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To Dream the Impossible Dream: Globalization and Harmonization of Environmental Laws

Cover Page Footnote

International Law; Commercial Law; Law

“To Dream the Impossible Dream”: Globalization and Harmonization of Environmental Laws

Alberto Bernabe-Riefkohl†

I. Introduction

Some day, the world will be environmentally safe. In this world, there will be advanced technology. There will also be surpluses of food, products, and energy supplies. These will be produced logically, conscientiously, and without waste or pollution. This may sound like an impossible dream, but it does not have to be. Unfortunately, unless something is done to control the contradictions inherent in the globalization of the economy, it seems probable that this dream may never come true.¹

Increasingly, countries are entering into free-trade agreements.² In addition, recently concluded trade negotiations suggest the elimination of all trade barriers worldwide³ and the creation of a World Trade

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¹ The conflict between the development of free trade policies and the creation and enforcement of environmental policies is not limited to the American continent. By their very nature, environmental issues may affect the whole world. Similarly, since the recently completed Uruguay Round negotiations to eliminate worldwide trade barriers under the auspices of the General Agreement on Tariffs and Trade (GATT) awaits ratification by the participating countries, the conflicts between free trade and environmental policy may also soon affect all nations. As of October 1994, however, only 26 out of the 124 GATT members had ratified the agreements of the Uruguay Round. *The two-door policy on trade*, THE ECONOMIST, Oct. 1, 1994, at 29. On November 29, 1994, the House of Representatives of the U.S. Congress approved participation by the United States in the GATT by a vote of 288 to 146. Two days later the Senate also voted to approve participation by a vote of 76 to 24. David E. Sanger, *Senate Approves Pact to Ease Trade Curbs; A Victory for Clinton*, N.Y. TIMES, Dec. 2, 1994, at A1.

² See *infra* notes 15-18 and accompanying text.

³ The recently concluded Uruguay Round of the General Agreement on Tariffs and Trade (GATT) is the most important agreement on international trade today. The GATT has 124 signatories accounting for almost 90% of world trade. It was originally signed in 1947 and since then its Secretariat has sponsored periodic rounds of negotiations to reduce tariffs. The Uruguay Round started seven years ago and it was the seventh round of negotiations. This Round focused on expanding GATT to cover agriculture and services and on eliminating many “non-tariff” barriers to trade. See Keith Bradsher, *U.S. and Europe Clear the*

Organization, which would regulate world commerce and solve disputes among the parties involved.⁴ This globalization of the economy, however, has not been accompanied by a globalization of environmental protections.⁵ In theory, the policies of economic development, free trade, environmental protection, and health and safety standards are reconcilable. In practice, unfortunately, given the trend of global economic development theories, the two ideologies seem to be incompatible. For instance, many environmentalists consider the current trend to expand free trade to be a threat to the environment,⁶ while, in contrast, proponents of free trade view environmental regulation as a threat to economic expansion.⁷

In response to these conflicting views, parties to trade negotiations have adopted several different approaches to accommodate the interests of free trade and to simultaneously provide for the protection of the environment. These approaches include the harmonization of laws, the adoption of equivalence standards, and the creation of international dispute resolution panels.⁸ None of these techniques, however,

Way for a World Accord on Trade, Setting Aside Major Disputes, N.Y. TIMES, Dec. 15, 1993, at A1; Clark W. Lackert, *Practitioners Hopeful That GATT's Promise Won't Come Up Empty*, NAT'L L.J., May 16, 1994, at C41; David Moberg, *The Morning NAFTA*, IN THESE TIMES, Dec. 13, 1993, at 20, 21; Clare Nullis, *No Agreement in Sight at World Roundtable*, CHICAGO SUN-TIMES, Nov. 28, 1993, at 23. On September 27, 1994, the Clinton administration presented legislation to implement the Uruguay Round accords of the GATT under the "fast-track" procedures that require Congress to vote on the bill without amendments. 59 Fed. Reg. 218 (1993). This request included a plea for "authority to include the right to make deals depend on trading partners' environmental and labour standards." *The two-door policy on trade*, *supra* note 1, at 29. After Senate Republicans threatened to vote against the bill unless this condition was dropped, the administration then dropped the whole request. *Id.* The final version of the "bill . . . changes many aspects of U.S. international trade." Lawrence Walders & Gregory Menegaz, *Amendments to Anti-Dumping Law are Debated*, NAT'L L.J., Nov. 14, 1994, at C3.

⁴ The most recent accords in the Uruguay Round of the GATT created the World Trade Organization (WTO) to take over the administration of the GATT in 1995. Agreement Establishing the World Trade Organization, Part II of Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993), reprinted in 33 I.L.M. 13 (1994) [hereinafter WTO Establishment]. The WTO will become the fourth major supranational entity, after the World Bank, the International Monetary Fund, and the United Nations. Harvey Berkman, *As GATT Gains, Will States Wane? New World Trade Pact Could Erode Job, State Sovereignty*, NAT'L L.J., Nov. 14, 1994, at A1. The WTO will include all the countries who ratify the GATT. Each member will have a vote and no one will have a veto. This organization will also be in charge of dispute resolution among parties to the accord. WTO Establishment, *supra*, 33 I.L.M. at 13-27. The GATT's new structure under the WTO has been described as "a system of international governance with powerful legislative, executive and judicial authority over member nations." Ralph Nader, *Drop the GATT*, THE NATION, Oct. 10, 1994, at 368.

⁵ Throughout this Article, reference to environmental protection will mean any action by a governmental agency with the purpose of regulating the effects of industry over the environment, including health and safety standards, and the preservation of biodiversity in animal and plant species either on a national scale or as a means to protect the global environment.

⁶ See *infra* part II.B.

⁷ See *infra* part II.A.

⁸ For a discussion of the alternative approaches, see Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA as a Means of Eliminating Environmental Contamination as a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 686 (1993); Richard B.

has proven adequate to protect against threats to the environment, and the reasons for this are many. First, these strategies are built upon the premise that free trade is more important than protecting the environment.⁹ In addition, they also have the effect of undermining sovereignty and democracy.¹⁰ Therefore, in the future, the only real hope for protecting the environment lies in the adoption of new perspectives for economic development.

In Part II of this Article, the theory behind free trade is discussed. The conflict between the theory of free trade and the attempts by national and local governments to protect the environment is addressed in Part III. Finally, in Part IV, the author tries to determine whether the conflict is irreconcilable.

II. The Case for Globalization and Free Trade

The movement toward the globalization of the economy is intertwined with the long history of capitalism's development as an international economic system. As in the past, multinational enterprises in competition have reacted to recurring economic stagnation crises by reaching out for new markets and maximizing revenues through the export of capital and the reorganization of manufacturing structures around the world.¹¹ In the 1950s, for example, most of the expanding foreign investment was concentrated in the exploitation of raw materials and resource-based manufacturing.¹² Over the past decade, however, this trend has changed to an expansion of investments in finance and to a reorganization of manufacturing enterprises all over the world.¹³ In fact, more than one third of the U.S. "international trade" during the late 1980s was actually intra firm trade.¹⁴

More recently, the movement toward the globalization of the economy has been characterized by attempts to eliminate trade barriers and tariffs through trade agreements and the formation of trading blocs. The Uruguay Round agreements under the auspices of the General Agreement on Tariffs and Trade (GATT),¹⁵ the European Union

Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1335-37 (1992).

⁹ See *infra* part II.B.

¹⁰ See *infra* notes 99-121 and accompanying text.

¹¹ *Review of the Month: Globalization-To What End? Part I*, MONTHLY REV., Feb. 1992, at 1, 2 [hereinafter *Review of the Month Part I*]; Laura B. Pincus et al., *Legal Issues Involved in Corporate Globalization*, 1991 COLUM. BUS. L. REV. 269, 270 (discussing the benefits of globalization).

¹² Saskia Sassen, *Economic Globalization: A New Geography, Composition and Institutional Framework*, in GLOBAL VISIONS 61, 62 (Jeremy Brecher et al. eds., 1993). See also *Review of the Month Part I*, *supra* note 11, at 13-14.

¹³ Pincus et al., *supra* note 11, at 269-70.

¹⁴ Sassen, *supra* note 12, at 63.

¹⁵ General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993), reprinted in 33 I.L.M. 1 (1994) [hereinafter GATT-Uruguay Round]. See also *supra* notes 2-4.

(EU),¹⁶ the United States-Canada Free-Trade Agreement (CFTA),¹⁷ and the North American Free Trade Agreement (NAFTA)¹⁸ are just a few examples of the global free-trade movement.

A. *Proponents of the Free-Trade Movement*

Proponents of free-trade agreements rely on several arguments to support their cause. First, they argue that free trade will stimulate trading among nations with different comparative advantages in producing goods,¹⁹ which will bring economic benefit to all nations involved.²⁰

¹⁶ The European Union was previously known as the European Economic Community. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1987, 298 U.N.T.S. 11. The name changed as a result of the Maastricht Treaty in 1993. Maastricht Treaty on Political Union, Feb. 7, 1992, 31 I.L.M. 247, 255 (entered into force on Nov. 1, 1993).

¹⁷ The United States-Canada Free-Trade Agreement (CFTA) was signed on January 2, 1988, and it was referred to Congress on July 25, 1988. Congress enacted the U.S.-Canada Free-Trade Agreement Implementation Act, and President Reagan signed the bill into law on September 28, 1988. See U.S.-Canada Free-Trade Agreement Implementation Act, Pub. L. No. 100-449, 102 Stat. 1851 (1988) (codified at 19 U.S.C. § 2112 (Supp. IV 1992)).

¹⁸ The North American Free Trade Agreement (NAFTA) is an agreement to create a free trading zone between Mexico, the United States, and Canada within the scope of the GATT. North American Free Trade Agreement, Dec. 8 and 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Negotiations for the Agreement were announced on October 7, 1992, in San Antonio. Gary N. Horlick & Amanda DeBusk, *Dispute Resolution under NAFTA: Building on the FTA, GATT and ICSID*, in NAFTA: BUSINESS IMPLICATIONS AND LEGAL RULES FOR THE WORLD'S LARGEST COMMON MARKET, AMERICAN CONFERENCE INSTITUTE, 1992, sec. XV, at 2 (citing Remarks at the Initializing Ceremony for the North American Free Trade Agreement in San Antonio, Texas, 28 WEEKLY COMP. PRES. DOC. 1877-78 (Oct. 7, 1992)). NAFTA was later ratified by the parties and entered into force on January 1, 1994. The adoption of NAFTA did not diminish the importance of the Free-Trade Agreement between Canada and the United States. In fact, in regard to trade relations between the United States and Canada, NAFTA expressly incorporates many provisions of the CFTA. For example, the CFTA provisions regarding trade and investment in the automobile industry, NAFTA, *supra*, at art. 300, 32 I.L.M. at 299, 320-21; tariff elimination in the textile industry, *Id.* at art. 300, 32 I.L.M. at 327-37; Energy and Basic Petrochemicals, *id.* at Annex 608.2, 32 I.L.M. at 368, are all applicable to the United States and Canada under NAFTA. As part of the negotiations for NAFTA, a new North American Environmental Commission was created, and a plan for the border region between the United States and Mexico was adopted. However, these side agreements are not linked to the NAFTA Agreement itself, and they "could easily die from lack of financing or lack of implementing authority." Jan Gilbreath, *Environment and NAFTA: Changing our Approach to Trade Policy*, in NAFTA: BUSINESS IMPLICATIONS AND LEGAL RULES FOR THE WORLD'S LARGEST COMMON MARKET, AMERICAN CONFERENCE INSTITUTE, 1992, sec. VI, at 1-2. See also GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 98 (1993) (asserting that NAFTA supporters lack confidence in the United States and Mexico's commitment to environmental provisions of the Agreement because of inadequate enforcement funding). The Commission was a disappointment to many in the environmental community because they expected an entity "that would have considerably more authority to carry out environmental policy in North America, including the ability to monitor for regulatory compliance." Gilbreath, *supra*, at 9. Such powers would have to be established by another agreement creating an institutional framework. *Id.* The Border Plan itself has been criticized because it "does not commit the parties to specific projects, and it lacks a long-term funding strategy." HUFBAUER & SCHOTT, *supra*, at 97. According to Hufbauer and Schott, the United States would have to commit five billion dollars over the next five years to achieve the goals of the border environmental programs. *Id.* at 149. However, the United States has proposed only \$379 million. *Id.*

¹⁹ Stewart, *supra* note 8, at 1329.

Proponents also suggest that free-trade policies will eventually reduce inequalities among countries by encouraging capital investment in poorer countries.²¹ Finally, supporters of free trade claim that it enhances the welfare of all nations involved because wider markets promote competition, which enhances productivity, technological innovation, and efficiency.²²

Advocates of free-trade policies also claim that the advantages are not only for the producers in the countries involved. They claim that consumers benefit economically from free trade as well. Advocates argue that free trade will provide consumers with more, better, and less expensive products from which to choose among because products can be traded without restriction between member countries.²³ In turn, this economic growth will lead to a higher standard of living. For example, an active proponent of free trade in the United States has eloquently stated the theory in the following way:

The process of economic integration and trade liberalization is accelerating throughout the world, particularly in western and eastern Europe and in the Pacific Rim. The major nations of the world are becoming more and more closely tied through trade, investment, and capital transfers. Countries that do not seize the opportunities opened up by these changes are in danger of being left behind. Those that do are able to deliver rising standards of living to their citizens. Dismantling barriers to trade and investment increases trade, which in turn spurs economic growth, productivity gains, and job creation. Business benefits from predictable rules of doing business across their borders. Consumers benefit from lower prices and a greater variety of products. Businesses and all trading partners realize gains in efficiency. The bottom line is enhanced competitiveness for goods and services traded from liberalized economies in the global marketplace.

Expanding world trade also means greater prosperity for all. . . .²⁴

In sum, the argument is that free trade will generate economic growth, which will lead to a higher standard of living for all parties involved. Most influentially, this goal has been adopted by the GATT itself, which states that its purpose is "to contribute to a higher standard of living, full employment, [and] large and growing real income."²⁵

²⁰ *Id.* at 1329-30.

²¹ *Id.* at 1330.

²² *Id.* These aspects of the economy are usually measured by the Gross National Product (GNP). John B. Cobb, Jr., *Growth Without Progress?*, 15 *LOY. L.A. INT'L & COMP. L.J.* 45, 46 (1992).

²³ Cobb, *supra* note 22, at 46, 49.

²⁴ James R. Holbein, *The Case for Free Trade*, 15 *LOY. L.A. INT'L & COMP. L.J.* 19, 20 (1992). When this article, *The Case for Free Trade*, was published, the author was "the Acting Director, Office of Latin America, United States Commerce Department. He [was] responsible for trade policy and business counseling/export promotion for all of Latin America and the Caribbean countries except Mexico. He [was] also the United States Secretary for the United States/Canada Free Trade Agreement Binational Secretariat." *Id.* at 19.

²⁵ Peter L. Lallas et al., *Environmental Protection and International Trade: Toward Mutually*

B. *The Other Side (or Costs) of Free Trade*

In reality, however, free-trade advocates present only part of the picture. Globalization is a movement toward the expansion of markets, and in all market-based competition there are winners and losers. In recent years, it has become apparent that the environment can be one of the losers in the trend toward indiscriminate economic development. The possible consequences of competition-driven, low environmental standards are undoubtedly serious. Some examples of the consequences of unrestrained free trade are the deterioration of the ozone layer, global warming, deforestation, water and air pollution, massive oil and chemical spills, acid rain, waste disposal, and nuclear hazards. As Herman Daly and Robert Goodland, two members of the environmental department of the World Bank, have stated: "International capital mobility, coupled with free trade of products, stimulates a standards-lowering competition to attract capital: wages can be lowered, as can health insurance, worker safety standards, environmental standards, etc."²⁶

The development of the border regions between Mexico and the United States and between Canada and the United States, for example, demonstrates that many manufacturers have disregarded the environment when trying to gain a competitive advantage.²⁷ The reason for this environmental "unfriendliness" is obvious: It is more profitable to

Supportive Rules and Policies, 16 HARV. ENVTL. L. REV. 271, 275 (1992) (citing General Agreement on Tariffs and Trade, opened for signature Jan. 1, 1948, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (Preamble)).

²⁶ Alexander Cockburn, *The Executioner's Song: Clinton, Labor and Free Trade*, THE NATION, Nov. 2, 1992, at 489, 508.

²⁷ The situation has been described as follows:

Economic development in the U.S.-Mexico border region has occurred largely without enforcement of environmental law by either the United States or Mexico, and the region provides a vivid warning as to the environmental consequences of uncontrolled industrial growth. Simply put, virtually every medium (water, land and air) in the border region has been in some way significantly degraded by unfettered growth. The region's surface waters are veritable sewers, thick with human feces and industrial toxins. The subsurface water tables, upon which the arid region is highly dependent for both human and industrial consumption needs, are similarly compromised. Toxic hot spots, areas where industrial and often hazardous and/or toxic wastes have been disposed of without regard for law or the environment, dot the region's landscape. Hazardous wastes are routinely burned by landfill operators, releasing dangerous levels of toxic compounds into the region's air. The human costs of these environmental tragedies are only now beginning to be recognized.

To a lesser degree, the United States-Canada border shares many of these same environmental ill effects caused by North American economic activity in the absence of sufficient environmental protections. A recent study conducted by the Sierra Club found that the Great Lakes were a 'toxic soup' of more than 500 chemicals. In 1990, U.S. companies alone dumped more than 680 million pounds of toxic chemicals into the Great Lakes.

Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 595-96 (1993) (footnotes omitted).

conduct business without having to comply with environmental regulations.²⁸ Obviously, this competitive advantage and high return on profits is very appealing; however, it is also a very dangerous threat to the environment.

III. The Conflict Between Free-Trade and Environmental Protection Policies

Rather than focusing on the maximization of profits, the theory behind environmental protection is based on the premise that protecting the environment is "objectively necessary in itself."²⁹ Environmentalists argue that environmental protection is fundamental to the survival of the planet and, therefore, it cannot be restricted simply to advance the values of economic development. Instead, they believe economic development has to be environmentally safe, and environmental advocates often do not believe that proponents of economic development and trade can be trusted to protect "the environmental inheritance of future generations."³⁰

For these reasons, environmental protection policies frequently come into conflict with economic policies, including free-trade theories. In an attempt to protect the environment or the health of its citizens, for example, a country may create barriers to the importation of foreign products that do not meet the country's regulations or that it considers hazardous to the environment. For instance, a country may decide to prohibit the sale of vegetables produced with high levels of pesticides or the importation of products that release chlorofluorocarbons. In addition, a country may decide to encourage better manufacturing practices abroad by creating barriers to the importation of products that are manufactured by environmentally dangerous processes, even if the products themselves are not dangerous. For example, a country may decide to ban the import of tuna caught with fishing nets that accidentally kill dolphins. These measures have international consequences. If foreign producers want to sell their products in the country that has enacted these regulations, they would have to modify their production procedures. For example, they would have to limit the use of pesticides, eliminate the use of chlorofluorocarbons, and design new ways to fish for tuna.

To the proponents of free trade any one of these approaches to environmental, health, and safety standards would constitute a protec-

²⁸ According to one study, for example, "companies can increase profit margins by more than two hundred percent by not meeting environmental laws." *Id.* at 597 (citing FRIENDS OF THE EARTH, *RELEASE, STANDARDS DOWN, PROFITS UP!* (Jan. 1993)).

²⁹ Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1374 (1992) (citing ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 50 (1989)).

³⁰ Richard A. Johnson, *Commentary: Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT'L ENVTL. L. REV. 577, 581 (1993).

tionist obstacle to free trade, because imports from countries that do not meet the regulations could be eliminated. Because the regulations have an effect on trade, even though they are not specifically related to it, they are considered "non-tariff trade barriers" that operate as obstacles to economic development.³¹ To reduce these barriers, countries which are members of free-trade agreements and trading blocs have tried to harmonize the approaches towards environmental protection taken by the different countries. They have also addressed this threat of "disguised protectionism" by providing remedies to the parties affected by the non-tariff barriers. The GATT, the CFTA, and the NAFTA all address these issues in detail.

A. *Harmonization of Standards*

In contrast with the changing structure of the world's economy, the political structure of the planet remains unchanged. It is still composed of hundreds of individual nation states, each one with its own laws and regulations on economic development and the environment.³² This fractionalization creates a contradiction in the globalization movement because the world economy is not characterized by stable cooperation among states. Given the disparity of regulations, countries have to "harmonize" their laws to avoid obstructing free trade and economic development, especially as they organize into economic alliances or transnational trading blocs. Unfortunately, during this process, the movement to eliminate trade barriers and to promote free trade directly conflicts with the individual efforts of nations to protect the environment.

For example, one approach taken by multinational agreements to solve the conflict between national and environmental standards and free trade is the adoption of uniform standards for all the parties involved in a free-trade agreement. Given the current world political structure, this is a problematic approach. For the same reason, it is also the least promising. To be successful, it would require some sort of international or global planning of the economy. It would also "re-

³¹ In response to a complaint by the United States against the European Union's decision to ban the import of hormone treated beef and to South Korea's dispute over the alleged use of a carcinogen by American grapefruit growers, "USTR [United States Trade Representative] Carla Hills [was led] to declare that without additional international guidelines, health and safety standards could become 'the trade barrier of choice in the 1990s.'" *"Big Green" Style Pesticide Laws Could Endanger Uruguay Round, EC Warns U.S.*, 7 Int'l Trade Rep. (BNA) No. 33, at 1263 (Aug. 15, 1990).

³² It is interesting to note that even in the European Union (EU), the tendency is to go back to nationalist policies. It has been reported recently that a new movement toward economic regionalism is transforming Europe's economic and political landscape. See William Drozdiak, *Regions Take Reign in Europe*, CHICAGO SUN-TIMES, June 5, 1994, at 39. The recent elections for the European Parliament saw a record low turnout. Also, many of the winners were representatives of nationalist or anti-European Union parties. See Jeremy Gaunt, *EU, Beset by Voter Apathy, Seeks Direction*, CHICAGO SUN-TIMES, June 19, 1994, at 38. In Denmark, for example, anti-Union groups received more than 25% of the votes. *Id.*

quire [] closer industrial linkages, technology transfers, and more formal economic institutions."³³

1. GATT as an Example of Harmonization of Standards

An example of this harmonization approach is the GATT's Agreement on Technical Barriers to Trade of 1979 (Standards Code), which encourages states to use international standards and concludes that the indiscriminate use of national standards could create barriers to trade.³⁴ This Code has been described as "a significant multilateral effort to prevent or discourage the use of technical standards as artificial barriers to trade."³⁵ However, it has also been criticized because it provides very little help in solving the issues of environmental protection. In addition, the Code is not mandatory, and as originally enacted, it did nothing but suggest a global harmonization of standards. A further blow to environmental protection came with the Dunkel Draft Amendments of 1991. These Amendments changed the language of the Standards Code to allow the parties to raise their standards "in the least trade restrictive way."³⁶ This modification appears to suggest the parties should use the lowest agreeable standard possible. The Code, therefore, appears to limit the efforts of countries that want to adopt higher standards of environmental protection.

2. NAFTA as an Example of Harmonization of Standards

The drafters of the NAFTA adopted a different approach than the GATT, but the results are similar. NAFTA recognizes the right of the parties to "adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation."³⁷ However, the scope of this right is extremely limited. Chapter 9 of the NAFTA deals with voluntary and governmental product and service standards.³⁸ Currently, however, the only services covered by this Chapter are land transportation and telecommunication services.³⁹ The NAFTA recognizes the need for the parties to establish and enforce standards,⁴⁰ but it attempts to ensure that they do not create unneces-

³³ Gilbreath, *supra* note 18, at 4.

³⁴ Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, 1186 U.N.T.S. 276, *reprinted in* General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 8 (26th Supp. 8 1980).

³⁵ Gilbreath, *supra* note 18, at 3.

³⁶ *Id.*

³⁷ NAFTA, *supra* note 18, at art. 904, 32 I.L.M. at 387.

³⁸ See The North American Free Trade Agreement Implementation Act, ch. 9, sec. A(1) (1993), *available in* 1993 WL 561157 (N.A.F.T.A.), at *1 [hereinafter NAFTA Implementation Act].

³⁹ *Id.* sec. A(5), at *3.

⁴⁰ The Chapter also recognizes the rights of the parties to adopt, maintain, or apply

sary obstacles to trade.⁴¹ The parties' rights, therefore, are limited to instances where the measure: (1) uses international standards as a guideline,⁴² (2) is not a disguised trade barrier,⁴³ and (3) is compatible with standards of the other parties.⁴⁴

In a separate chapter, the NAFTA recognizes rights of the parties to issue and enforce agriculture sanitary and phytosanitary measures⁴⁵ to protect human, animal, or plant life from a limited amount of risks.⁴⁶ However, such protective measures are allowed "only to the extent necessary" and only when it does not create unjustified discrimination between goods of one member party and like goods of another.⁴⁷ Once again, these restrictions can be interpreted to limit the effort of the parties to the "least trade restrictive" measure possible.

Also, with the objective of making the measures equivalent for all parties, the NAFTA requires that they be based on international standards and be proven to be based on scientific evidence and on a risk

measures "to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements" of the NAFTA country that adopted the measure. NAFTA, *supra* note 18, at art. 904(1), 32 I.L.M. at 387.

⁴¹ NAFTA Implementation Act, *supra* note 38, ch. 9, sec. A(8), at *4.

⁴² Article 905(1) of the NAFTA requires the parties to use "relevant international standards . . . , except where such standards would be ineffective or inappropriate means to fulfill its legitimate objectives, for example because of fundamental climactic, geographical, climactic, technological or infrastructural factors. . . ." NAFTA, *supra* note 18, at art. 905(1), 32 I.L.M. at 387. In such a case, the parties could apply standards that could provide a higher level of protection than the applicable international standard. *Id.* at art. 905(3), 32 I.L.M. at 387.

⁴³ Article 904(3) of the NAFTA requires the parties to treat goods and services from the other parties no less favorably than like goods or services of national origin. *Id.* at art. 904(3), 32 I.L.M. at 387. Article 904(4) prohibits the adoption of measures that would create "unnecessary obstacle[s] to trade between the Parties." *Id.* at art. 904(4), 32 I.L.M. at 387.

⁴⁴ See *supra* note 42.

⁴⁵ "Sanitary and phytosanitary ("S&P") measures generally deal with protecting human, animal and plant life from risks of plant- and animal-borne pests and diseases, and additives and contaminants in foods and feedstuffs." See The North American Free Trade Agreement Implementation Act, ch. 7, sec. B(A)(1), 1993, available in 1993 WL 561155 (N.A.F.T.A.), at *1. For example, a country may require that products that pose a risk of introducing a disease be treated to eliminate it. See *id.* sec. B(A)(3), at *2. The summary defines sanitary or phytosanitary measure as any measure to:

- protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,
- protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease causing organism in a food, beverage or feedstuff,
- protect human life or health in its territory from the risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof, or
- prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest. . . .

Id. sec. B(A)(4)(a), at *2-3.

⁴⁶ *Id.* These measures are exempt from the national treatment requirement of Chapter III, Article 301. See NAFTA, *supra* note 18, at art. 710, 32 I.L.M. at 377.

⁴⁷ NAFTA, *supra* note 18, at art. 712(4)-(5), 32 I.L.M. at 378. TERENCE P. STEWART, NORTH AMERICAN FREE TRADE AGREEMENT, A SUMMARY 27-28 (1992).

assessment of the circumstances.⁴⁸ This scientific proof is difficult to obtain in many cases, particularly where the national standards are based on responses to social demands or environmental tragedies rather than on scientific research.⁴⁹ Finally, the parties are encouraged to attempt to achieve equivalence in their measures. In case of a dispute, the decision of whether an environmental measure complies with any of these requirements would be decided by a dispute resolution panel.⁵⁰

The NAFTA, however, fails to provide any incentive for the harmonization of manufacturing process standards. It simply does not address the possible interest of a party in regulating the importation of goods manufactured by dangerous processes when the products themselves are not dangerous.⁵¹ Such an attempt at harmonizing manufacturing process standards could probably be successfully challenged as a trade restriction.

3. *EU and Harmonization Efforts*

Given that one of the ultimate goals of the European Union is to unify its members politically, it is not surprising that of all the multilateral arrangements to date, the EU has made the most advances toward the harmonization of trade and environmental standards. While the main players in the American continent have refused to prepare an environmental impact statement as part of the negotiation for trade agreements,⁵² the EU has declared explicitly that environmental protection is one of its goals. Unfortunately, however, even following the approach of the EU, the inherent conflict between free trade and protection of the environment has allowed only very limited results. The creation of a globally planned economy under a unified political and legislative structure is incompatible with the current political development of the globalization movement.

⁴⁸ NAFTA, *supra* note 18, at art. 713, 32 I.L.M. at 378. The parties are encouraged to participate in international standardizing organizations and to promote the development and review of international standards, guidelines, and recommendations. STEWART, *supra* note 47, at 27-28.

⁴⁹ Gilbreath, *supra* note 18, at 3.

⁵⁰ See *infra* notes 63-84 and accompanying text for a discussion of the dispute resolution systems under different multilateral agreements.

⁵¹ For example, a country may catch tuna with a process that endangers another species of animals or may produce an agricultural product in a way that damages a water source that crosses national borders. The tuna or the agricultural product is neither damaged nor dangerous, but the processes through which they are produced create risks to either the global environment, or the environment of the country of origin of the products or of the other parties to the dispute.

⁵² Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1284 (1992). In fact, "[n]either the Office of the United States Trade Representative (Office), nor its predecessor, has ever prepared an environmental impact statement on a trade agreement. In litigation over the Office's refusal to prepare such statements on the Uruguay Round and NAFTA, the Office made it clear that it has no intention of ever doing so." *Id.*

The effort to create a unified internal market in Europe started thirty-seven years ago when the Treaty of Rome in 1957 created the European Economic Community (EEC).⁵³ The goal of the EEC was to create a common market free of restrictions on the movement of goods, services, people, and capital.⁵⁴ One specific goal of the Treaty of Rome was the elimination of tariff barriers.⁵⁵ Since 1957, most tariffs have been eliminated, but there are many "non-tariff barriers" still in place that hinder free trade between Member States of the EU. Many of these "non-tariff barriers" are environmental, health, and safety regulations.⁵⁶

In addition, other goals specifically addressed by the EU include the protection of the environment and the elimination of regional disparities through environmental and social cohesion.⁵⁷ In contrast with the efforts to harmonize free trade and environmental protection on the American continent, the EU views economic development and environmental policies as interdependent. The existence of this goal recently prompted a decision by the European Court of Justice, which recognized that the protection of the environment could justify a Member State's regulation even if it affected free trade.⁵⁸

In that case, the European Commission challenged a Danish regulation that required all bottles in Denmark to be reusable. The Court held that the regulation was justified because it was aimed at protecting the environment, which is one of the objectives of the EU.⁵⁹ It was the first time the Court held that an environmental regulation could be justified even when it clearly affected free trade.⁶⁰ Decisions like this one are promising, but some problems remain unsolved. The de-

⁵³ See *supra* note 16.

⁵⁴ John Riggs, *An Overview of 1992 and EC Institutions: Executive, Legislative and Judicial Processes*, in ABA NATIONAL INSTITUTE ON FRONTIERS OF EUROPEAN LITIGATION: 1992 AND BEYOND 3 (1991).

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 4.

⁵⁷ James J. Friedberg, *Closing the Gap Between Word and Deed in European Community Environmental Policy*, 15 LOY. L.A. INT'L & COMP. L.J. 275, 284 (1993) (citing EEC TREATY, *supra* note 16, at arts. 130(a), 130(r) (as amended 1987)); see also ERNEST WISTRICH, AFTER 1992: THE UNITED STATES OF EUROPE 64-76 (rev. ed. 1991) (discussing policies behind the EU's aim for social cohesion). By requiring certain minimum environmental and safety standards before a country can become a member, the EU has tried to limit downward harmonization and prevent the widening of the gap in development among member states. This rule was applied in the cases of Portugal, Spain, and Greece. These countries required help to improve their standards and create some infrastructure to enforce it before they were allowed to become full members of the community. *Id.* at 69. This approach could have been taken in the cases of Mexico, the United States, and Canada during the negotiations of the NAFTA.

⁵⁸ Ludwig Kramer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 121 (1993) (citing Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607). Toni R.F. Sexton, *Enacting National Environmental Laws More Stringent than Other States' Laws in the European Community: Re Disposable Beer Cans: Commission v. Denmark*, 24 CORNELL INT'L L.J. 563, 564 (1991).

⁵⁹ Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607.

⁶⁰ Sexton, *supra* note 58, at 564.

cision only refers to the rights of countries to deal with issues not yet addressed by the EU. It does not address whether a regulation would be valid if a state attempted to impose a higher standard than one adopted by the EU.⁶¹

The difficulty of developing a regional environmental policy demonstrates the need for a global approach to the problem. Indeed, even if all the countries in Europe decide to act together, the resulting policies would only have a limited effect globally if other countries in the world do not act accordingly. The benefit to the global environment would be limited, for example, if all the countries in Europe decide to stop manufacturing products that damage the ozone layer but the rest of the world continues to do so.⁶² Also, if the production of these products is less expensive and more profitable, it would place the European producers at such a disadvantage which may cause them to revert back to producing ozone-depleting products to face the competition.

Finally, given the GATT's emphasis on dispute resolution, the EU's attempt to develop regional approaches to the conflict between free trade and environmental protection may not be effective. Even if the European continent decides to adopt certain standards for all the members of the EU, other GATT members who are not members of the EU could challenge the EU standards as non-tariff barriers before dispute resolution panels. A harmonized standard for all Europe would have little impact on the global environment if other countries could have a GATT panel declare it void as a violation of international trade rules.

B. Dispute Resolution

Dispute resolution in international tribunals is the second approach taken by multilateral agreements to regulate the use of trade barriers. The European Court of Justice, for example, has jurisdiction over complaints against EU members that limit free trade. The GATT and the NAFTA give similar jurisdiction to dispute resolution panels.⁶³

⁶¹ *Id.* at 587-88, 593.

⁶² The fact that national governments have different priorities in terms of environmental issues creates a difficult problem. For example, commentators in Europe and the United States have complained about how the United States has not moved quickly enough to agree to global environmental policies regarding the ozone layer, global warming, and biodiversity. Friedberg, *supra* note 57, at 282-83. There was an outcry in Germany, for example, when President Bush refused to sign the Species Protection Convention alleging it would hurt the American biotechnology industry. Petra Kelly, *A Very Bad Way to Enter the Next Century*, in GLOBAL VISIONS, *supra* note 12, at 133, 142. See also Howard G. Buffet, *U.S. Shuns Major Role After Rio Earth Summit*, CHICAGO SUN-TIMES, Sept. 4, 1994, at 40 (criticizing the fact that the United States has not ratified the Convention on Biodiversity of the Rio Earth Summit and did not attend the conference of the parties for the Biodiversity Convention). In the two years since the Convention was signed, it has been ratified by the European Union and nearly seventy countries, including Japan, Canada, Germany, and the United Kingdom. *Id.*

⁶³ See, e.g., General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947,

In all cases, the task of the tribunal is to determine whether the national environmental regulation is a valid restriction on trade. When the regulation is obviously discriminatory, the decision is a simple one. A country in a multilateral free-trade agreement generally cannot impose regulations on foreign products that it does not impose on similar domestic products. Articles I and III of the GATT, for example, provide that the parties to the Agreement shall accord no less favorable treatment than that given to comparable goods manufactured in their own territory with respect to all laws, regulations, and requirements affecting their internal sale.⁶⁴ Similarly, Article 301 of the NAFTA imposes the same obligation on its signatories by incorporating Article III of the GATT by reference.⁶⁵

However, most cases are not that simple. Controversies often arise when regulations operate as barriers to foreign products without directly discriminating against them. For example, if Denmark requires all bottles sold in its territory to be recyclable, other European manufacturers may be affected if they have less access to recyclable materials. On its face, the regulation applies equally to all manufacturers domestic or foreign. Nevertheless, it has a discriminatory effect on some foreign manufacturers. In this type of case, the tribunals must determine if the regulation's effect on free trade is justified.

All environmental regulations ever reviewed by GATT dispute resolution panels have been declared invalid as violations of free-trade rules.⁶⁶ In fact, the GATT provides the best example of the limitations of dispute resolution as a method of harmonizing environmental laws. Article XX(b) of the GATT allows unilateral bans on importing products that are hazardous to life or health, but only if the ban is not a "disguised restriction on international trade" and the measure is "nec-

art. XXIII, T.I.A.S. No. 1700, at 60-61, 55 U.N.T.S. 187, 266-68 [hereinafter GATT]. There are three different dispute resolution mechanisms in the NAFTA. Chapter 11, subchapter B provides the rules for disputes between a party and an investor from another party; Chapter 19 provides the rules for disputes related to antidumping and countervailing duty laws; and Chapter 20 provides rules for disputes among the parties themselves. Articles of Chapter 20 parallel articles of Chapter 18 of the CFTA. For a detailed discussion of all these mechanisms and rules, see Horlick & DeBusk, *supra* note 18; William Graham, *Dispute Resolution and Institutions of NAFTA: Preliminary Observations*, in *NAFTA: BUSINESS IMPLICATIONS AND LEGAL RULES FOR THE WORLD'S LARGEST COMMON MARKET*, AMERICAN CONFERENCE INSTITUTE, 1992, sec. XVI; Jose L. Siqueiros, *NAFTA Institutional Arrangements and Dispute Settlement Procedures*, in *NAFTA: BUSINESS IMPLICATIONS AND LEGAL RULES FOR THE WORLD'S LARGEST COMMON MARKET*, AMERICAN CONFERENCE INSTITUTE, 1992, sec. XVII. Article 2005 of the NAFTA states that if a dispute arises under both NAFTA and the GATT, the parties must attempt to agree on the appropriate forum, *except* in cases of disputes related to environmental matters which shall be decided only by NAFTA dispute resolution panels. See NAFTA, *supra* note 18, at art. 2005, 32 I.L.M. at 694.

⁶⁴ GATT, *supra* note 63, at arts. I, III(2), T.I.A.S. No. 1700, at 8-9, 14, 55 U.N.T.S. at 196-98, 206.

⁶⁵ See NAFTA, *supra* note 18, at art. 301, 32 I.L.M. at 299.

⁶⁶ Elizabeth E. Krus, *The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?*, 14 *LOY. L.A. INT'L & COMP. L.J.* 903, 928 (1992).

essary" to achieve this end.⁶⁷ However, in a controversy involving the trade of tuna, a dispute resolution panel recently interpreted this Article in a way that limits the ability of the parties to the GATT to reconcile environmental and trade policies.⁶⁸

On August 28, 1990, a federal District Court ordered the U.S. Department of Commerce to ban the importation of tuna from five nations which used methods that violated the standards imposed by the Marine Mammal Protection Act (MMPA).⁶⁹ According to the MMPA, tuna caught by enterprises using methods that did not meet the standards imposed by the Act could not be imported into the United States.⁷⁰ The MMPA also banned tuna imported from a nation that had itself imported tuna from nations failing to meet the standards.⁷¹ The ban was applied to Mexico, which has the second largest and most modern tuna fleet in the world.⁷² A large portion of Mexico's tuna exports go to the United States and to nations that also export tuna to the United States.⁷³ In November 1990, Mexico challenged the ban and requested a GATT panel to mediate the dispute.

Mexico argued, among other things, that the MMPA violated the non-discriminatory national treatment principles of Article III of the GATT and constituted a disguised protectionist measure because it discriminated between domestic and imported products based on the production process.⁷⁴ The United States argued in response that the measures were needed to protect animal life and therefore, were exempt from the no less favorable treatment principles.⁷⁵

The Dispute Resolution Panel (Panel) held that the ban violated the rules of the international trading system.⁷⁶ First, it found that a country could not ban an import because it objects to the process through which it is produced.⁷⁷ In addition, the Panel decided that Article XX(b) of the GATT does not extend to "extrajurisdictional" measures by a member country.⁷⁸

The decision of the Panel was not officially adopted by the GATT

⁶⁷ GATT, *supra* note 63, at art. XX(b), T.I.A.S. No. 1700, at 56-57, 55 U.N.T.S. at 262. See Robert Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 546 (1992).

⁶⁸ Kruis, *supra* note 66, at 905 n.18 (citing *United States Restrictions on Imports of Tuna: Report of the Panel*, GATT Doc. DS21/R, at 50-51 (Sept. 3, 1991) [hereinafter *Panel Report*]).

⁶⁹ Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988) [hereinafter MMPA]. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

⁷⁰ MMPA, *supra* note 69, 16 U.S.C. § 1371.

⁷¹ *Id.*

⁷² Kruis, *supra* note 66, at 914.

⁷³ *Id.*

⁷⁴ *Id.* at 916 (citing *Panel Report*, *supra* note 68).

⁷⁵ *Id.* at 919.

⁷⁶ *Id.* at 920-21, 923.

⁷⁷ *Id.* at 920.

⁷⁸ *Id.* at 921, 924.

Council because the dispute was settled.⁷⁹ However, the decision involved the only section of the GATT that deals with the environment,⁸⁰ and has far-reaching consequences.⁸¹ The interpretation of the Panel leaves virtually no possibility under Article XX for nations to justify an environmental regulation that affects trade.⁸² The Panel's interpretation also eliminates the possibility of unilateral regulations to protect the global environment. In addition, the decision invalidates the use of secondary boycotts, like the one imposed by the MMPA and ordered by the District Court,⁸³ on nations that trade with countries to which a ban applies directly.

Although the dispute resolution mechanisms of the NAFTA are somewhat different, there is no reason to believe that they would lead to a different result in similar circumstances. Both the NAFTA and the GATT, in one way or another, subject the validity of national environmental and safety measures to the needs of trade. Chapters 7 and 9 of the NAFTA, which appear to allow the parties to adopt national regulations to protect the environment, are in fact severely limited by requirements to ensure that they do not create unnecessary obstacles to trade.⁸⁴ These inherent limits of the dispute resolution process seriously frustrate the attempts of national governments to maintain the adopted level of environmental protection when challenged in international tribunals.

IV. The Irreconcilable Nature of the Conflict

The problem with global environmental protection is not that individual governments are not willing to enact legislation to protect their countries. Rather, the main problem is that the conflict usually appears in the negotiation and creation of international alliances

⁷⁹ Donald A. Carr, *Environmental Considerations of the North American Free Trade Agreement, in NAFTA: BUSINESS IMPLICATIONS AND LEGAL RULES FOR THE WORLD'S LARGEST COMMON MARKET*, AMERICAN CONFERENCE INSTITUTE, 1992, sec. VII, at 4.

⁸⁰ The word "environment" does not appear anywhere in the GATT. However, the Agreement does have language suggesting that measures needed to protect human, animal, or plant life, or related to the conservation of exhaustible resources are exempt from international trade controls. GATT, *supra* note 63, at arts. XX(b), XX(g), T.I.A.S. No. 1700, at 56-57, 55 U.N.T.S. at 262. See Housman & Zaelke, *supra* note 67, at 546-51. The United States used these two sections to argue that the tuna embargo was not in violation of the GATT. The term "environment" was not incorporated into GATT documents until the 1979 Standards Code. See *supra* notes 34-36 and accompanying text. The Code clarified this exception and explained that environmental considerations could justify departures from international standards only as long as they are not disguised trade barriers or unjustified burdens on commerce. Carr, *supra* note 79, at 3.

⁸¹ One commentator has used this decision as the best example to conclude that the GATT's approach to environmental controversies is "anachronistic." See Carr, *supra* note 79, at 4.

⁸² Kruis, *supra* note 66, at 928. A similar position was adopted by the United Nations Conference on Environment and Development (UNCED) in its Rio Declaration. See *infra* note 85.

⁸³ See *Earth Island Inst. v. Mosbacher*, 785 F. Supp. at 826, 828 (N.D. Cal. 1992).

⁸⁴ See *supra* notes 37-51 and accompanying text.

where players in the world market are specifically promoting free-trade interests. The movement toward the globalization of the economy based on free trade rests on the underlying premise that free trade is a more valuable objective than environmental protection. Therefore, furthering free-trade interests may limit the ability of a country to address many environmental, health, and safety concerns. In fact, it may actually defeat some of the national and local efforts to deal with these issues.⁸⁵

The argument that environmental protection should be subordinated to free trade is based on the theory of "economic growth." Environmental problems can be dealt with more effectively

⁸⁵ Another component of the conflict between free trade policies and environmental protection regulation is the fact that while free traders are attempting to achieve economic growth through globalization, there is less of an organized effort to protect simultaneously the global environment. Even though there are many international treaties that attempt to globalize environmental protection, they are limited in scope and apply only to those countries that voluntarily decide to participate in them. In addition, many are nonbinding agreements. The Montreal Protocol, for example, which attempts to limit the amount of ozone-depleting substances, does not cover all the products that affect the ozone layer and has not been signed by all the countries in the world (not even all the members of the GATT). Housman & Zaelke, *supra* note 67, at 578-80. In other words, as of yet, there is no worldwide commitment to address the global problem of the depletion of the ozone layer.

The efforts of the United Nations on the environmental question are also fragmentary. Indeed, not all nations are members of the United Nations, and the General Assembly has already opposed the use of environmental measures as trade restrictions. *Id.* at 588. Likewise, the recent summit of the UNCED in Rio de Janeiro did not advance much in the area of international agreements toward the protection of the environment. The "achievements" of this summit have been described by one commentator as follows:

It produced an ambitious but ultimately vague, watered down, and unenforceable list of good intentions for the next century called Agenda 21. It concluded a treaty on biodiversity that is likewise vague, toothless, contains no significant funding, and fails to assure that the benefits of biotechnology accrue commonly to humankind or that the dangers of biotechnology are monitored. It concluded a climate change treaty that fails to set specific targets or methods of reduction for greenhouse gases. It announced a forest policy that is vague and without implementing machinery.

Robert W. Benson, *The Threat of Trade, the Failure of Politics and Law, and the Need for Direct Citizen Action in the Global Environmental Crisis*, 15 *LOV. L.A. INT'L & COMP. L.J.* 1, 12 (1992).

The declaration also adopted a principle that opposes "disguised restrictions" on trade in the name of environmental protection. It has been argued that this principle places "an almost impossible burden on the proponents of international environmental agreements containing trade-related enforcement measures since it is almost impossible to achieve an international consensus." Housman & Zaelke, *supra* note 67, at 588-89. Principle 12 of the Rio Declaration states:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

United Nations Conference on Environment and Development, Rio de Janeiro, U.N. Doc. A/Conf.151/5/Rev.1, reprinted in 31 *I.L.M.* 874, 878 (1992).

once the countries have acquired the monetary means to address them. From the perspective of the free trader, it is logical to argue that a country can afford to destroy the environment now, because free trade will allow it to acquire the means to clean it up later. Indeed, this "we can afford to destroy" theory was part of the arguments in support for the NAFTA and the GATT.⁸⁶

This perspective on environmental protection, which subordinates it to free-trade theory, is truly inadequate. First, the underlying theories of globalization and free trade simply do not reflect reality. Economic growth or development, particularly as measured by a country's Gross National Product (GNP), is not the best indicator of "progress" or of better living conditions.⁸⁷ This link between free trade and growth is "more often asserted than explained,"⁸⁸ and it has been described as "one of the most widely held, yet most difficult to prove, ideas in economics."⁸⁹ Given this poorly explained source of free-trade theory, several economists have set out to question the theory of "growth" based on free trade as measured by the GNP.⁹⁰ One commentator has criticized the basis of the free-trade "growth" theory by arguing:

The answer is that what is sought is primarily growth of market activity. This is what GNP chiefly measures, and policies directed to the increase of GNP consistently focus on increasing this activity. It is assumed that people become economically better off as market activity increases. . . .

It is obvious that it [GNP] includes elements that do not reflect well-being. . . . Similarly, as crime increases, the costs of fighting it

⁸⁶ In the Environmental Protection Agency's Integrated Environmental Plan for the Mexican-U.S. Border Area, the Bush administration "emphasize[d] its view that the NAFTA would result in environmental improvement in Mexico because it would result in a higher Mexican standard of living." Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 938 (1992). Many commentators and supporters of free trade also espouse this view. See, e.g., Thomas J. Schoenbaum, *AGORA: Trade and Environment, Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 702 (1992) (arguing that trade liberalization would help the environment because it would ensure economic growth, which according to the author "will create the financial means, particularly for developing countries, to control pollution and protect the environment").

⁸⁷ See Benson, *supra* note 85, at 7; Cobb, *supra* note 22; Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L.A. INT'L & COMP. L.J. 33 (1992); *Review of the Month Part I*, *supra* note 11; *Review of the Month: Globalization-To What End? Part II*, MONTHLY REV., Mar. 1992 [hereinafter *Review of the Month Part II*].

⁸⁸ Peter Passell, *How Free Trade Prompts Growth: A Primer*, N.Y. TIMES, Dec. 15, 1993, at A1. David Sanger, commenting on the vote in the House of Representatives regarding the implementing legislation for the GATT, stated that "[i]t was clear from the debate today, however, that even supporters of the accord have only the vaguest views of what it would mean for the nation's economy." David E. Sanger, *The Lame-Duck Congress: The Vote; House Approves Trade Agreement by a Wide Margin*, 288-146, N.Y. TIMES, Nov. 29, 1994, at A1.

⁸⁹ Passell, *supra* note 88, at A1. Peter Passell has provided perhaps the most accurate description of the explanation behind the theory of free trade: "Free trade means growth. Free trade means growth. Free trade means growth. Just say it 50 more times and all doubts will melt away." *Id.*

⁹⁰ See Cobb, *supra* note 22, at 57-61; Daly, *supra* note 87, at 42-44.

rise. But although that causes the GNP to grow, the economic welfare of the people is not improved.⁹¹

In addition, using more complete economic indicators, Professor John Cobb has concluded that the United States showed a regression in living standards between 1978 and 1988, even though it also showed traditional "economic growth."⁹² Others have concluded that the recent global expansion of the economy has been accompanied in most countries by a rise in unemployment and a decline in earnings among the lower third or even the bottom half of the earnings distribution.⁹³ As stated by one commentator in evaluating the lessons learned from a recent conference on free trade and the environment in Latin America:

Traditional economic growth refers to growth of the market economy based upon consumption of non-renewable resources. Mere economic growth has become confused with economic health, development, or progress. The only reason traditional economic growth is considered growth at all is due to the statistical sleight of hand called GNP. In reality, GNP ignores many real costs such as depletion of non-renewable resources, and environmental, health, social, and political costs and disregards relevant beings outside the formal marketplace. . . . Increments in GNP may actually reflect regress rather than progress even for present generations.⁹⁴

These studies should lead to a re-evaluation of the policy of economic growth based on the globalization of free trade.⁹⁵ Accordingly, they

⁹¹ Cobb, *supra* note 22, at 50.

⁹² *Id.* at 56. See also *Review of the Month Part I*, *supra* note 11, at 7-8 (describing the decline in percent average annual growth despite an increase in Gross Domestic Product of industrialized nations); *Review of the Month Part II*, *supra* note 87, at 10-13 (showing the continued widening of the gap between developed and undeveloped nations).

⁹³ Sassen, *supra* note 12, at 61, 65.

⁹⁴ Benson, *supra* note 85, at 7.

⁹⁵ This kind of attack on globalization has come from all levels of the political spectrum. For example, Cuauhtémoc Cárdenas, the Mexican presidential candidate for the Partido de la Revolución Democrática (PRD), has argued that "if one relies only on the effects of market forces, social contrasts become deeper and the gaps in the development of the economies become wider." Sassen, *supra* note 12, at xii. Similarly, Ralph Nader, the nationally recognized consumer advocate, has concluded that the result of participating in the GATT "will be a weakening of living standards and a chilling of proposed environmental advances. . . ." Nader, *supra* note 4, at 369. On the other hand, James Goldsmith, a conservative billionaire who was recently seeking a seat in the European Parliament, has argued that "global free trade will produce chaos for the many but financial bliss for a few." See George Will, *Gatt Spawns A Dark Vision: New Proletariat*, CHICAGO SUN-TIMES, June 12, 1994, at 50. He has been quoted as stating that it will produce social divisions "deeper than anything Marx anticipated." *Id.* Similarly, John Nash, Jr., counsel for the largest U.S. privately-owned textile manufacturer, has stated:

Countries in our own hemisphere that are following the free-trade model and boosting their GNP are at the same time increasing the number of poor they have by millions. GATT will do the same here. . . . Free trade tends to benefit the top 20 percent of our country. Productivity is up, GNP is up and overall wages are stagnant or down.

Berkman, *supra* note 4, at A26. Most recently, this kind of attack was seen during the debates in Congress about the implementing legislation on the GATT. Representative Marcy Kaptur, a Democrat from Ohio, for example, argued that the past 47 years of GATT have not helped American workers. Sanger, *supra* note 88, at A1.

should also lead to a review of the idea that environmental protection can wait until countries acquire growth.

Moreover, the development of a globalized economy is not narrowing the gap between the developed and the less developed countries in the world. If anything, the gap has continued to widen.⁹⁶ Also, the environmental damage that accompanies globalized development has proven to be very uneven. Those who suffer most of the cost of environmental harms are usually not the ones who benefit from the economic growth.⁹⁷

The perspective on environmental protection based on free-trade theory is also unsatisfactory because the GATT's approach to unilateral restrictions is inadequate. Unilateral pressure on environmentally harmful processes has proven to be an effective way to address global environmental policies. For example, the secondary boycott imposed by the United States on the import of Japanese pearls in an attempt to protect sea turtles was successful in pressuring the Japanese to agree to eliminate their imports of turtle products from other nations.⁹⁸

In addition, the approach to harmonization taken by multinational agreements, such as the NAFTA and the GATT, threatens the sovereignty of the nations involved in the agreements and particularly, the sovereignty of their states or provinces.⁹⁹ A constantly increasing number of environmental regulations are created by local governments.¹⁰⁰ For example, some states in the United States restrict the sale of chlorofluorocarbons and beef hormones.¹⁰¹ However, if a country is a member of the GATT, it must ensure that all of its states act in accordance with the Agreement.¹⁰² If a state's regulations vio-

⁹⁶ See *Review of the Month Part II*, *supra* note 87, at 10, 15-16 (arguing that the trend toward globalization leads to greater expansion of the economy by inducing greater national debt and aggravating the gap between the first world and dependent countries and affecting the living conditions of most people in all countries).

⁹⁷ See Edith B. Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 *YALE L.J.* 2123, 2127 (1993) (arguing that "the poor and disadvantaged often bear a disproportionate share of environmental costs. . . . It is they who are disproportionately exposed to toxic chemicals, breathe dirty air, drink polluted water, and are forced by poverty to exploit soils, forests and other resources in an unsustainable manner.").

⁹⁸ Stewart, *supra* note 8, at 1359.

⁹⁹ In a recent article, Ralph Nader summarized the arguments against the new GATT agreements as follows:

[S]erious issues of sovereignty and democracy are at stake. Membership in the WTO would commit the United States to make its laws and regulations conform to the WTO's decisions and rules. That means adhering to a regime that places trade *uber alles*, that subordinates all nontrade values and policies—such as consumer, environment and workplace standards—to the imperatives of foreign commerce. And the WTO regime will be enforced by closed, secretive WTO tribunals without citizen or even subnational (i.e. state and local) input.

Nader, *supra* note 4, at 368-69.

¹⁰⁰ Housman et al., *supra* note 27, at 601.

¹⁰¹ *Id.*

¹⁰² See GATT, *supra* note 63, at art. XXIV:(6), T.I.A.S. No. 1700, at 63-64, 55 U.N.T.S. at 272. See Housman & Zaelke, *supra* note 67, at 552.

late the GATT, the whole country is in violation of the GATT.¹⁰³

In undermining national or state sovereignty, the approach of the NAFTA and the GATT to harmonization could also undermine the standards adopted by individual national governments. Any country can challenge the regulations enacted by a state or region of another GATT member country before a dispute resolution panel. If the international panel declares a state's regulation invalid as a restriction on trade, the federal government could nullify it, or the winning country could retaliate against single states.¹⁰⁴ However, individuals, state or regional governments, and non-government organizations are not allowed to participate in the panel's proceedings, neither to present nor to receive information.¹⁰⁵ The decisions of the GATT panels are usually not made public "until the GATT Council adopts the determination of the GATT dispute settlement panel."¹⁰⁶ Most nations, including the United States, also refuse to make public their submissions to GATT panels.¹⁰⁷ Therefore, while the process is active, there is no assurance that the government is representing the best interests of the states or their citizens.¹⁰⁸ In this way, democratically elected bodies (and the citizens they represent) find themselves subject to review by international panels in which they have no representation.¹⁰⁹

Worried about the impact that the GATT would have on their sovereignty, thirty-four states of the United States have agreed to form a Multistate Tax Commission to study, among other things, the effects of the GATT on multistate and multinational business.¹¹⁰ This Commission has already declared that the states are "deeply concerned" because the fate of state regulations could be determined by foreign judges in tribunals where "[t]he states [will not] have standing to defend themselves."¹¹¹ The states are also concerned about state-federal

¹⁰³ Housman & Zaelke, *supra* note 67, at 552.

¹⁰⁴ See Berkman, *supra* note 4, at A26.

¹⁰⁵ Housman, *supra* note 29, at 1387; Housman & Zaelke, *supra* note 67, at 558; Goldman, *supra* note 52, at 1285-86.

¹⁰⁶ Goldman, *supra* note 52, at 1285. This type of secrecy is required to an even greater extent by the text of the NAFTA. *Id.* at 1286.

¹⁰⁷ *Id.*

¹⁰⁸ Housman, *supra* note 29, at 1387.

¹⁰⁹ The NAFTA negotiations themselves are an example of poor democratic representation. All draft agreements and summaries of the negotiations were kept secret. Even after the final agreement had been reached, the United States refused to provide the public with its terms. Goldman, *supra* note 52, at 1283 (citing Letter from the Office of the United States Trade Representative to Public Citizen (Aug. 19, 1992) (on file with author); Letter from Public Citizen to the Office of the United States Trade Representative (Aug. 17, 1992) (on file with author)). See also Sen. Moynihan Says NAFTA Text Should Be Provided to Public, 9 Int'l Trade Rep. (BNA) No. 34, at 1416 (Aug. 19, 1992); Gephardt Urges Bush to Reveal Details of Proposed North American Trade Pact, 9 Int'l Trade Rep. (BNA) No. 36, at 1567 (Sept. 2, 1992). Also, the process for the approval of the NAFTA was held through a "fast track" procedure, which forced Congress to vote on the agreement without being able to suggest amendments and with less time to discuss it than they would have had under normal circumstances.

¹¹⁰ See Berkman, *supra* note 4, at A26.

¹¹¹ See *id.*

relations because they have to rely on the federal government, which could ultimately sue under the supremacy clause to strike any laws found to be illegal under GATT.¹¹²

In Europe, this concern over sovereignty is also evident. Anxious to guard their sovereign powers, the fifteen national governments of the members of the European Union are currently challenging the authority of the European Commission, the Union's unelected administration, to be the sole negotiator on trade issues.¹¹³ The controversy may delay ratification by the European governments of the recently concluded GATT accords.¹¹⁴

Some of the results of the CFTA are good examples of the harmful effects of subjecting environmental regulations to revision by international bodies with no state representation. This approach has led to the adoption of the weakest common regulation between the countries:

The CFTA has functioned both as a sword to attack more stringent domestic environmental regulation and as a shield to protect less stringent environmental and health standards. For instance, both U.S. and Canadian entities have used the CFTA and GATT prohibitions on non-tariff trade barriers to challenge the other nation's domestic environmental laws. . . .

Moreover, harmonization as required under CFTA arguably has resulted in lower environmental standards and reduced import protections at the border. For example, Canadian pesticide regulations now are set using the U.S. risk-benefit model rather than the more stringent precautionary model previously used in the Canadian regulations. In addition, a "streamlined" random meat inspection system to further the CFTA goal of reducing trade restrictions replaced inspection of Canadian meat at the U.S. border.¹¹⁵

Further, harmonization under the CFTA has resulted in the invalidation of the efforts to protect the Pacific salmon¹¹⁶ and in the "elimination of Canadian controls over the exportation of energy to the United States."¹¹⁷ This elimination of controls has created great "obstacles to ongoing international efforts to address the threat of global warming."¹¹⁸

¹¹² *Id.* The Multistate Tax Commission asked the Clinton administration to include a provision in the GATT implementing legislation to require the executive branch to get congressional approval before it could sue a state. The administration agreed to require notice but not approval or permission. *Id.* The administration also agreed to require the Office of the United States Trade Representative to give the states information about challenges to state laws and "to work closely with them in the laws' defense," which may include "the possibility of allowing themselves [state representatives] to address the GATT panels." *Id.*

¹¹³ See *The EU and trade: The GATT sat on the mat*, THE ECONOMIST, Oct. 1, 1994, at 70. Interestingly, though, the European governments apparently agree that the Commission should have the exclusive authority to negotiate environmental matters. *Id.*

¹¹⁴ *Id.*

¹¹⁵ Housman & Zaelke, *supra* note 67, at 575-77 (footnotes omitted).

¹¹⁶ *Id.* at 575.

¹¹⁷ *Id.* at 577.

¹¹⁸ *Id.*

The Tuna-Dolphin panel decision is another good example of the threat to national democracy and sovereignty.¹¹⁹ Before the decision in that case, the citizens of the United States, through their democratically elected representatives, decided that they wanted to protect dolphins from the risk of extinction. Unfortunately, given the movement for the globalization of free trade, those same members of society do not have the last word in decisions of this type. The decision was subjected to the review of an international panel not elected by those citizens.¹²⁰ This panel decided that the decision of the democratically elected bodies lacked justification.¹²¹ The decision practically eliminated the possibility of using Article XX of the GATT to justify environmental regulations that affect trade. In sum, the lack of a coherent harmonization effort in the major multinational agreements, with its accompanying reliance on dispute resolution remedies, may eventually eliminate the ability of the parties to enforce their own standards.

V. Conclusion

At first, the case for free trade and economic growth is very appealing. An increase in trade will encourage investment, stimulate the economy, enhance productivity, increase the standard of living, and raise the Gross National Product of all countries involved. Unfortunately, the case for free trade is also extremely dangerous. Free-trade theory seems to be based on the assumption that we can continue to produce and consume forever without damaging the environment and that protection of the environment can wait until we achieve "economic growth."

Yet, the history of the development of the border regions of the United States and the results of free-trade policies do not support the conclusions offered by free-trade proponents. Certainly, improvements in the standard of living are always welcome, but there are different ways to achieve this end. The fact remains that we live in a finite world with limited resources. Simply increasing production and market trade without regard for the environment can lead to negative results.

¹¹⁹ *Id.* at 597-98.

¹²⁰ Attacks on the effect of GATT on national sovereignty have also come from different ends of the political spectrum. Ralph Nader, backed by most of the U.S. environmental community, has asserted that GATT's panels "threaten the nation's web of state and federal environmental and consumer protection laws by requiring that such laws be the 'least trade-restrictive' means to achieve their ends." Berkman, *supra* note 4, at A1. He has also stated that participation in the WTO is "an absurd step backward" that would override laws when the United States is forced to obey the directives of the WTO or to pay large fines. Steven Taylor, *The '90s Nader*, NAT'L JURIST, Oct.-Nov. 1994, at 10, 13. On the other end of the spectrum, well-known conservative analyst Pat Buchanan has called GATT "globaloney" and has argued that it will "speed the erosion of the nation's manufacturing base, not to mention what's left of its sovereignty." Berkman, *supra* note 4, at A26.

¹²¹ See *supra* notes 69-78 and accompanying text.

Many proponents of free trade argue that there is no better alternative. To them, the suggestion that there may be a different way to organize economic growth is unthinkable because in their eyes it would lead to "chaos."¹²² In response, it may be suggested that a globalization plan that leads to weaker environmental protection, lower health and safety standards, lower wages, and less democratic participation is not very promising. It is time to begin to consider alternatives—alternatives that would lead to some kind of sustainable development without the risks of unregulated free trade.¹²³

The European Union has made some limited progress in this direction. The Single European Act (SEA) recognizes environmental quality as a good in and of itself and commits the EU to its protection.¹²⁴ The SEA is also committed to eliminating disparities in development among nations to avoid downward harmonization. This commitment has required regional planning and regulation which has interfered with competition among producers affecting their possible profits, as in the case of the Danish bottle recycling case.¹²⁵

Unfortunately, global development and environmental protection cannot be achieved by organizing one continent alone. It must not be forgotten that even though the countries in Europe belong to the same economic community, they are still in economic competition with each other and with the rest of the world. In the end, the success of the EU has been limited precisely by enterprises protective of their profits, and member states concerned about sovereignty and protective of their industries.¹²⁶

As long as market competition is the driving force of economic development, there will be a need to find a way to get ahead by maxi-

¹²² Schoenbaum, *supra* note 86, at 703, (arguing that "[i]f every country were allowed to impose its own domestic environmental standards on other countries, the result would not be greater environmental protection but chaos and anarchy").

¹²³ The most radical alternatives are global in nature and would require a new way of organizing the economy on a world scale emphasizing joint design or products and manufacturing processes. See, e.g., HUFBAUER & SCHOTT, *supra* note 18, at 100. However, even within the context of free-trade agreements as they exist now, some suggestions are possible. For example, the parties to a free-trade agreement could agree to exclude new members until they achieve a certain level of environmental protection infrastructure, as in the EU. See *supra* note 57 and accompanying text. If a country in a trade agreement fails to enforce its standards or if the parties cannot agree to common standards, then an environmental tax (or "green fee") could be imposed on all imports from that country. See HUFBAUER & SCHOTT, *supra* note 18, at XX; Peter Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519, 548 (1993). However, these alternatives were rejected during the negotiations of the NAFTA. *Id.* Another rejected alternative would have been to require an environmental impact study before the agreement could be approved. See Goldman, *supra* note 52, at 1284. The fact that these alternatives seem unacceptable to those who negotiated the most recent free-trade agreement is yet another example of how inadequate free-trade theory is to advance sustainable development.

¹²⁴ Single European Act, 1987 O.J. (L 169) 1.

¹²⁵ See *supra* note 58 and accompanying text.

¹²⁶ Friedberg, *supra* note 57, at 276-77.

mizing profits. Unfortunately, the environment is usually one of the losers in this economic battle. Given all this, then, is there any hope that the dream of environmental protection can actually come true or is it really an impossible dream? It seems that to achieve the dream, the ideal of economic growth based on production and market activity must be modified or abandoned. Globalization must be achieved with better values in mind. Growth for the sake of profits will not raise the standard of living, eliminate the differences among nations, or allow sustainable development by conserving resources. In the future, growth will have to be controlled through efficiency and high standards and not be based only on competition and consumption. Economic power needs to be taken away from the corporations that take advantage of the environment and placed closer to the people who are expecting to get the benefits of it. A free-trade treaty can only improve environmental and living conditions if it sets high standards on environmental protection, production processes, health and safety, and if it guarantees their enforcement through upward harmonization.

Economic development and the rules that regulate it also have to be more democratic. The whole process of dispute resolution has to be opened up to allow participation by the public. It also has to be more receptive to environmental concerns, at least by admitting experts and evidence in fields other than trade. This change is essential to the future of the environment. Also, the democratic decisions of the citizens should not be subject to the rule of multinational agencies in the name of free trade and "growth." International trade policies should not prevail over the decisions of the citizens of a country to adopt laws to protect the environment. Such unilateral environmental protection policies should be allowed in an effort to develop international agreements on environmental issues.

In conclusion, if we are going to think in terms of global economic development, we must think about global economic planning *and* environmental protection simultaneously. All this, of course, is heresy to free traders. It would lead to chaos; it would mean the end of the world as we know it. Well, that is the point indeed. To avoid a future environmental collapse we do need to end the world as we know it. We need to create a new one; one where dreams can come true.

