a measure is to achieve "a legitimate domestic objective" and the measure does not operate to exclude foreign goods that meet that "legitimate domestic objective." A legitimate domestic objective

is defined as an objective whose purpose is to promote "health, safety, essential security, the environment, or consumer interests" (Article 609). But this definition does not clarify whether such an objective has to pertain solely to one's territory or can reflect whatever preferences domestic individuals have. See also 19 United States Code 2531 regarding the protection of legitimate environmental interests.

44. See "Developments in the Law–International Environmental Law" (especially Section VI.–Extraterritorial Environmental Regulation), *Harvard Law Review*, May 1991, pp. 1484, 1611–12, 1622–23, and 1630–31. But see 1623, n. 80.
45. For example, extraterritorial laws deal with technology transfer, corrupt practices, and trading with the enemy.
46. For inappropriate use of the term "extraterritorial," see GATT Report, p. 33. See also GATT, "Minutes of Meeting (February 18)," GATT Document C/M/254, March 10, 1992, pp. 25–26, 29–30, and 32. Laws that rely upon a *government policy* standard like the "intermediary nation" embargo in the Tuna-Dolphin dispute get very close to extraterritoriality.
47. Tuna-Dolphin report, 5.25.
48. Tuna-Dolphin report, 5.26. More precisely, the amendment was to the provision in the draft ITO Charter that served as the basis for GATT Article XX(b). This amendment, which required "corresponding safeguards" in the importing country "if similar conditions exist in that country," was reconsidered and abandoned because it was deemed confusing and because the same requirement already existed in the headnote. Attached to the amendment was an explanatory note (also abandoned) that implied a jurisdictional focus for Article XX(b).
49. The proceedings of the UN Conference and its preparatory meetings are used as "legislative history" for the GATT. The ITO was never consummated.
50. For example, see Joel P. Trachtman, "GATT Dispute Settlement Panel," *American Journal of International Law*, January 1992, pp. 142, 148–149 and Eric Christensen and 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," *The University of Miami Inter-American Law Review*, Winter 1991–92, pp. 569, 583–585.
51. For a discussion of this history, see Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX," *Journal of World Trade*, October 1991, pp. 37–41.
52. International Convention for the Abolition of Import and Export Prohibitions and Restrictions (and Protocol), 46 U.S. Statutes at Large 2461, Article 4 and Ad. Article 4. The convention is not in force.
53. 49 U.S. Statutes at Large 1246 (repealed). The law was "extrajurisdictional" because it protected whales outside the territory of the United States. (Dolphins were specifically omitted.)
54. One murky area would be what Richard Blackhurst and Arvind Subramanian call "psychological spillovers." See their chapter, "Promoting Multilateral Cooperation on the Environment," in Kym Anderson and Richard Blackhurst, eds., *The Greening of World Trade Issues* (London: Harvester Wheatsheaf, 1992), pp. 247–248, 265.
55. Tuna-Dolphin report, 5.31. The previous GATT panel had decided that a measure would qualify under Article XX(g) only if it were "primarily aimed at rendering effective" the restrictions on domestic production or consumption. The Tuna-Dolphin panel syllogized that since a country can restrict production or consumption only when they are under its jurisdiction, trade measures aimed at facilitating such restrictions cannot possibly be extrajurisdictional.

56. As Joseph Greenwald has pointed out, the panel fails to consider the possibility that a country might want to restrict the domestic *consumption* of dolphin-unsafe tuna, and that an import ban could render this restriction more effective. For criticism of the ruling in the previous GATT case, see note 51, p. 51.
57. See note 51, pp. 45–47, 52–53.
58. A U.S. regulation aimed only at American tuna vessels could easily be frustrated by the practice of adopting flags of convenience. See Laura L. Lones, "The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation," *Vanderbilt Journal of Transnational Law,* 22, no. 4 (1989): 997, 1017.
59. That would not bother the economists who believe that all resources should be unreachable by environmental trade measures.
60. Genesis 6:19 in *The NIV Study Bible* (Grand Rapids: Zondervan, 1985).
61. Tuna-Dolphin report, 5.27.
62. See note 61, 5.25 and 5.32.
63. See "Canada-Administration of the Foreign Investment Review Act," GATT, BISD 30S/140, 5.20.
64. Perhaps GATT panels could operate more in a factfinding, conciliation, or arbitration mode. By operating in an adversarial and quasi-judicial mode, panels encourage divergent (and often twisted) interpretations of GATT rules by parties to the dispute.
65. For example, the Tuna-Dolphin panel stated that

> The United States had not demonstrated to the Panel—as required of the party invoking an Article XX exception—that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiations of international cooperative arrangements. . . .

See Tuna-Dolphin report, 5.28. Yet since the mid-1970s, the United States has sought international cooperative agreements to protect marine mammals threatened by commercial fishing. Moreover, in January 1991 (one week before it requested the GATT panel), Mexico refused to endorse the intergovernmental La Jolla resolution committing parties to cut dolphin mortalities to one-half the 1989 rate. The Tuna-Dolphin panel did not address these facts. It didn't have to. Under GATT practice, all the panel had to say is that the United States "had not demonstrated" enough.

66. But it is up to the *contracting parties* to determine whether a trade measure fits one of the Article XX exceptions and meets the terms of the headnote.
67. Of course, this unwillingness can soften. Nations might decide to *strengthen* the GATT by restricting certain kinds of unilateral action. But clarifying Article XX "rights" would seem to be a precondition for such harmonization negotiations.
68. U.S. Department of State, *Foreign Relation of the United States,* 1933, Volume I, p. 729.
69. Tuna-Dolphin report, 6.2.
70. GATT Report, p. 23.
71. Article XX.
72. At the Geneva meeting, the delegate from France insisted that the word *not* be deleted. See UN Document E/PC/T/A/PV/30, p. 13.

73. See note 51, pp. 47–48.
74. For example, see UN Document E/CONF.2/C.3/SR.35, pp. 6–7. The ITO authors were surely aware of the extensive consideration (by the League of Nations) of how to combat unjustified veterinary and sanitary restrictions.
75. *Corrosion Proof Fittings v. EPA,* Brief amicus curiae of the Government of Canada, May 22, 1990, p. 17.
76. The court remanded the regulation to the EPA, but did not base its judgment on international or bilateral trade obligations. See David Palmeter, "Environment and Trade. Who Will Be Heard? What Law Is Relevant?" *Journal of World Trade,* April 1992, p. 35.
77. Stephan Schmidheiny, *Changing Course* (Cambridge, Mass.: MIT Press, 1992), p. 76. For a discussion of the precautionary principle and the GATT, see WWF International, *Multilateral Trade Organization,* May 1992, pp. 14–15.
78. This scheme was apparently thought to be less controversial because it does not require an explicit judgment about the scientific merit of the policy objective at issue.
79. See "Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes," GATT BISD 37S/200, paras. 74–75, 81. The panel concluded that "necessary" in Article XX(b) should be interpreted the same way the Section 337 panel did for Article XX(d).
80. For a critique of the "least GATT-inconsistent test," see note 51, pp. 48–50. See also Fredric L. Kirgis, Jr., "Effective Pollution Control in Industrialized Countries: International Economic Disentives, Policy Responses, and the GATT," *Michigan Law Review,* April 1972, pp. 860, 892–893.
81. GATT panels differ in the extent to which they do this analysis, as opposed to simply asserting that the defendant country has not proved its case.
82. It is not clear that a GATT panel would find a mandatory labeling requirement (calling for disclosure of production methods) to be GATT-consistent. Several years ago, the German federal court dismissed a lawsuit seeking a prohibition on the sale of Korean yarn because of the unethical treatment of Korean workers. The court saw no merit in the suggestion that such products be labeled, arguing that the conditions of production were not of essential importance to the buyer. See A.H. Hermann, "Korean sweatshops are fair competition," *Financial Times,* August 18, 1980, p. 12.
83. Labeling would work if consumers acted "morally," in a Kantian sense.
84. For a detailed discussion of how the new rules might restrict environmental laws, see Steve Charnovitz, "Trade Negotiations and the Environment," *International Environmental Reporter,* March 11, 1992, pp. 144–148.
85. See "Agreement (1991) on Technical Barriers to Trade," Article 2.2–2.3 and "Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures," Paras. 19, 21, in GATT Document MTN.TNC/W/FA [hereinafter Dunkel Text]. (The Dunkel Text was promulgated by GATT's Director-General, Arthur Dunkel.)
86. Article XX(d) provides that

> Subject to the requirement that such 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . (d) necessary to secure compliance with laws or regulations which are

not inconsistent with the provisions of this 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(d) is relevant to the environmental debate because its case law has been used by GATT panels in interpreting Article XX(b).

87. "United States-Measures Affecting Alcoholic and Malt Beverages," GATT Document DS23/R, February 7, 1992, 5.41–5.43 and 5.52. The decision was reprinted in *Inside U.S. Trade* several weeks before it was publicly released by the GATT.
88. See note 87, 5.52.
89. See note 88.
90. This treatment of the concept of proportionality is an outgrowth of discussion with J. David Richardson of the Institute for International Economics.
91. See Laurence W. Gormley, *Prohibiting Restrictions on Trade Within the EEC* (Amsterdam: Elsevier Science Publishers, 1985), at 124–126.
92. By *relative proportionality,* I mean an examination of functionally equivalent environmental measures to find the one with the lowest commercial cost. *Absolute proportionality* goes further by weighing the costs of a measure against its benefits and by considering non-equivalent options, including the option of doing nothing.
93. The quotation comes from the Opinion of the Advocate General, but the court seems to have adopted this approach in finding that the Danish quantitative restrictions were "disproportionate" to the objective pursued. See James Cameron and Jonathan Robinson, "The Use of Trade Provisions in International Environmental Agreements," Report for the OECD Environmental Directorate, OECD Document COM/ENV/TD(92)6, February 3, 1992, paras. 77–83 and 92–94. See also Toni R.F. Sexton, "Enacting National Environmental Laws More Stringent than Other States' Laws in the European Community: Re Disposable Beer cans: Commission v. Denmark," *Cornell International Law Journal,* 24, no. 3 (1991): 563.
94. For example, see Joint Session of Trade and Environment Experts, "The Applicability of the GATT to Trade and Environment Concerns," OECD Document COM/ENV/EC/TD(91)66, November 4, 1991, at paras. 17–18. See also Ted. L. McDorman, "The 1991 U.S.–Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts," *North Carolina Journal of International Law and Commercial Regulation,* Forthcoming summer 1992, pp. 461, 477–479.
95. "Canada's Landing Requirement for Pacific Coast Salmon and Herring," *World Trade Materials,* March 1990 [hereinafter FTA Salmon and Herring report], 7.35–7.38. But see the last sentence at 7.05.
96. See "Agreement (1991) on Technical Barriers to Trade," Article 2.2, n. 1, which states the requirement that regulations not be more trade-restrictive than necessary "is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create."
97. GATT might also weigh health costs versus health benefits. For example, an import ban on refrigerators containing CFCs might cost lives today from spoiled food, but save lives in the future by preserving the ozone layer, See "The Price of Green," *The Economist,* May 9, 1992, p. 87.
98. In addition, GATT norms can indirectly influence a nation's environmental policies. See David A. Wirth, "A Matchmaker's Challenge: Marrying International

Law and American Environmental Law," *Virginia Journal of International Law,* Winter 1992, at 377, 410, 411.

99. For a discussion of such an approach, see FTA Salmon and Herring report, 7.07–7.11.
100. This could weigh the commercial versus environmental objectives of the EC as a whole. Or the commercial objectives of the United Kingdom could be weighed against the environmental objectives of Denmark.
101. But in a recent GATT dispute (Beer I), the Canadian government argued that "cost" should not be cited as a justification for preventing a foreign government "from implementing environmental measures pursuant to Article XX(b)." See "Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies," GATT Document DS17/R, 4.73, in *World Trade Materials,* March 1992, p. 114.
102. See Steve Charnovitz, "Environmental and Labor Standards in Trade," *The World Economy* (May 1992): 335, 348–349.
103. GATT Report, p. 22.
104. In countries with "monist" legal systems, treaties may be directly applied and therefore come into conflict with the GATT.
105. GATT Document 1527 (1992), p. 11.
106. GATT Report, p. 25.
107. For a brief discussion, see Robert F. Housman and Durwood J. Zaelke, "Trade, Environment and Sustainable Development: A Primer," *Hastings International and Comparative Law Review* 15 (Summer 1992): 535, 580–584.
108. CITES Document Com. 8.22(Rev.), March 1992. The fact that non-parties would be treated differently than parties does not transform this into a sanction.
109. Based on conversations with U.S. government officials. In addition, a proposal by the U.S. Fish & Wildlife Service for federal legislation banning the importation of parrots from certain countries was nixed by the Office of Management and Budget on account of the Tuna-Dolphin decision.
110. For background on Article XX(h), see John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969), pp. 731–732.
111. GATT Article XX(h) and Ad. Article XX.
112. A few months ago, the U.S. Council for International Business recommended that if Article XX(h) is used to permit environmental treaties, the GATT should adopt a set of criteria including: the "polluter pays" principle, sound science, and "proportionality between the objectives sought and the trade measures employed." See U.S. Council for International Business, "An Integrated Approach to Environment and Trade Issues and the GATT," May 1992.
113. GATT, *Analytical Index,* 1989, XX-10-XX-11.
114. UN Document E/CONF. 2/78, Article 57(d). Compare to the GATT's Preamble, which suggests that trade and economic relations be conducted with a view to "developing the full use of the resources of the world . . ."
115. See note 51, pp. 45–47.
116. See GATT, BISD I/13, Article XX(h); and UN Document E/403, Resolution 30 (IV). See also UN Document E/CONF. 2/78, Article 45 (a)(ix) and Article 70:1(c) and (d).
117. "Understanding on the Interpretation of Article XXV of the General Agreement on Tariffs and Trade" (Dunkel Text), Section V.1, para. 5.
118. See the remarks by UNEP Executive Director Mostafa K. Tolba at the 1992 Conference of the CITES Parties.
119. GATT Report, p. 26. See GATT Article XXV:5(ii).
120. Tuna-Dolphin report, 6.3.

121. For example, see Eliza Patterson, "GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects," *Journal of World Trade,* June 1992, p. 35.
122. See GATT Article XXX for the requirements to amend the General Agreement.
123. Vienna Convention on the Law of Treaties, Article 30, at 8 International Legal Materials 679, 691. But this rule does not apply retroactively to treaties that came into force before the Vienna Convention came into force in 1980. One might consider the GATT as coming into force in 1948 although, technically, the GATT has never come into force. It is applied only provisionally.
124. Consider the example of the Wellington Convention (1989) for the Prohibition of Fishing with Long Driftnets in the South Pacific. This Convention *directs* parties to take measures "consistent with international law" to prohibit the transhipment of drifnet caught fish. (See Wellington Convention, Article 3, 29 International Legal Materials 1454.) Assuming GATT qualifies as international law, the treaty presents an interesting conundrum. On the one hand, Wellington may be GATT-consistent if it is a more recent treaty ***obligation***. On the other hand, Wellington is an obligation only if it is consistent with the GATT.
125. Imagine that GATT members A, B, C . . . agree on a treaty to ban the importation of cigarettes. The mere existence of this treaty obligation does not diminish the rights of GATT member Z (which produces cigarettes) to lodge a complaint about an Article XI violation. See Vienna Convention, Article 34. But see Article 38 regarding customary rules of international law.
126. My calculations.
127. GATT Report, p. 27.
128. See note 51, pp. 47–48.
129. Even if the conditions in the headnote are rigorously applied, three types of trade measure will probably pass muster. First, there will be legitimate environmental restrictions. Second, there will be protectionist measures so well disguised that they slip through. Third, there will be regulations that are oversolicitous of the environment—for example, with a benefit-cost ratio less than one. A proportionality test might help catch this third type, but (in my view) countries should have the right to be oversolicitous. Tests that can catch the second type would also curtail the first type.
130. A traditional argument from political science is that GATT disciplines enable freer trade because they give governments political cover in refusing new protectionist entreaties. Consequently, by giving an explicit go-ahead to defiled-item standards, the GATT would be leaving governments more vulnerable to protectionist pressures for pseudoenvironmental regulations.

    Such a criticism of my thesis is valid. But the point about GATT's restraining influence is exaggerated. The real deterrent against ill-considered defiled-item standards is that such action would reduce national economic welfare. While a strong GATT can hope to stop countries from using double standards to beggar their neighbors (for example, no foreign-origin autos made using fossil fuels), it must ultimately be self-interest, rather that GATT rules, that prevents countries from beggaring themselves (for example, no autos of any origin made using fossil fuels).

    The same dynamics hold for all treaties. The glue of a treaty is not the seals at the end, but the understanding of all parties that by giving up the right to pursue their own interests without regard to other countries, they can gain if other parties also give up their rights to pursue self-seeking behavior. A well-designed treaty enhances the ability of parties to achieve their national self interest. But treaties cannot change the way a nation views its self-interest. While

sanctions might be used to force nations to participate in treaties (what Charles Pearson calls "forced riders"), any such treaty is inherently unstable.

131. For example, see the full-page advertisement in several U.S. newspapers: "Sabotage! of America's Health, Food Safety and Environmental Laws," *The New York Times,* April 20, 1992, p. B5.
132. Defenders of the GATT orthodoxy would respond that they are not anti-environment; they are pro-environment. The abstinence they favor involves the use of trade measures to promote environmental protection when other methods would be more effective. It is sometimes argued that prohibiting the use of third-best measure will encourage the use of second- and first-best alternatives. For example, see Piritta Sórsa, "GATT and Environment: Basic Issues and Some Developing Country Concerns," in Patrick Low, ed., *International Trade and the Environment,* World Bank discussion paper no. 159, April 1992, pp. 325, 331, 339. But no evidence has been offered in support of this argument. Forbidding third-best measures may lead to fourth-best measures.
133. The EC Council has enacted such a ban effective in 1995. See Council Regulation No. 3254/91.
134. The GATT, as presently constituted, should not judge whether beavers, rabbits, or dolphins merit protection. If a country wants to enact a Smallpox Virus Protection Act to embargo vaccines, the GATT should not weigh the objectives of virus health versus disease prevention. Nevertheless, a new international institution could be given the role of making explicit trade-offs based on value judgments. Such an institution might set international minimum standards. See Geoffrey Palmer, "New Ways to Make International Environmental Law," *American Journal of International Law,* April 1992, p. 259.
135. No effort is made here to delineate provisions that are "disguised restrictions," as opposed to those that are "arbitrary" or "unjustifiable" discrimination.
136. See Leo Ryan, "Ontario's Can Tax Angers Aluminum, Beer Industries," *The Journal of Commerce,* May 26, 1992, p. 1A. Canadian producers have an advantage in bottles because foreign suppliers lack a local distribution and recycling system.
137. See Tuna-Dolphin report, 3.14, 3.22, 3.38, 3.51, 4.28, and 4.29.
138. In Austria, a group of importers have agreed to a voluntary embargo of wood from countries that do not follow sustainable timber policies.
139. See Paragraph 20 of the "Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures" (Dunkel Text), Section L. 38
140. See note 84, p. 146.
141. This is similar to a standard suggested by a Canada–U.S. Free Trade Agreement panel. See FTA Salmon and Herring Report, 7.09–7.11. In note 19 of the panel's report, the concept of "equal burdens" is discussed.
142. Of course, for financial or administrative reasons, a foreign government might choose to apply the same standard domestically. Moreover, it is possible that a foreign producer might absorb these costs for exports and then try to shift them to its domestic customers. A government like Mexico could also argue that a higher standard solely for the American market reduces Mexico's ability to spread fixed costs over a large sales volume.
143. See "Countries Can't Use Trade to Promote Environmental Action, Conference Told," *International Trade Reporter,* May 20, 1992, pp. 901–902.
144. It should be noted that the GATT is making progress. Within six months after preparing a Factual Note on Trade and Environment (GATT Doc. L/6896), the GATT determined that these facts could be released to the public.
145. The problem is not that GATT panels have made the wrong decisions in envi-

ronmental cases. Rather, they have made the right decisions (in a series of easy cases) for the wrong reasons.

146. "United States–Measures Affecting Alcoholic and Malt Beverages," 5.79.
147. Although there is not stare decisis doctrine under the General Agreement, GATT panels routinely cite previous reports in justifying new decisions.
148. In advocating this new source of information for the GATT, I am not suggesting that GATT panels use such data to weigh commercial versus environmental objectives. The panels would continue to have the same duty as now. What would be added is a separate channel for reliable information about the environmental aspects of a case.
150. For a critique of GATT dispute resolution procedures, see U.S. Congress, Office of Technology Assessment, Trade and Environment: *Conflicts and Opportunities,* May 1992, p. 77.
151. One problem is that so many countries have seen their tuna embargoed. Currently, the United States imposes a primary-nation embargo on tuna from three countries—Colombia, Mexico, and Venezuela. In addition, 20 countries have recently been embargoed as tuna intermediaries. Because it has broader coverage than the primary embargo, the intermediary embargo could be classified as a trade *sanction*, rather than a government policy standard.
152. Many environmentalists believe that the GATT has learned *nothing* about this problem since August 1991.
153. See Tuna-Dolphin report, 4.2, 5.16, 5.28, and 5.33.
154. See Charles S. Pearson and Robert Repetto, "Reconciling Trade and Environment: The Next Steps," U.S. Environmental Protection Agency, December 1991.
155. Subsidies like these may be compatible with the "Polluter-Pays Principle." See the OECD Recommendation, "The Implementation of the Polluter-Pays Principle," 1974, Section II:2–II:3, in *OECD and the Environment* (Paris: OECD, 1986), p. 26.
156. See note 84, pp. 146–147.
157. See Max Baucus, "Trade as Environmental Lever," *The Journal of Commerce,* June 3, 1992, at 8A.
158. See Ernst-Ulrich Petersmann, "Trade Policy, Environmental Policy and the GATT," *Aussenwirtschaft,* July 1991, pp. 197, 210, 216.
159. For example, see the editorial "Dolphins and the GATT," *The Washington Post,* April 26, 1992, p. C6.
160. See World Commission on Environment and Development (Brundtland Commission), *Our Common Future* (Oxford: Oxford University Press, 1987), p. 84. Recently, Arthur Dunkel announced that the preamble to the final Uruguay Round agreement would include a commitment to implement the GATT "in the light of the general need to preserve the environment and promote sustainable economic development." See David Dodwell, "GATT rules 'will heed environment issues.'" *Financial Times,* May 8, 1992, p. 6.
161. This is not to say that the GATT Report is completely on target. For example, its analysis falls apart in cases of environmental irreversibility. After all, no society—even one enriched by greater commerce—is yet able to resurrect a lost species. But on the whole, the report's defense of trade is thoughtful and constructive.

ACKNOWLEDGMENTS. Robert F. Housman, Charles C. Pearson, and J. David Richardson. This article expresses the personal views of the author.

International Environmental Affairs
A JOURNAL FOR RESEARCH AND POLICY

Volume 4 Number 3 Summer 1992

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