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## The Environment and Trade — A Multilateral Imperative

*Geoffrey W. Levin*

Environmental protection<sup>1</sup> has emerged as one of the most pressing social issues of the last quarter of the twentieth century. Environmental concern in developed and developing countries alike continues to evolve as the global impact of local environmental adulteration becomes more evident.<sup>2</sup> Notwithstanding this recognition, economic and social interests often subvert environmental concerns.<sup>3</sup> In varying degree, developed and developing countries tolerate environmentally hazardous activities which lower production costs and provide a competitive advantage in international trade.<sup>4</sup>

As one of the world's greatest polluters, the United States

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1. Environmental protection encompasses both the conservation of existing natural resources and the restoration of environmental degradation, to the extent possible. Persistent environmental concerns include protection of wild flora and fauna; maintenance of air and water quality; preventing desertification; and preservation of the atmospheric ozone layer. For a general analysis of what constitutes the "environment" in the context of global environmental problems see, KENNETH A. DAHLBERG ET AL., *ENVIRONMENT AND THE GLOBAL ARENA* (1985); *Review of the Environmental Situation and of Activities Relating to the Environment Programme, Report of the Executive Director*, U.N.E.P. 3rd Sess., Agenda Item 7.0, at 20, U.N. Doc. UNEP/GC/30 (1975) [hereinafter *UNEP Review*].

2. *Recent Environmental Activities of the Agency for International Development: Hearing Before the Subcomm. on Human Rights and Int'l Orgs. of the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 6 (1990) [hereinafter *Activities of the A.I.D.*] (statement of Richard E. Bissell, Assistant Administrator, Bureau for Science and Technology, Agency for International Development).

3. Many developing countries subjugate the environment to more basic interests such as food and shelter. For example, countries permit the use of slash and burn agriculture techniques, which are rapidly destroying the tropical rain forests, in an attempt to gain arable agricultural land to meet the needs of an ever-increasing third world population. Cf. Ingo Walter, *International Economic Repercussions of Environmental Policy: An Economist's Perspective*, in *ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY* 22, 23 (Seymour J. Rubin & Thomas R. Graham eds., 1982) (explaining that different countries approach environmental management according to different schedules, with different degrees of rigor, and using different policy approaches).

4. 137 CONG. REC. S13169 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus).

recently has taken great strides and incurred substantial costs to remedy the deleterious effects of its industrialization and to prevent further environmental destruction.<sup>5</sup> Other countries' failure to address their own industries' impact on the environment and the perceived trade advantage this creates has led several members of the U.S. Congress to call for inclusion of environmental issues in the international trade regime.<sup>6</sup>

The U.S. International Trade Commission (ITC) identified at least thirty-three environmental bills introduced in the 101st Congress that would restrict international trade or affect international trade policy.<sup>7</sup> A number of bills directly linked export or import restrictions with environmental policies.<sup>8</sup> The 102d Congress has renewed<sup>9</sup> and surpassed<sup>10</sup> the 101st Congress's endeavors to condition trade on environmental protection. If passed, this legislation would introduce environmental "condi-

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5. The U.S. Environmental Protection Agency recently completed a study which indicates that U.S. expenditures on environmental protection have reached approximately \$100 billion per year. This expenditure represents 1.5-1.7% of the United States' gross national product and is expected to rise to nearly 3% of the GNP within ten years. 137 CONG. REC. S5300 (daily ed. Apr. 25, 1991) (introduced as a finding of Congress under S. 984, 102d Cong., 1st Sess. (1991)).

6. See, e.g., *Id.* at S5299 (daily ed. April 25, 1991) (statement of Sen. Boren cautioning that "[the United States] cannot afford to conduct its trade policy in an environmental vacuum." The proposed Senate bill, S. 984, calls for Congress to recognize explicitly that "[t]he significant and serious competitive advantage enjoyed by our foreign competitors from cost savings derived from the absence of effective pollution controls results in cheaper foreign imports which capture U.S. market share and injure U.S. industries." S. 984. *Id.* See *infra* notes 121-62 and accompanying text on proposed U.S. legislation.

7. U.S. INT'L TRADE COMM'N, PUB. NO. 2351, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE 1-8 (1991) (Report to the Senate Committee on Finance, on Investigation No. 332-287 under Section 332 of the Tariff Act of 1930) [hereinafter INT'L AGREEMENTS]. Most of these bills were not enacted, however, either because other actions made them unnecessary (e.g., the president's ban on U.S. imports of ivory), or because voluntary efforts were made on a bilateral and multilateral level (e.g., the Montreal Protocol on the phase out of CFCs). *Id.*

8. For instance, a number of bills would authorize the president to ban imports from nations which disregard international fisheries conservation programs, or which conduct trade in elephant products. See *infra* notes 138-39 and accompanying text.

9. S. 59 reintroduces provisions of S. 261, 101st Cong., 1st Sess. (1989), which would amend Section 301 of the Trade Act of 1974 to make the failure to protect the environment an unfair trade practice. S. 59, 102d Cong., 1st Sess. (1991).

10. S. 984, which calls for countervailing duties on imported products from countries with unsound environmental policies, provides the broadest statement yet for environmental protection. See *infra* notes 143-47 and accompanying text.

tionality"<sup>11</sup> by forcing trading partners of the United States to comply with minimum environmental standards or risk trade sanctions.

This Note contends that environmental conditionality would be less effective than multilateral action in achieving U.S. goals of fair trade and environmental protection. Part I outlines the relationship between international trade and environmental protection, and traces the history of environmental issues in the General Agreement on Tariffs and Trade (GATT).<sup>12</sup> Part II examines proposed U.S. legislation conditioning unfettered trade access on minimum environmental standards and analyzes the negative reaction these bills, if enacted, would probably elicit from the international community (developed and developing nations). Part III discusses the advantages of seeking environmental protection through international cooperation and explains how multilateral action provides a viable and internationally acceptable means of achieving Congress's moral, political and economic objectives for which it has prefaced unilateral action. This Note concludes that the U.S. Congress should redirect its efforts toward establishing environmental norms in a multilateral framework.

## PART I. THE RELATIONSHIP OF INTERNATIONAL TRADE TO THE ENVIRONMENT

Two interrelated concerns have propelled environmental issues to the forefront of the international trade arena. Genuine global concern for environmental protection is inducing economically and politically powerful nations to assert control over sovereign countries' environmental priorities.<sup>13</sup> Soaring

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11. As used herein, environmental "conditionality" mandates a quid pro quo, whereby trade access is allowed only to nations adopting specified environmental standards.

12. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. pts 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

13. GATT Secretariat, *Trade and the Environment* 16 (1992) (forthcoming in INTERNATIONAL TRADE 1990-1991, advance copy on file with the Minnesota Journal of Global Trade) (hereinafter GATT, *Trade and the Environment*).

Governments are increasingly recognizing the international character of environmental problems and are framing their responses in a more "cohesive international and analytical framework." *Trade and the Environment: Hearing on S. 2887 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 101st Cong., 2d Sess., 3 (1990) (statement of Donald Eiss, Deputy Assistant U.S. Trade Representative for Industry) [hereinafter *Hearing on S. 2887*]. The Organization for Economic Cooperation and Development (OECD) notes that "improving environmental conditions and promoting sustainable development have become increasingly fundamental objectives. Member coun-

membership in environmental action groups and increasing support for "Green" political parties in several nations are two compelling examples of flourishing international concern.<sup>14</sup>

The other dominant impetus behind environmental conditionality is the ubiquitous complaint that industries in developed countries suffer from an unfair competitive disadvantage.<sup>15</sup> Stringent domestic environmental protection regulations underlie many recent complaints of competitive disadvantage.<sup>16</sup> Capitalists and politicians have joined forces to level the economic playing field by advocating harmonized regulations in import-competing countries or U.S. trade restrictions which will impose commensurate costs on foreign goods and services.<sup>17</sup> The combined forces of environmental industrial and political groups are forcing governments to consider the implications of economic advancement on the natural environment.<sup>18</sup>

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tries fully recognize their special responsibility in the international effort to seek solutions to global environmental programs." *Id.*

14. The World Wildlife Fund, for example, has seen its membership in the United States alone increase by more than twenty-five times in the past decade, from twenty-five thousand to over six hundred thousand. *International Environmental Agenda for the 101st Congress; Hearing of the Senate Comm. on Foreign Relations*, 101st Cong., 1st Sess. 252 (1989) (statement of Russell Train, President, World Wildlife Fund) [hereinafter *Environmental Agenda*].

15. GATT, *Trade and the Environment*, *supra* note 13, at 16. The GATT Secretariat has noted that despite the domestic character of many environmental issues, concerns with competitiveness and the state of the environment have "internationalized" domestic environmental issues. *Id.*

16. "Environmental resources are another element that determines comparative advantage, much the same as labor force, capital and natural resource endowment." Charles Pearson, *Environment and International Economic Policy*, in *ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY* 46, 49 (Seymour J. Rubin & Thomas R. Graham eds., 1982).

17. The GATT Secretariat identified three strategies that those lobbying for a level playing field may demand: raising the standards in countries with low standards to a harmonized level; imposing duties on foreign imports to offset the claimed unfair cost advantage; and providing domestic subsidies. GATT, *Trade and the Environment*, *supra* note 13, at 17.

Genuine concern for the state of the environment cannot be entirely separated from domestic industry protection. It is the nationally felt need to enforce such restrictions domestically which has led to the competitive picture industry faces. It is also critical to recognize that productive efficiency and profitability are not by definition inimical to environmental protection. Increasing consumer demand for environmentally safe products has made the environment a marketing tool. Dolphin-safe tuna and recycled paper products are just two examples of profitable, environment-friendly products.

18. In response to industry pressure on politicians to lower domestic environmental standards, environmentalists support domestic producers' demands for a "level playing field." Attacking lower foreign standards with terms like

The frequent use of the term "sustainable development"<sup>19</sup> in environmental, economic and trade circles indicates an increasing awareness that environmental issues cannot be considered in isolation but must be examined in light of global economic development.<sup>20</sup> The future viability of the global environment depends upon "providing market-based incentives, eliminating structural impediments, and ending international trade practices that distort global markets."<sup>21</sup> The resultant economic dynamism achieved through free and fair trade<sup>22</sup> will

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"ecological dumping" to link "fair trade" and the environment, combined, these forces command significant political strength. *Id.*

19. Sustainable development posits that long-term development of local, regional, and global economies is dependent upon appropriate use of the Earth's resources. The concept brings to light the notion that we do not inherit the earth from our ancestors; rather, we borrow it from our children. "Sustainable Development involves meeting the needs of the present without compromising the ability of future generations to meet their own needs." *Policies and Mechanisms for Achieving Sustainable Development: Report by the UNCTAD Secretariat*, U.N. TDBOR, 38th Sess., pt. 1, at 3, U.N. Doc. TD/B/1304 (1991) [hereinafter *Policies and Mechanisms for Achieving Sustainable Development*]. For further discussion of the concept of sustainable development, see *Sustainable Development and UNCTAD Activities, Report by the UNCTAD Secretariat*, U.N. TDBOR, 37th Sess., pt. 1 at 1, U.N. Doc. TD/B/1267 (1990) [hereinafter *UNCTAD Activities*].

20. As early as 1975, the international community, by way of the United Nations Environment Programme, recognized the need to address environmental problems in a global framework. "What is necessary is integrated environmental management" rather than *ad hoc* unilateral steps, ". . . and the realization that the ultimate self-interest of all nations is inevitably merged in the inescapable web of interdependences." *U.N.E.P. Review*, *supra* note 1, at 20.

The Organization for Economic Cooperation and Development (OECD) adopted Declarations on Environmental Policies at three consecutive meetings in 1974, 1979, and 1985. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 8 (1986). The third Declaration, adopted in June 1985, "affirms that continued environmental improvement and sustained economic growth are interrelated and mutually enhancing objectives . . ." The Declaration also sets forth tactics for achieving this common goal, which include recognizing the importance of international co-operation. *Id.*

21. James A. Baker, *Diplomacy for the Environment: Address Before the National Governors Association* (Feb. 26, 1990), in U.S. DEPT. OF STATE, CURRENT POLICY 1254, at 2 [hereinafter *Baker Speech*].

22. The term "free trade" is misleading. "All trade among nations involves the sharing of reciprocal costs and benefits." William R. Robertson & Ronald A. Di Nicola, *Perspective on Free Trade: A 'Done Deal' Won't Be a Fair Deal; Workers on Both Sides Stand to Lose Unless Environmental, Job and Other Protections are Negotiated in Advance*, L.A. TIMES, Sept. 23, 1991, at B5. The term fair trade suggests that these costs and benefits must be allocated fairly among the parties.

benefit the developed and developing world alike.<sup>23</sup>

#### A. ENVIRONMENT AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The GATT signatories' goals of "raising standards of living" and "developing the full use of the resources of the world"<sup>24</sup> suggest a close nexus between economic development and the environment. Despite this connection, environmental concerns can conflict with GATT objectives. Environmental interests manifested through protectionist non-tariff barriers to trade could stifle the growth of the international economic system.<sup>25</sup> Restrictive trade practices negatively affect world trade and impair economic growth by distorting the price mechanism and the allocation of resources.<sup>26</sup>

The United Nations supports incorporating environmental concerns into all countries' development strategies. The organization cautions, however, that those concerns should "not be used to introduce new forms of conditionality in aid or in development financing and should not serve as a pretext for creating unjustified barriers to trade."<sup>27</sup> Nonetheless, the global nature of many environmental dilemmas creates pressure to apply trade restrictions "to influence environmental policies in third countries."<sup>28</sup> Broad based recognition of the relationship be-

23. Baker Speech, *supra* note 21, at 2; cf. INT'L AGREEMENTS, *supra* note 7, at 6-3 (additional views of Commissioner David B. Rohr).

The basic rationale for free international trade is that it promotes efficient use of resources by encouraging countries to specialize in the production of goods and services to which their resources are best suited and to import those which other countries can produce more efficiently. Pearson, *supra* note 16, at 48. In theory, any country which fails to specialize in the industries in which it has a competitive advantage will be priced out of the market in the absence of trade distorting market restrictions. See DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, Ch. VII (1817).

24. GATT preamble. These objectives are to be achieved "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." *Id.*

25. INT'L AGREEMENTS, *supra* note 7, at 6-3.

26. *Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Report of the Secretary-General*, U.N. GAOR, 44th Sess., Agenda Item 82(b), at 6, U.N. Doc. A/44/510 (1989). Report issued pursuant to U.N. General Assembly Resolution 42/173 of 11 December 1987.

27. G.A. Res. 228, U.N. GAOR 44th Sess., Agenda Item 82(f), ¶ 15(i), U.N. Doc. A/RES 44/228 (1989).

28. European Community Commission, *Trade and the Environment 1* (Sept. 1991) (on file with the *Minnesota Journal of Global Trade*) [hereinafter EC Commission, *Trade and the Environment*]. "The fact that different coun-

tween environmental protection and economic development is fundamental to avoiding unnecessary, coercive, unilateral trade barriers.<sup>29</sup>

The GATT combats unilateral trade restriction by promoting trade liberalization through multilateralism and nondiscrimination.<sup>30</sup> If governments are to reconcile the goals of promoting international commerce and protecting the global environment, they must contemplate environmental concerns as an element of this multilateral, nondiscriminatory trade order. Unilateral breach of these two GATT tenets bodes poorly for both the natural environment and the trade environment.

## B. RELEVANT GATT OBLIGATIONS

Free trade principles aside, there are instances when trade measures are necessary to achieve environmental goals (e.g., a ban on the import of dangerous substances or restrictions to enforce domestic product norms).<sup>31</sup> GATT's objectives of improving the global standard of living and efficiently employing the Earth's natural resources<sup>32</sup> acknowledge that "trade is a means to an end, rather than an end in itself."<sup>33</sup>

Although GATT is primarily an economic institution, there is room within the confines of the General Agreement to explicitly consider non-economic concerns. A number of exceptions allow environmental protection or other goals to take precedence over the advantages to be gained from free trade.<sup>34</sup> For

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tries take up the task of environmental management according to different schedules, with different degrees of rigor, and using different policy approaches raises the likelihood that international trade, commercial policies, and the location of industries will be affected." Walter, *supra* note 3, at 23.

29. The United States, in debate at a GATT Council meeting dedicated to environmental issues, held 29-30 May 1991, noted that many GATT members face urgent environmental problems at the national level the solutions to which would have implications for other contracting parties. *Trade-Environment Debate Narrows Down Differences*, 82 GATT FOCUS, July 1991, at 1-2. "It [is] therefore critical that members have a clear understanding of how GATT rights and obligations relate to the options that governments face." *Id.* at 2.

30. GATT preamble.

31. EC Commission, *Trade and the Environment*, *supra* note 28, at 1.

32. GATT preamble.

33. Seymour J. Rubin, *A Predominantly Commercial Policy Perspective*, in ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY 3, 3 (Seymour J. Rubin & Thomas R. Graham eds., 1982).

34. *Id.* Though the proposition that environmental protection must take precedence over certain gains from free trade sounds inconsistent with the premise that free trade and the environment need not be mutually exclusive, the dichotomy is readily disposed. Once environmental protection measures are



example, the general exceptions of Article XX,<sup>35</sup> the national security exceptions of Article XXI and the balance of payments exceptions of Article XII permit departures from free trade policy for both economic and non-economic reasons.

Despite the growing nexus between environmental issues and trade, GATT deals only indirectly with environmental protection goals.<sup>36</sup> Environmental measures, as with all protective measures that affect international trade, are subject to GATT limitations.<sup>37</sup> However, "GATT rules place essentially no constraints on the ability of countries to use appropriate policies to protect their environment from damage from domestic production activities or from the consumption of domestically produced or imported products."<sup>38</sup> Thus, a country ordinarily may adopt domestic policy measures such as production or consumption charges and regulations, and may apply those charges or other regulations to imported products at the point of ultimate sale in the domestic market or at the point of importation.<sup>39</sup>

Domestic environmental protection measures, however, are subject to the GATT obligations of national treatment and non-discrimination. Article III:2 prohibits a country from treating imported products less favorably than like domestic products in imposing internal taxes or other internal charges.<sup>40</sup> Similarly,

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universally identified and fully considered in all development programs, the environment will be another aspect of comparative advantage which may be exploited in the free trade arena.

35. See *infra* notes 44-51 and accompanying text for a discussion of the environmental exception in GATT Article XX.

36. INT'L AGREEMENTS, *supra* note 7, at 2-1.

37. Ernst-Ulrich Petersmann, *Trade Policy, Environmental Policy and the GATT: Why Trade Rules and Environmental Rules Should Be Mutually Consistent*, 46 AUSSENWIRTSCHAFT 197, 208 (1991).

38. GATT, *Trade and the Environment*, *supra* note 13, at 5.

39. Petersmann, *supra* note 37, at 208. The interpretive note to Article III set out in Annex I of the General Agreement provides that any tax or regulation of the kind referred to in Article III:1 which applies to an imported product and like domestic product but is imposed at the border against the imported product, "is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III." For application of this rule in the environmental field, see, e.g., the U.S. argument in the Tuna case that the import ban must be judged by the same criteria as the application of the internal regulation though applied at the border. See also Superfund case, *infra* note 75.

40. Article III:2 of the GATT provides:

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 taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic

Article III:4 obliges contracting parties to apply legal and regulatory requirements to imported products in a nondiscriminatory fashion with respect to like domestic products.<sup>41</sup> Environmental protection measures are also subject to the Article XI prohibition on quantitative restrictions.<sup>42</sup> The general exceptions of Article XX, however, may excuse "necessary" departures from GATT obligations.<sup>43</sup>

Article XX specifically acknowledges that the Agreement does not prevent contracting parties from adopting measures "(b) necessary to protect human, animal or plant life or health"<sup>44</sup> or "(g) relating to the conservation of exhaustible natural resources."<sup>45</sup> These measures are "[s]ubject to the requirement that [they] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade."<sup>46</sup> Much of the recent dispute resolution activity involving Article XX has addressed the question of which measures are "necessary" to achieve environmental protection purposes and which are merely disguised trade restrictions.<sup>47</sup>

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products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

41. Article III:4 of the GATT provides in pertinent part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

42. Article XI of the GATT provides:

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.

43. See Petersmann, *supra* note 37, at 209.

44. GATT art. XX:b.

45. GATT art. XX:g.

46. GATT art. XX preamble. Although art. XX does not impose a strict MFN requirement the terms of the preamble make any derogation of MFN questionable. EC Commission, *Trade and the Environment*, *supra* note 28, at 3 n.1.

47. See *infra* notes 64-95 and accompanying text on GATT dispute resolution proceedings. Though not always phrased in exact terms of necessity of the environmental protection measure, these cases, in one way or another, deal with unilaterally imposed trade distorting measures which have environmental protection either as their genesis or as an incidental benefit.

One of the greatest problems facing environmental protection under GATT

The national treatment principle does not mean that contracting parties are free under Article XX to require that imported products be produced in the same environmentally conscious manner as the like domestic product.<sup>48</sup> The Mexican complaint in the recent Tuna case asserted that products should not be differentiated based on production process.<sup>49</sup> The panel concluded that "production requirements may only be applied to imported products if the method of production has a bearing on the final characteristics of the product," such that the product *itself* proves to be environmentally damaging when introduced into the market of the importing country.<sup>50</sup> Under limited circumstances, if an imported product injures the domestic environment, Article XX may also permit regulating the foreign product more stringently than its domestic counterpart.<sup>51</sup>

Perhaps the GATT provision which comes closest to addressing environmental concerns is the GATT Standards Code,

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auspices is the appropriate measure of necessity. Article XX calls for measures "necessary" to achieve legitimate ends. The Standards Code, however, creates a balancing test between legitimate social objectives and their trade restrictive effects. The question is whether the necessity requirement of Article XX requires a balancing or cost/benefit type analysis. The GATT Panel on Salmon and Herring, GATT Dispute Settlement Panel, *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268, BISD 35th Supp. 98, (1989) (panel report adopted Mar. 22, 1988) [hereinafter *Salmon Panel Report*], required a cost-benefit analysis of Canada in which it intimated that a trade restrictive measure is not necessary to achieve a legitimate end if the country imposing the measure would refuse to do so if it were forced to bear the full measure of the costs of the program. In the *Salmon and Herring* case, the United States bore the entire cost of the requirement that all salmon and herring be landed in Canada for inspection before export. Using its cost benefit analysis, the panel held that the costs, if borne by Canada, would outweigh the benefits of the conservation measure. The landing requirement was therefore not necessary and not excused by Article XX. *Id.* ¶ 4.7.

48. *Trade-Environment Debate Narrows Down Differences*, *supra* note 29, at 3 (issue stressed by Nordic countries).

49. GATT Dispute Settlement Panel, *United States: Restrictions on Imports of Tuna, Restricted*, GATT Doc. DS21/R (Sept. 1991), *reprinted in* 30 I.L.M. 1598 [hereinafter *Tuna Panel Report*]. The panel in large part accepted the Mexican argument, which the EC and Japan also supported.

50. *Trade, the Environment and the GATT*, Report by the European Community Commission at the Informal Meeting of Trade Ministers, The Hague, at 2 (Oct. 11, 1991) (on file with the *Minnesota Journal of Global Trade*) [hereinafter *Trade, the Environment and the GATT*].

51. GATT, *Trade and the Environment*, *supra* note 13, at 11. "For example, phytosanitary regulations deal with the spread of pests and disease across borders through international trade in plant material. Various plant protection agreements permit rigorous inspection and even prohibition of imports." *Id.* Article XX mandates that measures adopted thereunder may not be "arbitrary or unjustifiable." GATT art. XX.

drafted in the 1979 Tokyo Round of GATT negotiations.<sup>52</sup> The Standards Code requirements are particularly relevant to environmental protection because observers often criticize environmental programs and regulations as being non-tariff barriers to trade which violate GATT.<sup>53</sup>

Significant in the Standards Code is that regulations are not to be applied with the intent of disrupting trade or with trade restrictive effects.<sup>54</sup> Thus, the agreement dictates that "technical regulations not be more trade-restrictive than necessary to fulfill a legitimate objective."<sup>55</sup> Among the "legitimate objectives" to be considered are the "protection of human health or safety, animal or plant life or health, or the environment."<sup>56</sup> The shortcoming of the Standards Code in the environmental arena is the paucity of case history construing the language. Compliance with the Standards Code requires consideration of the risks of "non-fulfillment"<sup>57</sup> when determining whether a trade restrictive measure is, in fact, necessary<sup>58</sup> to legitimate environmental programs.

Although GATT may prohibit unilaterally imposed quantitative restrictions and excessive tariffs, GATT rules in other ar-

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52. The Agreement on Technical Barriers to Trade (Standards Code) BISD 26th Supp. 8 (1980), entered into force on January 1, 1980. *Committee on Technical Barriers to Trade: Report of the Committee Presented to the CONTRACTING PARTIES at their Forty-sixth Session; reprinted in* BISD 37th Supp. 317 (1991). As of September 20, 1990, thirty-seven signatories, including the European Economic Community, Japan and the United States have acceded to the Agreement under Article 15.1. *Id.* at 317-18. U.S. implementation of the Tokyo Round — Trade Agreements Implementation Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

53. Petersmann, *supra* note 37, at 198.

54. Standards Code art. 2.2. There are two basic types of trade restrictive environmental measures: (1) those that have legitimate environmental purposes but have concomitant trade restrictive effects; and (2) those which facially proclaim to be directed at environmental protection but are in fact merely disguised trade restrictions. Rubin, *supra* note 33, at 4.

55. Standards Code art. 2.2. Unfortunately, the term "necessary" has not been sufficiently defined to permit definitive objective analysis.

56. *Id.*

57. *Id.*

58. For an in-depth analysis of the term "necessary," see the GATT panel decision on § 337 of the Tariff Act of 1930. GATT Dispute Resolution Panel, *United States: Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439, BISD 36th Supp. 345 (1990) (panel report adopted Nov. 7, 1989). The panel recognized that if there is a GATT-consistent enforcement measure available to the contracting party, then no GATT inconsistent measure will be "necessary." If, however, only GATT inconsistent enforcement measures are viable, then the least inconsistent measure must be adopted. *Id.* ¶ 5.26.

eas are not clear.<sup>59</sup> For instance, a country's failure to regulate the environmental impacts of industry is arguably equivalent to a countervailable subsidy.<sup>60</sup> Alternatively, a total want of environmental regulation could subject the products of the non-regulating country to antidumping duties because they are effectively being sold at below-market prices.<sup>61</sup> Under either of these propositions, an implicit minimum standard of environmental protection can be extracted from the penumbra of GATT.<sup>62</sup> In other words, the exporting country must regulate industry to at least a minimum standard so that the lack of regulation would not be a dutiable subsidy.<sup>63</sup>

### C. GATT PANEL DECISIONS ON THE ENVIRONMENT

The GATT's failure to take a definitive position on the relationship of trade to the environment could impede the achievement of international accord on environmental protection. GATT dispute resolution proceedings provide a measure of insight into the interplay of the environment and the obligations

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59. Hugo Paeman, EC Commission, REPORT OF THE EC COMMISSION ON TRADE AND ENVIRONMENT, reported in *General Developments: European Community; Commission Analyzes Problems Posed in Post-Uruguay Round Era*, 8 Int'l Trade Rep. (BNA) 1405 (Sept. 25, 1991). The twenty-page document prepared by the European Commission is part of an analysis of post-Uruguay Round problems facing GATT signatories.

60. Kenneth S. Komoroski, Comment, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 HOUS. J. INT'L L. 189 (1988).

61. Cf. INT'L AGREEMENTS, *supra* note 7, at 6-9 (additional views of Commissioner Rohr). The EC Commission questions the viability of a concept of "environmental dumping." The Commission noted that the term may not be objectively definable and could lead to pressure to eliminate other "inter-country" differences such as labor costs ("social dumping"). EC Commission, *Trade and the Environment*, *supra* note 28, at 4.

62. Imposition of a countervailing duty (CVD) or an antidumping duty (AD) does not require the dutied country to change its policy. The CVD/AD merely extracts the economic benefit of the unfair trade practice by charging a duty commensurate with the costs that would be incurred if there were sufficient regulatory controls.

63. Environmental protection is not the objective of the anti-subsidy provisions of the GATT. Rather, CVDs are permissible as a means of preventing trade distortions from governmental subsidization of industry. Countervailing duties in this context are an extension of the polluter-pays principle (PPP), which requires a polluting company to bear the economic costs of its own pollution. See OECD, THE POLLUTER PAYS PRINCIPLE; DEFINITION ANALYSIS INTERPRETATION (1975). A country which does not force its companies to bear the cost of their pollution grants an implicit subsidy and ensures the companies of a competitive advantage. Countervailing duties take away the subsidy and remove the trade distortion.

under the Agreement.<sup>64</sup> Various GATT panels have conducted dispute settlement activities implicating the aforementioned provisions as they relate to environmental protection. These provisions have been cited both in support of claims of unjust trade restrictions<sup>65</sup> and in defense thereof.<sup>66</sup>

The Article XI:1 prohibition on quantitative restrictions can be a significant impediment to environmental protection implemented through product distribution control. One GATT panel concluded that the United States could not invoke the Article XX(g) exception to justify a 1979 U.S. import ban on tuna and tuna products from Canada.<sup>67</sup> Canada argued that economic interests, not conservation, prompted the U.S. action.<sup>68</sup> Because the United States imposed no corresponding domestic regulation, as Article XI requires, the panel found that the import ban unquestionably constituted a quantitative restriction in violation of Article XI.<sup>69</sup>

Another case involving the interaction of Article XI and the Article XX environmental protection exception concerned a U.S. complaint against Canadian environmental export restrictions on unprocessed salmon and herring.<sup>70</sup> Canada justified its landing requirements on the basis of the Article XI:2<sup>71</sup> and the XX(g) exception for protection of exhaustible resources.<sup>72</sup> The panel concluded that the quantitative export restrictions were contrary to Article XI:1 and were not justified by Article XI:2 or

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64. When a contracting party believes that the value of a trade concession it has granted has been nullified or impaired by the actions of another contracting party, GATT Article XXIII permits the aggrieved to request the establishment of a panel to assist the Contracting Parties to deal with the matter. A "restatement" of GATT dispute-settlement procedures was adopted by the contracting parties at the conclusion of the Tokyo Round. See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD 26th Supp. 210 (1980).

65. Cf. Rubin, *supra* note 33, at 6 ("In traditional GATT terminology, a trade concession may be 'nullified or impaired' by the imposition or application of an environmental measure.").

66. See INT'L AGREEMENTS, *supra* note 7, at 2-3.

67. GATT Dispute Settlement Panel, *United States: Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc. L/5198, BISD 29th Supp. 91 (1983) (panel report adopted Feb. 22, 1982).

68. INT'L AGREEMENTS, *supra* note 7, at 2-3.

69. For the full text of Article XI:1, see *supra* note 42.

70. Salmon Panel Report, *supra* note 47.

71. Canada argued that its restrictions were "necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." *Id.* ¶ 4.1.

72. Canada claimed that its landing requirements were necessary to effectuate its species conservation programs. *Id.* ¶ 3.5.

XX(g) because the restrictions were not primarily aimed at the conservation of salmon and herring and were unnecessarily restrictive of trade.<sup>73</sup>

A third dispute addressed complaints by Canada, the European Community and Mexico about funding of the U.S. Superfund<sup>74</sup> environmental cleanup program by taxes that were higher on imported goods than on domestic products.<sup>75</sup> The United States claimed that the taxes were permissible under GATT Articles II:2(a)<sup>76</sup> and III:2.<sup>77</sup> It argued that the higher taxes on imports included the tax that would apply to the chemicals used in producing the imported goods, had they been made in the United States. The panel accepted the notion of a non-discriminatory equalizing tax, but rejected the differential scheme the United States had adopted and held the tax inconsistent with Article III:2.

The aforementioned cases all dealt with a party claiming that the impact on their domestic environment necessitated the trade restriction at issue. Although the panel reports evidence how GATT can account for national measures when examining whether imported goods have been discriminated against in the importing country, the reports do not discuss production-related activities in the exporting country.<sup>78</sup> Only recently has a GATT panel addressed the issue of unilateral extraterritorial environmental protection.

In 1991, a panel adjudicated Mexico's complaint against the United States' import restrictions on Mexican tuna.<sup>79</sup> The United States accused Mexico of violating the U.S. Marine Mammal Protection Act (MMPA).<sup>80</sup> The United States invoked sec-

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73. For a more complete discussion of this case, see *supra* note 47.

74. The United States Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (signed into law on Oct. 17, 1986).

75. See *United States: Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175, BISD 34th Supp. 136 (1988) (panel report adopted June 17, 1987).

76. GATT Article II:2(a) permits the imposition on imports of "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product. . . ."

77. The national treatment principle of Article III:2 calls for nondiscriminatory treatment of imported goods in respect "to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

78. INT'L AGREEMENTS, *supra* note 7, at 2-1.

79. Tuna Panel Report, *supra* note 49, at 1598. See also, *GATT: U.S. Embargo On Mexican Tuna Violates Gatt Rules, Panel Finds*, 8 INT'L TRADE REP. (BNA) 1288 (Aug. 28, 1991).

80. Pub. L. No.92-522, 86 Stat. 1027 (1972) (as amended, notably by Pub. L.

tion 101(a)(2)(B)<sup>81</sup> of the MMPA to ban the importation of Mexican yellowfin tuna caught in the Eastern Tropical Pacific (ETP)<sup>82</sup> using the "purse seine" technique. This technique has excessive incidental dolphin kill rates.<sup>83</sup> The United States justified the prohibition under Article XX(b) as a measure necessary to protect the lives or health of dolphins<sup>84</sup> and under Article XX(g) as a measure to protect an exhaustible natural resource.<sup>85</sup> Mexico argued, and the panel agreed, that Articles XX(b) and XX(g) must be interpreted to limit measures protecting life and health to the regulating country's territory.<sup>86</sup> This limitation on extraterritorial environmental protection means that domestically instituted programs aimed at safeguarding the environment outside a country's own territory violate GATT.<sup>87</sup>

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No. 100-711, 102 Stat. 4755 (1988) (codified in part at 16 U.S.C. 1361ff)). Section 101(a)(2) creates a mandatory prohibition by which the Secretary of the Treasury "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."

81. Section 101(a)(2)(B) provides that importation of yellowfin tuna harvested with purse seine nets in the ETP and products therefrom is prohibited unless the Secretary of Commerce finds that (1) the government of the harvesting country has a program of regulating the taking of marine mammals that is comparable to that of the United States, and (2) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by the United States vessels. The burden is on the exporting country to establish compliance through documentary evidence. *Id.*

82. The ETP is a portion of the Pacific Ocean bounded just north of San Francisco, California to the north, through Valdivia, Chile in the south, and the western edge of the Hawaiian islands to the west.

83. The foreign allowable rate for each year is measured as 1.25 times the actual U.S. fleet taking rate for the same year. Thus, it is not known until year-end whether the foreign rate exceeds the U.S. rate. If so, the embargo commences automatically and remains in effect until compliance is achieved, which cannot be certified until the end of the next calendar year, resulting in an import ban of twelve months or more.

84. Tuna Panel Report, *supra* note 49, at 1606, ¶ 3.33. The GATT Council has deferred consideration of the panel's report for formal adoption at the request of the United States and Mexico, which are trying to resolve the dispute bilaterally. GATT, *Trade and the Environment*, *supra* note 13, at 14.

85. Tuna Panel Report, *supra* note 49, at 1607 ¶ 3.40.

86. *Id.* at 1619-21 ¶¶ 5.24-5.34.

87. In letters to President Bush and USTR Carla Hills, Rep. Barb Boxer, joined by 62 of her colleagues, said the Panel ruling, if adopted, could be used to defeat trade measures applied by the United States or any other country to promote conservation of wildlife or natural resources outside its own territorial jurisdiction. *Trade Policy: Members of Congress Protest Recent GATT Ruling on U.S. Embargo of Mexican Tuna*, 8 Int'l Trade Rep. (BNA) 1399 (Sept. 25, 1991).



Because GATT prohibits extraterritorial environmental regulation through trade impediments, the world community may mistakenly infer that GATT will not protect the global environment.<sup>88</sup> GATT, however, apparently permits trade sanctions as a means to protect the environment when such sanctions are implemented as part of a multinational accord. Although no GATT panel has formally addressed the issue of multilateral, environmentally-motivated trade barriers, consensus among scholars is that multilateral agreements are permissible under GATT even though they may restrict trade.<sup>89</sup> The GATT Secretariat has noted that "GATT rules could never block the adoption of environmental policies which have broad support in the world community."<sup>90</sup> International agreements which prohibit all trade in a product by banning it at the point of sale or importation regardless of the product's origin or destination are consistent with GATT.<sup>91</sup> GATT-consistency is questionable, however, where an agreement discriminates between parties and non-parties.<sup>92</sup> For example, the trade conditioning provisions of the Montreal Protocol<sup>93</sup> and the Basel Convention<sup>94</sup> require countries to apply more restrictive trade provisions to non-parties than to parties.<sup>95</sup> The GATT membership has not yet addressed the issue of whether these departures from the nondiscrimination principle are permissible under Article XX.<sup>96</sup>

Even if this kind of multilateral agreement is not directly

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88. EC Commission, *Trade and the Environment*, *supra* note 28, at 1 (discussing misconceptions that GATT hinders domestic policies or "efforts to tackle global environmental challenges").

89. GATT, *Trade and the Environment*, *supra* note 13, at 12. The Tuna panel suggested that the United States could have pursued its environmental objectives "through the negotiation of international cooperative agreements." *Trade, the Environment and the GATT*, *supra* note 50, at 2 (quoting the GATT Panel Report).

90. GATT, *Trade and the Environment*, *supra* note 13, at 6.

91. *Id.* at 11. For instance, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) could legitimately be enforced through a broad trading ban. This does, however, require the participation of all countries involved. *Id.*

92. *Id.*

93. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

94. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, UNEP Doc. IG 80/3, 28 I.L.M. 657 (1989) (in force as of May 5, 1992 for twenty countries not including the United States).

95. GATT, *Trade and the Environment*, *supra* note 13, at 11.

96. *Id.*

consistent with the GATT's present terms, aggrieved parties will have difficulty finding compensation in the GATT system. The signatories to such multinational accords, with support of two-thirds of GATT's membership, could amend GATT or could qualify for a waiver under Article XXV to permit the trade restrictive measures in question.<sup>97</sup> Recognizing that GATT itself is a multilateral agreement, by definition other multilateral agreements may be permissible under GATT, despite the fact that they violate GATT's tenet of nondiscrimination.

#### D. GATT'S ROLE IN ENVIRONMENTAL PROTECTION

Contracting parties have historically recognized GATT's role in environmental protection. The Working Party on Environmental Measures and International Trade was created in 1971, but until recently, that working party had never been convened.<sup>98</sup> In 1991, the European Free Trade Association (EFTA),<sup>99</sup> with U.S. support, proposed that the 1971 Working Party on Environmental Measures and International Trade be convened to promote the role of GATT in environmental protection.<sup>100</sup> The preliminary agenda for the Working Party includes discussion of the relationship between GATT and Multilateral Environmental Conventions.<sup>101</sup> GATT's resolution of this issue is critical to avoiding the threat that countries adversely impacted could challenge the trade provisions of these agreements as being contrary to GATT.<sup>102</sup>

The United States Congress has not rejected GATT as the

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97. *Id.* at 12. GATT's current membership is 104 countries. Seventy countries, two-thirds of the membership, constitute a sufficient majority to amend the Agreement or grant a waiver.

98. Although it has not been convened, the Working Party's existence is not contested; it has a designated chairman and a mandate. *Trade-Environment Debate Narrows Down Differences*, *supra* note 29, at 1-2. Not all parties supported convening the Working Party so quickly. The members of the Association of Southeast Asian Nations (Indonesia, Malaysia, Philippines, Singapore and Thailand) urged caution in proceeding with the Working Party and stressed the need for consultations. *Id.*

99. The member nations of EFTA are Austria, Finland, Iceland, Norway, Sweden and Switzerland.

100. *Trade-Environment Debate Narrows Down Differences*, *supra* note 29, at 2. The European Community believes the GATT provides a viable framework for a global environmental policy. *Trade, the Environment and the GATT*, *supra* note 50, at 3. The EC has cautioned, however, that the GATT should not attempt to harmonize global environmental policies. *Trade-Environment Debate Narrows Down Differences*, *supra* note 29, at 3.

101. *Trade, the Environment and the GATT*, *supra* note 50, at 3.

102. *Id.* at 4.

appropriate body to address the trade consequences of lax environmental protection policies.<sup>103</sup> As early as 1988, congressional leaders advocated inclusion of environmental issues in the Uruguay Round.<sup>104</sup> More recently, Representative Jolene Unsoeld introduced House bill H.R. 3431, which specifically requires the United States Trade Representative (USTR) to "actively seek to" reform articles of GATT to take into consideration national and international environmental law.<sup>105</sup> Additionally, House of Representatives Concurrent Resolution 227 expresses the sense of Congress that the president should call on GATT members to support national and international efforts to protect the world environment and should reject any GATT action which does not protect the environment.<sup>106</sup>

In spite of congressional efforts to promote environmental issues in GATT, there is strong indication that the U.S. Congress will act unilaterally in the absence of multilateral action.<sup>107</sup> Domestic industry's growing environmental costs and resulting competitive disadvantage,<sup>108</sup> coupled with the CONTRACTING PARTIES' reluctance to directly address environmental protection within the confines of GATT,<sup>109</sup> is prompting the U.S. Congress to protect domestic manufacturers and the global environment through unilateral initiatives.

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103. 137 CONG. REC. S13169 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus) (counseling for a GATT environmental code modeled on the current subsidies code).

104. 137 CONG. REC. S708 (daily ed. Jan. 14, 1991) (statement of Sen. Moynihan).

105. H.R. 3431, 102d Cong., 1st Sess. (1991) (pending).

106. H.R. Con. Res. 227, 102d Cong., 1st Sess. (1991) (expressing the sense of the Congress that the president should encourage the contracting parties to the GATT to support national and international efforts to protect the world environment, and that the president should oppose GATT actions which circumscribe United States protection of the global environment). *See also* H.R. Con. Res. 246, 102d Cong., 1st Sess. (1991) (expressing the sense of the Congress on the relationship between trade agreements and the environment); H.R. Con. Res. 247, 102d Cong., 1st Sess. (1991) (expressing the sense of the Congress that the United States should not enter any international agreement or approve any international report that would hinder U.S. authority to police the world environment).

107. *See infra* notes 120-22 and accompanying text on legislation linking trade and the environment through unfair trade practices, import restrictions, and countervailing duties.

108. The cost of compliance with environmental regulations raises production cost and sales price, making U.S. goods less attractive on the world and domestic markets.

109. *See supra* notes 98, 100.

## PART II: U.S. LEGISLATION LINKING TRADE AND THE ENVIRONMENT

The current trend in congressional efforts to further environmental protection goals through international trade policy is analogous to Congress's treatment of labor rights conditionality in the 1980s.<sup>110</sup> As with labor rights conditionality, environmental protection concerns emanate from two levels. The first is societal concern — worker rights for the former and environmental quality for the latter. The second is economic concern for U.S. competitive disadvantage attributable to minimal labor regulation or lax environmental protection abroad.<sup>111</sup>

Congress began addressing the conjunction between labor rights and access to the United States market with three pieces of legislation in the mid-1980s.<sup>112</sup> Congress conditioned non-reciprocal benefits to developing countries under the Caribbean Basin Initiative (CBI),<sup>113</sup> the Generalized System of Preferences (GSP),<sup>114</sup> and the Overseas Private Investment Corporation

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110. For an exposition on U.S. legislation conditioning access to American markets on respect for labor rights, see Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990); Ian C. Ballon, *The Implication of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 VA. J. INT'L LAW 73 (1987).

111. "Empirical studies suggest causation in asserting that cost differences due to differences in environmental regulations are substantial. . . ." GATT, *Trade and the Environment*, *supra* note 13, at 20.

For a critical review of the evidence substantiating the impairment of the competitive economic position of U.S. industries because of non-subsidized environmental controls, see Pearson, *supra* note 16, at 50. For theory on the interplay of economics and environment, see INGO WALTER, *INTERNATIONAL ECONOMICS* (2d ed., 1975); *STUDIES IN INTERNATIONAL ENVIRONMENTAL ECONOMICS* (Ingo Walter ed., 1976); Stephen P. Magee & William F. Ford, *Environmental Pollution, the Terms of Trade and Balance of Payments of the United States*, 25 KYKLOS 101 (No. 1, 1972); Anthony Y.C. Koo, *Environmental Repercussions and Trade Theory*, 56 REV. ECON. & STAT. 235; and Blackhurst, *International Trade and Domestic Environmental Policies in a Growing World Economy*, LES RELATIONS INTERNATIONALES DANS UN MONDE EN MUTATION 341 (1977).

112. Amato, *supra* note 110, at 96.

113. Interest and Dividend Tax Compliance Act of 1983—Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 369 (codified at 19 U.S.C. §§ 2701-06 (1988)). The CBI authorizes the president to proclaim duty-free treatment for all eligible articles from a beneficiary country. *Id.* The statute also establishes conditions and guidelines to determine beneficiary status. *Id.*

114. Amendments under the Generalized System of Preferences Renewal Act of 1984 were enacted as § 501 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 3018 (codified at 19 U.S.C. §§ 2461-65 (1988)). The GSP enables the president to grant unilateral, nonreciprocal duty-free treatment to

(OPIC) Act<sup>115</sup> upon respect for minimum labor standards.<sup>116</sup> After failing to achieve adequate consideration of labor rights issues within the GATT framework,<sup>117</sup> Congress acted unilaterally, passing the Omnibus Trade and Competitiveness Act of 1988 (OTCA).<sup>118</sup> The OTCA characterizes labor rights abuses as an unfair trade practice actionable under section 301 of the Trade Act of 1974.<sup>119</sup>

Congress has not yet enacted an environmental protection provision analogous to the OTCA. However, encouraged by passage of legislation in the labor rights field, environmental activists and industry advocates have introduced a number of trade-conditioning environmental bills and resolutions in the past three congressional sessions.<sup>120</sup> Regardless of how the legisla-

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eligible articles from beneficiary countries when he determines that doing so would advance the economic development of Third World countries. *Id.*

115. Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, § 5, 99 Stat. 1669, 1670 (1985) (codified in scattered sections of 22 U.S.C. (Supp. III 1985) and 31 U.S.C. (Supp. III 1985)). "OPIC insures U.S. private investors against certain political risks, provides investment guarantees, and directly finances eligible projects in developing countries." Ballon, *supra* note 110, at 82 n.47.

116. *See generally* Ballon, *supra* note 110.

117. The United States has been a primary proponent of a social or labor clause in the GATT because GATT members can enforce compliance with the clause through trade sanctions. Amato, *supra* note 110, at 92. Labor standards were one of the Reagan Administration's prime negotiating objectives for the GATT Uruguay Round. *See* U.S. Objectives in the New Round of Multilateral Trade Negotiations (Statement of Clayton Yeutter, former USTR, before the Subcomm. on Int'l Trade of the Sen. Comm. on Finance (May 14, 1986)), reprinted in *U.S. Trade Law and Policy*, 408 PRAC. L. INST. 427, 437 (1987). Among the measures the United States has proposed to garner support for worker rights consideration in the GATT are a working party on labor rights and a GATT study of the issue of labor rights in the GATT. *See* Amato, *supra* note 110 at 93-95. The United States has encountered significant opposition to its attempts to introduce labor rights in the GATT, particularly from developing countries. These countries view the U.S. efforts as an attempt to eliminate cheap labor as the developing countries' one element of comparative advantage. *See id.* at 94. *See also International Workers' Rights, Hearing before the Subcomm. on Human Rights and Int'l Orgs. of the Comm. on Foreign Aff. of the House of Representatives*, 100th Cong., 1st Sess. (1987) (statement of Rep. Don Bonker) (linking rights to trade "is widely perceived as protectionist"). Similarly, developing countries have complained that the environment has been used as a "convenient cover for protectionist motives." *Trade-Environment Debate Narrows Down Differences*, *supra* note 29, at 1-2.

118. The Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 2411 (1988)).

119. *Id.*; Amato, *supra* note 110, at 96.

120. In congressional debate held on the amendments to S. 1630, Senator Lautenberg remarked that the legislation he would be introducing, S. 2887, is "consciously modeled after the labor standards in section 301 and in the GSP

ture works out the details of these bills, the measures evince Congress's concern that the United States is protecting the global environment at the expense of American competitiveness.<sup>121</sup> This protectionist rationale suggests that if the international community does not act multilaterally, the U.S. Congress will unilaterally attempt to protect the global environment and to protect U.S. industry's competitive position in world markets.<sup>122</sup>

#### A. RECENT LEGISLATION LINKING ACCESS TO U.S. MARKETS WITH ENVIRONMENTAL SAFEGUARDS

Congress's efforts to link trade policy to environmental protection goals can be categorized into three general courses of conduct: (a) classifying breaches of national and international environmental protection measures as unfair trade practices under Section 301 of the Trade Act of 1974;<sup>123</sup> (b) restricting imports from and exports to countries which fail to enforce national and international environmental conventions and agreements;<sup>124</sup> and (c) imposing countervailing duties against countries which fail to heed U.S. demands for environmental safeguarding.<sup>125</sup>

##### 1. Section 301 Unfair Trade Practices

Senate bill S. 59 entitled "General Agreement on Tariffs and Trade for the Environment Act of 1991," is the latest in a

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law. . . ." 136 CONG. REC. S3023 (daily ed. Mar. 22, 1990) (statement of Sen. Lautenberg). See *infra* notes 132-37 and accompanying text.

121. "[I]t simply does not make economic sense for American industry to shoulder the costs of global environmental protection . . . [while] foreign industries continue to pollute the world." 136 CONG. REC. S3003 (daily ed. Mar. 22, 1990) (statement of Sen. Dixon) (supporting trade conditioning amendment to the Clean Air Act)

122. 137 CONG. REC. S13170 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus) (remarking that unilateral changes in countervailing duty law may be necessary if trading partners are unwilling to negotiate environmental protection).

123. See *infra* notes 126-37 and accompanying text.

124. See *infra* notes 138-41 and accompanying text.

125. See *infra* notes 142-47 and accompanying text.

Senator Lautenberg has also proposed legislation which would condition entitlement to nonreciprocal benefits under the generalized system of preferences (GSP) and Caribbean Basin Economic Recovery Act (CBI) on environmental safeguards. S. 2887, 101st Cong., 2d Sess. (1990). In support of his bill, Senator Lautenberg has argued that the status of the GSP and CBI as exceptions to the GATT release the administration of those programs from the obligations of nondiscriminatory treatment. *Hearing on S. 2887, supra* note 13, at 9 (statement of Sen. Lautenberg).

series of parallel bills introduced in the past three Congresses.<sup>126</sup> In addition to promoting direct consideration of the environment within GATT, S. 59, like its predecessors, seeks to authorize the president to take unilateral action under section 301 of the Trade Act of 1974.<sup>127</sup> The bill would treat other countries' acts and practices that diminish the effectiveness of international agreements protecting endangered species as unreasonable under section 301.<sup>128</sup>

Section 301 grants the president broad discretion to retaliate against the products of a country whose trade policies or practices are "unreasonable," "unjustifiable" or "discriminatory" and "burden or restrict U.S. commerce."<sup>129</sup> Scholars have interpreted "unreasonableness" to encompass more than just those actions which would nullify or impair benefits under GATT.<sup>130</sup> Thus, section 301 relief is often directed at changing foreign governmental practices, rather than remedying specifically identifiable injuries to domestic industries.<sup>131</sup>

Senate bill S. 2887 also sought to amend section 301 to require countries to maintain certain minimum environmental standards.<sup>132</sup> Under this legislation, the United States Trade Representative (USTR) would be required to determine what constitutes an effective, generally-observed environmental standard.<sup>133</sup> Upon finding that a country fails to maintain adequate regulations, the USTR would have authority to restrict imports from the offending country.<sup>134</sup>

At hearings on S. 2887, Senator Lautenberg, the bill's spon-

126. S. 59, 102d Cong., 1st Sess. § 5 (1991).

127. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, (1974) (codified as amended at 19 U.S.C. §§ 2411-16 (1988)) (West Supp. 1987).

Section 301 authorizes the United States Trade Representative (USTR), subject to the direction of the president, to take action where he/she determines that:

- (A) the rights of the United States under any trade agreement are being denied; or
- (B) an act, policy, or practice of a foreign country —
  - (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
  - (ii) is unjustifiable, unreasonable or discriminatory and burdens or restricts United States commerce.

128. S. 59, 102d Cong., 1st Sess. § 5 (1991).

129. See *supra* note 127.

130. Ballon, *supra* note 110, at 95.

131. *Id.* at 105.

132. S. 2887, 101st Cong., 2d Sess. § 4(a) (1990).

133. *Id.* § 4(b).

134. *Id.* § 4(b).

sor, emphasized the sagacity of using U.S. trade leverage to achieve important policy goals.<sup>135</sup> The bill is intended to level the playing field for American businesses hampered by the cost of compliance with environmental regulations.<sup>136</sup> Senator Lautenberg justified the provision for Section 301 action by analogizing that: "just as cutting costs by exploiting workers is unfair trade under Section 301," so is cutting costs by exploiting the environment.<sup>137</sup>

## 2. Quantitative Import and Export Restrictions

Two pieces of legislation introduced in the 101st Congress, House bills H.R. 132<sup>138</sup> and H.R. 2519,<sup>139</sup> were directed at protecting wildlife for moral reasons rather than at alleviating competitive disadvantage. These bills are remarkable for the breadth of the trade restrictions they would impose. H.R. 132 would authorize the president to ban imports of *any product*—not just fishery products—from countries found to "diminish the effectiveness" of an international fishery conservation program. Similarly, H.R. 2519, in addition to calling for import and export bans on ivory, would require the president to revoke most-favored-nation treatment for *all products* from countries that do not adequately enforce elephant protection measures.

Among other quantitative restrictions aimed at decreasing U.S. companies' competitive disadvantage, the Senate Committee on Environment and Public Works included among its proposed 1990 amendments to the Clean Air Act an import ban to compel foreign governments to adopt chlorofluorocarbon (CFC) regulations similar to those the United States adopted pursuant to the Montreal Protocol.<sup>140</sup> As amended, S. 1630 would prohibit imports of products containing or manufactured with CFCs, unless both the manufacturing country *and* the exporting country have signed and complied with the Montreal Protocol.<sup>141</sup>

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135. *Hearing on S. 2887, supra* note 13, at 8 (statement of Sen. Lautenberg).

136. *Id.*

137. *Id.*

138. H.R. 132, 101st Cong., 1st Sess. (1989).

139. H.R. 2519, 101st Cong., 1st Sess. (1989).

140. Amendment number 1321 to amendment number 1293 to amend S. 1630, an amendment to the Clean Air Act. 136 CONG. REC. S3000 (daily ed. Mar. 22, 1990). S.1630, 101st Cong., 2d Sess. (1990) (enacted Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399).

141. S. 1630, 101st Cong., 2d Sess. (1990) (enacted Nov. 15, 1990).



### 3. Countervailing Duties

If passed, proposed amendment 1321 to the Clean Air Act would have required the Secretary of Commerce to establish a schedule of fees to be imposed upon any product imported into the United States that was produced in a manner which does not comply with the air quality standards prescribed in the Clean Air Act.<sup>142</sup> Though not categorized as such, this provision would have been tantamount to a countervailing duty on imported products produced or manufactured in an environmentally negligent manner.

The most unilaterally trade restrictive measure proposed to date is S. 984, sponsored by Senator David L. Boren.<sup>143</sup> Elevating concern to the next level, the Boren bill would impose countervailing duties on imports produced abroad under environmental standards less strict than those in the United States. The Boren bill specifically identifies "the failures of a government to impose effective environmental controls on production and manufacturing within its borders," as a "significant and unfair subsidy."<sup>144</sup> Senator Boren justified the harsh measures in his bill noting:

The increasing globalization of the world economy has meant that strictly regulating pollution within our borders, while maintaining the largest and most open market in the world, can impair our competitiveness and provide unfair advantages to foreign competitors subject to less stringent or effective pollution control.<sup>145</sup>

The Boren bill would counter the competitive advantage that foreign producers receive from less stringent environmental regulation by imposing a duty, equal to the "cost which would have to be incurred by the manufacturer or producer of the foreign articles of merchandise to comply with environmental standards imposed on U.S. producers of the same class or kind of merchandise."<sup>146</sup>

Not only would the Boren bill protect U.S. markets, it would create an additional market for U.S. pollution control equipment. Fifty percent of the revenue gained through countervailing duties would be placed in an export fund. The Agency

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142. Amendment number 1321 to amendment number 1293 to amend S. 1630, an amendment to the Clean Air Act. 136 CONG. REC. S3000 (daily ed. Mar. 22, 1990).

143. S. 984, 102d Cong., 1st Sess. (1991).

144. *Id.* § 2.

145. 137 CONG. REC. S5299 (daily ed. Apr. 25, 1991) (statements on introduced bills and joint resolutions) (statement of Sen. Boren).

146. *Id.*

for International Development (AID) would administer the fund, distributing monies from the fund to developing countries to help them purchase U.S. pollution control equipment.<sup>147</sup>

#### B. VIOLATIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The environment/trade bills introduced in the 101st and 102d Congresses demonstrate that a measure which purportedly protects the environment may really be designed to protect domestic industry.<sup>148</sup> Even when a measure is legitimately concerned with the environment, it may restrict trade more than is necessary to achieve the environmental objective.<sup>149</sup> Regardless of their purpose, the recent environment/trade bills in Congress would likely violate GATT, depending on their language and implementation upon enactment.

The most blatant examples of measures violating GATT are the bills that authorize quantitative restrictions, a violation of GATT Article XI, unless justified by GATT Article XX. Also highly suspect are the Boren bill's countervailing duties. Whether the general underenforcement of pollution control measures is in fact a countervailable subsidy within the meaning of GATT has yet to be resolved. "[U]nder most countries' laws, including those of the United States, a subsidy that is generally available is not countervailable" because it is not a benefit to a specific industry.<sup>150</sup>

If implemented, each of the three types of proposed environment/trade bills would probably violate GATT's requirement of nondiscrimination.<sup>151</sup> Whether the trade restrictive measures employed are sanctions under section 301, quantitative restrictions, or countervailing duties, the discretionary nature of

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147. *Id.*

148. Rubin, *supra* note 33, at 4. For example, at the congressional hearing on S. 2887, the AFL-CIO's Legislative Representative remarked: "It is [Senator Lautenberg's] view and ours that products made in an environmentally unsafe manner constitutes an unfair trade practice. . . . [It] unfairly reduces the cost of production which does not have to meet any environmental standards." This statement indicates that one group supporting the legislation perceives the bill more as a means to protect domestic industry from unfair competition than to protect the environment. *Hearing on S. 2887, supra* note 13, at 14 (statement of William J. Cunningham, Legislative Representative, AFL-CIO).

149. *Cf. United States: Section 337 of the Tariff Act of 1930, supra* note 58, ¶ 5.26.

150. INT'L AGREEMENTS, *supra* note 7, at 6-9 (additional views of Comm'r Rohr).

151. GATT art. I.

the enforcement measures and the politicized procedures for instituting the measures make it unlikely that all U.S. trading partners will receive equal treatment.

### C. VIOLATIONS OF MULTILATERALISM

GATT violations aside, the aspect of these bills that continues to attract the most criticism is their unilateral nature.<sup>152</sup> The GATT itself is the product of multilateral negotiations and has evolved through a series of multilateral negotiating rounds. The United States has traditionally been a staunch supporter of trade liberalization through the GATT's multilateral framework.<sup>153</sup> That support is apparently waning, however, as Congress increasingly pursues unilateral solutions to its trade problems.<sup>154</sup> At a time when the United States is engaged in multilateral negotiations in the GATT Uruguay Round, congressional support for unilateral trade restrictions to protect the environment undermines the United States' credibility and its negotiating strength.<sup>155</sup> The United States cannot legitimately ask other countries to eliminate existing barriers to trade while Congress is creating new elements of conditionality.<sup>156</sup>

Not all of the bills calling for unilateral action overlook the merits of multilateralism. To aid the harmonization of nations' environmental laws, the seminal provision of S. 59 directs several executive branches to jointly investigate international environmental agreements and foreign nations' environment, conservation and health laws.<sup>157</sup> Senator Daniel Patrick Moynihan, sponsor of S. 59, contends that the United States needs a better understanding of the current environmental protection situation before national policies can be harmonized into a "GATT for the Environment."<sup>158</sup> This clearly expresses the

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152. See, e.g., INT'L AGREEMENTS, *supra* note 7, at 6-3 (additional views of Comm'r Rohr); *id.* at E-3 (statement on behalf of the American Association of Exporters and Importers); *id.* at D-4 (statement of Competitive Enterprise Institute). For general criticisms of unilateral trade measures see Richard B. Bilder, *The Rule of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51 (1981); Ballon, *supra* note 110; Amato, *supra* note 110.

153. See Amato, *supra* note 110, at 87, 89 n.66.

154. See *supra* note 127 for a partial text of the current version of Congress's most significant unilateral measure, section 301 of the Trade Act of 1974.

155. INT'L AGREEMENTS, *supra* note 7, at E-10 (submission of the American Association of Exporters and Importers).

156. *Id.*

157. S. 59, 102d Cong., 1st Sess. § 4 (1991).

158. 137 CONG. REC. S708 (daily ed. Jan. 14, 1991) (statement of Sen. Moyni-

Senator's understanding that environmental policy and trade policy need to be linked in a multilateral framework.<sup>159</sup> Despite his belief in the international trade order, however, Senator Moynihan proposes using unilateral trade restrictions under section 301.<sup>160</sup>

Promoting a so-called "GATT for the Environment" is a commendable objective. Until there is international consensus, however, the United States is not justified in unilaterally imposing its environmental values on the rest of the world.<sup>161</sup> Moreover, imposing unilateral restrictions in the interim may defeat U.S. desires to achieve multilateral protection of the environment. Discriminatory trade restrictions not directly tied to particular environmental issues are an ineffective way of promoting multilateral cooperation.<sup>162</sup> Using section 301 to retaliate against lax environmental regulation, which is not generally recognized in the international community as an unfair trade practice, would undermine U.S. trading partners' confidence in multilateral dispute resolution.<sup>163</sup> In fact, resorting to unilateral action presupposes that the United States does not have a valid complaint under GATT.<sup>164</sup>

Moreover, the international community opposes unilateral economic coercion. "Deploring" the use of coercive economic measures, the United Nations General Assembly asked the Secretary-General to examine methods of curtailing developed countries' abuse of economic measures as a means of directly or indirectly coercing sovereign decisions of developing countries.<sup>165</sup> Several international organizations and subdivisions

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han). The bill would by statute make it an "objective of the United States to negotiate in the GATT framework a new agreement to harmonize environmental, conservation and health laws and enforcement." *Id.*

159. *Id.* at S707 (statement of Sen. Moynihan) (the legal framework of GATT dispute resolution provides enforceability and gives trade law a "clear advantage over environmental law.").

160. *Id.* (statement of Sen. Moynihan) (commenting that weak international enforcement of environmental treaties "has led many of us [in Congress] to urge unilateral action.").

161. *Cf. Ballon, supra* note 110, at 121 (in the absence of international consensus on the relationship between trade policy and worker rights, the United States should not retaliate unilaterally).

162. GATT, *Trade and the Environment, supra* note 13, at 4.

163. Ballon, *supra* note 110, at 122; Bronckers, *Private Response to Foreign Unfair Trade Practices*, 6 NW. J. INT'L L. & BUS. 651, 704 (1984).

164. A country with lower environmental standards than the United States would not necessarily nullify or impair any U.S. benefits under the GATT. Ballon, *supra* note 110, at 104.

165. *Economic Measures as a Means of Political and Economic Coercion, supra* note 26. This is not an entirely new contention in the international com-

within the United Nations system, including GATT and the United Nations Conference on Trade and Development (UNCTAD), contributed to the preparation of the Secretary General's report.<sup>166</sup> "Reaffirming" the sovereign rights of states,<sup>167</sup> and "[b]earing in mind the general principles governing international trade,"<sup>168</sup> UNCTAD's "rejection of coercive economic measures"<sup>169</sup> and the principles and rules of GATT,<sup>170</sup> the General Assembly

*Call[ed] upon* the developed countries to refrain from exercising political coercion through the application of economic instruments with the purpose of inducing changes in the economic or social systems, as well as in the domestic or foreign policies, of other countries . . . .<sup>171</sup>

The United States' threat of or use of unilateral trade measures would contradict the spirit of multilateralism promoted in GATT and other international bodies.

Even if unilateral actions did not violate both GATT and the international community's desire to solve problems multilaterally, they would still be ineffective. Trading partners may resist and retaliate against unilateral actions, preventing the actions from achieving goals of fair trade and environmental protection. Indeed, retaliatory responses will only encourage the breakdown of international cooperation.<sup>172</sup>

The European Community has emphasized that international cooperation is important to avoid the risk of "compensatory trade restrictions on the basis of the argument that third

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munity. Earlier reports of the Secretary-General on the same subject were submitted to the General Assembly at its 39th Session (A/39/415) pursuant to resolution 38/197 of 18 December 1983, at its 40th session (A/40/596) pursuant to resolution 39/210 of 18 December 1984, at its 41st session (A/41/739) pursuant to resolution 40/185 of 17 December 1985, and at its 42nd session (A/42/660) pursuant to resolution 41/165 of 5 December 1986.

166. *Id.*

167. Article 32 of the Charter of Economic Rights and Duties of States declares that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."

168. Contained in Res. 1995 (XIX) of 30 December 1964.

169. UNCTAD Res. 152 (VI) U.N. TDBOR, *Proceedings of the United Nations Conference on Trade and Development, Sixth Session*, vol. I, *Report and Annexes* (United Nations publication, Sales No. E.83.II.D.6), part one, sect. A.

170. Paragraph 7 (iii) of the Ministerial Declaration adopted on November 29, 1982 by the CONTRACTING PARTIES at their 38th session. See BISD 29th Supp. 11 (Sales No. GATT/1983-1), GATT doc. L/5424.

171. G.A. Res. 44/215, U.N. GAOR, 44th Sess. (Feb. 12, 1990).

172. *Hearing on S. 2887, supra* note 13, at 3-4 (statement of Mr. Eiss). Although unilateral restrictions such as § 301 may provide the United States with a strong bargaining chip in international negotiations, it only serves to increase animosity in relations with our trading partners.

countries are subject to laxer environmental requirements."<sup>173</sup> Such restrictions "could be a source of considerable trade tension and result in a very costly fragmentation of markets."<sup>174</sup> If the sanctions imposed pursuant to section 301 for failure to protect the environment nullify or impair GATT benefits, the affected country could reasonably withdraw compensatory GATT benefits.<sup>175</sup>

The retaliating country would have a strong case, in the absence of international consensus on appropriate environmental standards, that the United States' unilateral restrictions violate GATT.<sup>176</sup> The country may then seek authorization from the CONTRACTING PARTIES under Article XXIII:2 to withdraw concessions given to the United States,<sup>177</sup> or could simply follow the U.S. lead and impose retaliatory sanctions. The possible layers of counter-retaliation seem particularly senseless when one realizes that the imposed sanctions may have no relationship to the original environmental objective.

Because developed countries have environmental regulations similar to the United States and are economically powerful enough to retaliate, they would rarely be targets of unilateral U.S. action to enforce environmental standards. The more likely targets would be developing countries. The ability of developing countries to enforce strict environmental standards, however, will require either diverting capital from their economic development or obtaining transfer payments from developed countries.<sup>178</sup> Unilaterally restricting trade with developing countries would diminish their prospects for economic develop-

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173. *Commission Analyzes Problems Posed in Post-Uruguay Round Era*, *supra* note 59, at 1405 (quoting Report of EC Commission on Trade and Environment).

174. *Id.*

175. Ballon, *supra* note 110, at 121.

176. *Id.*; See *supra* text accompanying note 151 (summarizing GATT illegality).

177. GATT Article XXIII:2 states:

If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.

178. One feasible solution for an equitable division of the burden of environmental protection is for the developed world to forgive Third World debt in exchange for commitment to environmental protection. See generally *Promoting International Environmental Protection Through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65; *the Feasibility of Debt-For-Nature Swaps*, 16 N.C. J. INT'L L. & COM. REG. 127.

ment, making aid from developed countries necessary to regulate their environment. Unless the United States is willing to provide economic aid to the countries against which it imposes trade sanctions,<sup>179</sup> the emphasis of environment/trade legislation should change from confrontation to cooperation in achieving environmental goals.

A final problem with the effectiveness of the proposed environment/trade bills is the implied assertion that environmental legislation enacted by the United States is appropriate for all other countries. This is probably not the case. It would be nearly impossible for a single country to establish appropriate standards for all its trading partners. The U.S. federal government is unable to promulgate a single appropriate standard for the entire United States. Individual states are left to their own initiative to enact environmental protection laws commensurate with their needs.<sup>180</sup> Similarly, sovereign states must be free to establish environmental protection laws appropriate to their social, political, and natural environment.<sup>181</sup> A unilateral U.S. mandate of environmental protection by its trading partners<sup>182</sup> would result in tremendous cost and inefficiency if the prescribed levels of protection are inappropriate.<sup>183</sup>

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179. Of the congressional bills discussed in this Note, the Boren bill, *supra* note 143, contains the most concrete plans to help developing countries protect their environment. The Boren bill would use half of all countervailing duties collected to help developing countries purchase U.S.-made pollution control equipment. Imposition of duties will raise product prices and decrease demand, however, allowing less capital to return to the developing country and limiting the size of the fund to assist equipment purchases. The result still may be a poorer developing country with inadequate environmental protection. *Hearing on S. 2887, supra* note 13, at 4 (statement of Mr. Eiss).

180. *Id.* at 3. Mr. Eiss points out that regional environmental demands in southern California necessitate far more stringent standards than Federal standards. Just as it would be inconsistent to say that other States of the Federal Government have "inadequate standards because they do not mirror California's" the conclusion should not change when it is the policies of another nation under consideration. *Id.*

181. *Id.* A fundamental assumption behind allowing all countries to choose environmental protection standards for themselves is that they base their decisions on ideals of sustainable development. Multilateral coordination and enforcement are necessary to ensure that an economically and socially depressed country does not destroy its own environment and the global environment in an effort to achieve a tolerable standard of living.

182. Such is the goal of S. 2887, 101st Cong., 2d Sess. (1990).

183. *Hearing on S. 2887, supra* note 13, at 4 (statement of Mr. Eiss). "One would have to assume that the standards would be that [sic] applied by the United States, since that reflects our collective assessment as to what effective standards should be." *Id.* at 3. Mr. Eiss points out not only that the USTR is ill-equipped to make judgments as to proper levels of protection, but also the EPA

Perhaps the greatest advantage of an international framework for standardization<sup>184</sup> of environmental protection is that it is flexible enough to accommodate country-appropriate regulations.<sup>185</sup> "It is axiomatic that any policy will be only as successful as the manner in which it is implemented."<sup>186</sup> Whether based on command and control or market mechanisms, environmental norms and standards "should be established at levels which reflect . . . the environmental characteristics and . . . the economic and social priorities of the place where the standards are to apply."<sup>187</sup> Variations between countries will directly affect their cost structure and manner of meeting particular environmental standards.<sup>188</sup>

In addition to the natural environment's ability to absorb man-made waste, the internal social organization will also help determine the nature of an appropriate protection program. The significance of the social organization cannot be overemphasized. Many environmental problems become political policy is-

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suffers from the "immense complexities involved in judgments on the effectiveness of pollution abatement standards of other countries." *Id.* at 2.

184. Standardization contemplates a minimum level of environmental protection based on ideals of sustainable development. *See id.*

185. A unilaterally established standard cannot account for fundamental variations in different countries' climate, topography, social, and economic structure. If the importing country which promulgated the standard permitted individual countries to deviate from that standard, it would be guilty of violating the MFN principle. However, where multilateral agreement is reached, accommodations can be made for derogations from MFN. The argument could also be made that the trade policy is no different, simply that the same requirements are met in a different way by different countries—such as using best available technology as the standard as opposed to ambient environmental standards.

Moreover, the absence of multilateral agreement precludes unilateral action proclaiming international consensus. *Cf. Amato, supra* note 13, at 95.

186. *Policies and Mechanisms for Achieving Sustainable Development, supra* note 19, at 6.

187. *Id.* at 11. In its diagram of the "Mechanisms for Implementing Environmental Policy" the UNCTAD Secretariat places initial focus on domestic social organizations in determining effective measures of achieving sustainable development. Social organizations are viewed as a link or "valve" between information, the political process, the legal/regulatory process and market mechanisms. *Id.* at 35.

188. Climate, geography, population density, and the like, all impact the capacity of the environment to assimilate pollutants. "There is of course no systematic relationship or coincidence between national political frontiers and the highly specific determinants of environmental assimilative capacity." Walter, *supra* note 3, at 31. Because of this great variation, a single set of unilaterally created standards would be an inefficient means of protecting the environment in many developed and developing countries.



sues based on public outcry.<sup>189</sup> Concerned citizens can be instrumental in demanding enforcement actions either through public demands for administrative relief or through private legal action.<sup>190</sup> Nonetheless, ignorance of the true environmental hazards of industrialization may keep the public quiet. Information and technology transfers made possible by multilateral cooperation will help educate the public and aid developing countries in formulating appropriate environmental protection strategies.

### PART III. MULTILATERAL PROTECTION OF THE ENVIRONMENT

The multiple shortcomings of unilateral enforcement of U.S. environmental standards mandate that an international environmental order be established to achieve long-term sustainable development.<sup>191</sup> The Economic and Social Commission for Western Asia (ESCWA), in response to U.N. requests for methods of preventing and monitoring coercive economic measures, proposed *inter alia* a "strengthening of the GATT system"<sup>192</sup>

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189. *Policies and Mechanisms for Achieving Sustainable Development*, *supra* note 19, at 7.

190. Particularly in common law countries, where there is greater access to the legal system, private litigation or arbitration can be indispensable to the success of any regulatory system. *Id.* at 10.

191. Although its results may be problematic, a compromise between unilateralism and multilateralism could be achieved by inserting a broad environmental exception into the GATT. Such an exception could be amended to the safeguard provisions of Article XIX or the general exception provisions of Article XX, and would permit contracting parties to restrain trade to prevent harm to the global environment. A broad environmental exception would entail "serious risk for the trading system," however, and "would have to be subject to clear multilateral disciplines." EC Commission, *Trade and the Environment*, *supra* note 28, at 2. In other words, a multilateral framework for analyzing environmental issues would still need to be established.

Even a limited exception to the GATT presents multiple questions which parallel any other consideration of unilateral trade distorting actions. "Would there be a need to define what constitutes a global environmental issue justifying the application of trade restrictions? What standards of scientific evidence would be required? What role to attribute to certain GATT principles such as: MFN, national treatment, transparency, reasonableness of standards, less restrictive measure, compensation? Would the GATT be well equipped to assess the environmental justification of the measures in dispute settlement proceedings?" *Id.* at 3.

192. *Economic Measures as a Means of Political and Economic Coercion*, *supra* note 26, at 6. The ESCWA suggested that the GATT system could be strengthened through improved monitoring and reporting on contracting parties' trade policies, by way of a system that would bring coercive economic measures toward developing countries to the attention of each affected country.

and cooperation among developed and developing countries to reduce protectionism, barriers to trade and other restrictive trade policies.<sup>193</sup> The United States should promote these same objectives as the foundation for its international environmental and trade policy.<sup>194</sup>

Multilateralism is the accepted formula in international trade relations, and an international institutional infrastructure already exists for environmental protection.<sup>195</sup> Multilateral environmental protection efforts can capitalize on the existing legal, economic, and organizational foundation of international trade and environmental institutions. A multilateral accord would also avoid many of the problems of unilateral action by associating itself with the GATT's legal and economic legitimacy.

Meeting global environmental challenges through international cooperation will be far more conducive to trade liberalization and sustained development than unilateral action.<sup>196</sup> The EC Commission echoed this sentiment, noting that "[u]nilateral trade restrictions would not normally be effective and raise serious equity issues, in particular as regards their impact on developing countries."<sup>197</sup> Although any link of trade access to environmental standards will favor some nations over others, a multilateral framework for the establishment of those standards

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193. *Id.*

194. Although several of the proposed bills discussed in this Note include provisions spurring the president to encourage GATT members to address environmental issues, the presence in each bill of provisions calling for unilateral action undermines the importance of any specific mention of multilateralism.

195. Russell Train, President of the World Wildlife Fund has advocated increased congressional funding for international environmental programs such as UNEP. Train suggests that the United States Congress is the key to fully utilizing the international legal system. "Congress can measurably improve the global environment, and best prepare the next generation of conventions and treaties, by breathing new life into the international environmental instruments and institutions that already exist." *Environmental Agenda*, *supra* note 14 at 206 (statement of Russell Train, President, World Wildlife Fund) (emphasis in original).

196. *Accord*, EC Commission, *Trade and the Environment*, *supra* note 28, at 2 ("trade restrictions to deal with global environmental issues to be allowed only when such measures are adopted on the basis of multilateral conventions"); INT'L AGREEMENTS, *supra* note 7, at E-5 (submission of AA EI) (environmentally based trade sanctions "should only be applied within the context of a multilateral regime").

The Tuna Panel actually suggested that rather than proceeding through unilateral trade disruptive means, the United States could have pursued its objectives "through the negotiation of international cooperative agreements." *Trade, the Environment and the GATT*, *supra* note 50, at 2.

197. *Trade, the Environment and the GATT*, *supra* note 50, at 3.

should be less objectionable to developing countries than unilateral action. At the same time, establishment of such a framework would increase environmental protection in developing countries and level the playing field for international trade.<sup>198</sup>

The Montreal Protocol on Substances That Deplete the Ozone Layer<sup>199</sup> is one example of a recent multilateral agreement on the environment which attempts to diminish its possible adverse economic impact on developing countries. The protocol recognizes that developing countries need flexibility in phasing out ozone-depleting substances, and that resources should be transferred to them to help defray the costs of compliance.<sup>200</sup> Thus, certain developing countries were permitted a ten-year grace period before having to comply with the Protocol's control provisions so that they could reap the benefits of certain controlled chemicals.<sup>201</sup> In this multilateral context, imposing trade restrictions is justifiable to ensure compliance.<sup>202</sup>

With some modifications, GATT could do more to promote environmental protection, even without restructuring. Article XX need not be expanded to consider extraterritorial unilateral action. A provision in Article XX explicitly recognizes environmental protection as a fundamental moral goal.

One way to make GATT a better tool would be to amend Article XX to incorporate environmental concerns into a provision modeled on the commodity agreements exception of Article

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198. Cf. GATT, *Trade and the Environment*, *supra* note 13, at 4 ("multilateral cooperation [reduces] the possibility that solutions are affected by differences in the economic and political strengths of the parties involved.").

199. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989). The protocol's primary objective is to limit and phase out the use of specific CFCs. The particular CFCs to be controlled are listed in appendix A to the protocol. Each chemical is assigned a scientifically established "ozone depletion level" from which the control level for future reductions in use of the chemical are calculated. *Id.* at art. 2.

One year after the protocol entered into force, each signatory was to stop importing controlled CFCs from countries not party to the protocol. Member countries are to cease exports of controlled substances to nonsignatories as of January 1, 1993. *Id.* at art. 4.

The protocol also provides for a periodic review of the control measures in light of current scientific, environmental and economic information to be conducted every 4 years beginning in 1990. *Id.* at art. 6.

For a detailed discussion of these issues, see Koehler and Hajost, *The Montreal Protocol: A Dynamic Agreement for Protecting the Ozone Layer*, 19 AMBIO (Apr. 1990).

200. *Trade, the Environment and the GATT*, *supra* note 50, at 3.

201. Montreal Protocol art. 5.

202. *Trade, the Environment and the GATT*, *supra* note 50, at 3.

XX(h).<sup>203</sup> The commodities exception permits non-arbitrary measures undertaken in response to intergovernmental commodity agreements submitted to and not disapproved by the CONTRACTING PARTIES.<sup>204</sup> This exception could be adapted to environmental purposes by permitting countries to undertake restrictions pursuant to obligations under certain intergovernmental environmental agreements.<sup>205</sup> Such an explicit provision would clarify the status of agreements, such as the Montreal Protocol, and thereby curtail discriminatory unilateral enforcement. A contracting party could take unilateral action to enforce the terms of an environmental agreement only if the CONTRACTING PARTIES were informed of the action and did not disapprove.

#### A. MULTILATERAL ENVIRONMENTAL PROTECTION UNDER GATT AUSPICES

Mutually agreed upon standards would make noncompliance more difficult and would diminish the likelihood that sanctions will be applied on political grounds.<sup>206</sup> OECD members have pledged their commitment to establishing, ratifying and implementing international conventions on the protection and conservation of the environment.<sup>207</sup> Effective multilateral management of global environmental issues will better foster sustainable development by avoiding the trade distorting effects of unilateral measures. Implementing harmonized guiding principles will prevent recourse to such compensatory measures as import levies and export rebates.<sup>208</sup> Through international cooperation, environmental protection standards can be tailored to each country, yielding more efficient environmental protection while diminishing the unfair competitive advantage

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203. See *supra* note 191 for additional options for reconciling multilateralism and unilateralism.

204. GATT art. XX(h).

205. INT'L AGREEMENTS, *supra* note 7, at 6-8 (add'l views of comm'r Rohr).

206. Amato, *supra* note 110, at 106.

207. OECD Declaration on Environmental Policy, in OECD AND THE ENVIRONMENT, *supra* note 20, at 15.

208. Rubin, *supra* note 33, at 16. Unilateral efforts to combat the competitive disadvantage faced by industries in environmentally conscious countries are often countered by providing export rebates of pollution control taxes applied to domestic producers. This practice is clearly in contravention of the polluter pays principle as the costs are no longer borne by the domestic producer who chooses to export his products. As a result, the domestic environment is adversely impacted without recognition of the costs domestically. Instead, the costs of pollution control are borne by the exporter by way of environmentally based taxes levied in the importing country.

achieved by countries which would otherwise have lax control measures.

If trade restrictions are to be a means to ensure environmental protection, multilateralism must be respected. Multilateral linkage of trade and the environment is a preferable system in two respects: It is legally sound because it complies with GATT, and it is economically sound because it promotes trade while encouraging environmental protection. Multilateral agreements will prevent retaliation and foster country-appropriate standards from an economic and environmental perspective.

## B. IMPLEMENTING A MULTILATERAL SYSTEM

Accepting multilateralism over unilateralism is only the first step in achieving global environmental protection. The more vexing issue is how to implement an enforceable multilateral program. The most crucial element of any global program is the method of enforcement. A significant shortcoming of international law is that if a violation has no pecuniary consequences, states have a limited incentive to comply.<sup>209</sup> In any multilateral agreement, a free-rider can reap substantial benefits from cheating while others abide by the agreement. "The need to avoid 'free-riders' is the main argument for applying trade restrictions to those countries which do not assume commitments to tackle a global environmental challenge."<sup>210</sup> Because GATT provides a basis for enforcement, through withdrawal of trade concessions, it is imperative that any multilateral accord on environmental protection be adopted within the GATT framework.<sup>211</sup>

Taking coercive group action to achieve a globally recog-

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209. Nagendra Singh, *Foreword* to EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, xv (1987) [hereinafter WCED]. "[I]nadequate political commitment to any regime of regulation other than one based on reciprocal advantage . . ." results in a genre where regulation is easily framed, but nearly impossible to enforce.

210. EC Commission, *Trade and the Environment*, *supra* note 28, at 3.

211. The WCED, *supra* note 209, adopted "Elements for a Draft Convention on Environmental Protection and Sustainable Development," which is intended to serve as a basis for establishing an International Convention on Environmental Protection and a conduit for bringing existing international agreements into an enforceable framework. The WCED's draft proposals rely on commitment of the parties to peaceful dispute settlement through arbitration or mediation subject to time limitations, after which the parties would submit to binding judicial decision in the International Court of Justice. Though the Commission points out the inadequacies of a legal system which relies on voluntary compliance of the parties, it fails to suggest anything more compelling than agreement

nized goal is far less objectionable than unilateral domination of the developing world. A concerted, multifaceted program will be the most effective weapon against the free-rider problem. Such an effort will require institutions to aid in setting appropriate standards, monitoring compliance, transferring information and disciplining breaches.<sup>212</sup> Because GATT has an established framework to perform all of these functions, a multilateral accord relating trade and the environment would fit as an appropriate part of the GATT structure.<sup>213</sup>

### Conclusion

The current trend in the United States Congress toward effectuating U.S. environmental policy goals through unilateral restrictive trade practices is ill-advised. These unilateral measures violate GATT and are both inefficient and ineffective as a means to protect the global environment. International cooperation on environmental protection would better serve the environment and would curtail the competitive disadvantage of industries in countries with strict environmental protection laws.

The U.S. Congress should redirect its efforts from pursuing unilateral action to establishing a multilateral forum for the discussion of trade and the environment. As a basis for this forum, Congress should seek a multilateral agreement with enforceable provisions. This agreement should be adapted to fit within the framework of GATT.

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to be bound by the ICJ. A system of reciprocal advantage and disadvantage should be far more effective at inducing compliance.

212. "The principal obstacles to effective rule enforcement are, on the one hand, an inability to detect violations and violators and, on the other hand, the lack of authority or willingness to apply sanctions strong enough to deter violators." DAHLBERG, *supra* note 1, at 91. Given sufficient collaborative action, it is possible to put pressure on a free rider to comply with collectively established rules and norms. At the international level, trade sanctions may bring uncooperative states into compliance. *Id.*

213. The problem of the environment has many aspects and will continue to be a concern of several organizations. Cooperation among these organizations, such as the OECD and the U.N. Environmental Programme would improve safeguarding of the environment. Rubin, *supra* note 33, at 18. The relationship of trade and the environment, however, has grown sufficiently troublesome and needs to be addressed in its own forum. The GATT provides the logical forum for those discussions.

