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Cover Page Footnote

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GREENING WORLD TRADE: RECONCILING GATT AND MULTILATERAL ENVIRONMENTAL AGREEMENTS WITHIN THE EXISTING WORLD TRADE REGIME

CHARLES R. FLETCHER*

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I. INTRODUCTION: A GROWING AWARENESS OF THE NECESSITY OF MUTUALLY REINFORCING TRADE POLICY AND ENVIRONMENTAL POLICY

> Here is a national interest of nearly the first magnitude. It can be protected only by the national action in concert with that of another person. But for the [Migratory Bird Treaty of 1916] there soon might be no birds for another power. We see nothing . . . that compels the Government to sit by while . . . the protectors of our forests and our crops are destroyed.
>
> —Justice Oliver Wendell Holmes[1]

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Protection of the environment and promotion of free trade are relatively recent phenomena in international law. Justice Holmes' opinion protecting migratory birds addressed one of the earliest international environmental agreements in North America.[2] Nearly forty years after that agreement, nations negotiated the first global trade liberalization treaty, the General Agreement on Tariffs and Trade (GATT).[3] This watershed agreement initiated a marked departure from the previous national policy of high tariffs to the modern trend toward lower tariffs and trade liberalization.[4] Since its inception, GATT membership has grown to include nearly every nation in the world.[5] The trade liberalization fostered by GATT has stimulated unprecedented growth in international trade and economic development.[6] Subsequent "rounds" of trade negotiations within the GATT framework have continued to increase global free trade.[7] The most recent round of GATT negotiations, the Uruguay Round,[8] extended free trade principles to the new economic sectors, including intellectual property[9] and services.[10]

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1. Missouri v. Holland, 252 U.S. 416, 435 (1920). Justice Oliver Wendell Holmes, writing for the majority, commented on the importance of protecting migratory birds. *Id.*

2. Protection of Migratory Birds, Aug. 16, 1916, U.S.-U.K. (Canada), T.S. No. 628.

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700 [hereinafter GATT].

4. *See* JOHN JACKSON ET AL., LEGAL PROBLEMS IN INTERNATIONAL ECONOMIC RELATIONS 5-7 (3d ed. 1995). Although technically only a provisional agreement and never ratified by the U.S. Senate, the 1947 GATT has become the primary global trade liberalization tool. *Id.* at 289.

5. The most notable non-members are China and Russia.

6. BROOKINGS INSTITUTION, THE NEW GATT 8 (1994).

7. Eight GATT rounds have been negotiated: Geneva 1947, Annecy (France) 1949, Torquay (England) 1951, Dillon 1962, Kennedy 1967, Tokyo 1979, and Uruguay 1986. *See* Loretta F. Smith, *The GATT and International Trade*, 39 BUFF. L. REV. 919, 944 (1991). *See also* JACKSON, *supra* note 4, at 289-91.

8. The Uruguay Round made great strides toward an international economic regulatory agency by the creation of the World Trading Organization (WTO). For the first time there is a single dispute resolution mechanism for all aspects of the GATT that is binding and enforceable on all GATT members. BROOKINGS INSTITUTION, *supra* note 6, at 15. It will no longer be possible for a single GATT member, such as a defendant, to block adoption of a GATT dispute resolution panel decision. Dispute resolution panels will now automatically go into effect unless appealed under a new binding appellate review process. *Id.* Furthermore, the WTO finally creates an institutional framework that did not exist under the 1947 GATT. The "old" GATT was an interim agreement and never had an institutional structure commensurate with the scope and importance of the treaty. *Id.* The new WTO will provide an institutional framework including the "old" GATT and all agreements negotiated in the Uruguay Round. *Id.*

9. The Agreement on Trade-Related Intellectual Property Rights (TRIPS) was negotiated in the Uruguay Round. *See* BROOKINGS INSTITUTION, *supra* note 6, at 84-86, 99-105; JACKSON, *supra* note 4, at 291.

10. The General Agreement on Trade in Services (GATS) was negotiated in the Uruguay Round. *See* BROOKINGS INSTITUTION, *supra* note 6, at 84-99; JACKSON, *supra* note 4, at 291.

This Article explores alternatives for eliminating conflicts between multilateral trade policy[11] and proposes a proffered alternative for reconciling GATT and multilateral environmental agreements within the existing world trade regime. First, this Article examines why reconciliation of trade and environmental policy should be an important goal of the international community. Part II describes the history of environmental treaties in relation to international trade agreements and environmental treaties. Part III then analyzes whether the current GATT/WTO regime sufficiently harmonizes the goals of free trade and environmental protection. Finally, Part IV explores various proposals offered for the reconciliation of environmental policy and free trade while proposing an alternative for reconciling environmental policy and international trade within the existing trade regime.

A. Evidence of the Increased Environmental Awareness

> There is a powerful if prosaic place for an understanding of our planet[] . . . to begin: from the prospective of an astronaut, at a distance from which the political boundaries, the pointed message of traditional schoolroom maps, are indiscernible.
>
> —Christopher D. Stone[12]

In 1992 attention to the impact of international trade and development on the global environment in the United States intensified as a result of the United Nations Conference on Environment and Development (UNCED)[13] and the United States presidential campaign. At UNCED, over 170 representatives from various countries met to develop a plan for achieving global sustainable development.[14] While by most accounts the representatives did not achieve this goal, they did initiate an important dialogue on the connections between economic development and the environment.

During the 1992 United States presidential election, vice-presidential candidate Albert Gore, Jr. stated that international trade and environmental protection should be coordinated to encourage sustainable development.[15] He also attacked United States President

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11. The proposals explored in this paper focus primarily on the GATT/WTO, the principal global free trade agreement.

12. CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN 33 (1993).

13. *See* Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M. 874 [hereinafter Rio Declaration].

14. WILLIAM K. REILLY, STATEMENT BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FOREIGN AFFAIRS 2 (July 28, 1992).

15. Guy Gugliotta, *Gore Faults President on Jobs, Environment*, WASH. POST, Aug. 4, 1992, at A8. The Bruntland Commission popularized the term "sustainable development" in its report

George Bush for obstructing progress toward sustainable development at UNCED, and creating a false choice between the environment and development.[16]

Prior to the presidential campaign, Mr. Gore explained that the true choice is not between the environment and development but between long-term solutions and short-term needs:

> It is now all too easy to regard the earth as a collection of "resources" having an intrinsic value no larger than their usefulness of the moment....
>
> Too often we are unwilling to look beyond our ourselves to see the effect of our actions today on our children and grandchildren. I am convinced that many people have lost their faith in the future, because in virtually every facet of our civilization we are beginning to act as if our future is now so much in doubt that it makes more sense to focus exclusively on our current needs and short-term problems.[17]

Albert Gore argued that any long-term solution to global economic and environmental problems would require trade policies that promote sustainable development.[18]

Our Common Future. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43-54 (1987). While the commission did provide a loose definition of "sustainable development," the term is subject to considerable interpretation. Interpretations range from economic development, which is managed so as to ensure indefinite economic growth, to one which limits the consumption of resources to levels which will not degrade natural resources. *See* L.D. GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 310-11 (1994). One definition of "sustainable development" proffered by environmentalists is development which is indefinitely sustainable because it does not rely on the exploitation of non-renewable resources or the exploitation of renewable resources at a rate higher than the resource can replenish itself. *See* Address by David Brower at the Student Environmental Action Coalition Threshold Conference (Oct. 1-3, 1989) (notes on file with author). A useful analogy is a beneficiary of a trust. If each year the beneficiary only spends the interest earned by the trust, then the beneficiary can live off the trust indefinitely. However, if each year the trust beneficiary spends more than the interest earned and therefore spends part of the capital, then eventually the trust fund will be exhausted.

For the purposes of this Article, the term "sustainable development" will refer to the Bruntland Commission's call for development which "meets the needs of the present without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra*, at 43. This definition implies the most efficient use of exhaustible natural resources and use of renewable natural resources up to the level of a "safe yield," *id.* at principal 7, similar to the trust beneficiary analogy described above. A "safe yield" should ensure indefinite utilization the resource.

16. *Id.*

17. ALBERT GORE, EARTH IN BALANCE: ECOLOGY AND THE HUMAN SPIRIT 1-2 (1992).

18. *Id.* at 184-85, 191, 279, 434. Other commentators argue that a paradigm shift in the modern view of wealth and poverty is a prerequisite for the creation of political and legal institutions that will protect the environment. Heather Fisher Lindsay, *Balancing Community Needs Against Individual Desires*, 10 J. LAND USE & ENVTL. L. 371 (1995).

B. *The Tragedy of the Commons: GATT's Role in Achieving Global Sustainable Development*

> Though men now possess the power to dominate and exploit every corner of the natural world, nothing in that fact implies that they have the right or the need to do so.
>
> —Edward Abbey[19]

Potential solutions to environmental issues are perhaps most clearly described using the concept of the tragedy of the commons, played out on a global scale.[20] Approximately seventy percent of the earth's surface is either part of the global commons, or not yet subject to undisputed national control.[21] Consequently, a major challenge facing the international community is how to prevent over-utilization of the global commons and achieve global sustainable development.

The international community has, in fact, engaged in substantial efforts to protect the atmosphere,[22] Antarctica,[23] the high seas,[24] and other global resources including international fisheries[25] and global biodiversity.[26] However, enforcement of international agreements promotes sustainable development and protect the global commons is difficult. Trade restrictions are the least destructive method of enforcing these agreements, particularly when enforcement measures stronger than diplomatic negotiations are required to maintain the integrity of the global environment.[27] Unfortunately, the current structure of GATT often precludes the use of trade measures to enforce international environmental treaties.[28]

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19. EDWARD ABBY, A VOICE CRYING IN THE WILDERNESS 87 (1989).

20. The tragedy of the commons describes a situation where if all people who use a common resource, such as a fishery, continually use as much of the common property as they are able, then the common resource will eventually degrade. While in this case the fishermen will profit in the short term, the fishermen's long term survival is jeopardized by over utilization of the resource. *See* Garrett Harden, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

21. STONE, *supra* note 12, at 35.

22. *See* Framework Convention on Climate Change, May 9, 1992; Convention for the Protection of the Ozone Layer, March 22, 1985, T.I.A.S. No. 11097.

23. *See* Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

24. *See* United Nations Convention on the Law of the Sea, Dec. 10 1982, 21 I.L.M. 1261 (1982) (entered into force November 16, 1994).

25. *See* Convention on Fishing and Conservation of the Living Resources of the High Seas, March 20, 1966, 17 U.S.T. 138, 559 U.N.T.S. 285.

26. *See* Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) (entered into force December 29, 1993).

27. Trade restrictions have been included in a number of multilateral environmental treaties including the three major environmental treaties discussed in the next section of this Article.

28. *See infra* notes 65-79 and accompanying text.

The recent dispute between Canada and Spain is a dramatic example of the consequences of failing to develop sustainable natural resources.[29] In April 1995, Canada took international law into its own hands in a dispute over fishing rights off the coast of Newfoundland. In order to enforce an international fishing agreement, Canada impounded one Spanish trawler, cut the nets of another, and drove off a third Spanish ship.[30] This dispute exemplifies the need to harmonize international agreements governing both the development and protection of valuable environmental resources. Moreover, Canada's use of force emphasizes the need for alternatives to gunboat diplomacy when negotiations fail and international agreements conserving natural resources and protecting the global commons must be enforced. This Article next recounts the major historical events in international environmental jurisprudence.

II. HISTORY OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS RELATING TO INTERNATIONAL TRADE

Until the 1990s, the conflict between trade and the environment did not become a prominent national issue in America.[31] However, tensions between the two equally legitimate goals of liberalized trade and environmental protection have existed for at least a century. As early as the 1870s, trade restrictions designed to protect plant and animal health caused major commercial disputes.[32] Although these disputes centered on sanitary and phytosanitary measures,[33] these regulations were not altogether different from today's environmental laws. Similar to today's regulations, they placed restrictions on private trade and to protect the public health, safety and welfare.

The first recorded use of international trade restrictions to protect human health occurred in 1906, when an international conference convened by Switzerland adopted a treaty to end the production and importation of white phosphorus matches.[34] The Convention sought to ban the production of white phosphorus matches because it caused "a loathsome occupational disease."[35] The treaty proved to

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29. Anne Swardson, *Fish Accord Could Save Many Species: EC-Canada Pact Puts Problems in Spotlight*, WASH. POST, Apr. 18, 1995, at A14.

30. *Id.*

31. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE L. 39 (1992).

32. *Id.* at 38-39.

33. These are measures designed to protect public health and prevent the spread of agricultural diseases. Pesticide residue regulations and agricultural quarantines are examples of sanitary and phytosanitary measures. *See* DANIEL ESTY, GREENING THE GATT 50 (1994).

34. *Id.* at 39.

35. *Id.*

be effective in allowing manufacturers to switch to safer, but more expensive methods of match production fearing that they would be undercut by manufacturers using the cheaper, more hazardous white phosphorus method.[36]

Since the turn of the century, environmental concerns have expanded from occupational health and public safety concerns to a broad range of global ecological concerns.[37] The proliferation of environmental treaties demonstrates this expansion of environmental concerns. For example, Great Britain, Japan, Russia, and the United States entered into an agreement in 1911 for the "preservation and protection" of fur seals and otters.[38] Additionally, in 1916, the United States and Great Britain (for Canada) were prompted by the extinction of the passenger pigeon to enter into an agreement for the protection of migratory birds.[39] In 1921, Italy and the Kingdom of the Serbs, Croats, and Slovenes signed a treaty banning fishing methods having "an injurious effect upon the spawning and preservation" of Adriatic fisheries.[40]

The Convention Relative to the Preservation of Flora and Fauna in their Natural State is one of the earliest multilateral environmental agreements (MEAs) still in force.[41] The agreement was created to preserve the natural plant and animal life of the world by preserving land and restricting the hunting and collecting of species. The convention also prohibits the import or export of trophies without a certificate permitting export.[42]

A more ambitious MEA designed to protect plant and animal life is the Convention on the International Trade in Endangered Species of Flora and Fauna (CITES).[43] CITES is a MEA between more than 100 member nations[44] established for the protection of threatened species of flora and fauna from over-exploitation through international trade.[45] The appendices to CITES contain three lists of flora and fauna species that are of international concern. Appendix I lists

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36. Charnovitz, *supra* note 31, at 39. This treaty remains in force. *Id.*

37. *See id.* at 39.

38. *Id.* The treaty remained in force when Japan abrogated in 1941. *Id.* at 39 n.9.

39. *Id.* The treaty remains in force. *Id.* at 39 n.10.

40. *Id.* at 39-40. The convention is no longer in force. *Id.* at 40 n.11.

41. ESTY, *supra* note 33, at 275. This Convention has been superseded by the African Convention of 1968. *Id.*

42. *Id.* This agreement is particularity targeted at preservation of Africa's wildlife. *Id.*

43. Convention on the International Trade in Endangered Species of Wild Flora and Fauna, July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

44. William C. Burns, *CITES and the Regulation of International Trade In Endangered Species of Flora: A Clinical Approach*, 8 DICK. J. INT'L L. 203 (1990).

45. CITES, *supra* note 43, at preamble.

species threatened with extinction that may be affected by trade.[46] Appendix II lists species that will be threatened with extinction if injurious trade is not curtailed.[47] Finally, Appendix III lists domestic species for which member nations prevent export.[48] CITES, like other significant multilateral environmental agreements, is enforced through international trade restrictions.

CITES is one of the three most significant multilateral environmental agreements enforced through international trade restrictions. The Basel Convention[49] and the Montreal Protocol[50] are also enforced by trade restrictions. The Basel Convention, signed in 1989, is designed to limit the transboundary movement of hazardous wastes among parties and to ban the export of hazardous wastes to nonmember nations.[51] While the Basel Convention contains no provision for trade sanctions resulting from violations of the convention, the convention does restrict waste trade. Accordingly, the convention requires permission from both importing and exporting nations prior to transboundary shipment.[52] The importing nation must certify that it will provide for "environmentally sound management of hazardous wastes."[53] The exporting country must ensure that wastes to be exported will be "managed in an environmentally sound manner."[54] These provisions, however, may violate GATT/WTO obligations.[55] Additionally, the complete ban on waste trade with non-signatory nations could also create conflict with GATT obligations.[56]

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

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

48. *Id.* art. II(3).

49. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (entered into force May 5, 1992) [hereinafter Basel Convention].

50. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

51. Esty, *supra* note 33, at 280.

52. Basel Convention, *supra* note 49, art. 4, § 1.

53. *Id.* art. 4, § 2(b).

54. *Id.* art. 4, § 8.

55. These restrictions could violate the GATT articles I, III and XI. For example, restrictions on imports or exports of wastes, which in some situations have significant economic value, may violate the GATT article XI (prohibiting import and export quotas). A number of the GATT's exemptions could be used to justify these restrictions. However, a prohibition on exports of a valuable waste to a particular country could be viewed as an attempt to coerce the importing nation into changing its domestic waste management and disposal laws. This would violate the GATT obligations as interpreted by the *Tuna-Dolphin II* GATT panel report discussed in the next section. *See infra* note 70 at 5.26, 5.38.

56. Again, this trade ban would be, at a minimum, violative of the GATT articles I, III and XI. Additionally, GATT/WTO obligations require that the exporting country conduct at least a limited investigation into the importing country's waste treatment and disposal laws.

The Montreal Protocol, signed in 1987, is designed to reduce the production and use of ozone-depleting substances, particularly chlorofluorocarbons (CFCs).[57] The Montreal Protocol regulates trade of ozone-depleting substances, products containing ozone-depleting substances, and products produced using ozone-depleting substances.[58] Moreover, the protocol prohibits signatories from trading with non-signatories any ozone-depleting substances and all technologies which may be used in manufacturing ozone-depleting substances.[59] The Montreal Protocol also precludes signatories from providing aid, new subsidies, or other financial support to non-signatories if such assistance may facilitate the production of ozone-depleting substances.[60] Subsequent amendments call for complete termination of CFC production by 1996 with phaseouts of CFC use in developing countries by 2000 and in developed countries by 2010.[61]

Customary international law recognizes the right of sovereign nations to exploit resources and promulgate environmental regulations within the nation.[62] However, sovereignty must be tempered when domestic actions create transboundary harms.[63] The major MEAs and other environmental treaties reflect a growing international recognition that domestic actions contribute to global environmental problems, such as ozone depletion, species extinction, or fisheries depletion. Consequently, sovereign rights to exploit resources and promulgate environmental regulations within a nation are not absolute.

The conflict between free trade and environmental proponents who have designed and implemented these MEAs generally arises from differences in priorities. Environmental proponents see international trade law as a useful tool for ensuring compliance with MEAs. They argue that for MEAs to have any meaning some type of enforcement mechanism must exist; trade sanctions appear to be the

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57. *See* Montreal Protocol, *supra* note 50, art. 2, annex A.

58. ESTY, *supra* note 33, at 279-80.

59. Montreal Protocol, *supra* note 50, art. 4.

60. *Id.* art. 4, § 8.

61. ESTY, *supra* note 33, at 279-80.

62. *See* R.M. M'Gonigle, *"Developing Sustainability" and the Emerging Norms of International Environmental Law: The Case of Land-Based Marine Pollution Control*, 28 CAN. Y. B. INT'L L. 169, 177-81 (1990); *see also* Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416 [hereinafter Stockholm Declaration]; Rio Declaration, *supra* note 13; Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17th Sess., U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1963).

63. This principle is based on the Roman maxim *sic utere tuo ut alienum non laedas*, which means "use your property so as not to injure that of another." *See* Corfu Channel (U.S. v. Alb.), 1949 I.C.J. 244 (Dec. 15); Stockholm Declaration, *supra* note 62, at principle 21; Rio Declaration, *supra* note 13, at principle 2.

least destructive method of enforcement. While free trade proponents often support the goals of the MEAs, they are unwilling to jeopardize free trade.[64] These proponents view environmental trade restrictions as a potential threat because of the possibility that protectionist measures will be clothed in the guise of environmentalism.

While the potential for disguised protectionist measures is significant, trade measures do appear to be the least destructive method of enforcing MEAs. If the alternative is Canadian-style gunboat diplomacy or other military enforcement actions, trade restrictions are clearly the preferred enforcement mechanism. The solution, therefore, is to find a balance between the two equally important goals of free trade and environmental protection. The current GATT/WTO trade regime has grappled with this issue, and Part III of this Article will examine the GATT/WTO approach to balancing free trade with environmental protection.

III. HOW GATT/WTO PRESENTLY ADDRESSES ENVIRONMENTAL PROTECTION INITIATIVES

This Part will examine how the obligations of GATT contracting members relate to MEAs and environmental protection activities. The first section describes the basic obligations of the contracting members that most often impact environmental policy. The second section examines exceptions to GATT obligations established in GATT article XX. This section also will critique how these exceptions have been applied by GATT dispute resolution panels when examining trade restrictions designed to protect the environment.

A. *Obligations of GATT Contracting Members*

GATT articles I, III and XI create the obligations that most often impact environmental policy. Article I contains the most favored nation (MFN) obligation requiring that:

> any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like products originating . . . in all other contracting parties.[65]

Any substantial differentiation in the regulation of trade between GATT contracting parties violates the MFN obligation.[66]

Article III of GATT mandates national treatment of "like products." National treatment requires that imports from the territory

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64. *See* ESTY, *supra* note 33, at chapter 1.
65. GATT, *supra* note 2, art. I(1).
66. JOHN JACKSON, *supra* note 4, at 432.

of any contracting party "be accorded treatment no less favorable than that accorded to like products of national origin in respect to all laws, regulations and requirements affecting their internal sale."[67] Article III also precludes internal taxes or fees which are in excess of taxes or fees levied on domestic products.[68] In essence, the national treatment provision requires imports to be treated in the same manner as all other like products.

This requirement that all like products be treated equally limits a GATT contracting party's ability to regulate a product based on its environmental impact. Under the Montreal Protocol, for example, a country may be required to ban the import of circuit boards made by a process using CFCs as a solvent.[69] However, inspection of a circuit board made with CFCs and a circuit board made without CFCs would yield no distinction between the two products, and according to GATT jurisprudence, both circuit boards must be considered like products. The determination of whether products are similar must be made at the point of entry of the product into the domestic flow of commerce.[70] The production process method cannot be considered. Consequently, the circuit boards would be considered "like products," even though their status under the Montreal Protocol and their impact on the environment are significantly different.[71]

An important departure from the presumption against regulation of "production process methods" is embodied in the new Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).[72] This agreement, which was part of the Uruguay Round and is included as part of the WTO, regulates production process methods which violate intellectual property rights.[73] For example, if a manufacturer in a TRIPS member nation illegally uses a patented production process method and exports the related product to another TRIPS member nation, the importing nation may "take appropriate measures" to prevent the importation of the illegally produced product.[74] The ability of nations to differentiate products which are otherwise like products on the basis of the production method used would be in conflict with the traditional interpretation of the national treatment

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67. GATT, *supra* note 2, art. III(4).

68. *Id.* art. III(2).

69. Montreal Protocol, *supra* note 50, art. 2.

70. *See* U.S. GATT PANEL, RESTRICTIONS ON IMPORTS OF TUNA, 1994, 33 I.L.M. 839 at § 5.8 (July 1994) [hereinafter *Tuna-Dolphin II*] (limiting importing nation regulation to regulation as products); *see also* ESTY, *supra* note 33, at 51.

71. *See* GATT, *supra* note 2, art. III(2).

72. BROOKINGS INSTITUTION, *supra* note 6 at 84.

73. *Id.* at 101-02.

74. *Id.* at 103.

obligation. However, if one recognizes that products which are produced differently are not like products, the conflict may be avoided.[75]

Article XI of GATT prohibits the use of non-tariff barriers such as quotas or import bans. However, Article XI does include a number of exceptions, including an exception for agricultural or fisheries products "necessary" for the enforcement of domestic programs to restrict the domestic production of either like products or products which use the imported product.[76] If the "necessity"[77] requirement is met, this exception may be used to limit exploitation of scarce natural resources, such as fisheries stocks.[78] However, this exception explicitly applies to domestic production, and probably could not be used to force conservation of fisheries stock in international waters, which was the focus of the recent heated dispute between Canada and Spain.[79]

B. GATT Article XX Exceptions to the Obligations of Contracting Members

Article XX of GATT contains a number of exceptions which justify measures that would otherwise violate a contracting member's obligations under the agreement. The most commonly cited case interpreting the GATT Article XX exceptions is the first *Tuna-Dolphin* GATT panel report.[80] This report was issued pursuant to a challenge by Mexico against a United States ban, imposed pursuant to the MMPA, on the importation of tuna caught by methods fatal to dolphins.[81] This report has been discussed in a number of excellent

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75. In this case the distinction is between legal and illegal production methods. The recognition of this principle for the environmental impacts of production would be a logical extension.

76. *See* GATT, *supra* note 2, art. XI.

77. The word "necessary" has become a term of art in GATT jurisprudence. Interpretation of the word "necessary" will be discussed at length later in this section.

78. GATT, *supra* note 2, art. XI(2)(c)(i).

79. *See* Swardson, *supra* note 29, at A14.

80. U.S. GATT PANEL, RESTRICTIONS ON IMPORTS OF TUNA, 1991, 30 I.L.M. 1594 [hereinafter *Tuna-Dolphin I*].

81. The Marine Mammal Protection Act (MMPA), enacted in 1972, was part of an American campaign to protect dolphins from foreign and domestic tuna fishing fleets. *See* Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1994). The MMPA was not enforced until 1991 when a federal judge ordered the Bush administration to enforce the Act and ban the importation of Mexican tuna products. *See* Earth Island v. Mosbacher, 929 F.2d 1449, 1453 (9th Cir. 1991). This court order was a major victory for the American environmental community. Later in 1991, Mexico challenged the enforcement of the MMPA as a violation of the United States' obligations under the GATT. *See GATT/WTO: U.S. Embargo Against Mexican Tuna May Be Resolved in 1995, Official Says,* 12 INT'L TRADE REP. 10, D26 (1995) [hereinafter U.S. Embargo].

commentaries,[82] and this Article will not attempt to improve on them. Instead, this Article will examine the second *Tuna-Dolphin GATT Panel Report*,[83] issued pursuant to a challenge filed by the European Community (EC) and other nations which were subject to a secondary boycott imposed by the United States persuant to the MMPA.[84]

GATT Article XX(b) creates an exception for actions necessary to protect the life or health of humans, animals or plants. The *Tuna-Dolphin II* panel report delineated a three step analysis to determine whether the challenged actions are within the scope of Article XX(b).[85] First, it must be determined whether the policies in question are designed to protect human, animal, or plant life or health. Second, it must be determined if the measures taken are necessary to protect human, animal, or plant life or health. Third, it has to be determined whether the measures are an arbitrary or unjustifiable discrimination between countries where similar conditions prevail.[86]

Tuna-Dolphin I found that the Article XX(b) exception applied primarily to "sanitary measures [designed] to safeguard the life or health of humans, animals, or plants within the jurisdiction of the importing country."[87] However, *Tuna-Dolphin II* found that the text of Article XX(b) did not place a limitation on the location of the living things to be protected.[88] The panel consequently found that the policies pursued by the United States within its jurisdiction were within the range of policies covered by Article XX(b).[89]

The *Tuna-Dolphin II* GATT panel report then examined when an action was "necessary" to protect living things. The panel examined the plain meaning of "necessary" and found that an action was only necessary when other alternatives which are otherwise consistent with GATT are exhausted.[90]

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82. *See* David L. Ross, Comment, *Making GATT Dolphin Safe: Trade and the Environment*, 2 DUKE J. OF COMP. & INT'L L. 345 (1992); Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVT'L. L. 475 (1992); *see also* Smith, *supra* note 7, at 533.

83. *Tuna-Dolphin II*, *supra* note 70, at 841-903.

84. Because Mexico withdrew its complaint prior to the issuance of the *Tuna-Dolphin I* panel report, the report was never formally adopted by the contracting parties. The EC subsequently filed a similar challenge to the MMPA. As of this writing, the *Tuna-Dolphin II* panel report has not been formally adopted by the contracting parties.

85. *Tuna-Dolphin II*, *supra* note 70, § 5.29.

86. *Id.*

87. *Tuna Dolphin I*, *supra* note 80, § 2.5.

88. *Tuna-Dolphin II*, *supra* note 70, § 5.35.

89. *Id.* § 5.33.

90. *Id.* § 5.35. This analysis is consistent with the general rules for interpretation of treaties in the Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1988) [hereinafter Vienna Convention].

The panel went on to determine that the United States embargo of tuna, designed to protect the life and health of dolphins, could only be effective if the nations at which the embargo was targeted changed their policies and practices.[91] The embargo alone could not protect the life or health of dolphins. Furthermore, the panel found that Article XX(b), as a matter of policy, could not be interpreted to allow one member nation to force a change in the policies of another member nation.[92]

According to *Tuna-Dolphin II*, all possible alternatives must be exhausted, including extensive multilateral negotiations, before trade restrictions are "necessary."[93] A requirement that multilateral agreements be reached prior to any member nation taking action to protect the life or health of humans, plants or animals, would substantially hinder the ability of a member nation to take unilateral actions. These unilateral actions frequently serve an important role in forcing the evolution of customary international law.[94]

GATT Article XX(g) creates an exception for trade restrictions that relate to the conservation of exhaustible natural resources when implemented in conjunction with restriction of domestic production or consumption.[95] The *Tuna-Dolphin II* panel report delineated a three step analysis to determine if the challenged actions fall within the Article XX(g) exception.[96] First, the policies in question must be determined to conserve an exhaustible natural resource.[97] Second, the measures must be implemented in conjunction with restrictions on domestic production or consumption.[98] Third, the measures must not be an arbitrary or unjustifiable discrimination between countries where similar conditions prevail.[99]

The *Tuna-Dolphin I* panel report found that Article XX(g) could not be used to justify trade restrictions outside the jurisdiction of the member nation.[100] However, the *Tuna-Dolphin II* panel report[101]

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91. *Tuna-Dolphin II, supra* note 70, § 5.35.

92. *Id.* § 5.38.

93. *Id.* § 5.24. The panel did not specify to what extent the United States would be required to pursue multilateral negotiations prior to taking more trade restrictive measures. Apparently the United States' efforts to resolve this issue through the Inter-American Tropical Tuna Commission were not sufficient. Jeffery L. Dunoff, *Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes,* 15 MICH. J. INT'L L. 1043, 1053-54 n.33 (1994).

94. Robert Housman and Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer,* 15 HASTINGS INT'L & COMP. L. REV. 535, 548 (1992).

95. *See Tuna Dolphin II, supra* note 70, § 5.11.

96. *Id.* § 5.12.

97. *See* GATT, *supra* note 2, art. XX(g).

98. *See id.*

99. *Tuna-Dolphin II, supra* note 70, § 5.12.

100. *See Tuna-Dolphin I, supra* note 80, § 5.32.

found that the text of Article XX(g) did not place any limitation on the location of the natural resource to be protected.[102] Consequently, the *Tuna-Dolphin II* panel found that the policies pursued by the United States, within its jurisdiction, were within the range of policies covered by Article XX(b).[103] Additional GATT dispute settlement panel reports support the conclusions of the *Tuna-Dolphin II* panel.[104]

The *Tuna-Dolphin II* panel adopted a previous GATT panel finding that the term "relating to" means "primarily aimed" at the conservation of natural resources.[105] Using this test, the *Tuna-Dolphin II* panel found that the embargo on tuna could not independently protect dolphins, but that the measure was primarily aimed at forcing other member nations to change national policies to protect dolphins. As a matter of policy, the panel concluded that measures which force other nations to change national policies could not be primarily aimed at either the conservation of an exhaustible natural resource or at effectuating restrictions on domestic production or consumption.[106] Both Tuna-Dolphin panel reports limited actions to protect the environment to actions within the jurisdiction of the member nations.[107] Consequently, the extent to which a nation can act within its jurisdiction to enforce international environmental laws outside its territorial boundaries surfaces as an important issue.

One theory of how extra-territorial enforcement of environmental laws could be implemented through actions within national jurisdiction, and thus without violating the Tuna-Dolphin panel report, focuses on an import certification requirement.[108] To achieve the goal of the MMPA—the elimination of fishing techniques that kill dolphins—the United States could require certification from tuna importers that the tuna was caught using "dolphin safe" methods. This approach would be an action within national jurisdiction which

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101. The *Tuna Dolphin II* panel report also used an analysis similar to that of its analysis of the GATT article XX(b).

102. *Tuna-Dolphin II*, *supra* note 70, § 5.15.

103. *Id.* § 5.33. It is important to note that the panel used the term "extra-territorial," perhaps inviting an interpretation that actions within a nation's jurisdiction fall within the GATT article XX(g). As the *Tuna-Dolphin II* panel points out, this distinction is particularly important when considering regulation of migratory species such as tuna and salmon. *Id.*

104. *See, e.g.*, *Canada—Measures Affecting the Exports of Unprocessed Herring and Salmon*, GATT Doc. 35S/98 (Mar. 22, 1988); *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc. 29S/91 (adopted Feb. 22, 1982).

105. *Tuna-Dolphin II*, *supra* note 70, § 5.22.

106. *Id.* § 5.27.

107. *See Tuna-Dolphin I*, *supra* note 80, § 5.32; *see also Tuna-Dolphin II*, *supra* note 70, § 5.33.

108. *See* PROFESSOR JOEL TRACHMAN, BALL CHAIR LECTURE AT FLORIDA STATE UNIVERSITY COLLEGE OF LAW (Feb. 22, 1995) (notes on file with author). This theory draws on comments made by Professor Trachman.

would enforce an environmental standard on individuals catching fish, for import into the United States, in international and foreign waters. While this approach may appear to violate the spirit of *Tuna-Dolphin II,* the panel's precise choice of the term "extra-jurisdictional"[109] suggests such an interpretation. The certification requirement would not place an affirmative requirement on a foreign nation to alter national policies, as did the MMPA.[110] Perhaps of more importance, however, is that the certification requirement is more narrowly tailored to achieve its goal. No arbitrary distinctions would be made on the basis of national origin because the regulation would apply to all fishing vessels catching fish for sale in the United States.[111] Arguably, this type of process could be used to enforce any production process method requirements, as long as a similar requirement is placed on like products whether imported or domestic.

While many domestic and international environmental measures are consistent with the current GATT/WTO structure, GATT does not seek to promote environmental protection or sustainable development.[112] In fact, the GATT preamble states that GATT is meant to facilitate the "full use of the natural resources of the world."[113] GATT panel decisions have explicitly refused to consider contracting members' obligations under MEAs.[114] GATT panels' failures to recognize obligations persuant to MEAs which conflict with GATT obligations may prevent the enforcement of internationally recognized environmental standards embodied in these MEAs. Consequently, observers conclude that the current GATT/WTO regime fails to promote either sustainable development or mutually reinforcing trade and environmental policy.[115] In response, the European Community (EC) has proposed to modify GATT or to take other measures within the GATT/WTO trade regime that would encourage mutually reinforcing trade and environmental policies.[116]

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109. *Tuna-Dolphin II, supra* note 70, §§ 5.20, 5.33.

110. *See Tuna-Dolphin I, supra* note 80.

111. Presumably, the same requirement would be placed on domestic fishing vessels, eliminating any distinction on the basis of national origin.

112. *See* GATT, *supra* note 2, at preamb.

113. *Id.*

114. *See Tuna-Dolphin II, supra* note 70, § 5.19.

115. *See* ESTY, *supra* note 33, at 52-53; Dunoff, *supra* note 93, at 1051-62.

116. Bob Kapanen, *The EC Proposal to Modify the GATT/Environment Interface,* 4 DALHOUSIE J. LEGAL STUD. 217, 219 (1994).

IV. PROPOSALS FOR RECONCILING ENVIRONMENTAL POLICY AND FREE TRADE

National governments, NGOs, publicists and scholars have proposed various mechanisms for reconciling the trade and environment conflict. These proposals vary considerably, reflecting divergent views on the appropriate balance between free trade and protection of the global environment. These proposals range from harmonization of national environmental laws, to use of unilateral trade measures for protection of the global environment. This Part will examine these proposals and draw on these proposals to present a preferred method for reconciling free trade and environmental policy.

A. GATT-MEA Conflict

What is the appropriate forum for resolution of conflicts between multilateral trade agreements and MEAs? The GATT/WTO dispute settlement body (DSB) is not necessarily the appropriate forum for two very important reasons. First, when the DSB hears a dispute between member nations, the DSB only considers the nations' obligations under GATT. The DSB fails to consider competing treaty obligations under other multilateral treaties even when both parties to the dispute ratify the competing treaty.[117] Moreover, the GATT

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117. *See Tuna-Dolphin II, supra* note 70, §§ 3.41, 5.19. Although the parties agreed CITES was *lex specialis,* the panel refused to consider any obligations under CITES or other environmental agreements. The panel justified this ruling by holding that under the general rule of interpretation in article 31 of the Vienna Convention, multilateral treaties such as CITES could not be considered unless they were signed by all the GATT members. *Tuna-Dolphin II, supra* note 70, § 5.19. The panel did not specify which subsection of article 31 it relied on in reaching this conclusion. When the panel applied the supplemental rules of interpretation in article 32 of the Vienna Convention, the panel found that other treaties could not be applied because "no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments." *Tuna-Dolphin II, supra* note 70, § 5.20. This argument apparently disregards the fact that most of the environmental agreements cited by the U.S. and the E.C. entered into force after GATT was signed in 1947. See *Tuna-Dolphin II, supra* note 70, §§ 3.21, 3.23, 3.39, 5.20.

This decision is particularly unpersuasive because it does not directly address the argument that CITES is *lex specialis,* and the application of the general and supplemental rules of interpretation is superficial. For instance, the panel apparently rejected the application of CITES under the general rules of interpretation based on an analysis of article 31, section 2(a). This section allows application of other treaties "made between all parties in connection with the conclusion of the treaty." Vienna Convention, *supra* note 90, at art. 31, § 2(a). While this section was correctly applied, the panel apparently failed to consider the application of CITES under article 31, section 3(c), which allows the application of "any rule of international law applicable in the relations between the parties." Vienna Convention, *supra* note 90, at art. 31, § 2(a). The absence of the phrase "all parties" in article 31, section 3(c) suggests that this section allows application of the rule of international law binding only the parties to the dispute, not all parties to the treaty. Following this interpretation, obligations under CITES should have been considered by the GATT panel.

council has stated that GATT may not be competent to consider environmental issues when examining trade issues:

> It was . . . clear that the GATT's competence was limited to trade policies and those trade-related aspects of environmental policies which might result in significant trade effects for GATT contracting parties. In respect neither of its vocation nor of its competence was the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment.[118]

The GATT's narrowly drawn scope of competence could, through trade restrictions, effectively preclude enforcement of MEAs, such as CITES, the Basel Convention, and the Montreal Protocol. These MEAs contain provisions for possible trade restrictions against parties to the agreements who do not satisfy their obligations.[119] In addition, the Basel Convention and the Montreal Protocol contain provisions for trade restrictions against non-signatories.[120] While CITES does not contain similar provisions, the United States has enforced CITES against non-signatories,[121] as well as signatories.[122] However, if a signatory or non-signatory of a MEA ever chooses to challenge the enforcement of a MEA as a violation of GATT obligations, the DSB apparently will consider only the GATT obligations and not any additional treaty obligations.[123] This conflict creates a problem for the enforcement of multilateral environmental agreements because, in many instances, enforcement of MEAs will violate GATT obligations as currently defined.

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118. *GATT's Follow-Up to the United Nations Conference on Environment and Development*, GATT Doc. SR. 48/1 (Dec. 2, 1992) (decision by the contracting parties).

119. Basel Convention, *supra* note 49, art. 4, para. 4; CITES, *supra* note 44, arts. II, III; Montreal Protocol, *supra* note 50.

120. Basel Convention, *supra* note 49, art. 4; Montreal Protocol, *supra* note 50, art. 4.

121. In April 1988, the United States banned all imports of ivory from Burundi due to involvement in illicit ivory trade. Burundi had not yet joined CITES, but a few months later Burundi joined CITES and enforced the ivory ban. *See* Burns, *supra* note 44, at 217.

122. In April 1994, President Bill Clinton imposed sanctions against Taiwan for trafficking in rhinoceros and tiger parts. *See U.S. Authorizes 10 Million Dollars in Sanctions for Rhinos and Tigers*, AGENCE FR. PRESSE (Paris), October 8, 1994. In 1986, the U.S. banned the importation of all wildlife products from Singapore, citing that country's failure to properly regulate the wildlife trade. *See* Burns, *supra* note 44, at 217. The CITES Secretariat has also taken multilateral action to enforce CITES. In January 1986, the Secretariat requested sanctions against the Portuguese territory of Macau for continued trade in rhino horns, musk, and ivory. By May 1986, the territory had complied with CITES and the sanctions were lifted. *Id.*

123. *See* Convention on Fishing, *supra* note 25. This statement holds true even where all parties to the dispute are signatories to the environmental agreement at issue. *See supra* note 117 and accompanying text.

B. Multilateral Coordination of Environmental Policy and Trade Policy

Concerns about the coexistence of GATT and multilateral environmental agreements have prompted a number of proposals to address enforcement of multilateral environmental agreements through trade measures without the threat of the actions being invalidated by a GATT DSB.[124] The EC has submitted a proposal to the GATT which includes the following elements:

- establishment of measures to ensure the effective implementation of measures to protect the environment, including the Basel Convention, Montreal Protocol, and CITES;[125]
- development of an interpretive document for GATT Article XX to set out clear criteria on the use of trade measures to enforce multilateral environmental agreements, including "circumstances under which trade sanctions taken pursuant to a MEA, and applied to a GATT member which did not sign the MEA, can go against other GATT obligations";[126] and
- clarification of the circumstances under which the production process methods will qualify as GATT Article XX exceptions.[127]

The International Chamber of Commerce (ICC) and the Organization for Economic Cooperation and Development (OECD) have also developed proposals to reduce conflict between environmental policy and trade policy. The ICC proposal states that trade sanctions to enforce environmental objectives should be avoided.[128] The proposal outlines eight policy guidelines for development of an environmental policy having a minimal impact on free trade. These guidelines include:

- reliance on market-oriented measures that encourage innovation;
- harmonization of national standards;
- transparency of environmental policies and regulations to ensure they do not become non-tariff barriers;
- enforcement of standards and regulation in a non-discriminatory fashion, in accordance with GATT MFN and national treatment obligations;
- establishment of standards based on sound science; and

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124. Kapanen, *supra* note 116, at 218-19.
125. *Id.*
126. *Id.* at 222-23.
127. *Id.* at 229.
128. *International Chamber Seeks Rules on Link Between Environment, Trade*, 8 INT'L TRADE REP. (BNA) 1817 (1991).

- incorporation into international environmental agreements methods for measuring compliance and enforcement.[129]

Most of these proposals would be useful guidelines for environmental policy makers who wish to avoid conflict with international trade agreements, including GATT. However, a requirement that all environmental policies be based on sound science implies that actions must be based on evidence generally accepted by the world scientific community.[130] This requirement could preclude a "precautionary" approach[131] to environmental policy making. Furthermore, a "sound science" requirement could preclude international action to prevent ozone depletion or global warming because these environmental threats are still theories and are not supported by sufficient scientific evidence to be generally accepted by the scientific community.[132]

Instead, the international community should examine whether an environmental policy or program has scientific underpinnings. The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[133] provided some guidance for determining a scientific basis for existing evidence when it recognized that "[s]cience is not an encyclopedic body of knowledge about the universe. Instead it represents a process for proposing and refining theoretic explanations about the world that are subject to further testing and refinement[134]. . . . [I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method."[135] This "scientific method" requirement is much more flexible and can allow for precautionary actions when the potential for environmental harm is great.

In addition to the proposals discussed above, the ICC proposal calls for development of mechanisms to resolve international disputes arising from environmental measures that may effect trade.[136] This proposal is significant because it recognizes the difficulties of

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129. *Id.*

130. The term "sound science" has become a term of art which generally describes science which has been proven to the satisfaction of a majority of the scientific community. ESTY, *supra* note 33, at 118 n.20.

131. The "precautionary principle" suggests that if the scientific evidence is uncertain, but the potential environmental harm is great, then the policy maker should err on the side of too much protection instead of too little. *Id.* at 41 n.6.

132. For a discussion on the systematic problems arising from reliance on science in environmental policy, see Lindsay, *supra* note 18, at 378-86.

133. 113 S.Ct. 2786 (1993).

134. Brief for American Association for the Advancement of Science and the National Academy of Sciences as Amici Curiae at 7-8, *Daubert,* 113 S.Ct at 2786, 2795 (1993).

135. *Daubert,* 113 S.Ct. at 2795.

136. International Trade Reporter, *supra* note 128.

resolving conflicts between environmental agreements and trade agreements through the GATT dispute resolution mechanism.

The OECD has also attempted to grapple with the problem of how to reconcile environmental policy with free trade. The use of unilateral trade measures, production process methods, and economic instruments to protect the environment were methods considered in 1993.[137] However, OECD delegates were not able to reach a consensus on these substantive issues and instead developed a series of procedural guidelines on reviews of environmental policy, dispute settlement, and international environmental cooperation.[138]

The failure of this group of twenty-four nations to reach agreement on substantive issues, even in the form of non-binding guidelines, illustrates the difficulties which the international community will face in developing any type of trade and environment agreement. Of interest, however, is that the main differences among the OECD delegates was not between different blocks of member nations, but between trade ministers and the environment ministers within the various nations.[139] This split demonstrates that greater disparities can exist between the trade and environment advocates within nations than between ministers of different nations.

C. *Proposals for Unilateral Enforcement of Environmental Policy Through Trade Measures*

Professor Robert Hudec has separated unilateral enforcement of environmental policy through trade measures into two groups: altruistic measures and level-playing-field measures.[140] Altruistic trade measures are usually designed to induce foreign nations or individuals to change their behavior in ways which will improve global environmental quality. "Level-playing-field" measures are generally designed to off-set any competitive disadvantage a producer in a "high-standard" nation may suffer versus producers in nations with low, or non-existent environmental standards.[141]

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137. *See OECD: Members See Link of Trade, Environment as a Major Challenge Currently Facing Policy-Makers*, INT'L ENV. DAILY (BNA), Jan. 6, 1994, at D4.

138. *Id.*

139. *Id.*

140. ROBERT E. HUDEC, GATT LEGAL RESTRAINTS ON THE USE OF TRADE MEASURES AGAINST FOREIGN ENVIRONMENTAL PRACTICES 1-2 (unpublished manuscript) (presented at a conference in Washington, D.C. entitled "Domestic Policy Divergence in an Integrated World Economy: Fairness Claims and the Gains from Trade" on Sept. 30 and Oct. 1, 1994) (copy on file with author).

141. *Id.* at 2.

1. Altruistic Proposals

The altruistic proposals are designed to improve environmental quality throughout the globe through the use of trade restrictions and incentives.[142] The MMPA is an example of an altruistic unilateral measure.

A number of proposals have been made in the United States to use GATT, or similar trade mechanisms, to motivate other nations to improve environmental protection. For example, Senator Daniel Moynihan, in 1991, proposed the creation of a General Agreement on Tariffs and Trade for the Environment.[143] This agreement would have used international environmental agreements as standards for the United States to impose trade sanctions against violators of international environmental standards.[144] The proposal also would have amended Section 301 of the Trade Act of 1974 to allow retaliation for actions which "diminish the effectiveness of any international agreement on the environment."[145]

This proposal to place altruistic environmental concerns on par with intellectual property suggests an interesting parallel between protection of intellectual property and protection of the environment. The recently ratified TRIPS agreement creates a global regime for the protection of intellectual property rights.[146] TRIPS requires minimum levels of protection and enforcement of intellectual property rights, and in many respects it is a major step toward global harmonization of intellectual property laws.[147] The development of TRIPS was an immense undertaking which required many years of negotiation. However, the developed nations which had a high level of intellectual property protection invested the time, resources and leadership necessary to complete TRIPS. The developed nations were willing to make this investment because they believed that through the long-term benefits of the world-wide harmonization of intellectual property laws they would more than recover their investment in the creation of this new international regime.[148]

Unfortunately, few members of the international community see global harmonization of environmental laws as an investment which

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142. *Id.*

143. 5.59, 102d (Cong., 1st Sess. (1991); *see Trade Incentives and Environmental Reforms: The Search for a Suitable Incentive*, 4 GEO. INTL. ENV. L. REV. 421, 427 (1992).

144. 137 CONG. REC. 5707-08 (Jan. 14, 1991) (statement of Sen. Moynihan).

145. *Id.*

146. BOOKINGS INSTITUTION, *supra* note 6, at 109.

147. *Id.* at 100, 109.

148. *Id.* at 112 (observing that developed nations will gain at the experience of developing countries).

will be profitable. Nations have not been willing to make the investment of time, resources, and leadership necessary to create a long-term solution for reconciling international trade and environmental policy, much less world-wide harmonization of environmental policy. Consequently, the creation of a new international regime, in the style of TRIPS, would be difficult to achieve in the current international climate.

Another proposal for using GATT to create incentives for improvement of environmental protection is to make trade preferences conditional on sufficient domestic environmental measures.[149] GATT contracting members have the ability to give tariffs preferences to developing countries in accordance with the Generalized System of Preferences (GSP). The GSP preferences are given by each contracting member independently and they may be withdrawn in whole or in part at any time. This independence has led some contracting parties to grant preferences conditioned upon the exporting country initiating certain policies which are largely unrelated to trade. For example, in order to obtain tariff preferences under the United States' GSP scheme, a developing country must not:

- expropriate or otherwise seize control of property owned by an United States citizen, including intellectual property;
- repudiate an agreement with a United States citizen;
- impose taxes or other restrictions with respect to property of a United States citizen, the effect of which is to expropriate that property;
- aid or abet any individual or group which has committed an act of international terrorism;
- deny its workers internationally recognized rights, including acceptable minimum wages;
- refrain from awarding arbitral awards; and
- be a member of the Organization of Petroleum Exporting Countries.[150]

Furthermore, the country must cooperate with the United States to prevent the unlawful importation of narcotics into the United States.[151]

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149. United States Senator Max Baccus proposed this link in 1991. *See* 137 Cong. Rec. at S13,170. This proposal could actually be seen as a solution to the "level playing-field" problem which will be discussed later. The "altruistic" / "level playing-field" differentiation appears to be one of purpose rather than effect, and therefore the same measure could fall in either category.

150. *See* Trade Act of 1974, 19 U.S.C. § 2462(b) (1994).

151. *Id.*

Predictably, developing nations oppose designation of GSP benefits conditioned on the conformity of a developing nation's domestic laws to policies like the United States policies listed above. Developing nations view GSPs as nonreciprocal benefits granted to assist in their economic development.[152] Developing nations often view conditions, such as the conditions in the United States GSP program, as distortions of the original intent behind the GSPs.[153] Accordingly, the addition of environmental conditions on GSP benefits would be viewed as a further distortion.[154]

While the equity of granting GSP benefits on the condition of domestic policies is debatable, it is undeniable that developed nations have no obligation to grant GSP benefits. Consequently, any inconsistency resulting from a conditional denial of GSP benefits can be corrected by denying GSP benefits entirely. As a practical matter, there is little a GSP recipient can do to prevent developed nations from placing conditions on the grant of GSP benefits.[155]

However, compelling reasons exist for not placing environmental conditions on GSP benefits. For example, consider the following scenario: The United States, as a condition of GSP benefits, requires the recipient to enforce all its national environmental laws.[156] In 1995, a poor Caribbean island nation which has recently thrown off an oppressive government, like Haiti, applies for GSP benefits. No matter how environmentally progressive this nation is, it would, at this time, have higher priorities.[157] Feeding its people and establishing a new democratic society would, quite rightly, take precedence over enforcement of environmental laws. Consequently, a well-intentioned attempt to encourage environmental protection could actually have the perverse effect of delaying environmental protection in this poor country.

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152. Kriangsak Kittichaisaree, *Using Trade Sanctions and Subsidies To Achieve Environmental Objectives in the Pacific Rim*, 4 COLO. J. INT'L ENVT'L. L. & POL'Y 296, 314-15 (1993). GATT, as amended in 1964, appears to support this position by stating that "[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties." GATT, *supra* note 2, art. XXXVI(8).

153. Kittichaisaree, *supra* note 152, at 315.

154. *Id.* at 315.

155. FRIEDER ROESSLER, DIVERGING DOMESTIC POLICIES AND MULTILATERAL TRADE INTEGRATION 22 (draft manuscript).

156. This is a requirement of the North American Free Trade Agreement (NAFTA) environmental side-agreement. North American Agreement on Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480; ESTY, *supra* note 33, at 105; JOHN JACKSON, *supra* note 4, at 492.

157. Pragmatic issues such as what laws the new government would need to enforce would also be in question.

The goal of the GSP system is to encourage economic growth in less developed nations. Many GATT experts believe environmental protection will not take place until a sufficient level of economic prosperity is achieved.[158] While the universality of this proposition is questionable, in the above hypothetical this proposition is clearly true. This poor island nation would not be granted GSP benefits until it could enforce its environmental laws. But this nation would not have the resources to develop the institutional infrastructure necessary for meaningful enforcement of environmental laws and regulations until it had achieved a sufficient level of economic prosperity. Until a nation can meet the basic needs of its people, feed them and preserve the social order, the nation cannot afford the luxury of environmental protection.

In this hypothetical, what would be the most beneficial course of action for a developed nation? A variety of proposals exist for a "Green Fund" and other types of environmental aid.[159] These proposals, if enacted, would be perhaps the most cost-effective methods of achieving environmental protection in less developed nations.[160] However, existing aid programs are often at odds with the goals of environmental protection and sustainable development. For instance, in Cambodia, a nation torn by decades of brutal civil war, aid of all forms was urgently needed.[161] The aid which has been provided does not promote sustainable development or foster economic growth in harmony with the natural environment.[162] The aid on which Cambodia must rely promotes heavy use on agricultural chemicals such as fertilizers and pesticides which can be damaging to the natural balance of the environment.[163]

In the short term, perhaps the most effective action developed nations could take would be to make all aid "green aid." All aid packages should promote sustainable development. None of them should force developing nations to begin the destructive dependence on unsustainable agricultural and natural resource management techniques. Aid which promotes unsustainable growth or over-utilization of natural resources undermines sustainable development and the self-reliance which is necessary for these nations to enter the ranks of developed nation without sacrificing the ecology of their nations or the global commons of the world.

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158. *See* ESTY, *supra* note 33, at 63-65.
159. *Id.* at 88-89.
160. *Id.*
161. Kittichaisaree, *supra* note 152, at 313.
162. *Id.* at 313-14
163. *Id.* at 313.

2. *Level-Playing-Field Proposals*

Level-playing-field proposals are not so much concerned with improving the global environment as with ensuring that domestic environmental protection will not create a competitive disadvantage. The theory is that if environmental protection, or the lack thereof, is allowed to be used as a competitive advantage, industries in the countries with "high" environmental protection will either go out of business because they cannot compete with imports from nations with "low" environmental regulations, or the businesses will move to nations with "low" environmental regulation to take advantage of this comparative advantage.[164]

Many of the level-playing-field proposals raised in the United States Congress focus on some type of border adjustment to offset the higher cost of environmental controls. An early example of this was the Copper Bill.[165] This bill would have added additional duties on copper and copper bearing ores at an amount equivalent to the additional "environmental cost of production" in the United States.[166]

A more recent, more sophisticated example of this approach was introduced by United States Senator Max Bauccus in 1991.[167] This proposal would authorize countervailing duties against imports from countries which refuse to negotiate international environmental standards.[168] The United States would impose the duty if the United States' environmental standard had a sound scientific basis, the same standard applied to all competitive domestic products, and the imported products was causing injury to competitive domestic production.[169]

This proposal appears to take steps to minimize conflicts with international trade agreements. However, it also appears to be in direct conflict with the Tuna-Dolphin GATT panel decisions. Arguably, the intent of the countervailing duties would be to induce the offending country to change its domestic policy by negotiating, and

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164. *See* Brian Copeland & M. Scott Taylor, *North-South Trade and the Environment*, 109 Q.J. ECON. 755, 757 (1994) (finding that when pollution is isolated as a factor of production, economic theory predicts that in an open market high-pollution industries will move to nations with "low" environmental standards). *But cf. World Bank Economist Denies U.S. Policies on Pollution Prompt Firms To Move Overseas*, 15 INT'L ENVL. L. REP. (BNA) 104 (1992) (citing empirical evidence illustrating that industries move to take advantage of low labor costs and access to raw material, not lax environmental laws).

165. *Id.*

166. S. 353, 102d Cong., 1st Sess. (1991).

167. 137 Cong. Rec. 513, 169 (Sept. 17, 1991) (statement of Sen. Bacchus).

168. *Id.*

169. *Id.*

presumably agreeing to, international environmental standards. Any attempt to use trade measures to coerce another nation into changing domestic policies is in violation of the *Tuna-Dolphin II* GATT panel report.

Many level-playing-field proposals would violate the national treatment requirement of GATT Article III by taxing imported products at a higher level than like domestic products. For contracting parties to utilize a level-playing-field approach which levies a border adjustment to offset the differential in environmental protection costs[170] between the importing and exporting nations, the importing nation would need to invoke the anti-dumping provisions of GATT Article VI and the anti-dumping interpretive code.[171]

Eliza Patterson, a former resident scholar at the GATT Secretariat in Geneva, has recommended use of the anti-dumping code to implement level-playing-field border adjustments.[172] The anti-dumping code would need to be modified to allow for "anti-eco-dumping" actions. Patterson argues that environmental protection requires prices which accurately reflect the environmental costs, such as the cost of the resources used, environmental harms created and clean-up costs associated with production of the product.[173] If these costs are not internalized, and the price of the product does not reflect the true production costs, sale of the product below production cost would be considered dumping.[174] According to Patterson, permissible border adjustments of the export price should include the value of the environmental resources used in the production and the cost of the damage caused to the environment by production. These damages could be measured in clean-up costs. While these criteria may not initially seem to further the goal of the level-playing-field approach, it would reduce the comparative advantage that a "low-standard" nation would have over a "high-standard" nation. Additionally, if the environmental costs were tied to the costs of environmental protection in the importing nation, this "anti-

170. Arguably, the border adjustment would simply require the price of imported products from "low-standard" nations to include the environmental costs that products manufactured in "high-standard" have already internalized.

171. Eliza Patterson, *GATT and the Environment: Rules To Minimize Adverse Trade and Environmental Effects*, 26 J. WORLD TRADE 99, 104 (1992).

172. *Id.*

173. *Id.*

174. The methods established in the anti-dumping code for a determination of dumping and the appropriate offsetting duty are extremely complex. *See id.* at 104. When no comparable home market is available for comparison, the calculation is based on "production costs" plus additions for selling costs, profits and other differences affecting price differential. GATT, *supra* note 2, art. VI (b)(ii).

ecodumping" approach could effectively create a level-playing-field between imported and domestic products.[175]

One level-playing-field proposal has been adopted by the United States and has withstood the scrutiny of a GATT challenge. In 1986, amendments to the Comprehensive Emergency Response and Clean-up Liability Act created new funding sources for "Superfund," a federal hazardous waste clean-up program.[176] The new funding sources included an excise tax on domestic production of hazardous materials, contributions by parties found liable for hazardous waste contamination, and a border tax adjustment on the importation of certain pollution causing chemical products.[177] The border tax adjustment was designed to ensure that the domestic excise tax did not harm the competitive nature of domestic manufacturers.[178] When this adjustment was challenged, a GATT panel found that it was not a violation of the national treatment requirements of GATT Article III as long as it was comparable to the domestic tax.[179]

D. A Preferred Short-term Proposal

Evaluation of proposals for reconciling GATT with MEAs requires examination of both short-term proposals (requiring as long as 10 years to implement), which take advantage of the existing trade regime, and long-term proposals (requiring as long as 50 years to implement), which could more thoroughly reconcile international trade with environmental policy and promote sustainable development.[180] The proposals which were considered by this Article are generally more modest, short-term proposals.

While creation of a new international regime for coordination of international trade policy with environmental policy may be an excellent ultimate goal, a substantial investment of time, resources and leadership will be required to achieve this aspiration. In the meantime, a short-term solution should be implemented within the current institutional frameworks to begin the process reconciling

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175. Patterson, *supra* note 171, at 104-05.

176. Patrick M. Flynn, *Government Recovery of Superfund Cleanup Oversight Costs: A Critique of* United States v. Rohm & Hass Co., 47 RUTGERS L. REV. 789, 798 (1995).

177. Hudec, *supra* note 140, at 19.

178. ESTY, *supra* note 33, at 266-67.

179. *Id.* at 266-67. For a thorough discussion of environmental border tax adjustments, see Paul Demaret and Raoul Stewardson, *Border Tax Adjustments Under GATT and EC Law and General Implications for Environmental Taxes,* 28 J. WORLD TRADE 5 (1994).

180. The proposals discussed in this Article have primarily been short-term solutions. A number of broad long-term solutions have been proposed, including a "global Marshal plan" proposed by Vice President Al Gore in EARTH IN THE BALANCE, *supra* note 17, at 295-360, and a "global environmental organization," proposed by Daniel Esty. ESTY, *supra* note 33, at 78-98.

GATT and environmental policy. The most effective short-term solution will take advantage of the existing international institutions, thus achieving some gains while the investments in a long-term solution are being made.

Of the proposals discussed earlier in this Article, the EC proposal to create an interpretive agreement for GATT Article XX most effectively builds on the existing GATT framework. As the EC proposes, the agreement must delineate the situations in which a MEA can be enforced against GATT contracting members using trade measures which would otherwise be inconsistent with the obligations of GATT contracting members.[181]

In order for MEAs to effectively protect our environment and global commons, MEAs must be enforceable through trade sanctions to the extent required in the MEAs. Consequently, the Article XX interpretive agreement must allow for unilateral and multilateral enforcement measures which are specifically provided for in the MEAs. In this situation, the party invoking trade restrictions will be enforcing an internationally accepted standard which was established through multilateral negotiations.[182] Because the trade restrictions and standards they enforce would have been established previously, through multilateral negotiations, the potential for protectionist measures disguised as "green" trade restrictions will be minimized. Additionally, the nation imposing the trade restriction would bear the burden of proving that any trade restriction was within an Article XX exception as defined by the interpretive agreement, in addition to proving that the restriction was consistent with the MEA.

Enforcement actions against members of a MEA should be allowed by the interpretive agreement. Each nation that has signed and ratified the MEA should be bound by it.[183] However, whether the interpretive agreement should allow enforcement actions against GATT contracting members who have signed, but not ratified the MEA, or against non-signatories, is not as clear. In order to maintain the integrity of the MEAs, nations which have signed, but not ratified, a MEA should be presumed to be bound by the MEA. Consequently, a trade restrictive enforcement action pursuant to a MEA should be presumed valid under the interpretive agreement.

Unilateral enforcement against non-signatories should only be permitted under the GATT Article XX interpretive agreement to the

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181. *See supra* note 122-25 and accompanying text.

182. The OECD has also suggested that trade restrictions are best used "within the context of international environmental agreements." OECD, *supra* note 137.

183. *Pacta Sunt Servanda,* Vienna Convention, *supra* note 90, at art. 26.

extent the action is permitted by international law. This would require a showing by the nation seeking the enforcement action that the MEA, or the principal purposes of the MEA, have risen to the level of customary international law.[184] While this restriction will limit the effectiveness of some MEAs, it is necessary to respect the sovereignty of the GATT contracting members.

However, multilateral trade restrictive enforcement measures which are expressly delineated in the MEA, should be allowed under the interpretive agreement. This provision would, for instance, permit enforcement of the requirement in the Montreal Protocol that member nations do not sell to non-member nations equipment to manufacture ozone-depleting substances.[185] This infringement on the sovereignty of the GATT contracting members is justified by the breadth of acceptance which MEAs enjoy throughout the world, and by the potentially devastating environmental harms that they are intended to prevent. Because these trade restrictions are not targeted at any particular nation, but apply to a group of nations undefined at the time the MEA is drafted, the potential of disguised protectionist measures is minimal.

Finally, the interpretive agreement should specify that the regulation of PPMs does qualify under the GATT Article XX exceptions when the contracting member is enforcing an internationally accepted standard delineated in a MEA. This approach would be somewhat analogous to the TRIPS regulation of PPMs which are related to intellectual property rights.[186] Under the interpretive agreement, as in TRIPS, when a product is produced in contravention of the internationally accepted standards, nations should be able to prevent the importation of the illicitly manufactured products. While this standard would not save the MMPA and the United States' tuna embargo, it would allow multi-lateral or unilateral actions to enforce internationally accepted standards, without undue risk of disguised protectionist measures.

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184. Consider, for instance, the example of the United States' enforcement of CITES against Burundi, a non-signatory nation. For this action to be approved pursuant to the interpretive agreement, the United States would have to show that a general recognition of a duty to preserve endangered species had arisen (*opinio juris*), thereby creating a duty incumbent upon all nations, because of the numerous multilateral and bilateral agreements protecting threatened and endangered species, because of the world-wide acceptance of CITES, and because of a general state practice of protecting endangered species. *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW AND WORLD ORDER 83-86 (1971); GURUSWAMY, *supra* note 15, at 387. Of course, in accordance with the principals of international law, Burundi would have the opportunity to offer a defense, such as persistent objection to this international norm. *See* GURUSWAMY, *supra* note 15, at 387.

185. Montreal Protocol *supra* note 50, art. 4. *See infra* notes 57-61 and accompanying text.

186. *See supra* notes 70-73 and accompanying text.

The GATT Article XX interpretive agreement could also address issues related to ecodumping and the level-playing-field proposals. However, due to the complexities of dumping analysis and the existing anti-dumping code, any anti-ecodumping provisions should be incorporated into the anti-dumping code. Because the potential comparative advantages of disparate environmental standards could precipitate a race to the bottom, anti-ecodumping provisions should be seriously considered. Nevertheless, the complexities of creating an anti-ecodumping code are such that this may be better relegated to long-term approaches for reconciling international trade and environmental policy.

The interpretive agreement should not allow for extra-jurisdictional enforcement of domestically promulgated environmental standards. When a nation can establish by domestic law an environmental standard, and impose that standard on foreign nations without their consent, the threat to national sovereignty and free trade is too great. A process by which a nation can extra-jurisdictionally impose its will, even in the name of such a noble cause as environmental protection, is too tempting a vehicle for disguised protectionist measures. Enforcement of internationally accepted standards should be permitted by the interpretive agreement, but extra-jurisdictional enforcement of domestic measures should not be permitted.

This proposed interpretive agreement for the GATT Article XX is only a short-term solution which does not address all of the problems of reconciling international trade with environmental policy. For instance, the GATT/WTO's limited competence would still be a concern. However, under the interpretive agreement, the GATT/WTO DSB would not be making environmental policy, or even evaluating the effect of a MEA on trade. Rather, it would be only examining the international standards already defined in MEAs and permitting or precluding their implementation according to the guidelines discussed above. Issues related to domestic environmental measures which impact trade would still be evaluated using existing GATT jurisprudence. However, when a measure implemented a MEA, the GATT/WTO DSB could consider MEAs and other aspects of international law as directed by the interpretive agreement. This would be a substantial step towards reconciling international trade with environmental policy.

V. CONCLUSION

The need for creating a trade policy that encourages global development should not be underestimated. As the human population of the world increases and demands on natural resources grow,

the need to conserve our natural resources and preserve our global commons increases. If we fail to adequately conserve resources and ensure that future generations can also utilize these resources, then the global environment and the global economy will suffer.

The high seas confrontation between the Canadian Coast Guard and a Spanish fishing fleet in April 1995 is a dramatic example of the potential consequences of failing to achieve sustainable development. This dispute demonstrates that failure to sustainably manage global natural resources can have costs beyond the loss of the resource. The economic impact on the Spanish fishing industry alone has been estimated in excess of 6000 jobs, and the cost of the good will between nations cannot be measured.[187]

To achieve sustainable development the international community must see past short-term interests and invest the time, resources and leadership necessary to implement a viable structure for reconciling international trade with environmental policy. Only by mutually reinforcing trade and environmental policy can we ensure that we do not deplete natural resources for short-term profit. Only by making the necessary investments in our future can we ensure that the earth will be able to support the growing generations to come.

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187. *EU: Spanish Fury as Fishermen Face 6,000 Job Losses—Fishing Dispute,* LONDON TIMES, Apr. 18, 1995, at A1.