NEW YORK LAW SCHOOL
CENTER FOR INTERNATIONAL LAW

Symposium on
World Trade and the Environment

SYDNEY M. CONE, III*: From your left to your right are the following panelists who will speak in this order for fifteen to twenty minutes each. After the four panelists have completed their talks, we will have a general discussion in which I hope all of you will feel free to participate. Because we have C-SPAN with us tonight, we do request that when you participate, you come forward and use the microphones. Starting from the left, the first panelist is David Balton who has come to us from Washington today. He is the Director of the Office of Marine Conservation of the U.S. Department of State. Prior to being Director of the Office of Marine Conservation, David was at the State Department's Office of the Legal Advisor where he functioned as a lawyer. David's status was promoted from that of lawyer to client, and many of us in this room know the significance of that. The next panelist is Steve Charnovitz, Director of Global Environment & Trade Study at Yale University. I am particularly happy that Steve is here because I will not be the only person speaking with something of a southern accent, and Steve is a lawyer as well as Director of Global and Environment and Trade Study at Yale. The next panelist is Philippe Sands, and I am personally delighted to finally meet Philippe face-to-face. He and I have talked over the phone over a long period of time about having an event such as this. The origins of this event really go back to Philippe calling me up one day and in effect suggesting this event.

That day was some time in the past and we are finally here. Philippe is a Reader in International Law at London University and he also participates in NYU's Global Law School. Our final panelist is T.N. Srinivasan, the Chairman of the Department of Economics at Yale University, and we are very privileged to have him with us. T.N. Srinivasan is well known in the area of trade and we do not often have the privilege of having him join us from New Haven. He is also a chaired Professor of Economics at Yale. I hope that this is an adequate introduction of such a distinguished panel and I will now ask David Balton to start. He will attempt to give us the

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background and the foreground of the substance of the current debate over world trade and the environment. Mr. Balton.

DAVID BALTON*: Thank you very much, Professor. Let me say at the outset that I am not an expert on trade and the environment as a subject. My job at the State Department is to care about critters that swim in the ocean. Yet in recent times I find myself called before the United States Court of International Trade and the World Trade Organization. These pesky trade issues will not let me go. I have concluded that I must have done something truly terrible in a previous life that this would be my punishment. For tonight, I am going to leave the large conceptualization of these issues to the other panelists, who, I assure you, have spent much more time thinking about the big picture than I have. I will instead attempt to present a ground level view, a view from the trenches, of two of the trade and environment cases that have become cause celebre in recent years — tunas and dolphins, and more recently, shrimp and sea turtles.

Starting with tunas and dolphins: for reasons nobody completely understands, yellow-fin tuna and dolphins swim together in one part of the world, the eastern tropical Pacific Ocean. Although people do not know why that happens, fishermen long ago realized that it is possible to round-up dolphins, put a net around them, and catch the tuna that are swimming underneath them very efficiently. There is only one problem with this approach. It led to the deaths of hundreds of thousands of dolphins a year dating back to the 1960s. When this came to light, it provoked quite a reaction, particularly in the United States. Congress first responded by imposing restrictions on the way United States fishermen could fish, in order to protect the dolphins. Actually the U.S. vessels found themselves leaving the fishery as a result of these restrictions. Then Congress decided that, for other countries that wanted to sell their yellow-fin tuna in the United States, they would have to abide by comparable protections for the dolphins. This lead to trade embargoes upon a number of countries, particularly from Latin America.

As many of you may know, this in turn led to not one but two different GATT cases, the first bought principally by Mexico in 1991, and a second brought principally by the European Union in 1993. In both cases, GATT panels determined that these embargoes under the Marine Mammel Protection Act were a violation of our international obligations under the GATT. But neither of those decisions was ever brought to fruition for a

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variety of reasons. Instead, the tuna and dolphin situation has proceeded down a different path, not currently before the WTO. Instead, there has been a cooperative multilateral effort to solve this problem. The multilateral effort began in 1992. There was an original agreement, affectionately called the La Jolla Agreement, in which the countries whose vessels fish for tuna in the Pacific agreed to take a number of measures to reduce dolphin deaths there. And, in fact, they succeeded in dramatically reducing dolphin deaths, probably in hopes that the U.S. embargoes on the tuna would be lifted. But those embargoes were not lifted.

The situation appeared to be headed for a long term stalemate until 1995, when the countries in question, including the United States and several U.S. environmental groups came together in Panama City and adopted what we now call the Declaration of Panama. This was a deal which said: if the U.S. lifts the embargoes and does a number of other things, the countries whose vessels fish in the eastern Pacific Ocean for tuna will take additional measures to protect dolphins. These countries will turn the 1992 agreement, which had been a voluntary agreement, into one that was legally binding. With the adoption of the Declaration of Panama, the scene shifted to Congress. After a couple of difficult years and long debate, about a year ago in the summer of 1997, legislation was in fact passed to give effect to that deal, the Panama Declaration. Negotiations then began on the international plane to finalize and bring to fruition the international agreement to protect dolphins in the Eastern Pacific Ocean. That agreement is not yet in force, but it will provide for very stringent requirements to protect dolphins in the course of the tuna fishery. I will add that today about three thousand dolphins are killed in this fishery, which may still seem like a lot to you. But it represents only one percent of former dolphin mortality and represents a fraction of one percent of all the dolphins in that region which is in fact the stricter standard than in most fisheries that occur inside U.S. waters.

Let's take a look at shrimp and sea turtles. Sea turtle species are endangered. They've been on the U.S. endangered species list for a long time and a number of international endangered species lists, including Appendix 1 to the Convention on International Trade and Endangered Species Annex for some time. One of the principal causes of sea turtle mortality, at least in U.S. waters, is that they get caught in trawl nets that shrimpers use. Shrimp are caught by dragging a net along the bottom of the sea floor. Only about ten percent of what is caught in the net is actually shrimp. All sorts of other things get caught as well, including sea turtles. Sea turtles need to breathe air and, when they get caught in the nets, they drown. Fortunately for the turtles, a piece of technology was developed in the 1980s called turtle excluder devices or TEDs. If any of you had an old style barbecue grill dating back to the 1950s, you will know more or less

what a TED looks like. It is a round piece of metal with slats in it. If it were put on top your charcoal grill, you could grill your steaks on it. But if it's put in the back-end of a shrimp trawl net, it will allow the shrimp to pass through as the net is moved forward in the water. But large objects like sea turtles hit the grid and then are directed out a trap door in the net. A TED costs a few hundred dollars. It is a remarkably effective piece of technology and quite cheap — I think you'd agree. Starting in the 1980s, the U.S. began to institute requirements for U.S. vessels that fish for shrimp in areas where sea turtles occur to use TEDs. By 1990, it was a requirement on all of them.

In 1989, Congress also passed a law as a rider to an appropriations act that prohibits importation of shrimp that is harvested in ways harmful to sea turtles. The Department of State was given responsibility to implement this law and, in the first few years of implementation, we decided that Congress had really intended its application to be limited to an area of the Caribbean region all the way down to Brazil. I won't go into the long rationale we had for that, but I will say that the rationale was challenged in court. At the very end of 1995, the U.S. Court of International Trade (CIT) decided that we were wrong and that Congress had from the start intended the law to apply on a worldwide basis. At the time that the first CIT case was handed down, we were wrapping up negotiations with our Latin American friends to try to "multilateralize" this issue, much as the tuna-dolphin issue was becoming multilateral. We were negotiating what has become, and is currently before the Senate for advice and consent, the Inter-American Convention for the Protection and Conservation of Sea Turtles. One of the things this treaty requires is that shrimp trawl vessels use TEDs. It requires a lot of other things as well.

We then were confronted with the situation that we were not only dealing with countries in Latin America but, because of the CIT decision, all countries that wanted to sell their shrimp to the United States. Some of the largest exporters of shrimp to the United States are in the Indian Ocean region — Thailand, in particular. Thailand was not amused when it found itself subject to this law and, with three other countries, filed a case at the World Trade Organization about which we will hear more later. There is, as well, ongoing litigation in the U.S. Court of International Trade about the Department of State's implementation of this law restricting shrimp imports.

For all the controversy that these two laws have given rise to, I think most who look at the situation soberly would say that the trade restrictions seem to have brought about progress on the environmental front. In fact, dolphin moralities in the eastern tropical Pacific Ocean tuna fishery are much lower than they were before. One could quibble about the cause and effect, but my sense, as someone who works on the issue day to day, is that it really did matter that these countries were prohibited from selling their tuna in the

U.S. unless they started to protect dolphins better. And, similarly, today 18 countries in addition to the U.S. require the use of TEDs on all their shrimp trawl vessels operating in areas where sea turtles occur. Those 18 countries are developing countries. I am quite sure that many of them would not have those TEDs requirements in place but for the U.S. restrictions on imports.

That said, these laws have entailed certain costs as well. They have engendered some political resentment from the countries that feel that we are imposing our environmental standards on them. I would say, as a personal matter, that I have noted a palpable lack of cooperation from the affected countries on related issues due to this resentment. It is also my sense that the trade embargoes have had diminishing effectiveness over time, as countries figure out ways to find other markets for their products. And, of course, there is the matter of potential conflict with international trading rules. From the point of view of the Department of State, the obvious solution would be to have multilateral standards for environmental protection and multilateral agreements to promote adherence to those standards, including through the use of trade measures. We have had success in the tuna-dolphin situation, although that success has not nailed down yet. The tuna-dolphin agreement that we negotiated has not yet entered into force. Similarly, the Inter-American Sea Turtle Convention that I mentioned earlier is not yet in force either. We would like to negotiate something a comparable for the Indian Ocean region but it takes two or, in this case, more like 30, to tango. Those countries need to demonstrate a willingness to do so as well. In short, multilateral solutions are easy to call for — hard to achieve. I'll end my comments here and pass the microphone on to the next speaker. Thank you.

SYDNEY M. CONE, III: The next speaker is Steve Charnovitz from the Global Environment and Trade Study at Yale. I'm intervening just to say that I want to throw out a term that has been used by some commentators on the United States' approach in these two cases David just told us about, and the term has been called creative unilateralism. There are those on the panel who will, I think, dispute that term and say that unilateralism by the United States is to be condemned, but there are commentators — and it's possible that Mr. Balton would agree — that think that the United States' unilateralism has been creative.

STEVE CHARNOVITZ*: Thank you. Trade in the environment is a vast and expanding set of issues, far more than anyone could cover in one talk.

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* Steve Charnovitz is the Director of the Global Environment & Trade Study at Yale University.

So I thought tonight I would try to focus on what's most important for lawyers which is: "What does emerging international trade law dictate regarding the environment and health?" I'll start with domestic environment and health and then discuss some global issues. Now, the official line from the World Trade Organization was presented in a speech by Mr. Ruggiero, the Director General of the WTO several months ago when he said the following: "Subject to the basic requirement of non-discrimination, WTO rules place no constraint on the policy choices available to a country to protect its own environment or health standards."[1] That's the official line coming from the WTO. The question I want to pose to you is whether we can reconcile that official line with the actual decisions that have been coming out of WTO adjudication. I think the answer is no, we can't.

I want to discuss briefly a few cases. The gasoline case, which was a complaint against the United States Environmental Protection Agency standard on gasoline, the hormone case against the European Commission (regarding their ban on meat produced with growth hormones), and a more recent Australian Salmon case that there is a little op-ed that I wrote about that was handed out in front this evening.[2] Those are the three cases on domestic environment and health. In all three of those cases the defendant government lost. I think that's significant. There's another decision that I'll mention briefly — the Japan Alcohol case. It's not an environmental case, but the way in which the panel interpreted GATT law has significance for environmental regulation.

Let me start with the interpretations of the GATT Article XX headstone. The General Agreement on Tariffs and Trade (the GATT) is a set of rules about when and how governments can use trade restrictions. Article XX in the GATT sets out General Exceptions to the rest of the GATT for public policy.[3] Article XX begins with a headstone that lays out the qualifying conditions for using the exceptions. The interpretations of this headstone first arose in this gasoline case. If you're not familiar with them, let me just briefly say there was a U.S. Environmental Protection Agency regulation that applied a different standard to foreign origin gasoline then to domestic gasoline. Now, I'm not at all defending the U.S. regulation. I wrote at the time that I thought it was GATT-illegal. But in holding it to be GATT

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1. "A Shared Responsibility: Global Policy Coherence For Our Global Age," Address to the Conference on "Globalization as a Challenge for German Business," Organized by the German Federal Ministry of Economic Affairs and the Association of German Chambers of Industry and Commerce, December 9, 1997, WTO Press Release at 3.

2. Steve Charnovitz, *Slipping on Salmon Trade*, J. COMM., Sept. 10, 1998, at 6A.

3. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. OF WORLD TRADE 37 (1991).

illegal, the WTO appellate authority went way too far and sharply constricted the already narrow window available for the environment in GATT Article XX.

Unfortunately, I don't have time to go over all the new ground broken in that gasoline case but let me mention three points which I think are most significant.[4] First, the GATT Appellate Body assigned the burden of persuasion onto the defendant government. Second, it held that EPA failed to meet this burden because it did not show how it had factored into its decision making the higher cost being imposed on foreign gasoline producers. And, third, EPA did not show that it had sought a joint administrative solution with regulatory agencies in Venezuela and or Columbia which were the two complaining countries. What I want to say here is that there is some dissonance between what the Director General says about there being no constraint and the fact that recent WTO caseload deepens the constraints. All three of those interpretations I just outlined are brand new interpretations in the WTO and all are new constraints on what national decisionmaking can do.

Looking at the WTO Appellate Body's criticism from a public policy perspective, one could easily agree with it. EPA should get better at weighing the cost of its regulations on foreigners. For that matter, EPA should get better at weighing the cost of its regulations on domestic companies. But in imposing these requirements, the WTO is imposing new constraints and it seems clear that the Director General's speech quoted really was whitewashing that fact.

Let me now move to another trade rule. This involves the hormone and salmon cases. These are cases under the new WTO agreement on sanitary and phytosanitary measures and this is an agreement that supervises national regulations on products for reasons of public health for food safety. The hormone case is probably familiar to you; it's gotten a lot of publicity. Basically, the European Commission was banning, and is still banning, meat produced with hormones. The Appellate Body found that there was no evidence that that meat was less safe than other meat would be for people to eat and so the E.U. lost that case.[5]

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4. *See* Steve Charnovitz, *New WTO Adjudication and its Implications for the Environment*, 19 INT'L TRADE REP. 851 (1996)(discussing the Gasoline decision). United States — Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996).

5. *See* EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, Jan. 16, 1998. *See also* Steve Charnovitz, *Environment and Health under WTO Dispute Settlement*, 32 INT'L LAW. 901, 914-16 (1998).

The salmon case, a fairly recent one, is, I think, a different situation and an interesting one. Australia was banning the importation of untreated salmon — salmon that had not been heat treated — on the grounds that this salmon could contain pathogens that would be very harmful to Australia. Australia being an island nation, is vulnerable to these exotic pathogens. Nevertheless, the panel ruled against Australia. They said, yes, there was evidence that these pathogens could be harmful, but the panel felt that Australia's regulation was not adequately based on a risk assessment. I think, in that regard, the panel was probably right.[6] Australia hadn't procedurally done as much as it should have. But the panel went farther than that. They said that Australia also violated the WTO because it was being *inconsistent* in its regulations. The panel compared the way Australia regulated salmon to the way it regulated other fish such as eel. The panel then concluded that Australia was being tougher on salmon than on eel and, therefore, Australia was violating the WTO because they were inconsistent. The panel also held that Australia was violating the WTO because it hadn't used the most least-trade restrictive regulation. The panel said that there are other methods that could have been used instead of heat treatment. Australia hadn't done so and therefore that was a violation.

Again, let me state my overall point. These decisions demonstrate that the WTO is placing entirely new constraints on national decision-making. Some of these new disciplines were written during the Uruguay round. In this caselaw on sanitary standards, we are seeing tentative steps toward the development of international administrative law. Perhaps that's a good development. Nevertheless I think we need to be honest with ourselves and admit that yes, the WTO does impose constraints on national decision-making.

Another issue I'll just touch on briefly is the so-called the "aim and effect" test in GATT Article III. That is GATT's national treatment provision. The aim and effect test was designed in the early 1990s to enable panels to distinguish between two products as to whether or not they were "like" products. The GATT National Treatment Rule applies only to "like" products and so you have to determine whether two products being complained about are like or unlike. This came up in the Japan Alcohol case where Japan was being challenged on the grounds that it was taxing foreign-produced alcohol higher than domestic produced alcohol.[7] Japan said that

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6. *See* Australia — Measures Affecting Importation of Salmon, Report of the Panel, WT/DS18/R, June 12, 1998.

7. *See* Japan — Taxes on Alcoholic Beverages, Report of the Panel, WT/DS8/R, July 11, 1996.

they were different products because they were chemically different. The panel disagreed and did so by tossing out the aim and effect test.[8]

Without an aim and effect test, the national treatment requirement takes on very sharp edges. Losing that safe harbor makes it very difficult for governments to use tax or regulatory policy to distinguish products based on policy distinctions. Let me give you a couple of examples. Suppose a government wanted to impose a motor vehicle tax based on fuel economy. With an aim and effect test, the panel could say that high and low fuel economy vehicles are not like products. In 1994, a GATT panel did just that and allowed a United States law that distinguished between high and low fuel economy vehicles.[9] But without this aim and effect test, a panel could say that all automobiles are like all other automobiles and therefore a tax based on fuel economy could be viewed as a GATT violation. The WTO has laid a serious political trap for itself here. I should note that so far this Alcohol decision has not had any ramifications for the environment. But it is only a matter of time before regulations or taxes with environmental distinctions will be hit under this new rule.

Let me now move from the domestic environment and health to global issues. Dave Balton has talked about the shrimp-turtle case and I think that's an example of where a very difficult dispute is now before the Appellate Body and we'll have to see what they do with it. For global issues the Director General in his speech does not claim that GATT rules are innocuous. Mr. Ruggiero declares that a government cannot under WTO rules "apply trade restrictions to attempt to change the process and production methods or other policies of its trading partners."[10] So here the WTO Director General, I think, is being honest in what the WTO constrains. This leads to an important question: "should the WTO be constraining that?"

As was indicated by Mr. Balton, the panel said that the United States should have tried to negotiate a multilateral agreement. Yet I think that's a one-sided inquiry just to ask the United States why it didn't negotiate. It takes two to negotiate. I think it's just as relevant to ask say Malaysia or Thailand why it doesn't protect sea turtles.

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8. *See* Steve Charnovitz, *Environment and Health under WTO Dispute Settlement*, 32 INT'L LAW. 901, 902–05 (1998); Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for and "Aim and Effects" Test*, 32 INT'L LAW. 619, 626–33 (1998).

9. United States — Taxes on Automobiles, 33 I.L.M. 1397 (1994).

10. "A Shared Responsibility: Global Policy Coherence For Our Global Age," Address to the Conference on "Globalization as a Challenge for German Business," Organized by the German Federal Ministry of Economic Affairs and the Association of German Chambers of Industry and Commerce, December 9, 1997, WTO Press Release at 3.

The recognition that sea turtles are endangered goes back at least as early as 1924 when international action was first sought. If the WTO mechanism merely asks the question of why the United States uses a trade measure, but doesn't ask the question of why certain Asian countries are not safeguarding sea turtles, then it's a rather unbalanced mechanism. That Appellate Body decision is due out in about a month and I can assure you if it upholds the broad panel decision, there are going to be a lot of environmental groups that are going to be very unhappy with the WTO. Just last week, I got this new booklet "Slain by Trade" put out by the Sea Turtle Restoration Project attacking the WTO, and that's even before the decision comes out.

Finally, let me just offer a few observations. I think the WTO is clearly having an impact on environment and health law, but it's not happening the other way around. International environmental institutions are not yet having much effect on trade law. We are not inculcating environmental principles into trade policymaking. Indeed, the WTO has been resisting closer ties to environmental institutions. I think there is a real agenda here for using environmental principles to strengthen the trade regime. Environmentalists know that subsidies are bad — fishery subsidies or agriculture subsidies, or energy subsidies — and yet the WTO has not moved to stop those subsidies. Environmentalists know that protectionism in agriculture or textiles is bad for developing countries — it keeps them poor — and yet the WTO is moving very slowly to deal with that kind of protectionism. Environmentalists favor market mechanisms like labels to inform consumers and the public about how products are produced. Yet environmentalists fear that the WTO will try to outlaw labels about products in the name of freer trade. For instance, labels that say whether or not timber has been sustainably produced.

So this points to a deeper agenda. We have to do more than just defend environmental laws against trade rules. We need to infuse the best of environmental policy into trade policy. Typically trade and environmental policy diverge. Environmental policy aspires to transcend nationalism and it utilizes a holistic approach whereas trade policy often reflects autarchy and nationalism and doesn't recognize the cybernetic connections in our world economy. The challenge in the years ahead will be to improve both the trade and environmental regime by encouraging cooperation between those regimes and by encouraging each of those regimes to learn the best practices from each other. Thank you.

SYDNEY M. CONE, III: Thank you very much. Well, you certainly put a challenge before the next two speakers as well as before the whole world and so let's move to the next two speakers right away. Philippe Sands.

PHILIPPE SANDS*: Thank you very much, Sydney. I greatly enjoyed listening to the first two contributions. I think it's worth stepping even one notch further into the genesis of this event. It actually got triggered, going back even a month before our conversation, by a letter written by Professor Jagdish Bhagwati in the *Financial Times* in the summer of 1997. Various other people read that letter. Professor Bhagwati, who is a very distinguished economist at Columbia, was running a thesis that it would be very dangerous to integrate into the WTO system, objectives which were not directly related to the promotion of trade namely environmental protection and labor standards by which, he also indicated human rights standards. I wrote a response to that letter which indicated that there was another way of looking at this and that it was time to look at the international legal order in a more holistic manner. We have got to the point where today we deal with issues in a very fragmentary way in the international legal order. We have a law of trade, a law of human rights, a law relating to the activities of multilateral development banks, a law of the sea, a law of the environment, and numerous laws too expansive to mention. Somehow, the textbooks treat this order as though they are disconnected, as though the international legal order somehow is this fragmentary structure in which there is no contact or communication and that each of these systems lives in a state of hermetic encapsulation where it doesn't reach out.

Professor Bhagwati's basic thesis was that if we talk about environment, labor, and human rights standards in the trade context, we will unravel the trade regime. That was the concern. The response that I put in my letter, which was also published by the *Financial Times*, was that, over the long term, the sustainability of the trade regime or the environmental regime or the human rights regime, depended upon their ability to integrate concerns. None of the societal objectives have a particular primacy over another. There was then a further letter in which I was accused of being anti-economic growth, anti-development, anti-this, and anti-that. I received, a number of letters from people who had read this exchange of correspondence. Professor Cone suggested in our first conversation that perhaps we could invite the various authors to talk about these issues at this meeting, and I believe that was the genesis of this meeting. It's one of the great things you learn is that if you take the time to write a letter to a newspaper, you will get thirty or forty letters from all over the world, from people unknown to you attacking you critically, inviting you to do this, that

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and the other. It does in fact produce a response, so I want to thank you very much to responding to that letter in a personal way and leading to this.

The simple point that I make by way of this introduction is that there is a broader issue at stake here. We're not only concerned with trade and environment, we are concerned with human rights and trade, human rights and the environment, the law of the sea and trade, and the law of the sea and the environment. The bigger issue is how do we, living in a single planet divided among some 190 nations with about 20 major international legal orders emerging sometimes in a reconciled way and sometimes in conflict, meld the whole thing together in the absence of a central legislative or judicial system. In a nutshell, that is the problem that we face. It is the problem of globalization. It is in that context that the issues that were raised by the United States' actions in, firstly, the tuna-dolphin case and, secondly, the shrimp-turtle case, really need to be addressed. Do we believe in a system which encourages unilateralism or do we want to move towards a system which encourages multilateralism? Clearly, the two are not mutually irreconcilable because those of us who look closely at the development in international law, know that that tends to be a system going way back.

I looked with some of students in my course at NYU last week at an 1893 arbitration between the United Kingdom and the United States in which the United States intervened beyond its territory to stop United Kingdom registered fishing vessels from exploiting to extinction fur seals located in the Bering Sea. It's a very wonderful arbitration. The award is about seven pages and the pleadings are about 125 pages, but the pleadings are extremely entertaining. In fact, the case is identical to the tuna-dolphin case a hundred years later and the judgment was, in effect, the same. The tribunal said you can't do that. It's extra territorial application of your laws. And according to freedom of high seas, if the United Kingdom wants in its wisdom to exploit to extinction fur seals, there is no reason in law why it cannot do that. However, since we have been encouraged to do so by the two states, we hereby adopt regulation governing the taking of fur seals. Those regulations, in fact, became among the earliest bilateral treaty-based regulations governing the actions. You can fast forward and you'll find exactly the same thing seventy years later in relation to efforts by Iceland during the negotiation of the law of the sea convention to unilaterally extend its exclusive fishery zone by fifty miles and exclude the United Kingdom from fishing for cod in those waters and, lo and behold, what happens? Eight years later, the United Nations convention on the Law of the Sea allowed coastal states to extend to two hundred miles, their exclusive fishery zone. So there is a link between unilateralism and multilateralism.

Even more recently in 1995, many of you will remember, Canada went beyond its two hundred miles to stop a Spanish registered vessel from fishing

for Greenland halibut, which is a species that migrates between the high seas and Canada's exclusive economic zone. In part, the argument was that the Spanish vessel was flouting Spain's quota under a relevant regional fisheries agreement using nets which were illegal and so on and so forth. Lo and behold, a few weeks later, the United Nations adopted an agreement, the agreement on straddling stocks, which was a first for international law. The agreement basically establishes the basis for stopping high seas freedom and requiring states which wish to fish in areas regulated by regional agreement to first become parties to those regional agreements. It's a unique agreement. So, there is an inexorable link between unilateralism and subsequent multilateral action. The difficulty moving on from those two contextual elements is to deal with the situation that we face today in the trade and environment context, and Steve has given an excellent exposition of a range of cases that clearly have implications to the trade and environment nexus and David has set some of the background in terms of the tuna and shrimp cases.

I spend a lot of my time advising developing countries on issues so my perspective would be slightly different. We've been presented today with a rather compelling portrait of why the United States is or should be entitled to take measures to control the activity of foreigners outside United States territory in areas beyond anyone's national jurisdiction. I don't say for a moment that I'm not in some way sympathetic to the desire, and I genuinely believe, given the judicial and litigation histories in which those cases were brought, that these were not cases in which the United States was seeking competitive economic advantage. But the cases are problematic for another reason, and the reason the tuna case is problematic — and it's a point that I think that David didn't, I'm sure not intentionally, wish to address — is these dolphins are not in any way endangered. What was really happening here, was the United States was imposing upon third persons its own system of values. For various reasons, American people have a high degree of empathy to dolphins which even British people don't have. That requires and entitles the United States to take measures and this was, from an international legal perspective, fatal to the sympathies of a lot of people in relation to that case. If the dolphin had been endangered, if there had been an international agreement seeking to protect them from further endangerment, and if there had been compelling evidence that the United States had in fact sought to enter into an agreement with other states that might be affected then I think, plausibly, the United States' actions were or might have been justifiable. I think that people like me find themselves in the position with both the tuna-dolphin panel decisions, of saying right result, wrong reasoning.

The reasoning is very problematic for a large number of reasons, and the previous speakers have alluded to some of those reasons. I don't want to go

into any great detail about what those reasons are, but the reasoning shuts the door in a way that is perhaps more permanent and fixed than was necessary, and the reasoning doesn't adopt an approach which I think would be from an international legal perspective more plausible and more certain although it alludes to the whole question of the desirability of one state applying its laws extraterritorially. The second tuna panel decision in particular touches upon that issue because among the three panelists was at least one international lawyer who had a high degree of knowledge on environmental law.

One thing that is absolutely critical to understand, and I'm less critical than Steve about the performance of the Appellate Body, is that the GATT and WTO panels tend to be people who are trade diplomats. It's one hundred percent understandable that their interest in life is maintaining the trade regime. Why should they promote human rights or why should they promote environment? They have been trade diplomats for years, and they have been put there by their governments to protect that system. In the WTO Appellate Body system we now have a number of individuals who come from a far more general international background — for example, the formal Legal Adviser to the European Commission, Claus Dieter Ehlerman and Philippine Supreme Court Judge Florentino Feleciano. We begin now to see that the excessive trade focus in the GATT is being replaced in the Appellate Body context.

The shrimp-turtle case is perhaps not quite as problematic, but it nevertheless is problematic. The turtles are listed on an endangered species treaty. The problem with the treaty is that it doesn't regulate trade in shrimp. It regulates trade in the turtles themselves which are listed on the convention. The WTO panel did not accept the request of the United States to interpret the Convention on International Trade and Endangered Species broadly. The panel interpreted the Convention as regulating trade in turtles and did not allow the United States to rely upon the provisions of that instrument to seek, if you like, incidental protection through other trade measures. That problem is compounded by the fact that the United States most regrettably is not a party to other multilateral agreements which could conceivably be invoked in support of its argument. Most specifically, the United States is not a party to the Convention on Biological Diversity which contains a provision which quite clearly could be construed to allow measures to be taken extraterritorially where there is a serious threat to bio-diversity. So, one has to look at the picture in a slightly broader context and imagine that there are other ways of legally construing the situation. The United States will probably also lose the shrimp-turtle case in large part because, whilst their arguments are plausible in terms of the background of the rules of international law which exist and upon which they can rely, they are not

persuasive. I'll comment a little bit more about that in relation to the nature of international environmental law and how one approaches it.

Now, that takes us to the key question. Clearly the WTO institutions must be able to accommodate and integrate environmental standards, labor standards, and human standards. Just today, we're reading about a new case brought by — the debate that we're having now is not just about the environment — the European Union and Japan against the United States concerning the law in Massachusetts prohibiting the purchase by Massachusetts authorities dealings with companies that engage in activities in Burma on the grounds of Burma's atrocious human rights record and labor standards. So, the same principles apply and what you ought to be hearing me say is there is a need to accommodate these other standards. The GATT system will not be able to sustain itself if it cannot do so. The question is how do we do that? That's what I want to turn to very briefly. Well, there are basically two ways of doing it. The first way of doing it is the legislative route. Here, I'm focusing more on trade measures in relation to global commons areas rather than trade measures relating to domestic activities and focusing on the distinction which Steve drew between products on the one hand and production processes and methods on the other hand. The legislative way has been under way for about four years.

The WTO has established a committee on trade and environment to examine all manner of issues including the relationship between the WTO rules and the multilateral environmental agreement which now regulate a whole range of issues. That committee has made absolutely no progress. It might as well just be disbanded because it is a complete waste of time. Views are utterly and totally polarized on it, and it's quite clear that states do not have it in them to reach an agreement through the legislative process. The only alternative that we have then is through some judicial initiative and that places us now in the situation in which, unlike international law of twenty years ago, we now have an international legal order in which there is a range of judicial mechanisms available for states and other actors as a result of these disputes. One of those is the WTO Dispute Settlement Body. My understanding is that in a couple of years, when the right case comes along, and the right case I think has not yet come along, the Appellate Body will have reached a sufficient degree of maturity and authority to be able to indicate what the way forward is. Now, the Appellate Body is too young to do that. The means exist in international law in order to do that and let me explain a little more.

The process of treaty interpretation is governed by Articles XXXI and XXXII of the Vienna Convention on the Law of Treaties. That provides for the interpreter of the treaty to take into account a variety of sources in going through the process of interpreting a treaty, and it is established in both the

GATT and WTO system that it is appropriate to take into account the Vienna Convention rules in interpreting the treaty that is being applied and to go through that process. The WTO Appellate Body has now said something that was never said in any GATT panel previously, and that is that the rules of the WTO have to be interpreted in a manner which is not in clinical isolation from general public international law. That opens the door for the Appellate Body, on the right case, to proceed by way of reference to Article XXXI, paragraph iii, subparagraph C of the Vienna Convention on the Law of Treaties ("XXXI.iii.C"). If you read the second Tuna panel case you will see that they refer to the entirety of the text of Articles XXXI and XXXII except XXXI.iii.C which is not mentioned. What does Article XXXI.iii.C say that would indicate that it ought to be avoided? It says that in interpreting the text of the treaty, it's appropriate to take into account other relevant rules of international law. I'm told that in the second Tuna panel decision, one of the panelists wanted to invoke Article XXXI.iii.C in order to reach a different conclusion through a different form of reasoning. He was the sole international lawyer on the panel. The two trade diplomats said absolutely no way because that's going to open a Pandora's box and a can of worms, and there is no way we are going down that route by taking into account other rules of international law.

The GATT system will unravel, and that, in effect, is what the shrimp-turtle panel said in relation to its approach to the interpretation of the chapeau to Article XX. So, Article XXXI.iii.C amazingly has never been referred to in a GATT panel decision or in a WTO panel decision or in the Appellate Body decision. It's most interesting — and I don't know whether the United States did it in its own submissions — that two of the *amicus* briefs, which I understand from David were filed to the Appellate Body as an attachment to the United States' submissions, made no reference to whether they agreed with the contents specifically or to Article XXXI.iii.C as a way forward. The difficulty on this case is whether or not one could construe the endangerment of turtles in the convention on international trade and species as reaching a customary international law status. In my view, the better argument is, that it does and that if it wanted to, the Appellate Body could go down that route, but the case did not sufficiently allow it to go down that route.

In conclusion, the message I'm trying to say loud and clear is, firstly, we need to think about these issues of trade and environment in their broader context. Secondly, it is in the interest of the trade system to accommodate other societal interest if it is not to unravel at a later date. In the European Union context, we have clear experience that interpreting the Treaty of Rome, Articles XXX to XXXVI, by accommodating environmental standards has not lead to an unraveling of the trade regime. Thirdly, we do

not necessarily have to be unsupportive of unilateral measures if they are subsequently followed by a multilateral approach which is I think what's happened certainly in the tuna-dolphin cases. Fourthly and finally, we cannot allow the international legal order to continue with these sort of self-contained and self-referential regimes that do not reach out to meld a set of broader societal interests which are not necessarily irreconcilable.

SYDNEY M. CONE, III: Thank you for that excellent exposition. The last panelist, the cleanup hitter, Professor Srinivasan will now benefit us with his remarks.

T.N. SRINIVASAN*: Thank you. I am in a bit of a handicap. I'm not a lawyer. The previous three speakers are distinguished lawyers and they made their excellent case from a legal perspective for what they were arguing. I'm going to look at it primarily as an economist but before I do so, I want to ask the following question following what Philippe said earlier. Now, there is a trade law, there is a law of the sea, there is an intellectual property law, there are other laws and the view seems to be that these are all independent. They have their own existence and there is no connection among them. Now, from my perspective, there is a trade institution, WTO, there is an intellectual property institution, World Intellectual Property Organization (WIPO), there is an international labor organization which has been concerned with labor and human rights. If one were interested in human rights or in intellectual property matters, why not use these existing organizations with their expertise, with their knowledge, and if their enforcement mechanisms are not strong enough, why not negotiate, on how these enforcement mechanisms of these organizations could be strengthened. That is not the way the negotiations have gone. From the Uruguay round of multilateral trade negotiations, matters which were not directly related to trade were brought into the WTO framework. The reasons, as I see it, are several. One reason is that trade policy instruments, trade sanctions, trade embargoes, are seen as more effective instruments for enforcing something, and so whether or not what you want to enforce is related to trade, why not use the bludgeon of trade policy instrument to enforce it. That's one reason. The other is, that if you look closely, either the tuna-dolphin case or the shrimp-sea turtle case or the other similar cases to come, the developing countries are involved on one side and the United States and the developed countries are on the other side. Because of the success of GATT, and of its

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successor organization, WTO, world trade has been growing by leaps and bounds. The developing countries which were previously not integrated into the trading system, have become increasingly integrated and they are competing effectively in the markets in the developed countries, and they see the in markets are being threatened. One way of protecting their markets would be to use old-fashioned protectionist instruments, tariffs, or non-tariff barriers, but with the WTO and GATT being successful, those instruments are not available. So, what is the best way, what is the alternative way of attacking and addressing the competition from developing countries. There are several ways you could do so. One way is to increase costs, either labor costs by insisting that the developing countries, whether their labor market conditions, or stage of development would allow or not, impose the labor standards which they cannot afford or environmental standards which they cannot afford. What would that mean? This would raise their costs and reduce their ability to compete in the world market and that's one way you could protect your markets. So from the developing country perspective, the notion that there are the moral considerations involved in the human rights issues, and there are global environmental considerations, all sound hollow. Many developing countries see these as only camouflaging to the real end. The real end is old-fashioned protectionism and that's how many developing countries see it.

Now, let me take one example where there is universal agreement which is also enshrined in GATT. This is about prohibition of trade in products produced by prison labor. Okay. The GATT allows such prohibition. Now, if we agree the universal moral norms are indeed the foundations of the case against unfettered trade in product produced by prisoners, then what should one make of the activities of UNICOR, a corporation wholly owned by the government of the United States, run by the bureau of prisons in the United States? It operates a hundred factories, sells over 150 products including prescription glasses, safety eyeware, linens and so on and so forth. Its gross sales in 1995 was around half a billion dollars of which wages paid to prisoners was about only 35 million. According to the assistant director of corporate management of UNICOR, prisoners, and I quote, "prisoners are not covered by Fair Labor Standards Act minimum wage laws, they don't get retirement benefits, unemployment compensation, etc. They are just workers but they are not employees."

Besides publicly owned UNICOR, private industry has been attracted and allowed to operate within prisons and, as the owner of one such private company agreed, it was a fantastic deal all the way around. And he liked and I quote, "the financial advantages of a prison business, namely getting to hire the cream of the crop from a pool of cheap prison labor, not to mention the use of brand new air-conditioned factory space rent free."

The cost advantage of UNICOR and any private business operating with prison labor should be obvious yet, as the narrator (this was in a 60 Minutes program) of the story put it without realizing the absurdity of the economic reasoning involved and I quote, "in 1934, when Congress created UNICOR, it restricted its sales to one and only one customer, the federal government. The reason was to prevent UNICOR's cheap prison labor from undercutting private industry in the commercial market place, but Congress also armed UNICOR with one big advantage — it gets first crack of the government's business even at the expense of the private companies competing for the same work."

Now, an economist or anyone with a little bit of economic reasoning will tell you, any sale to government by UNICOR displaces what another producer, domestic and foreign, would have made. It is irrelevant that UNICOR is not allowed to export or sell to domestic private sector. Yet those in the United States and the OECD who accuse less developed countries of lower labor standards than their own as engaging in social dumping, fail to see that the operation of UNICOR has the same effect. The point I want to make is that there is no uniformity in the thinking about the moral issues involved whether it is labor standards or environmental standards.

Now, turning to environmental standards *per se*, one could distinguish two separate categories: one is a purely a domestic environmental concern. For example, if Indian producers or Indian activities pollute a lake within India's borders, that's a purely domestic concern of India. Now, if India pollutes the River Ganges which flows into Bangladesh, it's another matter. It is a matter that is not purely Indian domestic concern. One would have thought that on matters that are purely domestic, it should be no business of any other country to say what standards that India or any other country should have. But this is not what the environmentalists in the developed countries argue. There are several reasons why they think that even purely domestic environmental issues should be brought into the international forum. One is the level playing field argument. If India has a lower labor standard or a lower environmental standard, it gives "an unfair" competitive advantage to India and so this ought to be countervailed through international trade restrictions of some sort.

Now, if you think it through, for arguing such case whether the competitive advantage arises, if it arises at all, from the lower environmental standards or lower wages or whatever does not matter: Whatever competitive advantage that a poor country has in competing in the developed country markets, one way or the other, ought to be countervailed. If it can't be countervailed through old-fashioned means, let's think of new means of countervailing.

Then there is the pollution haven seeking argument — that is, if India or China or developing countries have lower environmental standards, producers in the United States will shift their base of operation from the United States to the countries which have lower environmental standards. Now, on the face of it, it looks plausible. But if you analyze the available empirical evidence, based on studies that the number of economists have done, and examine what motivates multinational corporations to locate in one country or the other, environmental laws come very at the very low end of the ranking. They are more concerned about what the political risk in investing in that country is going to be. What exchange the rate arrangement in that country is going to be and so on. They are more concerned about other risks of doing business than the possible advantage of moving into a country with lower environmental standards. And so the pollution-haven argument doesn't apply as well.

Now, if you recognize that countries of the world are at different stages of development, different levels of income and different valuation of the costs and benefits of putting in an environmental protection measure, then you would recognize that diversity in labor standards, and diversity in environmental standards, would be the norm rather than an exception. And so, if there is diversity, and if that diversity is legitimate, there is no particular reason to think in terms of harmonizing the standards regardless of the stages of development the different countries might be in. And this particular consideration is very salient when it comes to labor standards and it is not that much different in the case of environmental standards. Let me turn to the issue of unilateralism versus multilateralism. The previous speakers provided evidence from the recent cases that unilateralism by the United States ended up eventually in a multilateral outcome that perhaps is desirable.

Now, I have difficulty with this argument on two grounds. One is this is, as a general principle, not evident to me that every exercise of aggressive unilateralism will necessarily result in a benign multilateralism at the end. So, the outcome is not certain. Now, it's not also obvious to me why one couldn't start the other way. Take the tuna-dolphin case, for example. There was no attempt, as far as I know, of trying to persuade the Mexicans and the rest of the world before the import ban was instituted, to persuade them from why the dolphins are so important, why they should value the dolphins the same way the United States was valuing them, and why, in their own interests, the Mexicans should do what the US wanted to do. This wasn't done. Now, you started with this trade embargo and then proceeded to move from there on after the GATT panel ruling. Why not, if indeed, the multilateral option is available, why not try the multilateral option first and, if it fails, then the unilateral option is always available. It is not ruled out.

And so, I'm not persuaded by the case, by the argument that unilateralism, and particularly of the type that the US has pursued, namely the aggressive unilateralism, is going to necessarily result in benign multilateralism.

I will conclude with the plea that we utilize all the institutions that are available to achieve desirable goals in the area of environment, in the area of labor standards, in the area of intellectual property and what have you. Let us strengthen the specialized institutions, and if there is a conflict or if there is a problem of the jurisdictions of two or more institutions not overlapping and their principles are not consistent, there are ways of coordination and consultation among institutions to resolve them. If we load on the WTO, which has a very well-defined trade mandate, and which had a successful history of promoting world trade over the five decades and divert it into areas which are not really trade related, this is going to unravel WTO. In the end, we will neither have better environment nor better human rights, but only have poor trade and poor economic growth. Thank you.

SYDNEY M. CONE, III: I want to thank the four speakers and with their approval, we'll proceed to request questions from the floor.

AUDIENCE MEMBER: I have two questions. Since I'm probably not going to get another shot at this microphone, I thought I'd ask both while I'm up here. One is for Philippe Sands. You have indicated that you thought there were two ways of getting to the goal line of having an international organization that could uphold and enforce environmental standards. One was essentially legislative and one was judicial. I was wondering if you thought there was any merit to the notion that perhaps we have a sufficient amount of legislative authority out there and that perhaps there is an executive function or executive branch that could have some effective role to play in this context. Do you think perhaps the UN or some other organization might use the existing legislative framework to take executive action that would be effective? And for Professor Srinivasan — I thought your defense of free trade and your comments about why a level playing field is not necessary to be somewhat persuasive with respect to purely domestic issues, but I noticed that when you moved into the international arena, you really didn't address the question of what happens when you're dealing with the global resource or global issue and how do we establish a system or how do we defend or what are the arguments against having some sort of universal standard in that context?

PHILIPPE SANDS: Outside of the European Union context, there isn't really in the international legal order, the type of executive authority that I think you're referring to. We are essentially living in a world of

desegregated international institutions which are nothing more than the sum of their parts, namely, their membership. Members have been unwilling outside of the European Union context to hand over to institutions this type of executive function. For example, there is no possibility of the United Nations bringing proceedings on behalf of the turtle, of Southeast Asia. We just don't have that institutional structure outside of the European Union. Personally, I'm persuaded that it is inevitable as the international legal order matures, and it is somewhere in the medieval era at this point, that that will come. But I think it's unlikely in the very short term, either in the trade or in the environment. We've seen in the human rights context efforts to empower Mary Robinson in relation to the promotion of human rights internationally are really falling very short of what a lot of the human rights activists and some states want to do. So, I think that's some way off and into the vacuum, and we're in a legislative logjam equally internationally. My instinct is that that is the place where the changes, if they are to occur, will occur.

T.N. SRINIVASAN: You're right, I didn't address the question of the international rather than domestic environmental issue. Now let me take the example of global warming and emission of greenhouse gases as an example of the global pollution issue. Now, here I would argue there is an equity issue and there is an efficiency issue. The efficiency issue is that suppose internationally or multilaterally, it is agreed that the emissions have to be reduced to a certain level. Now, what is the least costly way of achieving that reduction? Now that might involve much of the reduction taking place in let's say certain countries, Okay? Now, the equity part of it is that the cost of achieving that reduction in that country should not be borne only by that country because it is a global. So what is the solution? If first we agree multilaterally, for global welfare reasons, how much reduction should take place, you decide what is the least costly way of doing it. Perhaps compensation through income transfer or technology transfer or whatever the countries which have to bear most of the reduction requirement. So if you had that arrangement by which the goals are multilaterally set, and their efficiently implemented and equitably shared, that would be the route I would go rather than say — look, if you don't reduce your CO_2 emissions or SO_2 emissions by such and such, your market access to the United States is going to be denied through linking the environment with the trade policies.

AUDIENCE MEMBER: Just briefly that, sure, while theoretically one could imagine some sort of compensation mechanism, I mean the United States has a hard time just paying our UN dues, so for us to imagine us appropriating

money or something to compensate for the other countries, I think that would be pretty hard.

T.N. SRINIVASAN: Then you shouldn't talk about environmental goals.

AUDIENCE MEMBER: We're derelict these days in paying our dues to a number of, not only to the WTO and I think UNEP and the UN generally. Absolutely, it's a problem.

SYDNEY M. CONE, III: Well, I'm not sure you're not engaging yourself in this sort of linkage of money with ideas. Let's move on.

AUDIENCE MEMBER: When this issue came out, I guess in the press, regarding the sea turtle business conflict, I think that many people within the international trade community who are not openly environmentalist definitely expressed their outrage and disappointment with the different trading partners. What I'd like some of the panel members at least to touch upon is that I read in the *New York Times* that the United States did offer foreign assistance to pay for turtle excluders. I guess as a business person, one sits back and wonders, that you're being offered money to offset some of these costs and, really, what their rationale was? I believe there were three different countries, and supposedly they just cited their principles but I want to know if you knew more about this.

DAVID BALTON: I might be able to address that. In fact, for about ten years, the United States government has been engaging in a thorough aggressive campaign to transfer the technology to protect sea turtles in the course of shrimp-trawl fishing. With our friends the National Marine Fisheries Service, the Department of State has conducted up to fifty seminars and training exercises in foreign countries to show people how to make TEDs, how to install them, and how to use them. It's not rocket science, but it is a little tricky and it does require some training and practice. Also, we have invited scores of foreign officials to the United States for similar training in a laboratory in Pascagoula, Mississippi. The TEDs themselves are very cheap. In India, for example, they can be manufactured from local materials for about eight to twelve dollars. So, actually, providing the TEDs themselves is not nearly such a valuable thing to do as to provide training in how to use them and how to install them. That's what we have been doing, rather successfully. It has led to the adoption of programs requiring their use in many countries. Thank you.

SYDNEY M. CONE, III: Next. Yes?

AUDIENCE MEMBER: This question is directed to Philippe Sands. I think your point about the need for coordination between our international legal regimes is well taken. I wonder if there was a consensus that the WTO agreements should be interpreted in light of the existing international obligations of the members — whether the Appellate Body would be the appropriate forum for addressing those issues?.

PHILIPPE SANDS: I'm pretty optimistic about the Appellate Body. I mean I think that there are a number of extremely able individuals on the Appellate Body. I think it's very difficult for them in their early days to exercise the type of decisive decision-making in the direction that you have indicated because institutions take time to get up and running. But they have taken a number of very dramatic steps. As lawyers, we know that he or she who controls the drafting has a decisive input on the final outcome. One of the rules that has always applied in the GATT was that panel decisions would be drafted by the Secretariat of the GATT not by the panel members themselves. That has continued to prevail for the most part in the WTO context. At its very first meeting, when the WTO Secretariat turned up to assist the Appellate Body in the drafting of its first report, they were excluded from the room. They were told that they were not needed. I suspect that we will begin to see the Appellate Body exercising the type of judicial independence that was never shown in other bodies. So, I remain pretty optimistic at this point. Nothing I've seen yet — and I know that for some diehard GATT persons — I happen to be with the former legal advisor to the GATT the day the Appellate Body handed down its first decision in the Gasoline case, and he literally, no kidding, almost started crying when he saw the approach to analysis that the Appellate Body was taking. When he saw the words WTO System is not to be interpreted in clinical isolation from public international law. Those few words have dramatic consequences. So, I think they are preparing themselves to gear up to some rather decisive action although, as I indicated, this isn't quite the right case.

SYDNEY M. CONE, III: But before we go to the previous question, was your question, Ma'am, addressed to the competence of the individuals who at the moment happen to compose the Appellate Body, or was your question more of an institutional one?

AUDIENCE MEMBER: I think it's both really.

SYDNEY M. CONE, III: Would you care to comment on the institutional aspect of the Appellate Body which is a WTO Appellate Body and it isn't

even the supreme WTO body for disputes only, institutionally, the proper place to fuse diverse international agreements?

PHILIPPE SANDS: Well, I think the sad truth is that there isn't anywhere else. The International Court of Justice isn't going to do it because it tends to shy away from the hard technical type of issues. And it might give some general dicta on methods of interpretation, and so on and so forth. The Law of the Sea Convention has an express provision which makes it clear that if a trade issue arises, it is to be addressed not in context of the law of the sea, but in the context of GATT is what is what they've got in the text. One can image human rights instruments dealing within some corners but they don't yet have those bodies, the type of decisive authority that the Appellate Body has, so I suspect that, for better or worse, it is likely to developed by the Appellate Body. I apologize. I didn't understand that side of the question. But it's a very valid part of the question. Thank you very much for raising that.

SYDNEY M. CONE, III: You were going to revert to the earlier question.

PHILIPPE SANDS: I was just going to say that in terms of David's answer, I didn't hear whether you confirmed the United States had actually offered to pay for any of these turtle excluder devices. You indicated that there were seminars and teachings. But I didn't know whether there were any transfers financially available. But I would just throw out the question, — let's imagine a group of Chinese town planners coming to the United States and offering to give seminars on town planning and how you build towns which are not spread over 1,400 square miles, but rather are spread over 50 square miles so that people don't need to use their cars, so that people don't need to drive as much. I mean, it would have exactly the same reaction. It would be rejected as a totally unacceptable interference in the domestic affairs of the state, and outrage would be expressed. It's about how you do these things.

SYDNEY M. CONE, III: Are you speaking of this country or of your own?

PHILIPPE SANDS: I am speaking in particular of this country, Sydney. But I can tell you it would have the same reaction in the UK.

DAVID BALTON: I would have to comment that in the case of the training exercises we have run, they have met with very positive reactions on the part of the recipients. We have done so many of them because they've been requested of us. Let me also add that the turtle excluder device is not a piece of United States technology. Indonesia was using TEDs long before we

were. While there are problems of communication, cultural differences, and certainly disparities of economic development, in fact shrimp trawling is more or less the same exercise no matter where it takes place in the world. Very much the same gear is used, and the institution of this particular piece of technology is something that can be learned by people in different languages and at different stages of economic development, quite successfully. It's not like Chinese town planners coming to the United States. Thank you.

SYDNEY M. CONE, III: Next question. Somebody else over here. Yes, Ma'am?

AUDIENCE MEMBER: I want to just read this to you. The devices — the turtle excluder devices could save ninety-seven percent of the 150, 000 sea turtles that die in nets every year by losing up to three percent maximum of the shrimp. If we were to go towards green accounting, we could, for example, give to everybody who uses the excluder devices subsidies and monies for what the saving of the turtles that they accomplish. And this way, I think, you could get a push towards everybody being interested in using them. That's maybe the other way to approach this issue.

SYDNEY M. CONE, III: Thank you. Does anyone want to comment on that comment?

DAVID BALTON: I would say I agree with that.

SYDNEY M. CONE, III: You've managed to evoke agreement among the panelists. My congratulations.

AUDIENCE MEMBER: This really is a question for Mr. Charnovitz. I detected some note of pessimism about the lack of consensus or ability of both sides of this equation to persuade each other on how best to accommodate some of the mutual goals. I note that at the end you said that the challenge is really to find some way to get people to meet in the middle. I think my question really is, what kinds of activities do you see that can best promote that? As a practicing member of the Bar and Chairman of one of the Association's committees, my ideas for the fostering of public dialogue through evenings like this. But, I'm curious to hear what else, in your mind, is the best way to move toward that goal, I think it's a very laudable one.

STEVE CHARNOVITZ: Yes, that's a good question. I guess I am kind of pessimistic about this. I see in the — as Philippe said — in the World Trade

Organization, the Committee on Trade and Environment, and its two predecessors, made virtually no progress on this issue. We have in the United States over the last four years or so a debate about extending fast track authority to the President to negotiate new trade agreements and we've made really no progress over that. One of the key issues there is how you deal with environmental concerns. We have in the free trade area of the Americas those negotiations going on. There was an important meeting this week on that to get those trade negotiations moving. Yet, there's been very little progress among the countries in thinking about what are the environmental dimensions of that regional economic integration. So, I guess, I am a little pessimistic. But I think events like this are the right approach. We've got to get people from the different perspectives together in a dialogue to talk about these issues and go beyond the polarization and looking at some of the false issues, but rather look at the issues where there ought to be some common ground. I mean we ought to have common ground on a global environmental issue like endangered sea turtle. That's really the core issue here, not telling a country what to do about its own domestic environmental policy. I think we've got to get people from the business community, and the environmental community, and consumer groups and other stake-holders in the debate along with people from the government and try to talk through these issues and make progress both nationally in our own system where our trade policy has been on hold for four years, and internationally to get a new WTO millennium trade round started, and to make progress in regional agreements to the extent we're going to move on regionally on these kinds of issues. So I think that this sort of setting is a good one, and we just need more things like this.

T.N. SRINIVASAN: May I add a word?

SYDNEY M. CONE, III: Please.

T.N. SRINIVASAN: I'm not persuaded that the fact that the trade and environment committee in the WTO hasn't progressed very far, there is that thing in and of itself. The reason it hasn't gone very far is that, unlike in trade matters, the agreement on environmental matters, universal agreement on environmental matters, isn't there, and when there is no agreement, trying to push what might be special interest relating to environment through an organization on which there is universal agreement about trade matters, this will not go anywhere until there is much better consensus on what one wants to do in the environmental direction. So, in that sense I view this as a positive outcome rather than a negative outcome, that the trade and environment committee hasn't gone anywhere in WTO.

PANELIST: I guess I'm not sure I would view the WTO or the GATT as an institution on which there was universal agreement on trade matters. When I'm thinking about the trade environment debate, I'm thinking about the need to make progress toward free trade as a goal, and also to make progress toward better environmental protection. I think both concerns are equally important and I'd like to see the WTO do a lot more to move toward free trade. I don't see any consensus there at all. The committee on trade and environment could be doing that, too. It could be pointing out the environmental gains that could be gotten from less protectionism and more trade. So, it's not just an environmental agenda. It's not a question of, as you said before, overloading the system. The system in the WTO is supposed to be aimed at emancipating trade and liberalizing trade. It's not doing that too well either. So, I think environmentalists need to be pushing not just to safeguard sea turtles, but they ought to be pushing to liberalize trade.

SYDNEY M. CONE, III: I might say that the fact that the committee on trade and the environment has thus far not made significant progress is not surprising. It took seven years to conclude the Uruguay round. These matters take time. There is an unbelievable large number of interests that have to be accommodated and dealt with. If one is not endowed with considerable patience in this area, one should pick another area of intellectual interest. Sir?

AUDIENCE MEMBER: I'm Chair of the International Trade Committee here at the Association of the Bar. If you assume that countries enter into multilateral treaties, let's say in the environmental field or in the labor field — take your pick — and then they don't live up to those commitments that they've made in those treaties. If you don't use trade measures, how do you enforce those treaties? How do you bring a recalcitrant signatory to a treaty back in to live up to its commitments? For Professor Srinivasan or any of the other panelists.

T.N. SRINIVASAN: Let me take a crack at it. First of all, the notion that trade instruments are always effective in enforcing, I think this is wrong for several reasons. The one country on which this trade measure is applied has always got the option to forego the gains from trade, and not do anything. You can have a trade embargo, but no effect on the environment that you want to achieve through trade embargo. So the effectiveness of trade instrument is exaggerated. So I question your premise that trade instrument is effective, and that is the only instrument that is available to force countries to conform to agreement that they have signed on. The other argument is

that if you are designing an agreement, it has to be a self-enforcing agreement. It has to have, in and of itself, within the agreement or within the institution measures that ensure that there is compliance. Simply having an agreement when you know you have an issue that the incentives for complying with that agreement are not uniform across the signatories, that is a prescription for the treaty not being effective. And so, again, it seems to me that both that the panel negotiating the kind of agreement, you have to pay attention to whether the agreement is in the interest of parties who are signing, to enforce.

SYDNEY M. CONE, III: Philippe.

PHILIPPE SANDS: You've raised an interesting perspective that we haven't touched on and that's the use of trade measures, if you like, as a carrot rather than as a stick in international agreements. There are now a number of international agreements, environmental and other, which contain provisions that effectively provide that the states which are not parties to the agreement — they will suffer trade restrictions. I'm thinking of the Montreal Protocol on Ozone Depleting Substances and Richard Stewart and I at NYU served four years as legal advisors to the Environmental Protection Committee of the National People's Congress of China. It was made abundantly clear to us that if there had not been that provision in the text, China would not have become a party to the Montreal Protocol. I suspect, the same is with India, coupled with some financial incentives that are of a rather minimal character. The Basle Convention on Trans-Boundary Movement in Hazardous Waste has the same provision and that since the United States is not a party, now has the effect and principle of excluding the United States from trading internationally with the developing world in hazardous waste. United States industry, I understand, is champing at the bit to get the Senate to ratify that particular instrument. Finally, and one which is an interesting one, the chemical weapons convention has a remarkable provision in it which basically says you can't trade in chemicals — a whole list of chemicals — which could be used to make chemical weapons if you are not a part of the chemical weapons convention. It was only on the basis of that provision that the United States became a party to that convention. I remember the tremendous debate there was in Congress. Ultimately it was industry that insisted. There, I think, are three examples of trade restrictions being used as carrots rather than as sticks but have been very effective in bringing participants into a regime, and in that sense strengthening the regime.

T.N. SRINIVASAN: Within each of those examples within those regimes, WTO was not brought in at all. The trade sanctions through WTO were not brought in.

PANELIST: If you look at the history of international environmental treaties, you'd see from the very first environmental treaty in 1900 and the second one, that the use of trade measures to make the treaties work. Certainly not all environmental treaties these days have trade measures. Very few of them do. But there has been a long time recognition that trade measures could be useful in an environmental treaty.

SYDNEY M. CONE, III: It's nine o'clock. We'll take one more question from this gentleman here.

AUDIENCE MEMBER: I'm a principal at Golden Associates, a customs and international trade firm here in New York, and a former member of the Committee on International Trade here. A lot of the discussion has focused on broadening the GATT to deal more with environmental issues or keeping its focus narrow. I think there's an important distinction that's been blurred between the sea turtle type issue and the more classic trade/environmental issue.

The sea turtle issue is an international issue because it involves harvesting of a natural resource in international waters. It's not necessarily a GATT or a trade issue. There are other treaties that cover it and there can be other treaties that deal with it. Really, GATT is convenient because GATT has an enforcement mechanism which other treaties don't have. But there's a classic trade environmental issue in which the liberalization of trade is literally creating the environmental problem. To me, that's the issue where the GATT must address the environmental issue. And it's a classic dilemma. As you lower trade barriers, you enable manufacturers to move to really sharp jurisdictions for production. Classically, manufacturers look for cheap labor production location. But, that's only really very labor-intensive industries — when they look for jurisdictions where labor is cheap and labor regulation is loose either in enforcement or in drafting. In certain industries where environmental costs are a major concern, manufacturers can look for jurisdictions where environmental regulation is loose, either in enforcement or in drafting, they can move to those jurisdictions and, because of the lowering of trade barriers, they can move their product produced in those jurisdictions, to any market in the world. And you end up having a race to the bottom in the sense that jurisdictions then have to, in order to compete for the manufactures lower their trade regulations and enforcement to compete to bring manufacturers back. And the classic dilemma that occurs when you

are liberalizing trade barriers, is that you really need to have some kind of minimal standard for regulation and enforcement of regulation to prevent the race to the bottom. That occurs in all areas actually of commercial regulations, not just environmental regulation.

SYDNEY M. CONE, III: The race to the bottom, or as Professor Srinivasan has written, I believe it was Professor Srinivasan, more accurately might be called the race toward the bottom is a dilemma that I think the panel is familiar with. So if you will permit me, I will now take that concept which the T.N. did talk about and did say was more of an illusion in his view than a problem and so I will abridge your question, sir, and ask the panelists to deal with it. Sir?

DAVID BALTON: I would start by observing that the sea turtle case is the classic case. Shrimp are not harvested in international waters. They are harvested in waters under national jurisdiction. Because United States trade barriers or tariffs on shrimp are so low, eighty percent of the shrimp consumed in this country is imported. There is a lot of production of shrimp in other countries to satisfy the United States market and, because of that, environmental harm is if not created at least exacerbated, namely, the killing of sea turtles. And, while I have the floor, I wanted to take on at least call into question a comment by Philippe Sands earlier . . .

SYDNEY M. CONE, III: Before we call Philippe to task. Well, we will get to that. Any other comments on the race to or toward the bottom? You really dealt with it. Yes, it was dealt with by you earlier. Right. Okay. Why don't we now go on.

DAVID BALTON: The race to the bottom problem or toward the bottom problem is, in my view, a real one in this case. We did try to present that to the WTO panel and to the Appellate Body. Interestingly though, we did not ask either the WTO panel or the Appellate Body to look beyond the four squares of the WTO Agreement in the way that Philippe Sands suggested might be appropriate. We did refer to the Law of the Sea Convention, and the United Nations Fish Stocks Agreement, but only to support tangential propositions, namely, that sea turtles are recognized to be endangered, that there is a general commitment to conserve living marine resources and to minimize what we call by catch, particularly endangered species. But we felt, and still feel, that, this particular United States trade measure is justified under the actual terms of Article XX of the WTO Agreement sitting by itself. For those of you familiar with it, under Article XX(g), we feel that this is a measure that relates to the conservation of an exhaustible natural resource,

the sea turtle. We do make it effective, we think, in conjunction with restrictions on domestic production. United States shrimpers have to observe the very same rules that we require of imported shrimp. And we do think we satisfy the terms of the Chapeau to Article XX that this is neither an arbitrary nor unjustifiable discrimination between countries where the same conditions prevail. In fact, we think we treat like countries alike, and different countries differently. And, finally, it's not a disguised restriction on international trade. If it were disguised, why would we have undertaken the effort we have to promote the use of turtle excluder devices, and to encourage countries to protect sea turtles? Anyway, I just thought I'd offer that up as a final thought of mine. Thanks.

SYDNEY M. CONE, III: Shall we let the Department of State have the final word or do you want to respond to that?

PHILIPPE SANDS: Very brief. Just the analysis, David, would apply equally to Dolphins so you draw no distinction between the two cases. I think the central . . .

SYDNEY M. CONE, III: The dolphins are underrepresented on this panel.

PHILIPPE SANDS: I think the critical issue is, the word is coercion, to what extent is the United States coercing other states to adopt a certain form of behavior. I think the way out for the Appellate Body is to find a way of satisfying itself that coercion is not occurring. The only way it can do that is by reference to some other instrument. It might or might not indicate that these countries have voluntarily accepted limits on their freedom in relation to harvesting of certain species. I think if the Appellate Body can satisfy itself that there isn't in the sense that the 1994 tuna-dolphin panel found coercion, then, I think, your test is satisfied. But in this case it is not clear whether there was coercion.

DAVID BALTON: My only problem with that analysis is that I don't see the word coercion in Article XX. I think, and this maybe a radical thought, that Article XX ought to be applied as written, and maybe it really does mean that countries did not agree to limit their right to restrict imports, or exports I might add, for the sorts of reasons listed in Article XX, whatever the consequences. Thank you.

SYDNEY M. CONE, III: I want to thank everyone — the panelists and the participants. I think this has been a very successful symposium, and I now declare it — with thanks — adjourned.