Separate Spheres : Conflict and Congruence between International Trade and Environmental Law

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For society as a whole, environment is a part of its real wealth and cannot be treated as a free resource.

Environmental issues may come to exercise a growing influence on international economic relations. They . . . could influence the pattern of world trade, the international distribution of industry, the competitive position of different groups of countries, their comparative costs of production, etc.

…… *Founex Report (1971)*[1]

1 UNEP, *In Defence of the Earth: The Basic Texts on Environment: Founex*, Stockholm, Cocoyoc. United Nations Environment Programme, Nairobi, Kenya. (1981), *reprinted in* Tolba, El-Kholy, eds., *The World Environment, 1972-1992: Two Decades of Challenge*. United Nations Environment Programme 807 (1992).

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Introduction: Separate Spheres

In November of 1994, leaders of the Asia Pacific Economic Cooperation (APEC)[2] group met in Bogor, Indonesia to discuss various matters of importance to Pacific Rim nations. One particularly important result of the meeting was the decision, in principal, to establish an "Asian Free-Trade Zone" among the APEC member states.[3] Although formal proposals for structuring of the "free trade zone" will not be known for at least one year,[4] and the ultimate agreement is not anticipated before the year 2020, the Bogor decision represents an important first step toward the establishment of a pivotal cooperative undertaking between Pacific Rim countries. As one observer noted, "This is the biggest trade initiative in history. It's half the world deciding to eliminate its trade barriers."[5]

The Bogor decision represents, as well, an opportunity for participant nations to address the contentious issue of the relationship the law of international trade and international environmental law.[6] The issue is not a new one--as early as 1972, multilateral conferences relating to either trade or environment began to consider the potential for conflict between the two spheres of lawmaking.[7] More recently, the debate between trade and environment has arisen as a key issue in both multilateral trade negotiations[8] and, albeit briefly,

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2 APEC Member states currently include Australia, Brunei, Canada, Chile, China, Hong Kong, South Korea, Malaysia, the United States, Indonesia, Japan, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, Taiwan and Thailand. "Dresses for Success: Meeting in Indonesia, APEC's Leaders Adopt a Sweeping Endorsement of Free Trade," TIME, Nov.28, 1994, at 24.

3 *Id.*

4 *Id.*

5 *Id.* at 24, quoting C. Fred Bergsten, Director of Washington's Institute for International Economics and Chairman of the Eminent Person's Group.

6 *See, i.e.,* Anderson, "Unilateral Trade Measures and Environmental Protection Policy," 66 Temple L. Rev. 751, 752 (1993) (With regard to recent multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT); Schoenbaum, "Agora: Trade and Environment," 86 Am. J. Int'l L. 700, 727 (hereinafter Agenda 21); Baker, "Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT," 26 Vand. J. Trans. Law 437, 439 (1993); Lallas, Esty and Hoogstraten, "Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies," 16 Harv. Envt'l L. Rev. 271, 315 (1992).

7 *See, e.g.,* Declaration of the Stockholm Conference on the Human Environment, UN Doc. A/CONF. 48/14; 11 I.L.M. 1416 (1972) (Stockholm Declaration).

8 *See, e.g.,* Anderson, *supra* note 6 at 752, in which the author reports that "Trade groups were especially alarmed that environmentalists sought GATT amendments during the Uruguay Round of the [trade] negotiations, because they feared that such efforts would threaten the successful conclusion of those negotiations."

in the "Agenda 21" report of the United Nations Conference on Environment and Development (UNCED), held in Rio de Jainero, Brazil, in 1992.[9]

Essentially, the debate between advocates of liberalized trade and those of environmental protection surrounds the competing, and seemingly irreconcilable worldviews espoused by each side of the conflict. Advocates of free trade (hereinafter "free traders") argue for a global economic system free of artificial impediments to the free flow of goods and services between nations.[10] Environmentalists, while not specifically disagreeing with the importance of liberalized trade, nonetheless urge caution in the exploitation, transfer and consumption of natural resources.[11] Environmentalists strive, moreover, for the enforcement of strict limitations on activities deemed harmful to the earth's environment.

Over the past two decades, international measures designed to limit trade in resources or to regulate pollution-causing activities have invariably run afoul of trade measures designed to foster the free flow of goods and to encourage the growth of economic activity.[12] When such a conflict arises, the debate concerning the proper role of environmental considerations in international trade policy is raised anew. Until recently, however, proponents from each sphere of influence--economic and environmental--have remained entrenched behind walls

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9 Agenda 21, United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/4 (1992), *reprinted in* Schoenbaum, *supra* note 5, 727 (hereinafter Agenda 21). Although Agenda 21 will be discussed in more detail, *infra*, it is worth noting the following relevant provisions at this point:

> 2.19 Environment and trade policies should be mutually supportive. An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment . . . A sound environment, on the other hand, provides the ecological and other resources necessary to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.

10 *See, generally*, Schoenbaum, *supra* note 6.

11 World Resources Institute, *World Resources 1992-93* 4 (1992), p.4.

12 *See, e.g., United States--Restrictions on Imports of Tuna, Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991) (hereinafter *Tuna-Dolphin* decision) (GATT dispute panel case involving US restriction on importation of Mexican tuna due to collateral harm inflicted upon dolphin stocks during harvesting). Refer to discussion below for further details); *United States-Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. 34S/136 (1988) (hereinafter *Petroleum Products*) (U.S. attempt to impose special tax for environmental reasons invalidated by GATT panel); *Thailand--Restrictions on Importation of and Internal Taxes on Cigarettes, Report of The Panel adopted 7 November 1990*, B.I.S.D. (37th Supp.) 200-23 (arising from a dispute involving Thai restrictions on the importation of foreign cigarettes); Case 302.86, Commission v. Denmark, 1988 ECR 4607. For a good discussion of the *Danish Bottle Case* and its potential relevance to the GATT exception, *see* Schoenbaum, *supra* note 6, at 716.

of misconceptions and mistrust. Only within the past two or three years have scholars begun to detect a trend toward reconciliation between the competing concerns of international trade and environment.[13]

This article is addressed to those who, like the future drafters of the APEC free trade pact, are faced with reconciling the competing concerns of international trade and environment. In order for drafters of future trade pacts--such as that envisioned by the APEC nations--to avoid many of the difficulties associated with the trade and environment conflict, it will be necessary for them to clearly understand the origins and causes underlying the debate, as well as the specific points of contention raised over the past several years. Accordingly, the article will first consider the early development and growth of both modern international trade law and international environmental law.

The article will then focus upon the conflict between international trade law and various trade-related multilateral and unilateral environmental initiatives, including international environmental agreements and domestic environmental legislation with extraterritorial effects. Included in this section will be an assessment of the recently-concluded Uruguay Round of the GATT, and its likely implications for the future of the trade-environment debate.

Finally, the article will address recent efforts to reconcile the conflict between trade and environment and will conclude by offerings a number of proposals for future efforts at reconciliation.

I. A Brief History of the Two Regimes

A. The Development of Modern International Environmental Law

Although international agreements concerning the environment have existed since the first years of the century,[14] little attention was paid to "global"

13 For example, Agenda 21, *supra* note 9, at 126, refers specifically to the need to inculcate trade concerns; and the recently-published GATT Uruguay Round Report addresses a number of environmental issues. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125-1272 (1994) (hereinafter Uruguay Round).

14 *See, e.g.*, Tolba and El-Kholy, *supra* note 1, at 739, in which the authors refer to the Convention Concerning the Equitable Distribution of the Waters of the Rio Grande For Irrigation (1906) (The U.S. -Mexico Water Treaty); Convention for the Protection and Preservation of Fur Seals (1911); and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1940) as evidence of early international environmental initiatives.

environmental concerns until the years immediately following World War II.[15] With the establishment of the United Nations in 1945, the international community sought to establish the level of cooperation and understanding necessary to avoid yet another catastrophic global conflict. Pursuant to its mandate, the UN set about quickly to establish a range of institutions, some of which addressed certain aspects of the environment. Between the years of 1945 and 1948, for example, the Food and Agriculture Organization, World Health Organization and the United Nations Educational, Scientific and Cultural Organization were established. Although none were strictly "environmental organizations," they each addressed relevant environmental issues.[16] The environmental efforts of these early organizations were, however, largely ad hoc and not subject to any formal environmental coordinating authority.

A number of important issues were resolved outside of the United Nations framework during the organization's formative years. In the wake of the War, for example, one issue of particular concern was that of the use and misuse of important natural resources, specifically, of whales.[17] While little concern had been given to the conservation of whales prior to the War, the discovery of vastly depleted stocks of whales in the first post-War season prompted the United States to convene an international whaling conference in November of 1946.[18] The conference would ultimately produce the International Convention for the Regulation of Whaling, which in turn established the International Whaling Commission (IWC).[19]

By virtue of its creation of the IWC, the Whaling Convention marked an important transition from the pre-War system of international environmental treaties, which generally lacked any significant institutional framework. The IWC was, in effect, the first international environmental institution vested with real authority and empowered by the nations responsible for its creation.[20] By

15 *Id.* at 738.
16 UNESCO, for example, was in charge of the Intergovernmental Oceanographic Commission (IOC), a research facility that often addressed environmental concerns. Tolba and El-Kholy, *supra* note 1, at 741.
17 Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," 6 Ecology Law Q. 323, 346 (1977).
18 *Id.*
19 International Convention for the Regulation of Whaling 1946, UNTS 161, p.72. (hereinafter The Whaling Convention).
20 Scarff, *supra* note 17, at 347. Note, however, that certain research-oriented groups, such as the International Council of Scientific Unions, had begun focusing attention on environmen-

so empowering the IWC, whaling states exhibited a willingness to forfeit a certain degree of sovereignty in furtherance of environmental benefits.

Notwithstanding the U.N. and IWC institutions, "international environmental law" remained largely a collection of treaties without a unifying system of principles or norms in the two decades following World War II. In fact, many consider the true beginning of modern international environmental law to be the 1972 UN Conference of the Human Environment, held in Stockholm, Sweden.[21] The resulting report of the conference, including the landmark "Declaration of the United Nations Conference on the Human Environment" (the "Stockholm Declaration")[22] marks the transition of international environmental law from a diffuse collection of discrete agreements and institutions into a relatively unified body of law consisting of concrete norms and principles of customary law.[23]

One important result of the Stockholm Conference was the formation of the United Nations Environment Programme (UNEP).[24] In the intervening years, UNEP has served a number of important coordinating functions within the United Nations and has facilitated the conclusion of numerous multilateral environmental agreements. In the intervening years since the conclusion of the Stockholm conference international environmental law has grown rapidly with

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tal matters as early as the 1919. These groups were not, strictly speaking, vested with any decision-making power and served merely in an advisory and research capacity. *See, e.g.,* Tolba and El-Kholy, *supra* note 1, at 738. Pursuant to the Convention, however, the Whaling Commission is vested with authority, *inter alia,* to determine allowable catch limits and to close seasons based upon conservation needs. Whaling Convention, Article V, paragraph 1. It should be noted, however, that, at least in its early years, the IWC was not particularly concerned with conservation as an end in itself, but focussed rather achieving "optimum yields" of stock. *See, e.g.,* Scarff, *supra* note 17, at 347.

21 *See, e.g.,* Tolba and El-Kholy, *supra* note 1, at 742.

22 Stockholm Declaration, *supra* note 7.

23 Of particular importance is the Stockholm Declaration's Principle 21, which embodies the customary principle of *sic utere tuo ut alienum non laedas,* essentially translated as "Use your property so as not to harm your neighbor's." Principle 21 of the Declaration provides:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

For further discussion of the *sic utere* principle, *see* Cudahy, "Clouds on the Horizon: Acid Rain in Domestic Courts," in *Common Boundary/Common Problems: The Environmental Consequences of Energy Production* (1982).

24 The United Nations Environment Programme (UNEP) was established during the Stockholm Conference, but was not convened until the some months later. Tolba and El-Kholy, *supra* note 1, at 744. The parties to the Stockholm conference insisted that UNEP not be considered a "new UN agency for the environment," but, rather, that serve only to coordinate the environmental efforts of other UN agencies. *Id. See also, infra* note 41.

both the conclusion of a number of multilateral environmental agreements and the 1992 Rio Earth Summit representing significant accomplishments within the environmental sphere.[25]

B. The Development of Modern International Trade Law

As in the case of international environmental law, modern international trade law owes its creation to the turmoil of World War II. The earliest efforts toward the creation of a cohesive international trade regime were actually begun during World War II, partially in response to the belief that the War had been caused, to some extent, by underlying trade frictions between nations.[26] As champion of these early efforts, the United States relied upon the success of its own "Reciprocal Trade Agreements Act,"[27] under which Congress had authorized the President of the United States to negotiate reciprocal trade agreements for the mutual reduction of tariffs. The Agreement had proven so successful, in fact, that it was extended throughout the War and into the decades following the War's end.

At the close of World War II, the United States invited a number of its major trading partners to enter into a series of reciprocal trade agreements. At the same time, the newly formed United Nations set about to create the U.N. Economic and Social Council (ECOSOC). In February of 1946, the ECOSOC convened its first international conference, at which time the United States proposed the creation of an international trade organization.[28] This proposal would lead ultimately to the creation of the General Agreement on Tariffs and

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25 Important international agreements within the past twenty-two years include the Convention on International Trade in Endangered Species of Wild Flora and Fauna, 1973. 12 I.L.M. 1085 (1973) (prohibits trade in species designated as "endangered" and limits trade in species deemed "threatened."); the International Convention for the Prevention of Pollution from Ships (MARPOL) (1973) 12 I.L.M. 1319 and its 1978 Protocol, 17 I.L.M. 526 (1978); the Convention on the Control of Transboundary Movements of Hazardous Wastes (Basel Convention); the Vienna Convention for the Protection of the Ozone Layer (Vienna Convention) (1985), 26 I.L.M. 1541 (1985) and its Montreal Protocol on Substances That Deplete the Ozone Layer, adopted and opened for signature, Sept. 16, 1978, *entered into force* Jan. 1, 1989, 26 I.L.M. 1541 (1986) (hereinafter Montreal Protocol); the 1992 United Nations Framework Convention on Biological Diversity, *reprinted in* 21 Int'l Env't Rep. 31-40 (July 1992); and the 1992 United Nations Framework Convention on Climate Change, *reprinted in* 21 Int'l Env't Rep. 21-29 (July 1992).

26 Jackson and Davey, *Legal Problems of International Economic Relations* 294 (1986).

27 Act of June 12, 1934, c.474, 48 Stat. 943 (codified at 19 U.S.C.A. § 1351) (The U.S. Reciprocal Trade Agreements Act of 1934) (hereinafter The Reciprocal Trade Agreements Act).

28 Jackson & Davey, *supra* note 26, at 294.

Trade (GATT)[29] --the cornerstone of modern international trade law.

Although a thorough chronicle of the history of the GATT is beyond the scope of this article, it is important to note that the GATT was not originally envisioned as an organization, but, rather, as an agreement reflecting the results of multilateral tariff negotiations.[30] According to the original intentions of the GATT negotiators, the institutional framework necessary to support international trade was to have been served by the International Trade Organization (ITO). In fact, negotiations for the creation of the ITO coincided with those for the creation of the GATT.[31] For a variety of reasons, however, the ITO was never ratified and GATT became, in essence, an institution "by default."[32] The chief consequence of GATT's parentless status was the gradual development, by way of subsequent amendments and Rounds of discussion, of the modern GATT institutional system.[33]

While much of the current GATT system may eventually be subsumed within the newly-created World Trade Organization system,[34] the GATT system has remained relatively unchanged over the past fifteen years. As a result, the GATT system has achieved a relatively high degree of stability and its rules have gained predictability.

Today, the GATT embodies both procedural rules for resolution of conflict between contracting parties,[35] as well as the fundamental principles underlying modern trade law, many of which will be discussed in more detail below.[36] Through a series of multilateral trade negotiations, the GATT has managed to adapt itself to changing circumstances and to meet the needs of an increasingly complex world of multilateral traders. Perhaps in part due to the success of the GATT, a number of regional trade organizations have arisen; most notably, the

29 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All, 55 U.N.T.S. 187 (hereinafter GATT).
30 Jackson & Davey, *supra* note 26, at 294.
31 *Id.* at 295.
32 *Id.*
33 Regarding, *inter alia*, the GATT Tokyo Round of Trade Negotiations' establishment of the so-called "GATT Framework," *See, e.g.*, GATT 26th Supp. BISD (1980) and GATT, The Tokyo Round of Trade Negotiations: Report of the Director-General of GATT 118 (1979).
34 Refer to discussion, *infra*, regarding the Uruguay Round of Trade Negotiations and the World Trade Organization.
35 Uruguay Round, *supra* note 13, at Annex 2, pp. 1226-1247 (entitled "Understanding on Rules and Procedures Governing the Settlement of Disputes).
36 *Id.* at Annexes IA-IC, pp. 1154-1225 (entitled, respectively, "Multilateral Agreements on Trade in Goods;" "General Agreement on Trade in Services;" and "Trade-Related Aspects of Intellectual Property Rights").

European Economic Community (which evolved ultimately into the current European Union),[37] and the North American Free Trade Zone.[38] Insofar as these regional trade organizations will be considered in relevant sections below, they will not be considered in detail at this point.

II. Defining the Conflict Between Trade and Environment

The long-standing conflict between international trade law and international environment law has been well chronicled.[39] Although a great deal of attention has been paid to determining how and why such conflict arises, little has as yet been discussed concerning the possibility for resolving conflict between the two systems in a manner acceptable to both. This is due in large part to the prevailing belief that trade and environment, though linked inextricably by circumstance, are nonetheless subject to very different assumptions and approaches.

In fact, the paradigm underlying modern international environmental law (to the extent that one can isolate a single paradigm) is quite different from that of international trade law (as embodied, chiefly, in the GATT), although there are some important similarities between the two. Any attempt to reconcile a conflict involving aspects of each legal system, then, necessitates not only an appreciation of the origins of the two spheres of law, but also a careful consideration of the positions taken by each system with regard to the other.

A. The "Environmental Paradigm"

1. Points of Contention

As conflicts arise between international trade law and international environmental law, they are almost invariably resolved with reference to rules of

37 The European Economic Community (EEC) came into being pursuant to the Treaty Establishing the European Economic Community ("Treaty of Rome 1957," as amended through 1990). The EEC has since undergone a series of transformations, most recently pursuant to the Treaty on European Union (Maastricht Treaty 1992), *reprinted in* European Union, Selected Instruments Taken from the Treaties, Book 1, Volume 1 (1993). As the result of conditions not here relevant, the EEC is currently referred to, and will be referred to for purposes of this article, as the European Union (EU).

38 Created pursuant to the North American Free Trade Agreement Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, abridged version *reprinted in* 32 I.L.M. 296 (1993) (hereinafter NAFTA).

39 *See, i.e.,* references in footnote 5.

international trade, most commonly of the GATT. This is largely due to the fact that international environmental law lacks the cohesiveness of the international trading regime.[40] While GATT provides relatively clear and precise rules concerning acceptable trading behavior, international environmental law remains somewhat ill-defined and fragmented. Notwithstanding the recent UNCED accords, international environmental law is as yet without a single, unifying institution or system of rules and norms.[41] It may well be that international environmental law will never be reducible to a single, cohesive set of norms, rules and procedures. This is so for a variety of reasons, each of which bear upon the difficulty in reconciling international environmental law and international trade law.

As a preliminary matter, however, one should consider the circumstances under which international (or domestic, with extraterritorial effects) environmental law might resort to trade-limiting measures. Environmental trade measures generally take one of two forms--as a commitment within a given treaty or piece of legislation, or as a sanction for violation of a treaty or statute. To the extent that parties voluntarily commit to trade-limiting behavior, problems rarely arise.

This assumes, of course, that the limitation on trade applies only to contracting parties in a given treaty, or, if domestic legislation is involved, solely within the jurisdictional limits of the legislating nation. In certain cases, however, the environmental problem is such that trade of any kind cannot be tolerated, within or outside of the treaty system. Trade measures are axiomatic, for example, when the issue in question involves trade in scarce, vital or endangered resources.[42]

Trade measures are further employed when a given trade-related activity necessarily harms the global environment, even if only undertaken at a national

40 Weiss, "Agora: Trade and Environment, Response," 86 Am. J. Int'l L. 728 (1992) ("Until recently," states the author," most discussions of trade and environment issues focused on facilitating freer trading relationships, and hence on fitting environmental issues into the framework on trade law.").

41 While UNEP, *supra* note 23, is a single, unifying institution dedicated to advancing international environmental cooperation. Although UNEP serves several important functions, however, its legislative functions are severely limited. While UNEP facilitates the making of international rules, it does not itself enact or enforce such rules. For a thorough discussion of the role of UNEP, refer to Tolba and El-Kholy, *supra* note 1, at 745-762.

42 *See, e.g.*, the CITES agreement, *supra* note 25; which strictly limits trade in animals deemed endangered.

or local level. Consequently, the Montreal Protocol to the Vienna Convention on Substances that Deplete the Ozone Layer commits all parties to refrain from trade in chlorofluorocarbons (CFCs) or similar ozone-depleting materials with non-parties to the Convention.[43] Trade measures are deemed necessary because of the nature of the ozone problem.[44] In brief, ozone depletion is caused by the accumulation of man-made materials such as CFCs in the ozone layer of Earth's atmosphere. By the late 1980's, accumulation of CFCs had reached such proportions that an immediate end to all production was deemed necessary on a global basis, hence the Montreal Protocol and subsequent London Amendmants ban on production of and trade in CFCs. Viewed perhaps as an issue of global security, the problem of ozone depletion was deemed to be such that all nations--party or non-party--must cease the manufacture of ozone-depleting materials.

In addition to their use as commitments, trade measures may be employed as sanctions against violators of certain environmental agreements or domestic legislation. It is here that the greatest controversy arises between environment and trade, largely due to the unilateral nature of the sanctions employed.[45]

Trade sanctions may be employed in two ways. First, as a response to a related environmental harm. Thus, if a nation deems a certain animal to be in danger, it may prohibit importation of the animal or of any products related to its endangerment.[46] Secondly, a state might impose sanctions against a foreign state or individual in a manner not directly related to the environmental harm. Withdrawal of Most Favoured Nation treatment in response to recurring environmental wrongs is a rather extreme example of this form of sanction. Typically, however, states seek to draw some form of connection--albeit tenuous at times--between a given sanction and the environmental harm alleged.

Having considered the circumstances under which trade-limiting measures might be implicated in an environmental treaty or statute, attention must be paid to the principles and unique problems associated with environmental law that may give rise to the use of such measures.

First, and perhaps most important, is the problem of uncertainty. Whereas many of the principles underlying international trade law are relatively certain,

43 Montreal Protocol, *supra* note 25.
44 World Resources Institute, *supra* note 10, at 200 (1993).
45 Anderson, *supra* note 6, at 763-64.
46 *See, e.g., Tuna-Dolphin Case, supra* note 12.

uncertainty pervades most of international environmental law.[47] Concepts such as climate change, loss of biodiversity and, to a lesser extent, loss of ozone layer are simply incapable of reduction to a scientific certainty.[48] The costs associated with remediating such problems are, however, quite high.[49] Accordingly, those entrusted with the negotiation of international environmental agreements are often forced to balance present, known costs against future, unpredictable outcomes.

In light of the uncertainties associated with many environmental problems, a number of scholars of international environmental law have championed the "precautionary principle," pursuant to which present action is called for in the face of potential environmental catastrophe.[50]

The precautionary principle, while not yet rising to the level of customary international law, has gained enough acceptance to be reflected, albeit implicitly, in a number of international environmental agreements. To the extent that such agreements rely upon trade-limiting measures (either as elements of compliance or as sanctions for failure to comply), they will almost certainly run contrary to basic principles of international trade law. Although the provisions of GATT will be discussed in further detail below, it is worth noting here, for example, that GATT permits trade-limiting measures only in certain limited circumstances and only when such measures are "necessary" to accomplish a given, legitimate end.[51] Although the precautionary principle has not arisen as such in disputes concerning trade and environment, it is highly unlikely that measures based upon precaution in the face of uncertain future outcomes will satisfy the rather strict interpretation normally given the GATT "necessary" requirement.

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47 *See, i.e.*, Hurrell, "Introduction," *in* Hurrell and Kingsbury, eds. *The International politics of the Environment* 15 (1992)

48 Beckerman, "Global Warming and International Action: An Economic Perspective," *in Id.* at 271.

49 *Id.*

50 The "precautionary principle" was first endorsed by the North Seas Ministers, followed later by the UNEP Governing Council, the Paris Commission and the UN ECE region Bergen Conference, among others. *See*, Stairs and Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study," *in Id.* at 136. For a contrary view, *see* Reilly, "Aiming Before We Shoot: The Quiet Revolution in Environmental Policy," 1,3 U.S. EPA Communications and Public Affairs (A-107), September 26, 1990; in which William K. Reilly, Director of the U.S. Environmental Protection Agency, argues for action only in the face of a high degree of "sound scientific certainty."

51 *See, e.g., Thai Cigarette Case, supra* note 12.

Viewed from the perspective of environmental lawmakers, the GATT might seem unrealistic in its assessment of the nature of global environmental concerns. Herein lies a fundamental difference in orientation between the two regimes--international trade relies upon, fosters and often requires certainty, whereas international environmental law often espouses, out of perceived necessity, action without certainty.

Yet another problem faced by environmental policymakers is that of enforcement. While GATT shares this particular problem--especially given the opacity of domestic trading systems and the creativity of those hoping to bypass tariffs or to impose hidden subsidies--the issue is nonetheless different in the case of international environmental law.

While enforcement in international trade, at least in individual cases, is ultimately a matter of properly reallocating capital or balancing the flow of goods, the perceived immediacy associated with certain environmental problems necessitates, in the view of certain environmentalists, enforcement measures that would be unwarranted in case of a purely economic nature. Thus, some scholars have argued that unilateral environmental actions involving trade might be justified if the perceived immediacy of the problem is great and an international accord is deemed to be forthcoming.[52]

While GATT has thus far been relatively tolerant of international environmental agreements that include trade restrictions,[53] it would be unlikely to accept such measures *in anticipation* of future international accord. This is due to the fact that GATT's past acceptance of such trade measures is conditioned, at least implicitly, on the legitimacy, on the international accord represents.[54] Unilateral actions lack the legitimacy inherent in multilateral accords and are, presumably, more open to condemnation in a GATT proceeding. Thus, a potentially important method of enforcement in response to environmental threats may well run afoul of the GATT.

A final element of the "environmental paradigm" is that of the protection of the so-called "global commons"--those areas that lie outside of any accepted

52 Suskind and Ozawa, "Negotiating More Effective International Environmental Agreements," *in* Hurrell and Kingsbury, *supra* note 47, at 162.

53 To date, GATT has done nothing more than criticize the major international environmental agreements that contain trade measures. No GATT panel has invalidated an action taken pursuant to such an agreement. *See*, Baker, *supra* note 6, at 439.

54 *Id.* at 451.

national jurisdiction. An emerging principle of international environmental law holds that all states are responsible for the protection and preservation of the global commons.[55] Thus, according to the principle, jurisdiction to punish those who commit wrongs against the global commons rests with all states.[56] Past GATT decisions have, however, clearly stated that trade measures cannot be made on an extraterritorial basis.[57] While it is somewhat premature to consider this issue as one of direct conflict--the "global commons" principle is as yet not fully defined and is not, therefore, a rule of customary international law--the issue will nevertheless need to be resolved in the future.

2. Environmaental Perspectives on Trade Law

How, then, is international trade law viewed through the "environmental paradigm?" As early as the 1972 Stockholm Declaration, environmental policymakers seem to have embraced, to some extent, the interdependency of trade and environment, specifically as those issues relate to development. For example, Principle 8 of the Stockholm Declaration provides that:

> Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.[58]

The basic tenor of Principle 8--that the "right to development" must be recognized and treated as coequal with that of environment--has found expression in virtually every multilateral agreement entered into within the past twenty years. This may be due, in part, to the insistence of participating developing countries, whose fears of "eco-imperialism" are consistently raised in multilateral environmental negotiations.[59]

Recent indications reveal, however, a deepening understanding on the part of environmentalists of the relationship between environment and trade as an element of development. The notion of "sustainable development," originated

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55 Lallas, Esty and Hoogstraten, *supra* note 6, at 315.
56 *Id.*
57 *See, e.g., Tuna-Dolphin* Case, *supra* note 12, at ¶ 5.11, 30 I.L.M. at 1617.
58 Stockholm Declaration, *supra* note 7, at 1417.
59 "Eco-imperialism" is a multi-faceted notion concerning the fear of developing nations that the ecological "reborn" developed countries will somehow limit their ability to develop in the name of ecology. *See*, Mushkat, "The Environment/Trade Relationship as Seen from the Asia-Pacific Region," paper delivered at the Annual Meeting of the Racific Rim International Law Society, Fukuoka, Japan (June, 1993), p.20 (Paper is on file with the author).

in the now-famous Brundtland Report,[60] has been gaining popularity among scholars and policymakers as a means for reconciling the concerns of the developing world with the drive for environmental protection. Although the term defies easy definition, "sustainable development" has been referred to as meeting "the needs of the present without compromising the ability of future generations to meet their own needs."[61]

The concept of "sustainable development" infuses much of the Agenda 21 document produced as a result of the 1992 UNCED Conference in Brazil.[62] As noted, *supra,* Agenda 21 addressed to a minor extent the question of trade and environment and seemed to find the concept of free, responsible trade as in keeping with the aims of "sustainable development."[63]

Insofar as the exact nature of sustainable development, and the role to be allocated to liberalized trade in such a system remains unclear, it is difficult to assess the genuine trade-environment relationship as viewed through the "environment paradigm."

B. The "Trade Paradigm"

Although numerous trading regimes exist, the "trade paradigm" will be defined below in terms of GATT principles and rules.

1. Points of Contention

As may be noted below, a considerable amount of controversy has surrounded the role of international[64] environmental law from the perspective of international trade. A careful analysis of the major points of contention is, therefore, necessary in order to establish the "trade paradigm."

In seeking to encourage the free flow of commerce between states, GATT asserts four basic principles and/or prohibitions relevant to the environment-trade debate: The Most Favored Nation Principle (Art. I); The National Treatment Principle (Art. III); The Prohibition against Quantitative Restrictions (Art. XI); and the Limitation of Subsidies (Art. XVI and the Subsidies

60 The World Commission on Environment and Development, *Our Common Future* (1987) (hereinafter Brundtland Report).
61 *Id.*
62 *See, generally,* Agenda 21, *supra* note 9.
63 *Id.* at 727.
64 For purposes of this section, the term "international law" will include both international treaty law and domestic law with intended or incidental extraterritorial effects in restraint of trade.

Code). Each of these principles has far-reaching implications for environmental legislation and numerous conflicts have arisen with regard to each.

a. The Most Favored Nation Principle (Article I)

Under the Most Favored Nation (MFN) principle, each contracting party to GATT is required to administer its trade regulations (tariffs, etc.) without discriminating against any fellow contracting party. Article 1, Paragraph 1 of GATT defines the parameters of MFN as follows:

> With respects to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[65]

Under MFN, no tariff or special duty may be levied against the product of one country if "like products" from other countries are not similarly treated. The GATT Secretariat has stated unequivocally that "[i]n principle, it is not possible under GATT's rules to make access to one's own domestic market dependent on the domestic environmental policies or practices of the exporting country."[66] In this regard, MFN gives rise to numerous actual and potential conflicts with domestic environmental legislation. For example, domestic legislation may seek to affect the means by which like materials are produced abroad by restricting importation of products made by certain production process methods (PPMs).[67]

PPM regulations were clearly denounced under GATT in the now-famous *Tuna-Dolphin* decision.[68] The GATT dispute arose out of an embargo by the United States of tuna caught in international waters by Mexico in violation of The U.S. Marine Mammal Protection Act (MMPA),[69] which requires the use of fishing techniques designed to reduce by-catch of endangered dolphins. The

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65 GATT, *supra* note 29, at Art. I, Par. 1; 55 U.N.T.S. at 196-98.
66 GATT Secretariat, *Trade and Environment: Factual Note By the GATT Secretariat*, Geneva, February 1992 (paper distributed to those in attendance at the United Nations Conference on Environment and Development, 1992).
67 Housman, R. and Zaelke, D, "Trade, Environment, and Sustainable Development: A Primer," 15 Hastings Int'l & Comp. L. Rev. 535, 539 (1992).
68 *Tuna-Dolphin* decision, *supra* note 12.
69 16 U.S.C. §§1361-1407.

MMPA further requires the banning of imported fish caught with technology harmful to dolphins.[70] The U.S. embargo against importation of Mexican tuna was the result the continued by Mexican fisherman use of purse-seine nets while fishing for yellowfin tuna in the Eastern Tropical Pacific Ocean.[71] The U.S. objected to the use of the nets due to the fact that fishing by such means regularly involved large by-catch of dolphins, predators of the yellowfin tuna.[72] Consequently, in response to a federal court order,[73] the United States imposed an embargo against Mexican yellowfin tuna on February 22, 1991.[74]

On January 25, 1991, Mexico requested the convening of a dispute resolution panel pursuant to Article XXIII (2) of GATT.[75] Mexico alleged, among other GATT infractions, violation of Article I's MFN Principle. The U.S., Mexico argued, was treating Mexican tuna differently than "like" tuna of other nations. The U.S. countered that it was treating all tuna caught with purse seine nets alike.[76] Unconvinced by the United States' position, the GATT panel found that Article III "does not allow a party to discriminate against another party's products on the basis of the method of production."[77] In brief, the GATT panel deciding the *Tuna-Dolphin* decision was asked to address the permissibility of certain "eco-labeling" requirements imposed on all imports of canned tuna into the U.S. under the Dolphin Protection Consumer Information Act (The Consumer Act).[78] The Consumer Act, in part, defined certain requirements to be met by suppliers of tuna in order to label the tuna "dolphin safe."[79] The GATT panel found the provisions of the Consumer Act not to violate MFN solely on the basis of the voluntary nature of the labeling requirements--had the labeling been required of all suppliers, the GATT panel implied that a violation of MFN would exist.[80]

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70 *Id.*
71 Ross, D., "Making GATT Dolphin-Safe: Trade and The Environment," 2: 2 Duke J. of Comp. & Int'l L. 345, 346.
72 *Id.*
73 *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 975-6(N.D. Cal. 1990), aff'd 929 F. 2d 1449 (9th Cir. 1991).
74 *Tuna-Dolphin* decision, *supra* note 12, at para. 2. 7.
75 *Id.* at para. 1.1.
76 *Id.* at paras. 3 : 16, 3 : 20.
77 Ross, *supra* note 71, at 351, citing *Tuna-Dolphin* decision at para. 5.15.
78 16 U.S.C.A. § 1385. The Act is in fact the 1990 amendment to the MMPA. *See*, Ross, *supra* note 71, at 346.
79 *Tuna-Dolphin* decision, *supra* note 12, at 51.
80 *Id.*

b . The National Treatment Principle (Art. III)

Under the National Treatment Principle, goods imported from abroad must be accorded the same treatment as like domestic products.[81] The National Treatment Principle further prohibits the imposition of facially neutral regulations that acts in a preferential way with regard to domestic goods.[82] Under this principle, environmental and/or health standards, although facially neutral, may operate as technical barriers to trade (TBTs) in that they indirectly favor domestic producers.

The National Treatment Principle has been implicated in two important GATT decisions relating to domestic environmental legislation--the *Petroleum Products*[83] case and, again, the *Tuna-Dolphin* decision.[84] Each of the two decisions will be discussed below.

The *Petroleum Products* case involved a complaint by Canada, the European Community and Mexico concerning the imposition by the U.S. of a higher excise tax on imported crude oil than that imposed upon domestic oil.[85] The differential tax rate was established pursuant to the 1986 Superfund and Reauthorization Act[86] and was intended, in part, to finance hazardous waste site cleanup costs. Notwithstanding the arguments of the U.S. to the contrary, the GATT panel found U.S. and foreign crude oil to be "like products."[87] The GATT panel found further that the U.S. crude oil tax violated Article III, paragraph 2 of GATT and suggested that the U.S. either raise the tax on domestic crude, lower the rate on foreign crude or eliminate the tax altogether. The U.S. chose to raise the domestic rate.[88]

The decisions above give rise to one further complaint by environmentalists regarding the GATT National Treatment Principle--that the principle does not reward the internalization of environmental costs. In other words, nations

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81 GATT, *supra* Note 29, at Art. III, Paras. 1-2; 55 U.N.T.S. at 204-206.

82 *Id.*, at Art III, Para. 2, U.N.T.S., at 204, reads as follows:
The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal charges of any kind in excess of those applied, directly or indirectly, to domestic products.

83 *Petroleum Products*, *supra* Note 12.

84 *See, supra* note 12.

85 *Petroleum Products*, *supra* note 12, at 136.

86 The taxes in question were imposed by the United States in satisfaction of certain requirements of the U.S. Comprehensive Environmental Response, Compensation and Liability Act (known as "Superfund"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

87 *Petroleum Products*, *supra* note 12, at 159.

88 26 U.S.C.A. §461(c).

whose industries must meet stricter environmental standards (thereby internalizing environmental costs) cannot place levies, etc. on countries whose "like products" were made under lax standards.[89] Consequently, argue environmentalists, GATT provides inverse incentives--encouraging states to externalize environmental costs in order to remain competitive. The end result of such a regime is a "lowest common denominator" approach to environmental standard-setting.

c . Prohibition against Quantitative Restrictions (Art. XI)

Trade quotas are specifically prohibited under GATT's Article XI as "quantitative restrictions on trade."[90] As one commentator notes: "By broadly prohibiting non-tariff barriers, the ban on quantitative restrictions also prohibits a contracting party from instituting environmental restrictions such as a conservation ban or limit imposed on exports of resources," Article XX exceptions notwithstanding (see below). One example of non-GATT behavior might be the U.S. restriction placed upon the exportation of old-growth timber.[91]

Although not strictly a piece of domestic legislation, the Montreal Protocol on Substances that Deplete the Ozone Layer,[92] to which the U.S. is a party, represents a good example of the conflict between important environmental efforts and GATT Article XI. The Protocol's relevant provisions prohibits parties to the agreement from trading in "controlled substances" (i.e., chlorofluorocarbons, CFC's) with non-parties.[93] These provisions are necessary given the fact that *any* net increase in CFC emissions could result in further depletion of the ozone layer. As a consequence, the problem of "free riders" takes on added significance. The restriction against trade with non-parties, therefore, encourages participation in the Protocol.

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89 *See*, Housman & Zaelke, *supra* note 67, at 540. It is significant to note, moreover, that a GATT Panel has never found lax environmental standards--*de facto* or *de jure*--to constitute a countervailable subsidy. Price, "Linking Global Environmental Protection and International Trade: What are the Options After the U.S. -Mexico GATT Panel Decision ?" 27 U. B.C.L. Rev. 313 (1993).

90 GATT, *supra* note 29, at Article XI, para. 1 provides in relevant part:
No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

91 16 U.S.C. §§620(a), (c), (e), 489(a), 491(a), 493(5) (Supp. I 1990).

92 Montreal Protocol, *supra* note 25.

93 *Id.* at 1554-55.

The provisions of the Montreal Protocol have caused a great deal of debate among the GATT Contracting Parties. Under the Vienna Convention on the Law of Treaties, the Montreal Protocol is clearly "last in time," and, accordingly, serves as an exception to the GATT in cases involving parties to the Montreal Protocol.[94] Should a non-party to the Protocol be sanctioned, however, the question is considerably more difficult. In such instances, the likely result would be a violation of GATT, insofar as the Vienna Convention's "last in time" rule does not apply to cases involving non-parties to the later treaty.[95]

Although a GATT Panel has not been faced with a question specifically relating to a party/non-party dispute under the Protocol, recent meetings on the issue have been divisive, with a number of GATT parties asserting a belief that the Protocol may, at times, violate GATT.[96] In light of this controversy, the GATT Secretariat has suggested that the Protocol parties consider "whether GATT consistent possibilities could be used to influence the actions of countries which are reluctant to participate."[97]

The above debate over the Montreal Protocol has led one study to question whether or not the GATT Secretariat's treatment of the Protocol should not be rescinded in light of the *Tuna-Dolphin* decision.[98] Indeed, the *Tuna-Dolphin* restrictions are somewhat similar, at least in relevant respects, to the Protocol's restrictions. In fact, the *Tuna-Dolphin* restrictions are *less* problematic in that they are aimed solely at fish caught with purse seine nets, whereas the Protocol prohibits trade in *all* controlled substances. The GATT Secretariat is somewhat vague on its justifications for approving the Protocol, noting in support of its decision that the restrictions were non-arbitrary and therefore within the purview of article XX's exceptions, to be discussed in detail below.

d . Limitation on Subsidies (Art. XVI)

GATT, and the subsequent Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT ("Subsidies Code")[99] address two

94 *See, e. g.*, Baker, *supra* note 6, at 447 fn. 35, stating that "When two GATT contracting parties are also parties to the subsequent treaty, incompatible later provisions are "exceptions to the GATT," and when only one of the two GATT contracting parties is party to such a later treaty, GATT obligations remain."

95 *Id.*

96 *Trade and the Environment*, *supra* note 66, at 33.

97 *Id.*

98 Housman & Zaelke, *supra* note 67, at 580.

99 B.I.S.D. (26th Supp.) 56 (1980) (hereinafter "Subsidies Code").

basic types of subsidy: export subsidies and general subsidies. Together, these subsidies cause at least three types of trade distortion: (1) export subsidies may affect an importing country's industry in like products in a situation analogous to dumping, (2) export subsidies may be used to introduce products into a third country's market in which such goods will compete with non-subsidized goods imported from elsewhere, thereby forcing the nations whose goods can't compete to either adopt similar subsidies or submit to a price war, and (3) general subsidies may simply be used to give an advantage to domestic over foreign producers (this would likely be GATT permissible, although perhaps subject to countervailing duties).[100] In light of these possible effects, the parties to GATT have sought carefully to limit the type of subsidy permissible and to make available "market-correcting" responses.

Although GATT permits the use of general subsidies that "are used by governments to promote important objectives of social and economic policy,"[101] export subsidies on non-primary products are prohibited.[102] Primary products, for which export subsidies are permissible, are defined as "any product of farm, forest or fishery, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade."[103]

While it may be argued that lax environmental standards with regard to goods destined chiefly for export constitutes a "hidden" export subsidy, the difficulty in establishing a direct export subsidy is compounded in such a case by the need to prove the intent behind a particular environmental standard. A more compelling case can be made concerning the use of general subsidies, now seriously limited under the subsidies code.[104]

The Subsidies Code "requires signatories to ensure that their use of subsidies does not harm the trading interests of other signatories and authorizes countervailing duties where subsidized imports threaten material harm to domestic industries."[105] The Subsidies Code, then, presents several difficulties for envi-

100 Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict ?" 49 Wash. & Lee L. Rev. 1227 (1992) (hereinafter "Congruence or Conflict").
101 Subsidies Code, *supra* note 99, at Art. 8, Para. 1.
102 *See, i. e.*, GATT, *supra* note 29, at Art. XVI, Para. B. 4; and *Id.*, at Art. 9, Para 1.
103 GATT, *supra* note 29, at Art. XVI, §B, Para. 2.
104 Housman & Zaelke, *supra* note 67, at 555.
105 *Id.*

ronmental legislation. It may be true, as Jackson points out, that subsidization of domestic industries in order to assist them in internalizing environmental costs not internalized by their foreign competitors will run afoul of GATT.[106] Any exports so subsidized might subject the exporting country to countervailing duties.[107]

In addition to curtailing the range of permissible subsidies, the Subsidies Code further limits the circumstances under which countervailing duties may be used.[108] As a result, a party may be precluded from imposing countervailing duties on goods produced under lax environmental standards. In order for a party to be entitled to impose countervailing duties caused by so-called "eco-dumping," it would be necessary to show "injury." It is unclear (doubtful) whether the harm caused by lower environmental standards would constitute "injury" under the Code.[109] The GATT Secretariat, moreover, has stated that in order for a party to prevail in a complaint based upon the lax environmental standards of a foreign competitor nation, the party would have to show "not only that the environmental standards were low, causing a cognizable injury to the challenging party's industries, but that the standards were too low given the other party's per capita income and its environments's physical characteristics."[110] Under such a balancing test, it might be argued, for example, that Mexico's lower environmental standards (assuming they *are* verifiably lower[111]) are permissible due to the country's lower per capita income and vast tracts of desert wherein polluting activity can be undertaken at minimal threat to large populations.

e. GATT Exceptions (Article XX)

Article XX of the GATT provides for certain limited exceptions to the general prohibitions described above. As long as the excepted trade measures are "not applied in a manner which would constitute a means of arbitrary or

106 Jackson, J. *The World Trading System: Law and Policy of International Economic Relations* 209 (1989).
107 Housman & Zaelke, *supra* note 67, at 555.
108 *Trade and Environment*, *supra* note 66, at 19.
109 Housman & Zaelke, *supra* note 67, at 556.
110 *Id.*; *See also*, *Trade and Environment*, *supra* note 66, at 19.
111 *See, e. g.*, Loecke, "The National Environmental Policy Act of 1969 and Its Implications for NAFTA: *Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C.), rev'd, 5F. 3d 549 (D.C. Cir. 1993)," 23 Ga. J. Int'l & Comp. L. 603, 607 (1993); in which the author notes a number of concerns regarding Mexican environmental standards.

unjustifiable discrimination,"[112] parties may impose such measures deemed necessary based upon "national policy considerations."[113] The section goes on the define, by way of several subsections, those "national policy considerations" under which exceptions apply. Two subsections--XX (b) (Human, Animal and Plant Life or Health) and XX (g) (Conservation of Scarce Resources)--are relevant to domestic environmental legislation.

Article XX (b) excepts from GATT those measures "necessary to protect human, animal or plant life or health."[114] Although seemingly a broad grant of authority for engaging in domestic environmental lawmaking, this exception has in fact been undermined somewhat by the *Tuna-Dolphin* decision, in which the Panel decided that measures under Article XX (b) cannot have extraterritorial scope.[115] Domestic measures designed to protect the global commons, as was the case in the *Tuna-Dolphin* case, are not permitted.[116]

Yet another GATT Panel decision, the *Thai Cigarette* case involved the interpretation of the "necessary" requirement of XX (b). In considering whether or not a ban on certain foreign cigarettes would be permissible, the court stated that in order for a measure to be "necessary," two factors must be proven: "1) no reasonably available alternative measure consistent with GATT existed, and 2) the measure taken was the less trade restrictive measure of all available alternatives."[117]

The *Tuna-Dolphin* panel elaborated upon this rule, finding that the U.S. had not exhausted all GATT-safe means for resolving the dispute; e.g., the U.S. had not attempted to negotiate a bilateral agreement regarding tuna fishing.[118] These decisions cast a great deal of doubt on the effectiveness of Article XX (b) as a means for justifying domestic environmental measures. Whether such measures will be deemed "necessary" is an *ex post* determination based upon factors not normally within the purview of regulating agencies. Indeed, one

112 GATT, *supra* note 29, at Art. xx.
113 Housman & Zaelke, *supra* note 67, at 546.
114 GATT, *supra* note 29, at Art. XX (1) (2).
115 *Tuna-Dolphin* decision, *supra* note 12, at 45-6.
116 Once again, it is worth questioning why the same would not be true of the Montreal Protocol, *supra*, note 43. The ozone problem is not localized--it is inherently "extraterritorial," and yet the GATT Secretariat continues to support the Protocol. It will be necessary at some point for the Secretariat to address this inconsistency.
117 *Thai Cigarette Case*, *supra* note 12, at 200-23.
118 *Tuna-Dolphin* decision, *supra* note 12, at 46. In fact, as Housman & Zaelke note, the United States and other Eastern Tropical Pacific (ETP) countries (including Mexico) "have been involved in ongoing efforts to reach an agreement on the conservation of dolphins since

may question as to whether or not an agency *could* have the facilities needed to adjudge the "necessity" of each and every regulation under GATT.

Although not a GATT Panel decision, the *Danish Bottle Case*[119] might be used to further extend the requirements of Article XX to include the notion of "proportionality." The *Danish Bottle Case*, decided by the Court of Justice of the European Community pursuant to the European Community Treaty, involved certain Danish standards concerning the import of glass bottles from abroad. The Danish sought to justify restrictions upon imports under Article 36 of the Treaty--a directly comparable provision to the GATT's Article XX. In finding that the Danish requirements concerning certain quotas and inspections of foreign bottles constituted a violation of the Treaty, the court alluded to the fact that the measures chosen by the Dutch were clearly out of proportion to any legitimate interest in ensuring the quality of imported glass goods.[120]

Article XX (g) excepts from GATT those measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Once again, although not decided by a GATT Panel, the *Canadian Herring Case*[121] provides a useful illustration of the principles of Article XX (g). The case involved Canadian requirements for pre-border inspections of herring and salmon boats bound for U.S. waters, ostensibly for the purpose of gauging yields and related conservation data. Although the court noted that there was a connection between the rules and the legitimate aim of conservation, that the measures needed to be "primarily aimed at" conserving the resource. The same Panel further elaborated that "trade measures aimed at preserving a resource need not be necessary to preserve the resource, but instead need only be: 1) primarily aimed at preserving the resource; 2) taken in conjunction with domestic restrictions on the use of the resource; and 3) primarily aimed at rendering the domestic restriction effective."[122]

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the 1970s." Housman & Zaelke, *supra* note 67, at 547n. 47.

119 *Danish Bottle Case*, supra note 12. For a good discussion of the *Danish Bottle Case* and its potential relevance to the GATT exception, see Schoenbaum, supra note 8, at 716.

120 Schoenbaum, supra note 6, at 716.

121 In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the Panel, Oct. 16, 1989, panel established under Ch. 18 of the Free Trade Agreement between Canada and the United States.

122 *Id.*

III. The Tokyo and Uruguay Rounds

In addition to the above provisions, the GATT parties have met in two separate, protracted sessions to amend and interpret the original GATT agreement. Although a full discourse of the environmental implications of each round is beyond the scope of this paper, it will be necessary to examine a few aspects of the talks. Of particular importance are the provisions of the recently-concluded Uruguay Round concerning, *inter alia*, the establishment of a Trade and Environment Working Group and the creation of the World Trade Organization. As will be seen, the trend of recent GATT talks has been toward ever more stringent controls on environmental legislation and its impacts.

A. The Tokyo Round[123]

The Subsidies Code, described earlier, is perhaps one of the more important results of the Tokyo Round. As was seen earlier, the Subsidies Code has several detrimental effects upon domestic environmental legislation, including the prohibition against the use of domestic subsidies or countervailing duties in response to lax foreign environmental standards.

In addition to the Subsidies Code, the Tokyo Round produced the Agreement on Technical Barriers to Trade (The TBT Agreement, or "Standards Code"). The Code requires that the testing and adoption of technical regulations relating to health, safety, consumer and environmental protection not be used so as to create unnecessary barriers to trade. Pursuant to GATT Article X's transparency requirements,[124] parties are required to notify the international community regarding any domestic technical regulations which deviate from international norms and might affect trade.[125]

There has never been a dispute under the Standards Code, but it can hardly be viewed as innocuous. Rather, the Code is perhaps more fairly viewed as a step toward harmonization of environmental, health and safety standards. By requiring parties to publicly justify measures affecting trade and deviating from the international norm, the Code apparently seeks to encourage normalization of

123 See reference, *supra* note 33.
124 GATT. *supra* note 29, at Art. X, Para. 1.
125 Housman & Zaelke, supra note 67, at 554.

standards. Whether this is a positive or negative for environmental protection depends upon whether the "harmonized" standards are lax, moderate or strict.

B. The Uruguay Round[126]

The Uruguay Round commenced in 1986 and was recently completed and embodied in a document known as the "Marakesh Declaration."[127] Although the Uruguay Round presents a number of potentially important developments, two in particular will be discussed. The first development evident from the Uruguay Round is that at least some amount of attention was paid to the issue of the trade-environment debate. In a Decision of 14 April 1994, attached as an appendix to the Uruguay Round materials, the Ministers squarely address the issue of "Trade and Environment."[128] Although little more than a vague statement of principles, and not itself constituting any form of commitment on the part of the GATT parties, the Decision nonetheless represents an important step toward establishing mutual dialogue on trade and environment.

Having noted, *inter alia*, the Rio Declaration on Environment and Development and subsequent efforts undertaken by the GATT Group on Environmental Measures and International Trade, the statement announces the decision to establish, within the World Trade Organization (WTO) (below) a Committee on Trade and Environment open to all members of the WTO.[129] A selection of concerns to be addressed by the committee as of its first meeting includes the following:

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126 Refer to citation, supra note 13.
127 *Id.* at 1267.
128 *Id.*
129 The Decision further describes the "Terms of Reference" for the newly-created Committee as including the following provisions:
(a). to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
(b). to make appropriate recommendations on whether any modifications of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
--the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
--the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
--surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.

-- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;

-- the relationship between environmental policies relevant to trade and environmental measures with signigicant trade effects and the provisions of the multilateral trading system...[130]

Missing from the Decision is any indication as to exactly what the Committee on Trade and Environment is expected to do with its findings concerning the above issues. One may well assume, for example, that the Committee will have some impact upon the future of WTO decisions involving trade and environment disputes.

The WTO is itself the second, and certainly most significant achievement of the Uruguay Round of discussions. Articles I through XVI outline the establishment, basic structure and rules governing accesion to the WTO. Of particular importance is Article II, which defines the "Scope of the WTO."[131] According to the terms of the section,

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Member in matters related to the agreements and associated legal instruments included in the Annexes to the Agreement.
2. The Agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreement") are integral parts of this Agreement, binding on all members."

The above provisions are significant with relation to the trade-environment debate in that they represent the creation of an entirely new trade regime--one that antedates the key environmental agreements of the past twenty years. While, as noted earlier, agreements such as the Montreal Protocol were typically treated by the GATT as exceptions to the trade agreement's provisions, the WTO will likely be considered the "last in time" agreement for purposes of resolving disputes between the two regimes. Thus, the fact that the WTO adopts, by reference to attached Annexes, all of the 1947 GATT and subsequent Codes, might signal a fundamental shift in the applicability of many leading

130 Uruguay Round, *supra* note 13, 1268.
131 *Id.* at 1144.

environmental agreements.

A curious aspect of the new WTO system is that the old "1947 GATT" system survives its creation. Pursuant to Article XI of the Act, parties to the 1947 agreement are automatically eligible for membership in the WTO, but need not become members.[132] Moreover, a party may opt, under Article XIII, to join the WTO, but to remain bound by the terms of the 1947 agreement.[133] The situation thus created further exacerbates the difficulties mentioned above, for the key environmental agreements will remain exceptions as to those parties that choose to remain members of the 1947 agreement, but will no longer serve as exceptions as to those who join the 1994 GATT.

The array of possible outcomes to environment trade-disputes has, therefore, grown exponentially. What might be the result, for example, if a party to the 1994 GATT, who chooses not to be bound by its terms, complains of an environmental trade measure? Will the party be able to take advantage of the 1994 GATT for purposes of the Vienna Convention, while remaining bound only to the terms of the 1947 agreement?

IV. Trade Perspectives on Environmental Law

Given the issues discussed above, it is difficult, at best, to ascertain the prevailing mood on the part of "free traders" toward the trade-environment debate. Within the past two years, significant efforts have been undertaken by the GATT towards establishing a framework through which to better assess environmental issues. The GATT Working Group on Environmental Measures and International Trade, established originally in 1971, held its first meeting in 1991, and a second in 1992. Prior to the creation of the WTO, the Working Group was vested with the task of investigating the need for environmental side agreements to the GATT.[134] The status of that Group now seems uncertain.

As to the future, one may look only to the past for some indication as to how the WTO might approach environmental issues. The above materials indicate a fundamental difference in perception between environmentalists and trade-

132 *Id.* at 1150.
133 *Id.* at 1151.
134 Schoenbaum, *supra* note 6, at 726 fn. 144.

conflict decisionmakers--a difference that has rendered effective dialogue all but impossible Whereas GATT Panels have defined "proportionality" in terms of the costs associated with a measure relative to any environmental benefits,[135] environmentalists might view "proportionality" as a justification for immediate, definitive action regardless of cost.

Trade panels have been responsible for framing many of the issues in the debate between trade and environment, a fact which has resulted in a very real disparity between environmental and trade law. Although the GATT system and related. smaller trade systems are currently undergoing review of their environmental policies, they are, at heart, organizations dedicated to liberalized trade and not to environmental concerns. The proposals below may work, ultimately, to strike a balance between the two positions and to encourage the further development of dialogue and interaction at the planning and execution stages of international policymaking.

V. Toward Reconciliation of Trade and Environment

Scholars and policymakers from both sides of the debate appear to agree, in principle, upon the need for open and clear dialogue between the two factions. As a preliminary step toward reconciliation, then, proponents of trade and environment must engage in bilateral, cooperative talks designed to produce an explicit statement concerning the proper relationship between trade and environment.[136] Although some propose resolving ambiguities within the existing frameworks,[137] to do so would be to ignore the very real differences in perception between the two sides.

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135 *Danish Bottle Case*, *supra*, note 12. *See also*, Lallas, *supra* note 6, at 287, in which the author argues that under the European Court of Justice's definition of "proportionality," "the validity of a domestic environmental regulation affecting trade [depends]upon whether the economic costs of the regulation are deemed 'proportional' to its environmental benefits."

136 *See, i. e.*, Weiss, *supra* note 40, at 728-9.

137 *See, e. g.*, Schoenbaum, *supra* note 6 at 726, in which the author--an advocate of liberalized trade--argues, *inter alia*, for:

(1). conclusion of a side agreement on GATT Article XX to define currently ambiguous criteria and resolve conflicts of interpretation;

(2). utilization of the GATT Standards Code to provide a forum for harmonization of environmental standards and regulations…

(4). conclusion of a new GATT environmental Code to address the issues of multinational environmental agreements and minimum levels of pollution-control for import-sensitive industries.

What is needed, therefore, is an objective third body, established perhaps under the umbrella of the United Nations. The new body would necessarily involve experts from both trade-related and environmental fields. Within such a framework, it might be possible to define terms of reference, to determine acceptable standards against which to assess the ecological conduct of those engaged in trade and to resolve disputes between the competing systems of law.[138]

As the *Tuna-Dolphin* case demonstrates, GATT dispute resolution is ill-equipped to take into account factors outside of the "four corners" of GATT. Some commentators have suggested that GATT panels include environmental experts in cases involving environmental concerns.[139] While such would theoretically be possible under GATT, GATT may well not permit the Panels to take into account extra-GATT environmental concerns, rendering the presence of the environmental expert all but useless.[140] In order to allow such concerns to be taken into account in GATT disputes, the agreement itself would need to be amended so that the third body might resolve the limited number of trade cases involving environmental issues.

The concept of the harmonization of environmental standards has arisen occasionally as a possible source for reconciliation. However, the difficulty arises once again as to which body will be give the responsibility for assessing the standards to be applied. Commitment to the harmonization of standards assumes that such standards will be satisfactory to meet the needs of the environment. In many instances, environmental standards are necessarily flexible, in order to allow for changes in science and policy. Once again, an objective body would be better able to accommodate the concerns of both groups as to the harmonization of standards.

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138 The question may well arise as to the current relative bargaining power of the two factions. Clearly, the regime for international trade is well entrenched and, with the passage of the WTO, may be in a position to overwhelm much of the environmental legislation of the past decades to the extent that such legislation contains elements deemed unfriendly to trade. Although this grants to "free traders" a high degree of leverage in resolving disputes, it will likely not affect the current behavior of states with regard to environmental concerns. As noted earlier, the environmental paradigm is premised upon an urgency that may not be swayed by the possibility of future WTO review.

139 *See, e. g.*, Hudson, S. *Trade, Environment and the Pursuit of Sustainable Development* 5-6 (1991).

140 Housman and Zaelke, *supra* note 67, at 607.

Conclusion

Regardless of how the difficulties discussed above are resolved, the fact remains that future trade and environmental agreements should be drafted with an eye toward avoiding the kinds of disputes noted above. The drafters of the APEC will, for example, need to understand and appreciate the "environmental paradigm," rather than simply relying upon established formulae for international trade policymaking.

Ultimately, then, what is needed is an appreciation of both the differences and the similarities between the two spheres of influence--environment and trade. Whereas environmentalists urge immediate action in the face of uncertainty, free traders premise action upon high degrees of certainty. Environmentalists might view "cost" in ecological terms; placing a relatively high value upon such intangible concepts as sustainability and biodiversity. For the free trader, "cost" would most likely imply an economic assessment of market value--a matter of demand and supply. Perhaps most fundamentally, environmentalists may often view trade as the enemy of the environment and free traders might view environmental issues as obstructionistic and irrelevant to the liberalization of free trade.

The fundamental similarity between the two spheres is that each is concerned, ultimately, with improving the state of the earth, although each in very different--an occasionally diametrically opposed--ways. Recent agreements--Agenda 21 and the Uruguay Round of the GATT--show an ever-increasing sensitivity to the need for reconciliation between trade and environment. Although it is clearly too early to assess the value behind the rhetoric in these agreements, the trend is nevertheless encouraging.

APEC leaders would be well advised to embrace the trend toward reconciliation, to the extent that it exists, and to move forward toward a time when the two separate spheres of influence might converge.