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REFORMING U.S. TRADE POLICY TO PROTECT THE GLOBAL ENVIRONMENT: A MULTILATERAL APPROACH

Kevin C. Kennedy*

I. INTRODUCTION

Responsible governments wrestle daily with such issues as preventing war, ensuring respect for human rights, protecting the environment, and maintaining an open world trading system. Consider the following three events. First, Libya is suspected of sponsoring terrorist attacks at the Rome and Vienna airports. In March 1982, President Reagan declares a national emergency under the authority of the International Emergency Economic Powers Act¹ and imposes a fairly comprehensive ban on trade with Libya.² Second, protestors demanding political reform in the People's Republic of China are massacred in Tiananmen Square, Beijing, in June 1989. Thereafter, the U.S. government pressures China to improve its human rights policies by linking annual renewal of China's most-favored-nation ("MFN") trading status to its human rights record.³ Third, Mexican fishermen use a method of catching tuna that results in an unacceptably high dolphin mortality rate. The United States responds in 1990 with a ban on canned tuna imports from Mexico, under authority of the Marine Mammal Protection Act.⁴ Though these three events differ in time, space, and subject matter, they all share one common element: each event led the United States to impose trade sanctions in response to activities that the United States deemed unacceptable. The practice of im-

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1. 50 U.S.C. § 1701 (1988).

2. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 925 n.1 (2d ed. 1986).

3. See Ben Barber, *Clinton's Foreign Policy Brings New Emphasis to Human Rights*, *CHRISTIAN SCI. MONITOR*, Apr. 15, 1993, at 2. On May 28, 1993, President Clinton announced that he would renew China's MFN trading status, conditioned upon improvements in China's human rights record. See Paul Quinn Judge, *Renewal Set For China Trade Status*, *BOSTON GLOBE*, May 28, 1993, at 1.

4. 16 U.S.C. §§ 1361-1421(a) (1988). See Stephen J. Porter, Note, *The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?* 5 *GEO. INT'L ENVTL. L. REV.* 91 (1992).

posing trade sanctions on national security grounds, as in the case of the trade sanctions imposed on Libya, is time-honored but controversial.⁵ In 1807, for example, in an effort to avoid war with Britain and France, President Thomas Jefferson imposed an embargo on all export trade from the United States to any foreign port.⁶ On May 1, 1985, declaring a national emergency, President Ronald Reagan imposed a trade embargo against Nicaragua and the Sandinista regime.⁷ Recently, in March 1993, the House Foreign Affairs Committee held hearings to consider imposing trade sanctions against countries that violate international arms control agreements.⁸ On August 25, 1993, the United States imposed a ban on selected missile technology sales to China and Pakistan.⁹

More recent, but equally controversial, is the practice of using trade sanctions to advance the cause of human rights, as in the case of the threat to impose trade sanctions against China. One of the earliest and most hotly debated examples of a U.S. Congressional commitment to human rights backed with the threat of trade sanctions is the Jackson-Vanik Amendment to the Trade Act of 1974.¹⁰ This amendment denies MFN trading status to a Communist country that does not permit free emigration of its citizens.¹¹ Some U.S. trade laws enacted more recently, such as the Generalized System of Preferences,¹² condition receipt of trade benefits from the United States upon assurances that the beneficiary country complies with internationally recognized worker rights.

The third example, the U.S. ban on tuna imported from Mexico, involves the latest, and arguably the most controversial, example of employing trade sanctions to promote a foreign policy goal:

5. For an excellent review of the history and success record of economic sanctions in the United States, see BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* (1988).

6. *See id.* at 8. Jefferson's effort failed, however, as the War of 1812 demonstrated.

7. Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985).

8. *U.S. Urged to Withdraw Trade Benefits from Countries Promoting Weapons Trade*, 10 Int'l Trade Rep. (BNA) No. 9, at 365 (Mar. 3, 1993).

9. *U.S., Citing Arms Transfer, Bars Some Sales of Advanced Technology to China, Pakistan*, 10 Int'l Trade Rep. (BNA) No. 35, at 1444 (Sept. 1, 1993).

10. 19 U.S.C. §§ 2431-2441 (1988 & Supp. III 1991). Similarly, the Clinton administration conditioned renewal of China's MFN trade status upon improvement of its human rights record. *See* Amy Kaslow, *President Urges Renewal of China's Top Trade Status*, CHRISTIAN SCI. MONITOR, May 28, 1993, at 1, 4.

11. *See* Adlai E. Stevenson & Alton Frye, *Trading with the Communists*, FOREIGN AFF., Spring 1989, at 53.

12. 19 U.S.C. § 2462(b)(7) (1988 & Supp. III 1991).

the protection of the global commons. The use of unilateral trade sanctions to promote environmental protection is the focus of this Article.

It is not surprising that international trade measures have become the mechanism of choice for responding to behavior by other countries that threatens national security, human rights, or the global environment. First, trade sanctions are conspicuous measures and, therefore, potentially carry great symbolic importance. Second, trade measures do not generally involve or threaten the use of armed force.¹³ Moreover, it is undoubtedly easier to initiate and implement unilateral trade sanctions than it is to commit and deploy troops abroad.¹⁴

Given the advantages of trade sanctions as an international enforcement alternative, it is not surprising that some environmentalists have borrowed pages from the book of national security and human rights advocates and have embraced import bans and restrictions as the preferred method for forcing United States trading partners to adopt measures that protect the environment. Indeed, the use of trade measures to impose and enforce environmental standards is particularly compelling when the markets created by open international trade are in large part responsible for the environmental damage.¹⁵

Although trade sanctions have an obvious and understandable appeal, many environmentalists have failed to ask whether trade sanctions are effective in securing a better environment. Admittedly, the symbolic role of trade sanctions, much touted in the human rights arena,¹⁶ should not be completely discounted when pursuing environmental goals. Symbolic value may constitute a necessary condition for the imposition of trade sanctions against a

13. "Quarantines," like those imposed on Cuba by the United States during the Cuban missile crisis, are an exception to the generally peaceful nature of trade sanctions.

14. Nonetheless, building a national or international consensus on the use of trade sanctions might present policymakers with a supremely delicate challenge. Witness the struggle between Congress and President Bush over China's continued MFN trade status under the Jackson-Vanik Amendment. See Ann S. Tyson, *China Reacts to US Trade Decision*, CHRISTIAN SCI. MONITOR, May 25, 1990, at 3; *Senate Sustains President's Veto of Bill Conditioning MFN Status for China*, 9 Int'l Trade Rep. (BNA) No. 9, at 518 (Mar. 25, 1992).

15. For example, trade in toxic chemicals or in endangered species.

16. See, e.g., CARTER, *supra* note 5, at 94. Although the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5117 (1992), cut off U.S. exports of oil to South Africa, the latter could still purchase oil from other sources. See *id.* Nevertheless, "cutting off petroleum to South Africa had considerable symbolism." *Id.*

country with a less than exemplary environmental track record. Symbolism alone, however, ought not to provide a sufficient reason for imposing such sanctions without some measurable change in the offensive conduct of the target country.

Beyond symbolism, trade sanctions must serve as an effective tool for achieving environmental ends in order to justify the potentially crippling impact of trade barriers on the world economy. The efficiency of trade sanctions, therefore, ought to be decisionmakers' initial focus and must ultimately be the bottom line. Otherwise, the combination of legitimate environmental concerns with strong trade protectionist pressures at home could lead to an undisciplined and discriminatory use of trade sanctions. Given the potential adverse effects of such discriminatory use, trade sanctions imposed on environmental, or any other grounds, must be used in a very disciplined fashion.

Part II of this Article introduces some basic concepts in international trade law and international environmental law. Part III explores environmentalists' concerns about free trade. Part IV examines various proposed measures to reform trade laws to serve environmental ends, and concludes with a discussion of the benefits of a multilateral approach to achieving environmental goals.

II. OVERVIEW

A. *The General Agreement on Tariffs and Trade: The International Trade "Constitution"*

The modern formulation of the General Agreement on Tariffs and Trade ("GATT") is the centerpiece of international trade policy.¹⁷ GATT is both an international agreement and an international organization. Headquartered in Geneva, GATT is the primary international trade agreement governing trade in goods¹⁸ for some

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, 55 U.N.T.S. 187 [hereinafter GATT].

18. At present, GATT covers only trade in goods. The recently completed Uruguay Round of negotiations focused on trade in services, rules on investment, and intellectual property protection.

111 member countries,¹⁹ including every leading industrial country except China and Russia.

Although GATT was originally designed to be an interim treaty, and was not intended to be either the central world trade organization or the foundation agreement on international trade,²⁰ it nevertheless performs both of these duties.²¹ Strangely enough, GATT has never come into full force, but instead applies provisionally to the various contracting parties with varying levels of rigor.²² Every GATT contracting party—as GATT signatories are called—with the exception of Haiti,²³ has acceded to GATT through a “protocol of provisional application.”²⁴

Despite GATT’s unusual origin, both it and the trade philosophy it embodies have weathered a series of protectionist storms over its forty-five-year history. GATT has entrenched itself reasonably well both as a permanent agreement and as an international trade organization.²⁵

GATT is premised on the economic principle of “liberal” trade.²⁶ As one commentator has explained,

[i]n a liberal economic system, government does not thwart private parties in their attempts to enter voluntary transactions, and taxes are stable, predictable, and nonprohibitive. The General Agreement on Tariffs and Trade (GATT) is liberal in this

19. *European Council Calls for Conclusion to GATT Talks by End of Year and New MTO*, 10 Int’l Trade Rptr. (BNA) No. 25, at 1035, 1036 (June 23, 1993).

20. See Armin von Bogdandy, *International Trade Law*, in U.S. TRADE BARRIERS: A LEGAL ANALYSIS 74–76 (Eberhard Grabitz & Armin von Bogdandy eds. 1991); KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 10–16 (1970); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35–57 (1969) [hereinafter JACKSON I].

21. GATT was designed to be an interim agreement until the national legislatures of the GATT contracting parties approved the International Trade Organization (“ITO”) and the Havana Charter. But when a neo-isolationist U.S. Senate refused to approve U.S. membership in the organization, the gestating ITO and its Charter were stillborn. The contracting parties then pressed GATT into service to fill the legal and institutional vacuum and to perform the functions that the more complete ITO Charter, with its formal organizational structure, would have fulfilled. See RESTATEMENT (3D) FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, Introductory Note at 263–65 (1987).

22. See JACKSON I, *supra* note 20, at 59.

23. See *id.* at 60.

24. GATT, *supra* note 17, 61 Stat. at A2051, 55 U.N.T.S. at 308.

25. See *GATT’s Last Chance*, *ECONOMIST*, June 1, 1991, at 65; *A Lifeboat for Trade*, *ECONOMIST*, Dec. 8, 1990, at 11.

26. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1231 (1992) [hereinafter JACKSON II]. For a description of GATT’s negotiating history, see JACKSON I, *supra* note 20, at 35–57.

sense Interventions [by governments] in liberal exchange across frontiers to make trade fair may be the political price of liberalism, but such interventions are themselves its antithesis.²⁷

Liberal trade is desirable because, by exploiting the law of comparative advantage, it increases total world wealth in two important ways: (1) secure access to barrier-free international markets facilitates economies of scale; and (2) increased international competition leads to product and process innovation, further reducing manufacturing costs and expanding consumer choices.²⁸

GATT seeks to achieve its goal of liberal world trade primarily through three commitments contained in its first three Articles. These commitments, popularly referred to as the "three pillars" of GATT, include: (1) an unconditional MFN obligation that prohibits contracting parties from discriminating against or giving preferences to any other GATT contracting parties, regardless of whether the latter have made any trade concessions to the former; (2) binding negotiated tariff commitments on imports, coupled with the elimination of quotas on imports under Article XI; and (3) a national treatment obligation that requires contracting parties to treat imports the same as like domestic products insofar as taxes and other domestic regulations are concerned.²⁹

Generally speaking, any government regulation of, or interference with, international trade that deviates from the liberal trade philosophy of GATT is disapproved of by the Agreement.³⁰ GATT does, however, permit government intervention to regulate or prohibit the flow of goods across borders under limited circumstances.

27. Martin Wolf, *Why trade liberalization is a good idea*, in *THE URUGUAY ROUND, A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 14 (J. Michael Finger & Andrzej Olechowski eds. 1987).

28. See Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1330 (1992).

29. See Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 704-10 (1992).

30. In practice, of course, much of international trade in goods falls outside GATT disciplines, such as trade in textiles that is subject to export quotas under the Multifiber Arrangement, trade in agricultural products, trade in steel, and trade in automobiles from Japan which is subject to a voluntary restraint agreement. But these deviations from GATT represent a failure of political will on the part of GATT members to adhere to GATT disciplines rather than a failure of GATT per se. See RESTATEMENT (3D) FOREIGN RELATIONS LAW OF THE UNITED STATES rptrs. nn.2-3 (1987); PAUL B. STEPHEN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS* 684 (1993).

In addition to authorizing the imposition of tariffs on imported goods,³¹ GATT permits three other noteworthy deviations from the liberal trade paradigm.

First, a GATT contracting party facing a balance-of-payments shortfall may temporarily impose "quantitative restrictions," or quotas, on the volume of goods imported until the shortfall improves.³² Second, domestic industries seriously injured by competing imports may receive "safeguard" relief from their home government,³³ such as a temporary increase in tariffs or the imposition of quotas on competing imports.³⁴ The third exception authorized by GATT under which a contracting party may restrict or prohibit imports, is in fact a set of general exceptions found in Article XX regarding public health and safety measures³⁵ and the national security exception found in Article XXI.³⁶

31. GATT, *supra* note 17, art. II, 61 Stat. at A15, 55 U.N.T.S. at 200.

32. GATT, *supra* note 17, art. XII, 61 Stat. at A34, 55 U.N.T.S. at 228.

33. This is known in the United States as Section 201 escape clause relief. 19 U.S.C. §§ 2251-2254 (1992).

34. *Id.* See GATT, *supra* note 17, art. XIX, 61 Stat. pts. 5-6, 55 U.N.T.S. at 258.

35. GATT, *supra* note 17, art. XX, 61 Stat. at A60-61, 55 U.N.T.S. at 262; *id.* art. XXI, 61 Stat. at A63, 55 U.N.T.S. at 266.

36. Article XXI of GATT provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT, *supra* note 17, art. XXI, 61 Stat. at A63, 55 U.N.T.S. at 266.

The United States invoked Article XXI to impose a trade embargo against Nicaragua on May 1, 1985. See *President Reagan Imposes Trade Embargo, Other Economic Sanc-*

To fully understand the scope of the general exceptions of Article XX, they must be read against the backdrop of Section Four of Article III: the national treatment obligation. This obligation directs contracting parties not to discriminate against imports in favor of like domestic products.³⁷ To the extent that the importing country's health and safety regulations purport to have an extraterritorial effect—for example, by targeting foreign production processes rather than the product itself³⁸—the regulations also violate Section Four of Article III.³⁹

Article XX permits contracting parties to restrict imports on a number of specific grounds. Of its enumerated exceptions, the public health and safety exception, the customs enforcement exception, and the exception for conservation of natural resources touch most directly on the enforcement of environmental measures.⁴⁰

tions on Nicaragua, 2 Int'l Trade Rep. (BNA) No. 19, at 637 (May 8, 1985) (discussing Executive Order No. 12,513, *supra* note 7). Nicaragua responded by filing an unsuccessful complaint with the GATT Secretariat challenging the embargo. See *U.S. Embargo on Nicaragua Did Not Violate Obligations Under GATT, Despite Panel Rules*, 3 Int'l Trade Rep. (BNA) No. 45, at 1368 (May 12, 1986).

37. GATT's Article III 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.

GATT, *supra* note 17, art. III, § 2, 61 Stat. at A18, 55 U.N.T.S. at 210.

38. See Schoenbaum, *supra* note 29, at 702. GATT places virtually no obstacle whatsoever, however, in the path of a country that wants to protect its environment by regulating domestic industries that use polluting production processes and methods. *Id.* When an importing country's domestic health and safety standards discriminate against imported goods and in favor of domestic products, the exporting country can also complain under Article XXIII that an agreed-upon trade concession has been nullified or impaired.

39. GATT, *supra* note 17, art. IV, ¶ 4, 61 Stat. at A19, 55 U.N.T.S. at 210.

40. These three exceptions provide as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(b) necessary to protect human, animal or plant life or health;

....

A health or safety import measure must satisfy three requirements to be permissible under Article XX. First, it must be "necessary" to the extent that no less trade restrictive alternative is available. Second, it must not "arbitrarily" or "unjustifiably" discriminate between countries (in other words, it must be consistent with the MFN obligation). Finally, it must not be a disguised restriction on international trade.⁴¹

Because the terms "necessary," "arbitrarily," and "unjustifiably" are vague, the health and safety exception is a potentially rich source of formidable non-tariff barriers to trade. For example, it is unclear whether the exception for human life and health covers persons within the importing country only, or whether it extends to human health and life worldwide. Given such vagueness, there is a significant possibility that economically powerful countries will exploit the exception in order to extend their own brand of environmental protection to weaker trading nations. Developing countries consider industrialized countries' demands that they adopt and enforce strict environmental standards as "eco-imperialism."⁴² In practice, however, the Article XX exceptions have been used sparingly.⁴³

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

. . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

GATT, *supra* note 17, art. XX, 61 Stat. at A60-61, 55 U.N.T.S. at 262. For an overview of GATT provisions dealing with environmental issues, see Robert F. Housman & Durwood J. Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992).

41. See Schoenbaum, *supra* note 29, at 713.

42. See JACKSON II, *supra* note 26, at 1241. The developing and industrialized countries so far appear to be talking past each other in addressing environmental priorities. Developing countries tend to focus on providing water and housing and reducing poverty, while industrialized countries emphasize such problems as ozone depletion, biodiversity, deforestation, and desertification. See Robert M. Press, *A Year After Rio, North and South Still Debate Priorities*, CHRISTIAN SCI. MONITOR, May 19, 1993, at 3.

43. See OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 81-90 (1992) [hereinafter OTA REPORT]. See also JACKSON II, *supra* note 26, at 1239-45, for a more in-depth discussion of these three Article XX exceptions, of the role Article XX plays as an environmental regulatory tool, and of attempts to make Article XX a major loophole to GATT's liberal trade philosophy.

B. *The International Environmental "Constitutions":
The Stockholm and Rio Declarations*

In 1991, the U.S. International Trade Commission reported 170 multilateral and bilateral agreements for the protection of the environment and wildlife, most of them dating from the 1970s.⁴⁴ From this host of treaties and conventions, no single document emerges as *the* international environmental law "constitution" analogous to GATT in the trade field.⁴⁵ International environmental law thus resembles a patchwork quilt.⁴⁶ Nevertheless, two closely related documents set forth the basic principles of international environmental law and policy and are recognized as the centerpieces of the field. These documents are the 1972 Stockholm Declaration on the Human Environment⁴⁷ and the 1992 Rio Declaration on Environment and Development.⁴⁸

The Stockholm and Rio Declarations respectively contain twenty-six and twenty-seven guiding principles for protecting the global environment, principles to which signatory states have committed themselves. Neither declaration calls for the extreme version of environmental protection advocated by what one commentator has called the BANANA camp of environmentalists—"build absolutely nothing anywhere near anyone."⁴⁹ The Stockholm and Rio Declarations do not champion the cause of the environment

44. U.S. INTERNATIONAL TRADE COMMISSION, PUB. 2351, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE (Jan. 1991).

45. Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728, 729 (1992). Several authors have proposed that such a "constitution" be established. See, e.g., Daniel C. Esty, *GATting the Greens*, FOREIGN AFF., Nov./Dec. 1993, at 32, 36.

46. See Jeffrey M. Lang, *Trade and the Environment*, in CONFRONTING TRADE AND ENVIRONMENTAL CONFLICTS: PROSPECTS AND PRACTICAL APPROACHES 1, 8 (Am. Bar Ass'n Section on Int'l L. & Practice Conference papers, 1993).

47. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14 (1972) (adopted by the U.N. Conference on the Human Environment at Stockholm), reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

48. Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/Conf. 151/5 (1992) (adopted by the U.N. Conference on Environment and Development at Rio de Janeiro), reprinted in 31 I.L.M. 876 (1992) [hereinafter Rio Declaration].

49. "BANANA" is an acronym that describes the most extreme environmentalist position. Another popular acronym is "NIMBY" ("not in my back yard"), which describes a far more limited and far less altruistic environmental position. See Craig Van Grastek, *The Political Economy of Trade and the Environment in the United States Senate*, in INTERNATIONAL TRADE AND THE ENVIRONMENT 227, 233 (Patrick Low ed. 1992).

über alles,⁵⁰ but rather take a balanced approach to the issue of trade and the environment. Indeed, a distillation of the largely overlapping principles of the Declarations yields two potentially conflicting concepts: national sovereignty and international cooperation. Principle 21 of the Stockholm Declaration exemplifies this sovereignty/cooperation dichotomy:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁵¹

Principles 11 and 13 of the Rio Declaration further reflect the persistence of sovereignty as a driving force of international environmental agreements. These two Principles direct states to enact *national* legislation to deal with issues of environmental damage, liability, and compensation for victims of pollution.⁵² Relying exclusively on national initiatives to address domestic environmental issues, however, will not likely produce a comprehensive and coordinated legal regime that adequately advances the goal of protecting the global environment. Recognizing this, the Stockholm and Rio Declarations call upon states to cooperate with one another in developing international conventions to deal with issues of transboundary pollution.⁵³

50. See Jeffrey D. Kovar, *A Short Guide to the Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119 (1993).

51. Stockholm Declaration, *supra* note 47, Principle 21, U.N. Doc. A/Conf. 48/14 at 7, *reprinted in* 11 I.L.M. at 1420. Principle 2 of the Rio Declaration tracks Principle 21's language verbatim, merely adding "and developmental" to the phrase "pursuant to their own environmental policies." Rio Declaration, *supra* note 48, Principle 2, U.N. Doc. A/Conf. 151/5 at 2, *reprinted in* 31 I.L.M. at 877.

52. Principle 11 of the Rio Declaration provides in part that "States shall enact effective environmental legislation." Rio Declaration, *supra* note 48, Principle 11, U.N. Doc. A/Conf. 151/5 at 4, *reprinted in* 31 I.L.M. at 878. In this same regard, Principle 13 states in part that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage." *Id.* Principle 13, U.N. Doc. A/Conf. 151/5 at 4, *reprinted in* 31 I.L.M. at 878.

53. Stockholm Declaration, *supra* note 47, Principles 22, 24, U.N. Doc. A/Conf. 48/14 at 7, *reprinted in* 11 I.L.M. at 1420; Rio Declaration, *supra* note 48, Principles 13-14, U.N. Doc. A/Conf. 151/5 at 4, *reprinted in* 31 I.L.M. at 878. To further this cooperative effort, signatory states also commit to sharing scientific information. Stock-

In their attempts to preserve national sovereignty while encouraging international cooperation, the Stockholm and Rio Declarations also struggle to accommodate international environmental protection and international trade. Neither Declaration is hostile to international trade. On the contrary, both documents exhibit a keen sensitivity to the importance of an open trading system and an awareness that environmental regulations may easily be employed as pretexts for thinly disguised protectionism. Although the Stockholm Declaration does not directly address the impact of environmental regulation on the growth of international trade, the Rio Declaration provides a broad framework for harmonizing environmental and trade concerns. In the event that the two concerns conflict, the Rio Declaration gives trade issues primacy over environmental concerns.

Principles 11, 12, and 16 of the Rio Declaration specifically warn against pursuing aggressive environmental policies that could have a potentially adverse impact on international trade. First, Principle 11 states that “[environmental] [s]tandards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”⁵⁴ In addition, Principle 11 mildly admonishes industrialized countries not to demand that developing countries harmonize environmental standards without considering the economic and social costs to developing countries.

Principle 12 in turn addresses the crux of the environment/trade debate—namely, environmental measures that serve to disguise protectionist trade policies. The declaration weighs in on the side of trade:

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

holm Declaration, *supra* note 47, Principle 20, U.N. Doc. A/Conf. 48/14 at 6, *reprinted in* 11 I.L.M. at 1420; Rio Declaration, *supra* note 48, Principle 9, U.N. Doc. A/Conf. 151/5 at 3, *reprinted in* 31 I.L.M. at 877. For a criticism of state sovereignty as a political obstacle to further progress in the development of international environmental law, see Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291, 315 (1989).

54. Rio Declaration, *supra* note 48, Principle 11, U.N. Doc. A/Conf. 151/5 at 4, *reprinted in* 31 I.L.M. at 878.

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.⁵⁵

Principle 12 conveys both a substantive and procedural message. On the substantive level, when trade measures are used in the name of environmental protection, the means and the ends should be closely and causally linked. On the procedural level, unilateralism and extraterritorial regulation are unacceptable, while multilateral approaches and consensus are strongly encouraged.

Principle 16 of the Rio Declaration expands upon the directives of Principles 11 and 12. Principle 16 counsels against the adoption of environmental policies that might distort world trade patterns:

National authorities should endeavour to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.⁵⁶

Principle 16's "polluter pays principle" is tempered by Principle 11's warning against the imposition by developed countries of strict environmental standards on developing countries, and by Principle 12's rejection of unilateralism and protectionism in the guise of environmentalism.

If we accept the Stockholm and Rio Declarations as reasonably accurate reflections of world opinion on the interrelationship of trade and the environment,⁵⁷ then it would seem there is general agreement for the proposition that economic growth should not be stifled or the open world trading system destroyed in the guise of

55. *Id.* Principle 12, U.N. Doc. A/Conf. 151/5 at 4, reprinted in 31 I.L.M. at 878 (emphasis added).

56. *Id.* Principle 16, U.N. Doc. A/Conf. 151/5 at 5, reprinted in 31 I.L.M. at 879.

57. The vote on the Stockholm Declaration was 103 countries for, 0 against, and 12 abstaining. See BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 943 (2d ed. 1990). More than 175 countries attending the Rio Conference adopted the Rio Declaration by consensus. Kovar, *supra* note 50, at 119.

environmental protection. Although GATT predates the emergence of a significant international environmental movement among states by at least two decades,⁵⁸ both the Stockholm Declaration and the Rio Declaration in large part support the liberal trade philosophy of GATT.⁵⁹ Both stress the importance of balancing trade, economic growth, and environmental concerns. Taking a similar balancing approach, GATT emphasizes the importance of open, unrestricted trade, but recognizes that importing countries may have legitimate health and safety reasons for restricting or banning certain imports.

Even though GATT and its environmental counterparts, the Stockholm and Rio Declarations, are not in conflict, GATT and free trade policy in general have nevertheless become scapegoats for many environmentalists. The next section will address why this is so.

III. WHY ENVIRONMENTALISTS HAVE PILLORIED GATT AND FREE TRADE

A. *The Tension Between International Trade Law and International Environmental Law*

The fit between international trade law and international environmental law has always been rough at best, with trade and environmental issues proceeding on separate, but parallel, tracks. As levels of world trade and investment have rapidly risen in the post-war era, so too has the level of environmental degradation. Many commentators view this development with concern, others with outright alarm.⁶⁰

Many environmentalists are alarmed by the poor fit between trade and environment. A few environmental extremists have even

58. See *supra* text accompanying note 44.

59. See *supra* note 17 (noting that GATT entered into force in 1947).

60. See, e.g., Hamilton Southworth III, Comment, *GATT and the Environment—General Agreement on Tariffs and Trade, Trade and the Environment*, GATT Doc. 1529 (Feb. 13, 1992), 32 VA. J. INT'L L. 997 (1992). In its 1992 report, the Congressional Office of Technology Assessment observed in understated matter-of-factness that "[t]he potential for conflict between environmental concerns and international trade is increasing." OTA REPORT, *supra* note 43, at 3. Other observers consider trade liberalization and environmental degradation to be in a cause and effect relationship. See Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37,

demanded an end to free trade, arguing that with free trade comes economic growth, and with economic growth comes pollution.⁶¹ Moreover, because market mechanisms do not always take environmental costs fully into account, these critics argue that a legal climate that promotes unregulated free trade could contribute to the unrestricted, transborder movement of hazardous products and waste.⁶² Environmentalists also fear that countries with comparatively more stringent environmental standards will relax those standards (an environmental version of "the race to the bottom"⁶³), to allow domestic producers to compete with producers operating in countries with less demanding environmental standards,⁶⁴ thereby stanching the flow of capital, jobs, and wages abroad.⁶⁵

The need for greater integration of trade and environmental policies is undeniable.⁶⁶ Trade and environmental policies need not be mutually exclusive. As one economist has observed, "[m]ost environmental policies are not in conflict with basic GATT rules."⁶⁷ Although environmentalists have many grievances with GATT,⁶⁸ their ire is misdirected. If the real concern is that liberal trade may reduce worldwide environmental standards to the lowest common denominator, then the problem lies either in the market's failure to reflect environmental costs in prices or in government interference with the market through subsidization of polluting indus-

39-43 (1991); John Hunt, *Free Traders Heading for Clash with Greens*, FIN. TIMES, Sept. 5, 1991, at 6.

61. See Schoenbaum, *supra* note 29, at 700; *Don't Green GATT*, ECONOMIST, Dec. 26, 1992, at 15.

62. U.S. INTERNATIONAL TRADE COMMISSION, PUB. 2554, THE YEAR IN TRADE: OPERATION OF THE TRADE AGREEMENTS PROGRAM 1991, at 14 (Aug. 1992) [hereinafter THE YEAR IN TRADE 1991].

63. See Weiss, *supra* note 45, at 729; see also Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 31 (1992).

64. See Schoenbaum, *supra* note 29, at 701.

65. THE YEAR IN TRADE 1991, *supra* note 62, at 14.

66. The tuna/dolphin controversy is just one example. See *infra* note 78.

67. Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns*, in INTERNATIONAL TRADE AND THE ENVIRONMENT 325, 327 (Patrick Low ed. 1992).

68. The following are the grievances environmentalists have with GATT: (1) GATT limits national sovereignty and thus restricts the environmental measures a country may wish to use; (2) GATT does not permit production-based grounds as a reason for excluding an imported product; (3) GATT does not permit the imposition of countervailing duties on imports from countries with lax environmental laws; (4) GATT encourages harmonization of product standards, which leads to a lowering of standards; (5) GATT prevents export bans on products except in very narrowly defined circumstances; (6) GATT prevents the unilateral, extraterritorial imposition of environmental standards by one country upon another; (7) GATT's most-favored-nation obligation prohibits countries from distinguish-

tries.⁶⁹ Moreover, economic studies demonstrate that tough environmental standards by themselves do not cause companies to relocate abroad.⁷⁰ Other factors, such as labor costs, transportation infrastructure, market access, and political stability figure more prominently in the location/relocation decision.⁷¹ Hence, a rational government would not simply lower environmental standards to retain local industry as the environmentalists fear.

Nevertheless, the market model of favoring government non-interference with the free flow of goods—the model that shaped GATT—has not found a comfortable niche in international environmental law. Market economics leaves the problem of limiting externalities (e.g., pollution) to the market, not to governments. A market approach to environmental problems has not proven entirely effective.⁷² For example, one potential approach to mitigating pollution would be to adopt a “polluter pays principle.”⁷³ That is, those who pollute should bear the cost of pollution or pass it on to the consumer. But polluters are unlikely to abate their pollution voluntarily in the absence of a government requirement, because polluters cannot rely on their competitors to do so voluntarily. International environmental problems require a model that invites and arguably requires government regulation of the market.⁷⁴ Thus environmentalists are justified in challenging the free traders’ basic assumption that markets are capable of effectively protecting the environment.⁷⁵

ing between countries in treatment on the basis of different environmental policies; (8) GATT’s dispute settlement mechanisms are secretive and do not permit environmentalists to intervene in the decisionmaking process. *A Catalogue of Grievances*, *ECONOMIST*, Feb. 27, 1993, at 26.

69. See Sorsa, *supra* note 67, at 325 n.3.

70. See *The Greening of Protectionism*, *ECONOMIST*, Feb. 27, 1993, at 26 [hereinafter *Greening*].

71. See *id.*

72. Growing problems resulting from international trade in endangered species and hazardous substances are examples of market failures requiring government regulation. See *infra* note 96.

73. See *supra* note 56 and accompanying text.

74. See *JACKSON II*, *supra* note 26, at 1231–32.

75. See Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 *LOY. L.A. INT’L & COMP. L.J.* 33, 34–42 (1992); Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of A Neutral Forum and Neutral Principles*, 49 *WASH. & LEE L. REV.* 1279, 1290–92 (1992); *NAFTA Implementing Legislation Uncertain But Wilson Says No Plan to Delay Passage*, 10 *Int’l Trade Rep.* (BNA) No. 10, at 415–16 (Mar. 10, 1993).

B. The Catalysts for Environmentalists' Recent Disenchantment with GATT and Free Trade

A series of GATT Panel reports dealing with import bans ostensibly effected for environmental and health reasons⁷⁶ has contributed to environmentalists' disenchantment with GATT and with free trade in general.⁷⁷ Two GATT Panel reports in the 1980s involved the interpretation of Articles XX(g) (resource conservation measures) and XI (the general prohibition against quotas).

In a 1982 case, Canada challenged a U.S. ban on tuna imported from Canada.⁷⁸ Canada argued that the ban was imposed in retaliation for its seizure of American-flagged fishing vessels caught illegally harvesting tuna off of Canada's west coast. The United States defended its action as falling within Article XX(g)'s exception for conservation of fish stocks. The GATT Panel concluded that the United States could not use Article XX(g) to defend the ban since they had not taken any parallel measures at home to limit the tuna catch of the U.S. domestic fleet. Therefore, the ban on Canadian tuna imports constituted an impermissible quantitative restriction in violation of Article XI.⁷⁹

A 1988 GATT Panel decision also dealt with the interpretation of Article XX(g).⁸⁰ In that case, the United States protested a blanket export ban imposed by Canada on unprocessed herring and salmon. Because Canada had not placed any domestic restrictions on Canadian consumption of herring and salmon, the GATT Panel held that the Canadian export ban was not "primarily aimed" at

76. See Frederic L. Kirgis, Jr., *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221 (1992); Porter, *supra* note 4, at 91. For a review of U.S. legislation and recent congressional proposals that would authorize the imposition of unilateral trade sanctions on environmental grounds, see Matthew Hunter Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098, 2113-17 (1992). For a discussion of the GATT dispute settlement process, see Judith H. Bello & Alan F. Holmer, *Settling Disputes in the GATT: The Past, Present, and Future*, 24 INT'L LAW. 519 (1990).

77. For a discussion of environmental concerns raised during the NAFTA negotiations and how those issues were resolved, see Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT'L LAW. 751 (1993); Raymond B. Ludwizewski, "Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection, 27 INT'L LAW. 691 (1993).

78. *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, Report of the Panel, GATT Doc. L/5198 (Feb. 22, 1982), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 29th Supp., at 91 (1983).

79. *Id.*

80. *Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the

conservation.⁸¹ The Panel rejected Canada's argument that the so-called "quality" exception under Article XI:2(b) justified the ban since Canada's export ban was across-the-board and did not permit shipments that would comply with the standards.⁸²

A third GATT Panel report involved a Canadian and European Community ("EC") complaint against a U.S. surcharge imposed on imported oil and chemicals to fund the Superfund environmental cleanup law.⁸³ Because the additional taxes on imported oil were higher than comparable taxes on domestically produced oil, Canada argued that the Superfund tax violated GATT's national treatment obligation⁸⁴ and that the imposition of the tax constituted a prima facie case of GATT nullification and impairment under Article XXIII. The GATT Panel accepted Canada's position with regard to the tax on imported oil but agreed with the United States that the tax on nonpetroleum chemical imports constituted a legitimate border-tax adjustment permitted under Article II:2(a).⁸⁵

Panel, GATT Doc. L/6268 (Mar. 22, 1988), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 35th Supp., at 98 (1988).

81. *Id.* at 115.

82. In the aftermath of the GATT Panel report, Canada removed the export restrictions but replaced them with regulations requiring herring and salmon caught in Canadian waters to be landed in Canada before export. The United States brought a complaint under the Chapter 18 dispute resolution procedures of the Canada-United States Free Trade Agreement ("CUSFTA"). Canada-United States Free Trade Agreement, Jan. 2, 1988, reprinted in 27 I.L.M. 281 (1988). The United States complained that although the new regulations were not a direct export ban, they had that ultimate effect due to the additional time and expense incurred in off-loading and processing the fish in Canada before export. The panel concluded that the Canadian regulations were not primarily aimed at conservation, were not exempted under Article XX(g), and thus constituted an impermissible quantitative restriction in violation of GATT Article XI, which CUSFTA incorporates through its Article 407. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 1989 WL 250302 (U.S. Can. F.T.A. Binat. Panel Oct. 16, 1989). For a discussion of this case, see Ted L. McDorman, *International Trade Law Meets International Fisheries Law: The Canada-U.S. Salmon and Herring Dispute*, J. INT'L ARB., Dec. 1990, at 107.

83. *United States Taxes on Petroleum and Certain Imported Substances*, Report of the Panel, GATT Doc. L/6175 (June 17, 1987), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 34th Supp., at 136 (1987).

84. Article III prohibits the imposition of taxes that discriminate against imports in favor of like domestic products. It provides, in pertinent part:

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 products

GATT, *supra* note 17, art. III, ¶ 2, 61 Stat. at 18, 55 U.N.T.S. at 204.

85. Article II:2(a) of GATT provides:

The most recent and most notorious GATT Panel decision involving environmental trade measures dealt with the U.S. ban on tuna imported from Mexico.⁸⁶ The United States imposed an import ban on tuna under provisions of the Marine Mammal Protection Act,⁸⁷ a statute limiting the number of dolphins that may be killed while catching tuna using the purse-seine method. The United States justified its ban as necessary to protect animal life and to conserve exhaustible natural resources and therefore permissible under Article XX(b) and (g). Mexico argued that the ban violated the national treatment obligation of Article III and was also an illegal quantitative restriction in violation of Article XI.⁸⁸

The Panel held that the only permissible regulations under Article III are those that (1) regulate the imported product as a whole and not according to the production process used to manufacture the product, and (2) do not discriminate against the imported product in favor of the domestic product. The U.S. regulations failed to pass muster under either the first or second prong of this test.

The GATT Panel found that the United States had violated the national treatment obligation since the ban did not cover tuna products per se but rather the process by which tuna were caught.⁸⁹ The GATT Panel further found that the U.S. method for calculating the number of allowable foreign dolphin kills violated Article III's national treatment obligation since it discriminated against the Mexican fleet. Because the figure for foreign dolphin catches was

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) 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 or in respect of an article from which the imported product has been manufactured or produced in whole or in part.

GATT, *supra* note 17, art. II, ¶ 2(a), 61 Stat. at 15, 55 U.N.T.S. at 202.

86. *United States—Restrictions on Imports of Tuna*, Report of the Panel, GATT Doc. DS21/R, reprinted in 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin Panel Report*]. For an analysis of the GATT Panel report in the tuna/dolphin dispute, see Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?* 49 WASH. & LEE L. REV. 1407, 1409–21 (1992).

87. 16 U.S.C. §§ 1361–1421(a) (1988).

88. *Tuna/Dolphin Panel Report*, *supra* note 86, at ¶¶ 3.10, 3.16, reprinted in 30 I.L.M. at 1602–03.

89. *Tuna/Dolphin Panel Report*, *supra* note 86, at ¶ 5.14, reprinted in 30 I.L.M. at 1618.

based on the actual number killed by the U.S. fleet, the Mexican fleet, unlike the American fleet, never knew in advance what their quota was to be.⁹⁰

Although the Panel concluded that the Article XX(b) and (g) exceptions do not expressly prohibit extraterritorial jurisdiction (the Mexican fishing did not occur in U.S. waters), they also noted that if the U.S. interpretation were accepted, then any country could unilaterally impose on foreign nations its own health and safety measures. Under the United States' interpretation of Article XX, contracting parties would be unable to "deviate [from these unilaterally imposed measures] without jeopardizing their rights under the General Agreement."⁹¹ The Panel found this result unacceptable. The Panel suggested that the United States should have attempted to negotiate an international cooperative agreement with Mexico in the spirit of GATT multilateralism and not have proceeded to take unilateral action against tuna imports from Mexico.⁹²

Do GATT and its free trade progeny really threaten the environment? Can existing international trade legal regimes accommodate environmental issues? The next portion of this Article explores these questions.

IV. ACHIEVING ENVIRONMENTAL GOALS WHILE AVOIDING PROTECTIONISM

A. *Proposed Measures to Reform GATT*

GATT does not give an importing country carte blanche to restrict trade for environmental reasons because such freedom would seriously compromise its goal of liberal trade promotion. Nevertheless, GATT does not rule out all possible responses to environmental concern. Two GATT-legal responses do exist: (1) the health and safety exception of Article XX(b), and (2) the natural resources conservation exception of Article XX(g). Dissatisfied with what they perceive to be too limited a range of responses to environmental issues, critics of GATT have proposed

90. *Id.* ¶ 3.22, reprinted in 30 I.L.M. at 1604.

91. *Id.* ¶ 5.27, reprinted in 30 I.L.M. at 1620.

92. *Id.* ¶ 5.28, reprinted in 30 I.L.M. at 1620.

a variety of amendments to both GATT and U.S. trade laws. A number of bills and resolutions introduced in Congress attempt to reform GATT to give environmental issues greater weight in the context of international trade.⁹³ The desirability of any of these proposals from a trade-promotion standpoint is highly questionable since most come with a fairly high protectionist price tag.⁹⁴ Whether any of the proposals would be effective in achieving environmental goals is equally open to question. This Part addresses these issues in the context of ten specific proposals to reform GATT.

1. Amend Article XX or Adopt a GATT Waiver to Except Trade Measures Taken on Environmental Grounds

The best alternative, both because it is multilateral and because it would be implemented within the existing framework, would be to amend GATT to permit environmentally based trade measures. Specifically, the contracting parties could either amend Article XX or could seek a GATT waiver.

The major advantage to amending Article XX by adding an explicit exception for environmental measures is that any such amendment would necessarily be the product of a multilateral consensus on the appropriate response to environmental negligence. A multilateral approach would also minimize the threat of thinly disguised protectionist restrictions masquerading as environmental measures. An Article XX amendment could be extended to cover both products and production processes that are environmentally harmful.

The problems with this proposal, however, are at least twofold. First, amending GATT is extremely difficult: amendments to Article I (the MFN obligation) and Article II (tariff bindings) require unanimous approval of the contracting parties, and amendments can only be applied to those contracting parties that have accepted them.⁹⁵ Securing unanimous consent on a subject as contentious as environmental standards that also permitted deviations from the

93. See OTA REPORT, *supra* note 43, at 91-92; see also Hurlock, *supra* note 76, at 2113-17. Examples of pending bills are S. 979, 103d Cong., 1st Sess. (1993) (to require EPA administrator to establish environmental export program) and S. Res. 60, 103d Cong., 1st Sess. (1993) (to reopen GATT negotiations to address environmental concerns).

94. See *infra* notes 141, 143 and accompanying text.

95. GATT, *supra* note 17, art. XXX, 61 Stat. at 74, 55 U.N.T.S. at 282. For a

MFN principle expressed in the preface to Article XX would be virtually impossible.

A second problem with amending Article XX involves the thorny issue of establishing substantive standards. For example, if imports are to be excluded or taxed according to the processes by which they were produced, which country's standards should be applied? The best alternative, internationally agreed upon standards, has proven to be nettlesome in the past, even among close trading partners.⁹⁶ The U.S.-E.C. dispute over sanitary standards for beef and pork is one recent example.⁹⁷ If the domestic standards of the importing country are applied instead, a serious question of the extraterritorial application of the importing country's environmental regulations is raised. Unless pollution is transboundary,⁹⁸ by what authority can one country dictate to another the environmental standards it should adopt?⁹⁹

Considering the significant procedural hurdles attendant to the

discussion of a proposed amendment to Article XX that would include trade measures based on environmental grounds, see Hurlock, *supra* note 76.

96. Conventions where nations have agreed to total bans on trade in certain items (such as the Basel Convention on hazardous and toxic waste and CITES on endangered species) or where nations agree to discontinue using a certain product (e.g., the Montreal Protocol on CFCs) arguably have the best chance of success, if they are coupled with solid evidence from the scientific community regarding the dangers and risks of no action. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 27, 1989, U.N. Doc. UNEP/IG. 8013, *reprinted in* 28 I.L.M. 657 (1989) [hereinafter Basel Convention]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES]; Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

97. *E.C. Set to Block Imports of Most U.S. Pork, Claims Veterinary Standards Not Being Met*, 7 Int'l Trade Rep (BNA) No. 42, at 1610 (1990); See Werner P. Meng, *The Hormone Conflict Between the EEC and the United States Within the Context of GATT*, 11 MICH. J. INT'L. L. 818 (1990).

98. See RESTATEMENT (3D) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 601 (1987).

99. The response to this rhetorical question is analogous to the situation where one or more countries challenge another's human rights record. Countries owe minimum human rights guarantees to all other states. See *id.* § 701 cmt. c. Similarly, countries should honor their obligations to uphold internationally recognized minimum environmental standards. The difference in the human rights arena, however, is that violations are typically challenged under the authority of an international convention or a unanimous declaration of the United Nations General Assembly, not under the national law of the challenging state. In addition, the international law of human rights, unlike international environmental law outside the area of transboundary pollution or pollution of the global commons, has developed sufficiently so that even when it is not treaty based, it nevertheless in many instances has the status of customary international law. Compare *id.* § 702 (listing genocide, slavery, murder, torture, arbitrary detention, and systematic racial

GATT amendment process, particularly the unanimity requirement, a procedural alternative would be to adopt a GATT waiver that requires a super majority of two-thirds of those voting and one-half of the total membership.¹⁰⁰ Those parties approving the waiver would exempt one another from adhering to GATT in connection with international environmental conventions—to which they are also parties—that regulate production processes for environmental reasons. Because such conventions—the Basel Convention or the Montreal Protocol, for example—enjoy wide acceptance among GATT contracting parties, securing a waiver is feasible.¹⁰¹ A waiver would be superfluous, however, in those cases where the provisions of the environmental convention itself already permit specific trade measures to be taken under the terms of the convention.¹⁰² Standing alone, trade measures taken by an importing country that are directed against an exporting country's production processes might violate GATT, in the absence of a GATT waiver.¹⁰³ But trade measures taken pursuant to an international environmental convention that post-dates GATT arguably would not be unlawful under GATT since the customary international law of treaty interpretation dictates that in the event of an inconsistency between an earlier and a later treaty, the latter controls.¹⁰⁴ This assumes, of course, that

discrimination as violations of the customary international law of human rights) *with id.* § 601 (concerning the customary international law of the environment, where the Restatement provides that a state "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances," not to engage in injurious transboundary pollution).

100. GATT, *supra* note 17, art. XXV, ¶ 5, 61 Stat. at 68–69, 55 U.N.T.S. at 272–75.

101. See Ted L. McDorman, *The 1991 U.S.-Mexico GATT Panel Report On Tuna and Dolphin: Implications for Trade and Environment Conflicts*, 17 N.C. J. INT'L L. & COM. REG. 461, 481–87 (1992). Some commentators have suggested that the conventions that would make excellent candidates for a GATT waiver include: the Montreal Protocol, *supra* note 96; the Basel Convention, *supra* note 96; and CITES, *supra* note 96. See OTA REPORT, *supra* note 43, at 43–46; JACKSON II, *supra* note 26, at 1244–45. *But see* Sorsa, *supra* note 67, at 1003–11 (expressing doubt as to whether GATT effectively can accommodate multilateral environmental treaties such as CITES).

102. See, e.g., Montreal Protocol, *supra* note 96, art. 40 (banning import of ozone-depleting substances).

103. See Schoenbaum, *supra* note 29, at 709–10, 721–23. Schoenbaum argues that even without a waiver, trade measures taken pursuant to an international environmental convention that targets a scientifically recognized threat to human health and safety—such as the Montreal Protocol, *supra* note 96—should qualify under the Article XX(b) exception. *Id.* at 720.

104. Cf. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 30, ¶ 3 (entered into force Jan. 27, 1980). Because GATT predates the Vienna Convention, the Convention does not govern the interpretation of GATT. Nevertheless, the

the exporting and importing countries concerned are signatories both of GATT and of the international environmental agreement.¹⁰⁵

2. Amend the GATT Standards Code to Include Environmental Standards

Because of the tremendous procedural obstacles to amending GATT, the next best alternative would be to negotiate a side arrangement under GATT auspices. A negotiating strategy of side agreements was developed during the 1979 Tokyo Round of GATT multilateral trade negotiations ("MTNs"). At the Tokyo Round (the seventh in a series of GATT MTNs), a handful of GATT contracting parties entered into nine side agreements, commonly referred to as "codes." Three of these agreements pertain to particular types of products, covering trade in civil aircraft, bovine meat, and dairy products, while the other six deal with specific nontariff barriers to trade, including government procurement, customs valuation, dumping, subsidies, licensing, and standards.¹⁰⁶

One of the nontariff barrier agreements, the Agreement on Technical Barriers to Trade (the "Standards Code"),¹⁰⁷ addressed the growing use of product standards as nontariff barriers to trade. The aim of the Standards Code is to ensure that procedures relating to product standards, regulations, testing, and certification are not in fact protectionist measures in disguise.¹⁰⁸ The thirty-eight Stand-

Vienna Convention primarily codifies customary international law on the subject of treaty interpretation and is considered authoritative. See Schoenbaum, *supra* note 29, at 719 n.108 (citing RESTATEMENT (3D) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, Introductory Note at 144 (1987)).

Such a modification of GATT by a later concluded treaty has occurred with the Multi-Fiber Arrangement ("MFA"), BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 21st Supp., at 3 (1975), 25 U.S.T. 1001, 430 U.N.T.S. 166, which takes textiles and wearing apparel outside of GATT disciplines and governs such trade through assigned quotas. See McDorman, *supra* note 101, at 483-84. For a discussion of the MFA and its implementation in the United States, see American Ass'n of Exporters and Importers—Textiles and Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985).

105. See Schoenbaum, *supra* note 29, at 719; Geoffrey W. Levin, Note, *The Environment and Trade—A Multilateral Imperative*, 1 MINN. J. GLOBAL TRADE 231, 246 (1992).

106. A list of the Tokyo Round agreements and signatories appears in THE YEAR IN TRADE 1991, *supra* note 62, at 48-49.

107. See Agreement on Technical Barriers to Trade, GATT Doc. L/4812 (Nov. 12, 1979), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 8 (1980) [hereinafter Standards Code].

108. See *id.*, preamble, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 8 (1980).

ards Code signatories¹⁰⁹ are also encouraged to use internationally accepted harmonized standards whenever possible.¹¹⁰

The Standards Code is essentially an agreement on procedure. It does not create any substantive product standards or regulations. It aims to ensure that when signatories do implement and enforce product standards, such standards are transparent, reasonable, and based on product performance rather than design.¹¹¹

A revised and expanded Standards Code received tentative approval during the Uruguay MTN Round.¹¹² It would extend Code coverage to product processes and production methods ("PPMs"),¹¹³ require any standard that is not internationally accepted to be based on scientific principles, mandate that trade-restrictive measures be closely tailored to meet their objectives, and obligate subnational levels of government (cities, states, and provinces) to adhere to the Code.¹¹⁴ Environmentalists have criticized the proposed Standards Code revisions for failing to take into account the goal of environmental protection or to fully recognize it as a legitimate technical barrier to trade.¹¹⁵

3. *Exempt Environmental Subsidies from Countervailing Duty Laws*

Another related possibility would be to amend the GATT Subsidies Code, another side agreement that emerged from the Tokyo Round.¹¹⁶ The Subsidies Code was intended to regulate government

109. The signatories include Canada, the European Community, Japan, Mexico, and the United States. *Id.*

110. *See id.*

111. *Id.*

112. *See THE YEAR IN TRADE 1991, supra note 62, at 20.*

113. A related bill was introduced in the United States during the 102d Congress. S. 1965, the Global Clean Water Incentives Act, would permit the United States to impose a fee on imported products manufactured through processes that did not comply with the U.S. Clean Water Act. S. 1965, 102d Cong., 1st Sess. (1991). *See also* OTA REPORT, *supra* note 43, at 92. In the absence of a multilateral set of production processes to be regulated, this proposal, an extraterritorial imposition of U.S. standards abroad, would run into the same criticism received by the tuna import ban.

114. *See THE YEAR IN TRADE 1991, supra note 62, at 20.*

115. *See* WWF INTERNATIONAL RESEARCH REPORT, THE URUGUAY ROUND'S TECHNICAL BARRIERS TO TRADE AGREEMENT: LEGAL AND ENVIRONMENTAL IMPLICATIONS (Jan. 1993) [hereinafter THE URUGUAY ROUND'S TECHNICAL BARRIERS TO TRADE AGREEMENT]; Schoenbaum, *supra* note 29, at 717.

116. Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, Apr. 12, 1979, 31 U.S.T. 513, 1186 U.N.T.S. 204, *reprinted in*

subsidies granted to domestic industries, including preferential loans, grants, debt forgiveness, and preferential tax treatment. The Subsidies Code has achieved these regulatory aims only to a limited extent. Code signatories did succeed in reaching a consensus on export subsidies, banning all such subsidies on non-primary products.¹¹⁷ They failed to reach any meaningful commitment, however, on export subsidies of primary products¹¹⁸ and domestic subsidies.¹¹⁹

The Subsidies Code did recognize the potential desirability of allowing certain types of environmental subsidies. Article 11 of the Code¹²⁰ provides that signatories “do not intend to restrict the right of signatories to use such subsidies [i.e., subsidies other than export subsidies] to achieve these and other important policy objectives which they consider desirable.”¹²¹ Among the objectives listed is “redeployment of industry in order to avoid . . . environmental

BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 56 (1980) [hereinafter Subsidies Code].

117. *Id.* arts. 9–10, 31 U.S.T. at 531–32, 1186 U.N.T.S. at 222–24. Primary products are products of farms, forests, and fisheries. *Id.* art. 9, 31 U.S.T. at 531, 1186 U.N.T.S. at 222; GATT, *supra* note 17, art. XVI, § B, ¶ 2 Note, 61 Stat. at 51–52, 55 U.N.T.S. at 250.

Export subsidies are government benefits paid upon condition that the product be exported. In contrast, domestic subsidies are paid upon the manufacture and production of a product without regard to whether the product is ultimately exported. Export subsidies receive the greater disapprobation because, of the two types of subsidies, they are considered inherently trade distorting. See Kevin C. Kennedy, *An Examination of Domestic Subsidies and the Standard for Imposing Countervailing Duties*, 9 LOY. L.A. INT’L & COMP. L.J. 1 (1986); John Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT’L L.J. 257, 261 (1980).

118. With regard to export subsidies on primary products, Article 10 of the Subsidies Code imposes a vague obligation on signatories not to grant such subsidies “in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product . . .” *Id.* art. 10, 31 U.S.T. at 532, 1186 U.N.T.S. at 224–26. (emphasis added).

119. Subsidies Code, *supra* note 116, art. 11, 31 U.S.T. at 532–34, 1186 U.N.T.S. at 224–26.

120. Since it imposes no disciplinary measures on countries granting subsidies, Article 11 is without question the weakest part of the Subsidies Code. Article 11:4 provides:

Signatories recognize further that, without prejudice to their rights under this Agreement, nothing in paragraphs 1–3 above and in particular the enumeration of forms of subsidies creates, in itself, any basis for action under the General Agreement, as interpreted by this Agreement.

Id. art. 11, ¶ 4, 31 U.S.T. at 534, 1186 U.N.T.S. at 226.

121. Subsidies Code, *supra* note 116, art. 11, ¶ 1, 31 U.S.T. at 532–33, 1186 U.N.T.S. at 224.

problems.”¹²² Article 11’s exception for environmental subsidies may not be significant, however. The plain language of the Article 11 exception suggests that it was most likely intended to allow subsidies to encourage relocation of polluting industries from highly congested and densely populated urban and business centers to new, less crowded locations. Relocation may mitigate pollution in the severely affected, densely populated areas, but the relocating industries still will be free to pollute in the new site. Thus these subsidies may not serve to abate the overall level of pollution.

Although Article 11 does not expressly approve the use of subsidies to assist polluting industries in complying with pollution abatement programs, it is significant that the Subsidies Code does not ban environmental subsidies as it bans other export subsidies. In the course of the Uruguay Round of trade negotiations, consideration was given to expanding Article 11’s exemption expressly to include transitional assistance to firms for pollution abatement expenditures.¹²³ Nevertheless, U.S. countervailing duty law makes such subsidies illegal unless they are generally available to most or all industries within the exporting country.¹²⁴

Adopting a new U.S. policy relaxing U.S. unfair trade laws regarding pollution abatement subsidies would likely meet stiff resistance from U.S. domestic industry. Industry typically demands that U.S. trade laws be rigorous and that trade sanctions be vigorously imposed. Nevertheless, if the United States wants to dangle “carrots of encouragement” to induce other countries to adopt more

122. *Id.* art. 11, ¶ 1(f), 31 U.S.T. at 533, 1186 U.N.T.S. 224.

123. THE YEAR IN TRADE 1991, *supra* note 62, at 21.

124. 19 U.S.C. §§ 1677(5)(A)(ii), 1677(5)(B) (West Supp. 1993). If pollution abatement expenditures were subsidized by foreign governments, environmentalists in the United States might not object, but U.S. firms competing against the subsidized foreign firms almost certainly would. If the domestic firm is injured by those subsidized imports, and if the subsidies are available only to a specific industry or group of industries, then under U.S. trade law countervailing duties must be imposed equal to the amount of the subsidy. *See id.* § 1677(5)(A)–(B). The U.S. Commerce Department found countervailable, for example, the provision of interest-free loans to a specific enterprise for pollution control improvements. *Viscose Rayon Staple Fiber from Sweden*, 57 Fed. Reg. 6493 (1992). In *Gray Portland Cement and Clinker from Venezuela*, 56 Fed. Reg. 41,522, 41,524 (1991), however, Commerce concluded that loans for the purchase of environmental control equipment were not countervailable because they were not limited to a specific enterprise. *See also Certain Steel Products from Belgium*, 57 Fed. Reg. 57,750, 57,753 (1992) (declaring grants to steel companies to offset costs of complying with Clean Water Act countervailable).

stringent environmental regulations, then it should relax its countervailing duty law in cases where the exporting firm's government provides abatement incentives to polluting industries.

If, as a result of pressure from the business community, the United States pursues a trade strategy that is more combative than cooperative, then "sticks" will be more frequently employed as policy tools than "carrots." Several such "sticks" vie for use in the environment/trade setting, as the following discussion demonstrates.

4. Deny GSP Beneficiary Status to Developing Countries with Lax Environmental Standards

In the absence of a multilateral approach under GATT auspices—such as the first three proposals—there are a number of unilateral strategies that the United States and other countries could adopt to deal with the trade/environment issue. One such possibility would be to deny Generalized System of Preferences ("GSP") beneficiary status to countries that do not have or fail to enforce domestic pollution laws. GSP is a program of preferential tariffs offered by industrialized countries—primarily the members of the Organization for Economic Cooperation and Development or "OECD"—on a nonreciprocal basis to promote the growth and development of less developed countries.¹²⁵ Under the U.S. GSP program, approximately 130 countries have been designated as beneficiary countries. Selected imports from beneficiary countries are entitled to preferential tariff treatment more favorable than the already low MFN duty rate applicable to imports from GATT contracting parties.¹²⁶

The United States may choose not to designate a particular developing country as a GSP beneficiary or it may revoke a coun-

125. See *THE YEAR IN TRADE 1991*, *supra* note 62, at 157.

126. See *id.* This lower rate means that GSP eligible imports usually receive duty-free treatment or duty treatment that is substantially lower than the prevailing MFN duty rate. Congress renewed the U.S. GSP program until September 30, 1994. Pub. L. No. 1-3-66, 107 Stat. 667 (1993). The GSP legislation is codified at 19 U.S.C. §§ 2461–2466 (Supp. III 1991). In 1991, the top ten exporters to the U.S. among GSP beneficiary countries under the U.S. GSP program were Mexico, Malaysia, Thailand, Brazil, the Philippines, India, Israel, Argentina, Indonesia, and the former Yugoslavia. See *THE YEAR IN TRADE 1991*, *supra* note 62, at 161. Of the total volume of GSP imports from these ten countries, Mexico's share was 28%. See *id.*

try's beneficiary status if that country engages in any one of several enumerated acts:¹²⁷ (1) expropriating U.S.-owned property without just compensation;¹²⁸ (2) failing to enforce an arbitral award in favor of a U.S. citizen;¹²⁹ (3) supporting terrorism;¹³⁰ or (4) failing to afford its citizens internationally recognized workers' rights.¹³¹ A proviso analogous to the workers' rights proviso could be added to this list to the effect that countries will not be designated GSP beneficiaries and will not retain that designation if they fail to enforce internationally recognized environmental standards.¹³²

From the standpoint of international trade law and policy, this proposal is blatantly discriminatory, because it singles out developing countries for differential treatment vis-a-vis industrialized countries. Although developing countries would have no complaint of GATT nullification and impairment under Article XXIII insofar as the denial of GSP tariff status is concerned,¹³³ they would have a GATT Article I complaint on the ground that their imports would be treated differently than imports from industrialized countries.¹³⁴ Beyond GATT-based complaints, implementing a tariff scheme that discriminates against developing countries' imports on environmental grounds would almost certainly trigger the perennial accusation that GATT is a rich man's club with rules written by the rich for the benefit of the rich.

Using GSP beneficiary status to encourage protection of the environment is also problematic from the perspective of international environmental law, since there is no international consensus

127. 19 U.S.C.A. § 2462(b)(1)-(7) (West Supp. 1993).

128. *Id.* § 2462(b)(4)(A).

129. *Id.* § 2462(b)(5).

130. *Id.* § 2462(b)(6).

131. *Id.* § 2462(b)(7).

132. See Hurlock, *supra* note 76, at 2113-17. A parallel amendment could be added to U.S. trade legislation that would deny the MFN duty rate to any industrialized country that fails to enforce internationally recognized environmental pollution standards. The MFN rate, which is on average less than 4% *ad valorem* on manufactured goods, is far lower than the alternative Smoot-Hawley tariff rates that can range from 10% to 100% *ad valorem*. For example, the MFN duty rate on imported cars is 2.5% *ad valorem*, while the Smoot-Hawley rate is 10%. Harmonized Tariff Schedules of the United States, No. 8703, Pub. L. No. 100-418, 102 Stat. 1147 (1988).

133. No country has a complaint under GATT when it is receiving at least the MFN duty rate.

134. If a country promises MFN treatment to another country, the promisor country undertakes to give to the promisee country the benefit of any concession it has given, or may give, to any third state. In GATT, Article I is a rule of nondiscrimination among all parties with respect to the manner in which imports are treated. Under the proposal,

on most environmental quality standards.¹³⁵ For example, although participants at the Rio Earth Summit acknowledged the significant contribution that greenhouse gases make to global climate change, the Convention on Climate Change¹³⁶ was watered down to such a degree that no specific targets or timetables appeared in the final draft.¹³⁷ One obvious alternative, using U.S. domestic air and water quality standards, would be both controversial and confrontational. The best hope for reaching an international consensus on air and water quality standards is multilateral negotiation, not unilateral action.

5. Amend GATT Article XIX to Authorize Trade Restrictions Imposed Pursuant to Domestic Environmental Protection Laws

In a variation on the theme of taking unilateral trade measures to address environmental problems, GATT could be amended to incorporate by reference domestic environmental protection legislation. For example, Article XIX could be amended to permit countries to impose trade restrictions on imported products manufactured using processes that would violate the importing countries' domestic environmental protection laws. GATT would permit such measures, provided that the domestic industry could show that it was suffering as a result of the imports, as is currently required when escape clause relief is sought.¹³⁸ Under U.S. legislation implementing GATT Article XIX, upon a finding by the U.S. International Trade Commission that increased imports are a substantial cause of serious injury to domestic producers, the President may restrict those imports either by increasing tariffs, imposing quotas, or negotiating an orderly marketing agreement.¹³⁹ An exporting

developing countries' imports would be discriminated against relative to imports to the United States, thereby violating the MFN commitment. One way of avoiding this discriminatory treatment would be to treat all imports the same, whether from industrialized or developing countries, regarding compliance with environmental standards.

135. See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

136. United Nations Conference on Environment and Development: Framework Convention on Climate Change, June 4, 1992, U.N. Doc. A/AC.237/18(Part II)/Add. 1 and Corr. 1, reprinted in 31 I.L.M. 849 (1992).

137. See Elizabeth P. Barratt-Brown et al., *A Forum for Action on Global Warming: The UN Framework Convention on Climate Change*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 103, 110-11 (1993).

138. 19 U.S.C. § 2251(a) (1988).

139. 19 U.S.C. §§ 2251-53 (1988).

country adversely affected by escape clause relief would be permitted, however, to recover from the importing country in the form of trade concessions in some other product sector.¹⁴⁰

On the positive side, the granting of escape clause relief does not require a finding that the imported product has been the subject of unfair trade practices. Moreover, such relief would probably be temporary and would only continue until such time as the domestic industry was no longer suffering injury or the foreign firm changed its manufacturing processes. The major shortcoming of this proposal is that it permits an importing country to impose its own brand of environmental protection on its trading partners, albeit at the price of offsetting compensation. Although local environmental groups—and domestic industries confronted with significant foreign competition—might be placated by this proposal, it could prove provocative and invite trade retaliation, especially if no agreement could be reached on the appropriate compensation package.

6. Impose Countervailing Duties on Imports from Countries with Lax Environmental Standards

A somewhat more aggressive unilateral trade measure would be to use domestic environmental standards as the world standard against which all imports would be measured. Proposals have been made, some within Congress, to treat a country's failure to adopt and enforce environmental standards that are as rigorous as U.S. standards as a countervailable subsidy granted to that country's polluting domestic industries.¹⁴¹ Implementation of such a proposal would present several problems. First, how would the value of such a subsidy be measured? In a country with little environmental regulation, the benefit of noncompliance could not be measured by estimating the cost of compliance borne by other industries in that

140. GATT, *supra* note 17, art. XIX(3)(a), 61 Stat. at A60, 55 U.N.T.S. at 260.

141. For example, S. 984, introduced in 1991, would have required the imposition of countervailing duties on imports from countries with lax environmental regulations. S. 984, 102d Cong., 1st Sess. (1991). See OTA REPORT, *supra* note 43, at 92 (discussing other congressional proposals); Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1384-86 (1992); Thomas K. Plofchan, Jr., *Recognizing and Countervailing Environmental Subsidies*, 26 INT'L LAW. 763 (1992); INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE, USITC PUB. 2351, at 6-7 to 6-10 (1991) (Additional Views of Commissioner Rohr); Kenneth S.

country. Even if other polluting industries in the country were subject to regulation, drawing conclusions from the costs borne by these other industries would be like studying apples to learn about oranges; for example, it would be fruitless¹⁴² to estimate the cost of environmental compliance for the steel industry from the cost of compliance borne by the computer industry.

In the absence of a domestic benchmark in the exporting country, an alternative approach would be to compare the foregone costs of environmental regulations in the foreign industry to the actual costs borne by the U.S. competitors in that industry.¹⁴³ At best, this alternative could only result in a cost figure that is a rough approximation of the actual costs the foreign industry would incur in complying with U.S. environmental standards. Additionally, using U.S. environmental laws and standards as the world benchmark would effectively repeal the law of comparative advantage insofar as it relates to environmental conditions. Countries' absorptive capacities for pollution are different, as countries vary in meteorology, demography, and geography. Countries with fragile ecosystems require tough environmental standards, whereas countries with robust ecosystems may not require such stringent environmental regulation. Firms in more environmentally resilient countries have not necessarily received a subsidy that should trigger a countervailing duty, nor have they enjoyed an unfair competitive advantage through comparatively lax enforcement of environmental regulations.¹⁴⁴ For the United States to insist that a country adopt environmental standards as rigorous as U.S. standards would make the United States unnecessarily protectionist.¹⁴⁵

Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?* 10 Hous. J. INT'L L. 189 (1988); Michael Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. INT'L L. J. 85 (1987).

142. No pun intended.

143. Such a proposal was introduced in the Senate. International Pollution Deterrence Act, S. 984, 102d Cong., 1st Sess. (1991). Under this proposal, not only would countervailing duties be imposed on imports from countries with weak environmental laws, but the countervailable subsidy would be estimated by the cost to the foreign firm of complying with U.S. clean air and water laws. Half the revenues collected in the form of countervailing duties would be earmarked for a fund to finance developing countries' purchases of pollution abatement technology. See OTA REPORT, *supra* note 43, at 92.

144. One commentator rejects the comparative advantage argument and insists that environmental standards be harmonized upward, so that no country can claim that its absorptive capacity for pollution exempts it from the more stringent standards. See Schoenbaum, *supra* note 29, at 717.

145. Aside from the thorny questions of valuation and comparative advantage, under the current U.S. countervailing duty law, a subsidy is not countervailable if it is generally

7. Impose Antidumping Duties on Imports from Countries with Lax Environmental Laws

On a slight variation of the countervailing duty theme, the antidumping duty laws could be pressed into service to check lax foreign environmental laws or substandard enforcement of those laws. Domestic industries that are forced to compete with imports from countries with lower environmental standards often use the pejorative "ecological dumping" to describe this situation and have demanded that the playing field be leveled.¹⁴⁶ Under the U.S. antidumping duty law, if exporting foreign firms sell goods in their home market at prices higher than those charged in the U.S. market, the United States will impose antidumping duties equal to the price differential on the imports if those underpriced imports are shown to cause injury to the domestic industry.¹⁴⁷

According to critics of "ecological dumping," in countries with lax environmental laws, firms are producing at costs below what their actual costs of production would be under rigorous environmental regulation.¹⁴⁸ By using a constructed value methodology¹⁴⁹ that includes a fixed amount for environmental compliance, those environmental costs could be factored into the foreign

available to all industries within a country. See *supra* note 124 and accompanying text. Thus, in a country with no environmental controls, all industries within that country would be beneficiaries of this "subsidy," the "subsidy" would be generally available, and it would not, therefore, be countervailing under current U.S. law. See also Weiss, *supra* note 45, at 733-34, where the author expresses doubt about the effectiveness of countervailing duties as a trade measure to combat lax environmental regulation, in terms of identification, quantification, and enforcement.

146. See Levin, *supra* note 105, at 234 n.18.

147. 19 U.S.C.A. § 1673 (1980 & West Supp. 1993). See Tracy Murray, *The Administration of the Antidumping Duty Law by the Department of Commerce*, in *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 23* (Richard Boltuck & Robert E. Litan eds. 1991) [hereinafter *DOWN IN THE DUMPS*]. When home market sales are insufficient to allow a price comparison, the Commerce Department will look to the foreign firm's sales in third countries to establish a comparison price to the U.S. price. If neither sufficient home market sales nor third-country sales exist, or if the volume of home market sales is not sufficiently high, then the Commerce Department resorts to a constructed value methodology. Even where there are sales in the home market, if those sales are made at prices below the foreign firm's cost of production, they are disregarded. *Id.* § 1677b(b).

148. This argument is essentially equivalent to that advanced by proponents of countervailing duties on imports from countries with lax environmental standards. See *supra* part IV.A.6.

149. "Constructed value" is the sum of the cost of materials and fabrication, an amount for general expenses and profit, and the cost of all containers. 19 U.S.C. § 1677b(e)(1). A constructed value method is currently used for profit and general

firm's total constructed cost of production. This constructed cost of production would then be used to calculate the amount of duty to apply to the imported product.

The difficulty with using a fixed percentage is that, at best, it would merely represent an average of environmental costs incurred across a broad spectrum of businesses, presumably those in the United States. Such an amendment would be criticized, even though different foreign firms would be polluting at varying levels (just as some businesses are more profitable than others), because the same minimum percentage would arbitrarily apply to all of the exporting firms.¹⁵⁰

Furthermore, if a foreign manufacturer's production costs were to include a statutory minimum amount equal to American firms' environmental compliance costs, then it would be relatively easy to extend this cost-of-production rationale to differences in labor or to other social welfare costs borne by U.S. producers.¹⁵¹ If those differences in production costs were required to be factored into the cost-of-production analysis, as well, then U.S. producers' costs would become the benchmark for dumping, effectively undoing the benefits of "comparative advantage" brought about by international trade.

8. Amend Section 301 of the Trade Act of 1974

Amending the countervailing and antidumping duty laws or the escape clause would result in a narrowly focused basis for challenging foreign environmental regulation. A broader base of attack might be provided if section 301 of the Trade Act of 1974 were amended.¹⁵² While the overwhelming majority of U.S. unfair trade laws focus on the import side of the world trade ledger,

expenses under the U.S. antidumping duty law, with fixed minima of 8% and 10% respectively. *Id.* § 1677b(e)(1)(B)(i)-(ii).

150. These criticisms have been leveled at the fixed statutory minimum profit and general expenses percentages. See N. David Palmetier, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *DOWN IN THE DUMPS*, *supra* note 147, at 64, 75.

151. This has to some extent already taken place. Under the Generalized System of Preferences and the Caribbean Basin Initiative, developing countries that do not enforce minimum labor standards are ineligible for beneficiary status. In addition, under § 301 of the Trade Act of 1974, 19 U.S.C. § 2411 (1980 & West Supp. 1993), countries that do not respect minimum labor rights commit an unfair trade practice. See Levin, *supra* note 105, at 249-50.

152. 19 U.S.C.A. § 2411 (1980 & West Supp. 1993).

section 301 of the Trade Act of 1974 is designed to open foreign markets that are restricted or closed to U.S. exports of goods, services, or capital.¹⁵³ Section 301 targets four general types of unfair foreign trade practices: (1) those that violate existing international agreements with the United States;¹⁵⁴ and those that unfairly burden U.S. commerce because they are (2) “unjustifiable,”¹⁵⁵ (3) “unreasonable,”¹⁵⁶ or (4) “discriminatory.”¹⁵⁷ If the foreign trade practice is either violative of a trade agreement or is unjustifiable, action by the U.S. Trade Representative (“USTR”) is required to enforce U.S. rights or seek elimination of the practice.¹⁵⁸ For acts or practices that are unreasonable or discriminatory, the USTR has discretionary authority to take action.¹⁵⁹ Section 301 provides the USTR with an arsenal of retaliatory weapons that includes withdrawal of trade benefits and imposition of duties on imports of goods from the offending country.¹⁶⁰

“Unreasonable” practices are those that are “unfair and inequitable.”¹⁶¹ This definition is far from unambiguous and could be interpreted to include the failure of a country to enact and enforce environmental measures. Failure to enact and enforce laws that provide for minimum environmental protection could be added¹⁶² to the Act’s current list of illustrations of unreasonable practices.¹⁶³

The difficulty with this proposal is more procedural than sub-

153. *Id.* §§ 2411(a)(1), 2411(d)(1). See Bart S. Fisher & Ralph G. Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 *LAW. & POL’Y INT’L BUS.* 569 (1982); Robert E. Hudec, *Retaliation Against “Unreasonable” Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 *MINN. L. REV.* 461 (1975).

154. 19 U.S.C.A. § 2411(a)(1)(A) (West Supp. 1993).

155. *Id.* § 2411(a)(1)(B)(ii). A definition of “unjustifiable” trade practices, together with examples, is contained in the Act at *id.* § 2411(d)(4).

156. *Id.* § 2411(b)(1). A definition of “unreasonable” trade practices, together with examples, is contained in the Act at *id.* § 2411(d)(3).

157. *Id.* § 2411(b)(1). A definition of “discriminatory” trade practices is found at *id.* § 2411(d)(5).

158. *Id.* § 2411(a).

159. *Id.* § 2411(b).

160. *Id.* § 2411(c). For a summary of section 301 investigations initiated or continuing in 1991, see *THE YEAR IN TRADE 1991*, *supra* note 62, at 151–56.

161. 19 U.S.C.A. § 2411(d)(3)(a) (West Supp. 1993).

162. A bill introduced in the Senate in 1991 would have amended section 301 to make the failure to protect the environment an unfair trade practice. General Agreement on Tariffs and Trade for the Environment Act of 1991, S. 59, 102d Cong., 1st Sess. (1991).

163. This list already includes restricting foreign direct investment; failing to protect intellectual property rights; failing to enforce antitrust laws; and failing to enact and enforce worker health, safety, hour, and wage laws. *Id.* § 2411(d)(B)(i)–(iii).

stantive. Under section 301, the USTR's Office acts simultaneously as prosecutor, judge, and jury. Section 301 essentially is a unilateral method of dispute resolution and repeatedly has been condemned as such for being inconsistent with GATT's bilateral/multilateral dispute settlement approach.¹⁶⁴ Adding environmental issues to the section 301 list of unreasonable trade practices, therefore, might inflame resentment abroad.

9. *Impose an Environmental Tax on Imports*

The use of taxes to shape behavior is as old as the tax code. In the tuna/dolphin dispute, Mexico successfully challenged before a GATT Panel an import ban based on a product's production processes rather than the inherent characteristics of the product.¹⁶⁵ Along these lines, legislation introduced in the 102d Congress proposed imposition of a fee on imports manufactured through processes that do not comply with the Clean Water Act.¹⁶⁶ Such an import duty would act as an alternative to an import ban. This proposal only partially satisfies GATT's national treatment commitment, because no tax would be imposed directly on the U.S. domestic producer. Arguably, however, the compliance costs would be equivalent to payment of an environmental tax.¹⁶⁷ Professor Frederic Kirgis also has suggested a tax/fee proposal directed at promoting environmentally sound production processes that arguably would be consistent with GATT.¹⁶⁸ In order to withstand challenges under GATT, the tax would have to be imposed directly on specific products even though targeted at production processes. It also would have to be nondiscriminatory vis-a-vis the tax treatment that the comparable domestic product receives—thereby correcting the disparate tax treatment found in S. 1965—and be nondiscriminatory with regard to the country of origin, so as not to violate the MFN commitment.¹⁶⁹

164. See generally Jagdish Bhagwati, *It's the Process, Stupid*, *ECONOMIST*, Mar. 27, 1993, at 69; Bello & Holmer, *supra* note 76; Levin, *supra* note 105, at 256-63.

165. See *supra* note 86 and accompanying text.

166. Global Clean Water Incentives Act, S. 1965, 102d Cong., 1st Sess. (1991).

167. Article III(2) of GATT requires non-discriminatory tax treatment between imported goods and the like domestic product.

168. Kirgis, *supra* note 76, at 1222.

169. An environmental tax imposed by the United States on imported oil and chemicals as part of the Superfund legislation was upheld in part by a GATT Panel that

The shortcomings of this proposal are twofold. First, if the environmental tax is levied on foreign industries and not on American firms, the national treatment commitment would be violated.¹⁷⁰ Domestic firms, however, would naturally resist the imposition of a formal pollution tax, and would claim that they already pay an equivalent amount through the costs they incur in complying with current clean air and water standards. Second, an environmental tax is not primarily a revenue raising measure, but rather a behavior modifying one, intended to discourage certain conduct such as use of environmentally unsound manufacturing processes. Thus, a rational, nonpunitive tax would probably exempt firms that meet certain pollution standards. In order for foreign firms to qualify for the exemption, they too would have to comply with those same standards. Consequently, the United States once again would be engaged in extraterritorial assertion of legislative jurisdiction by unilaterally imposing its pollution standards on the world. Moreover, although the tax would be imposed nominally on the imported product, in actuality, the tax would target foreign production processes that do not comply with U.S. environmental standards, thus violating GATT multilateralism.

Politically, such "upward harmonization" is a source of potential friction between the United States and its trading partners. U.S. trading partners may perceive the policy as protectionist insofar as it has the effect of destroying the benefits of comparative advantage by attempting to eliminate cost differentials among countries attributable to variations in resources and environmental characteristics.¹⁷¹ As previously mentioned, targeting production processes also violates GATT's national treatment obligation.¹⁷² It is doubtful that any GATT panel would overlook the realities of such a tax and decline to lift the veil covering this thinly disguised protectionist measure.¹⁷³ Even assuming that the environmental tax

stated that "[w]hether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment." *United States—Taxes on Petroleum and Certain Imported Substances*, Report of the Panel, GATT Doc. L/6175 ¶ 5.2.4 (June 17, 1987), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS*, 34th Supp., at 136, 161 (1988) and in 27 I.L.M. 1601, 1614 (1988).

170. See Schoenbaum, *supra* note 29, at 721.

171. See generally Stewart, *supra* note 28.

172. See *supra* notes 37–39 and accompanying text; see also *supra* note 89 and accompanying text.

173. See JACKSON II, *supra* note 26, at 1236–37.

were evenhanded relative to imports and like domestic products,¹⁷⁴ in the absence of a widely accepted scientific justification for the tax, it could still run afoul of the GATT Standards Code.¹⁷⁵

10. Permit States to Adopt Nondiscriminatory, Proportional Environmental Measures

In view of the different priorities nations have placed on protecting the environment, some commentators hold little hope for reaching a consensus on rules for minimal global environmental protection.¹⁷⁶ Consequently, by using the European Community and the Treaty of Rome as a model,¹⁷⁷ countries could be permitted to adopt whatever environmental regulations they desire, even if these measures restrict trade. Under this proposal, the only limitation on such regulation would be that such measures not be disguised barriers to trade and that they be nondiscriminatory and "proportional," that is, nonexcessive in light of the environmental goal being sought.¹⁷⁸

Within the European Community, the European Court of Justice has jurisdiction to rule on the consistency of member states' environmental regulations with the Treaty of Rome. Within a wholly domestic setting, national courts also may evaluate the propriety of environmental laws. However, outside of these con-

174. See Schoenbaum, *supra* note 29, at 720, where the author argues that an environmental tax would necessarily be discriminatory and therefore would violate the MFN obligation because it would be based on the geographic origin of the product.

175. The Standards Code provides that "[p]arties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade." Standards Code, *supra* note 107, art. 2, ¶ 2.1, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 9 (1980). See also JACKSON II, *supra* note 26, at 1237-39.

176. See, e.g., Abbott, *supra* note 63, at 32; M.P.A. Kindall, *Talking Past Each Other At the Summit*, 4 COLO. J. INT'L ENV'T'L L. & POL'Y 69 (1993).

177. Article 130t of the Treaty Establishing the European Economic Community provides that "[t]he protective measures [on the environment] adopted in common . . . shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 130t (as amended 1987).

178. Abbott, *supra* note 63, at 32. For a discussion of the nondiscrimination and proportionality requirements, see Toni R.F. Sexton, Note, *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 (1991). A similar proposal has been made, drawing from the U.S. domestic experience with the "dormant commerce clause" doctrine, to employ a balancing test using nondiscrimination and a rational means-end relationship as criteria. See Porter, *supra* note 4, at 114-15.

texts, there is no binding international dispute resolution forum to adjudicate questions of good faith, discrimination, or proportionality in conflicts involving international trade.

At least two, and possibly three, procedural changes would need to be made within the GATT context before the European Community model could be applied on a global basis. First, the GATT dispute settlement machinery would have to be reformed to provide for, among other things, binding dispute resolution.¹⁷⁹ Second, this reform would have to be coupled with a GATT waiver permitting contracting parties to adopt nondiscriminatory, proportional environmental protection measures.

A third reform that also would be of immense assistance, if environmental factors are to be considered fully in the environment/trade calculus, would be the adoption of the environmentalists' "precautionary principle" that presumes, in essence, that environmental concerns receive primacy over trade concerns.¹⁸⁰ Adopting the precautionary principle would overcome the hurdle that countries limiting imports face in proving that a particular trade measure taken for environmental reasons is proportional. Adoption of the precautionary principle in the international trade context would prove invaluable in cases where scientific opinion is either divided or the evidence is inconclusive. In that event, once the respondent country demonstrates that there is a risk of environmental damage unless the trade measure is imposed, and that the risk is not pretextual, the burden would shift to the petitioning country to show that there is no scientific basis for excluding the product on health and safety grounds.

The obvious difficulty with the precautionary principle is that it creates a strong presumption, virtually irrebuttable, in favor of the legality of trade measures taken ostensibly on environmental grounds. In the hands of a country with strong protectionist tendencies, or under heavy domestic pressure to adopt protectionist policies, adoption of the precautionary principle could pose a substantial risk to free trade.

Three themes run through the foregoing reform proposals:

179. See Victoria Curzon Price, *New Institutional Developments in GATT*, 1 MINN. J. GLOBAL TRADE 87 (1992).

180. For a description of the "precautionary principle," see *Don't Green GATT*, ECONOMIST, Dec. 26, 1992, at 15; THE URUGUAY ROUND'S TECHNICAL BARRIERS TO TRADE AGREEMENT, *supra* note 115, at 4-5.

multilateralism, unilateralism, and extraterritoriality. Multilateralism is the prevalent theme in the proposals that call for reform in the context of GATT. As discussed above, however, there are significant obstacles to making GATT more responsive to environmental concerns without simultaneously jeopardizing free trade. Moreover, reaching a broad multilateral consensus on international environmental standards is highly problematic in practice, not least of all because the world's countries are at different stages of economic development.

The themes of unilateralism and extraterritoriality are prevalent in the reform proposals that call for amendments to U.S. domestic trade legislation. As the next section argues, however, unilateral action and attempts to apply domestic law extraterritorially are controversial and provocative, and neither solution can promise sweeping global environmental reform.

B. Problems with Unilateral Trade Sanctions

A major case study on the use of economic sanctions as a foreign policy tool¹⁸¹ identified five predominant foreign policy objectives that a "sender" country, that is, the country imposing sanctions, may seek: changing target-country policies in a relatively minor way; destabilizing the target government; disrupting a minor military venture; impairing the military potential of the target country; and changing target-country policies in a major way.¹⁸² The first and last of these goals encompass the use of trade sanctions for environmental objectives.

The historical use of trade sanctions reveals that export controls, sometimes in combination with financial restrictions, have been preferred over import controls.¹⁸³ Import controls are disfavored, because the target country can find alternative export mar-

181. GARY C. HUFBAUER ET AL., INSTITUTE FOR INTERNATIONAL ECONOMICS, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2d ed. 1990) [hereinafter HUFBAUER]; see also Carter, *supra* note 5.

182. See HUFBAUER, *supra* note 181, at 38. The "minor"/"major" language used to describe the first and fifth objectives attempts to distinguish "minor" changes such as signing a human rights or nuclear nonproliferation agreement from "major" changes such as ceding territory.

183. The Hufbauer study cites only one case in which import controls alone were used as a foreign policy weapon: an unsuccessful Soviet boycott of Australian wool aimed at securing the return of a Soviet diplomat who defected. See *id.* at 36.

kets, and, from the perspective of the sanctioning country, verification of the country of origin of imported goods can be difficult.¹⁸⁴

The study devises a "success score" based on the level of the policy result achieved and the contribution made by sanctions in reaching that result.¹⁸⁵ It concludes that in one-third of the fifty-one cases analyzed, where the goal sought was a modest policy change in the target country, the sender country made some progress in achieving its goal through the use of economic sanctions.¹⁸⁶ In contrast, in cases where the sender country sought the more ambitious goal of a major policy change in the target country, only one quarter of the twenty cases analyzed demonstrated modest progress by the sender country.¹⁸⁷ The study concludes:

Although it is not true that sanctions "never work," they are of limited utility in achieving foreign policy goals that depend on compelling the target country to take actions it stoutly resists. Still, in some instances, particularly situations involving small target countries and relatively modest policy goals, sanctions have helped alter foreign behavior.¹⁸⁸

The study advises policy-makers to consider a set of nine basic propositions when contemplating the imposition of sanctions.¹⁸⁹

184. *See id.*

185. *See id.* at 41-42.

186. *See id.* at 50. In those 17 cases, the average time period during which sanctions were imposed was 2.8 years. *See id.* at 51.

187. *See id.* at 55.

188. *Id.* at 92.

189. The nine basic propositions are as follows:

1. Sanctions seldom bring about major changes in the policies of the target country. *See id.* at 94.

2. In general, the greater the number of countries required to implement sanctions, the less likely they will be effective. Unilateral sanctions should be employed when the need for cooperation from allies is slight. *See id.* at 95-96. This proposition includes the problems of additional time required for agreement among multiple parties.

3. Target countries experiencing distress or significant problems are far more likely to yield. *See id.* at 97.

4. Economic sanctions are more effective when directed at close trading partners. *See id.* at 99.

5. Sanctions imposed slowly invite evasion and afford the target country the opportunity to adjust. *See id.* at 100-01.

6. Imposing sanctions in a comprehensive manner improves the chances for success. *See id.* at 102.

7. Sanctions are unlikely to succeed when the economic costs to the sender country are high. *See id.* at 102-03.

8. Sender parties should consider alternatives to sanctions ("choose the right tool for the job"). *Id.* at 104-05.

Three of these propositions bear directly on the question of when and whether trade measures should be imposed for environmental ends.

The second proposition instructs that unilateral imposition of trade sanctions might not work, because the target country might be able to circumvent the sanctions by finding alternative markets for its products.¹⁹⁰

The third proposition states that sanctions will be more likely to succeed against economically weak and vulnerable countries. The volume of trade between the United States and developing countries, where environmental protection may not be especially stringent, is relatively small overall but of great importance to the developing countries.¹⁹¹ The value of trade sanctions against these countries, however, is questionable, because the sanctions may reinforce negative perceptions of the United States as a bully of weaker nations. The United States might have economic leverage, but browbeating small countries with correspondingly small impact upon the global environment may be politically unwise.

The fourth proposition holds that sanctions work better when close trading partners are targeted. The closest trading partners of the United States—those countries that account for the largest percentages of total merchandise trade—are Canada, Japan, and Mexico.¹⁹²

9. The unintended costs and consequences of sanctions, particularly the domestic fallout from sanctions imposed for symbolic purposes, should be carefully analyzed ("look before you leap"). *Id.* at 105.

190. This assumes that all of the target's export trade does not go to the sanctioning country. For example, if the United States unilaterally imposed an import ban on environmental grounds on products from China, China might be able to find alternative markets in Japan and the EC. In 1991, while 9% of China's exports went to the United States, 45% went to Hong Kong, 14% to Japan, and 9% to the EC. U.S. INTERNATIONAL TRADE COMMISSION, PUB. 2621, EAST ASIA: REGIONAL ECONOMIC INTEGRATION AND IMPLICATIONS FOR THE UNITED STATES 41 (May 1993).

191. In 1991, the United States imported \$96 billion worth of merchandise from some 130 GSP (Generalized System of Preferences) beneficiary countries, of which \$30 billion came from Mexico. THE YEAR IN TRADE 1991, *supra* note 62, at 157, 160-61. Thus, total GSP imports in 1991 were less than 20% of the \$483 billion in total world merchandise imports into the United States. See *Chartbook: Composition of U.S. Merchandise Trade 1988-92*, INT'L ECON. REV., Mar. 1993 (special ed.), at 12 [hereinafter *Composition of U.S. Merchandise Trade*]. If trade with Mexico is excluded, that percentage drops to less than 14%.

192. In 1992, the United States exported \$425 billion worth of merchandise to the entire world. See *Composition of U.S. Merchandise Trade*, *supra* note 191, at 12. In 1992, the volume of U.S. export trade to the EC was \$97 billion, *see id.* at 38; to Canada, \$83 billion, *see id.* at 29; to Japan, \$46 billion, *see id.* at 63; and to Mexico, \$40 billion.

The United States cannot justify a "holier than thou" stance with these countries and their environmental records. In 1989, the United States released the greatest percentage of global greenhouse gas emissions—17.3% of the world total.¹⁹³ Moreover, since the environmental protection laws of the European Community, Canada and Japan generally do not differ from those of the United States, it would be unlikely for the United States to target these nations with environmental trade sanctions.¹⁹⁴ The same may hold true even for a developing country such as Mexico, which is modelling its environmental statutes after the U.S. clean air and water laws.¹⁹⁵ If the United States were to impose trade sanctions against imports from its major trading partners on environmental grounds, due to minor legal differences in regulations, the United States would probably face retaliation from the affected states. Once countries enter the vicious circle of imposition of trade sanctions and retaliation, it may be difficult to avert an all-out trade war.¹⁹⁶ In such a war, the environment could be a big loser.¹⁹⁷

C. Pursuing Multilateral Alternatives

As noted in the preceding section, unilateral trade sanctions are problematic. A better long-term approach for the United States

See id. at 32. These figures total \$266 billion, or 62% of all U.S. merchandise export trade. On the import side of the ledger in 1992, the total was \$524 billion. *See id.* The United States imported \$92 billion in merchandise from the EC, *see id.* at 38; \$98 billion from Canada, *see id.* at 29; \$95 billion from Japan, *see id.* at 63; and \$34 billion from Mexico, *see id.* at 32. These figures total \$319 billion, or 61% of all U.S. merchandise import trade.

193. *See* Scott Stevens, *Global Resources and Systems at Risk*, CHRISTIAN SCI. MONITOR, June 2, 1992, at 11. The corresponding figures for the E.C., Japan, and Mexico are 11.2%, 4.9%, and 1.9% respectively, for a combined total of 18%—just slightly more than the populous United States. *Id.*

194. For a summary of the environmental protection laws of the major industrialized countries, see generally J. ANDREW SCHLICKMAN ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION (1992). United States trade sanctions may, however, target a country's extra-normal activities, such as Japanese harvesting of whales. *See infra* notes 219, 226 and accompanying text.

195. *See Overview—The North American Free Trade Agreement*, 9 Int'l Trade Rep. (BNA) No. 34, at 1474, 1477 (Aug. 19, 1992). Mexico's record as to enforcement of its environmental laws has been poor, but the government is improving its commitment to environmental protection and enforcement. *See id.* at 1477.

196. *See, e.g.*, Clayton Jones, *Japan Fires a Shot Over the Bow of Clinton's "Managed Trade"*, CHRISTIAN SCI. MONITOR, May 11, 1993, at 1, 4.

197. Theoretically, only the most efficient producers would survive in the open markets for which the GATT negotiations aim. In a trade war, the walls of protectionism are erected to insulate inefficient producers from foreign competition. Inefficient producers

would be to negotiate multilateral environmental conventions based upon international consensus. This would help resolve the dilemma of maintaining American competitiveness in the international economy while pursuing the country's global environmental goals.¹⁹⁸

Despite some past successes in the field of multilateral environmental conventions,¹⁹⁹ there are several problems with this approach. Multilateral environmental conventions are sometimes vague,²⁰⁰ often hortatory rather than mandatory,²⁰¹ and typically contain weak and ineffective enforcement mechanisms.²⁰² Moreover, such conventions are rarely universally accepted.²⁰³

Future environmental treaties should be adopted under the auspices of GATT. The parties to GATT should undertake a multilateral approach and, at least in the near term, focus on procedure rather than dwell on more contentious specific standards. The Tokyo Round Codes provide a useful model.²⁰⁴ The major trading

consume more resources and thus cause more harm to the environment than their efficient competitors. See *Greening*, *supra* note 70, at 25.

198. See Alan F. Holmer & Judith H. Bello, *Trade and the Environment: A Snapshot from Tuna/Dolphins to the NAFTA and Beyond*, 27 INT'L LAW. 169, 176 (1993).

199. See, e.g., Montreal Protocol, *supra* note 96.

200. See, e.g., Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, S. TREATY DOC. NO. 9, 99th Cong., 1st Sess. (1985), reprinted in 26 I.L.M. 1529 (entered into force Sept. 22, 1988) (calling for cooperation in research and observation, but requiring no substantive change).

201. See, e.g., United Nations Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10,541, (1979), U.N. Doc. ECE/HLM.1/R.1, reprinted in 18 I.L.M. 1442 (1979) (entered into force Mar. 16, 1983) (recognizing the need for ameliorating pollution, but not mandating any specific pollution control measures).

202. See, e.g., CITES, *supra* note 96, art. XVIII, 27 U.S.T. at 1114-15, 993 U.N.T.S. at 256; *Illegal Trafficking in Wildlife Persists*, CHRISTIAN SCI. MONITOR, Mar. 8, 1993, at 15 ("the lack of commitment of some CITES nations keeps the treaty from living up to its promise" (quoting Ginette Hemley, World Wildlife Fund)); Hamilton Southworth, III, Comment, *GATT and the Environment—General Agreement on Tariffs and Trade, Trade and the Environment*, GATT Doc. 1529 (February 13, 1992), 32 VA. J. INT'L L. 997, 1003-13 (1992) (analyzing problems related to enforcement of CITES).

203. Recall, for example, the refusal of the United States to sign the Biodiversity Convention at the 1992 Earth Summit held in Rio de Janeiro. See Melinda Chandler, *The Biodiversity Convention: Selected Issues of Interest to the International Lawyer*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 141 (1993).

204. See *supra* part IV.A.2 for a discussion of the Tokyo Round Codes. For a history of the negotiations leading up to the completion of the Tokyo Round Codes, see GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 212-55 (1986). In the current round of GATT trade negotiations, for example, the Code approach may in fact be adopted in order to conclude an agreement covering trade in services. Rules dealing with free trade in services would be reduced to a side agreement that would be open to all GATT members. It is expected, however, that only a handful of GATT contracting parties would initially join such a Code.

nations signed on to these Codes, which in most cases have their own separate dispute resolution machinery.²⁰⁵

An agreement for a GATT Code devoted to trade and the environment could build on the Standards Code and its amendments as proposed during the Uruguay MTN Round. The Standards Code currently covers only measures imposed upon imported products based upon technical regulations addressing the characteristics of the product itself.²⁰⁶ The Uruguay Round amendments would extend the Standards Code to cover Production and Process Methods,²⁰⁷ thereby internationalizing an area previously controlled by domestic legislation.²⁰⁸

Twenty years ago the OECD countries adopted the principle that a pollution tax should be imposed upon polluters—the “polluter pays principle.”²⁰⁹ A Trade and Environment Code would pursue this economic model. The Code’s signatories would, however, have to determine in advance which PPMs would constitute a permissible ground for imposition of a trade measure. This provision would attempt to further uniform implementation and discourage unilateral trade protection measures cloaked in an environmental guise.

In a further departure from the Tokyo Round Code model, the administration and enforcement of a Trade and Environment Code would occur exclusively at the international, rather than the domestic, level.²¹⁰ In other words, only internationally agreed-upon PPMs would be permissible grounds for excluding a product for environmental reasons, and the dispute settlement process would be con-

205. See *supra* part IV.A.2.

206. In the Uruguay Round negotiations, amendments have been proposed to the Standards Code permitting measures to be taken against an imported product on environmental grounds. Such targeting, however, would still be limited to measures taken against a product that itself poses a threat to the environment. The proposals do not authorize trade restrictions imposed on the ground that the production method caused pollution in the exporting country. See Lang, *supra* note 46, at 19–21. See *supra* notes 112–115 and accompanying text.

207. See Patrick Low & Raed Safadi, *Trade Policy and Pollution*, in WORLD BANK DISCUSSION PAPERS NO. 159, INTERNATIONAL TRADE AND THE ENVIRONMENT 29, 40 (Patrick Low ed. World Bank 1992); THE URUGUAY ROUND’S TECHNICAL BARRIERS TO TRADE AGREEMENT, *supra* note 115, at 3–4. For a discussion of international organizations that might set forth technical standards and regulations, see Low & Safadi at 18–21.

208. See Low & Safadi, *supra* note 207, at 4.

209. *Id.* at 35. See also *supra* note 56 and accompanying text.

210. The Tokyo Round Codes are characterized primarily by dispute resolution in international forums, but they do not preclude the parties from resorting to domestic dispute resolution alternatives.

ducted before an international tribunal. Such multilateral actions would signal a recognition by signatories that PPMs are a legitimate source of international concern.

A Trade and Environment Code that would embody this recognition should be based on the following five commitments:

First, signatories would reaffirm their commitment to the principles of nondiscrimination embodied in the MFN and national treatment obligations of GATT Articles I and III,²¹¹ respectively, and to observe those commitments whenever trade measures are imposed against another signatory's products on environmental grounds. Such reaffirmation is important, because of the dangers of hidden protectionism inherent in permitting ostensibly environmentally grounded trade sanctions.

Second, signatories should impose trade measures against the products of any other signatory based on the PPMs of the manufacturing of the product—or for any other reason based on environmental grounds—only in a manner consistent with the Code. The *Tuna/Dolphin* Panel report²¹² interpreted Article XX of GATT to permit the imposition of trade measures against a product solely on the ground that the product itself, rather than the method by which the product was processed or manufactured, poses a threat to the environment.²¹³ Currently, complaints may be lodged under Article 14.25 of the Standards Code for the exclusion of imports based on technical standards drafted “in terms of processes and production methods rather than in terms of characteristics of products.”²¹⁴ A Trade and Environment Code would alter this rule. Article 14.25 could be amended to permit trade measures based on PPMs.²¹⁵

Third, in order to harmonize environmental regulations and standards as widely as possible, the signatories should prepare and adopt international environmental standards governing PPMs and other areas of environmental concern. These standards would be adopted under the auspices of appropriate international environ-

211. See GATT, *supra* note 17.

212. See *supra* note 86.

213. See *supra* note 89 and accompanying text.

214. Standards Code, *supra* note 107, art. 14.25, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 26 (1980).

215. See *supra* notes 112–115 and accompanying text.

mental bodies, such as the United Nations Environment Program. Where there is no international standard, or where the international environmental standard differs substantially from the signatory's domestic standard, the signatory may nevertheless require reasonable labelling requirements for the product. This labelling could notify importing consumers that the product's method of processing does not comply with the signatory's domestic environmental regulations. Before taking such measures, the proposed labelling requirement would be made public, in order to allow a reasonable opportunity for comment and discussion by other signatories. This provision would be modelled on Article 2.5 of the Standards Code, which requires notice and an opportunity to comment before the introduction of a domestic standard.²¹⁶ Such a procedure would codify the GATT Panel's ruling in the tuna/dolphin dispute that the United States could require labelling on cans advising consumers that the tuna had not been caught in a dolphin-friendly manner.²¹⁷

Harmonizing PPMs, however, will not necessarily advance the goal of internalizing environmental externalities in the production process.²¹⁸ Harmonization makes sense among countries with similar production functions, incomes and tastes. Conversely, harmonization of dissimilar countries may be unnecessarily intrusive. Inefficiency would result from forcing countries to adopt strict environmental measures when their geographical conditions would allow for comparatively more polluting manufacturing processes.²¹⁹ Nevertheless, this second-best solution is superior to that of unilateralism because of the danger of eco-imperialism. Reaching multilateral agreement on PPM standards must become a priority, before importing countries begin to unilaterally impose trade restrictions on an exporting country's products based on PPMs.

Fourth, in pursuing harmonization, signatories should be sensitive to building consensus and finding common ground. Adopting PPMs that promote, for example, human health or consumer protection may gain acceptance more quickly than attempts aimed at such abstract notions such as preserving ecosystems.²²⁰ Accord-

216. *See supra* note 107.

217. *Tuna/Dolphin Panel Report*, *supra* note 86, at ¶ 5.44.

218. *See, e.g.*, Low & Safadi, *supra* note 207, at 40.

219. *See id.*

220. *See id.* at 40.

ingly, from the outset, signatories must set priorities concerning which types of PPMs to regulate.²²¹

Fifth, in the event of a conflict between the Code and any other applicable international agreement to which the two countries are signatories, the terms of the latter would govern.²²² Absent any such agreement, trade sanctions imposed on environmental grounds should only be imposed in accordance with the provisions of the Code. To ensure uniform treatment and application of uniform standards, binding international dispute resolution should be the exclusive method for settling complaints under the Code.

Chapter 18 of the Canada-U.S. Free Trade Agreement ("FTA") provides a model for international trade dispute resolution. The Agreement calls for binding arbitration in the event a dispute arising under the FTA cannot be resolved informally.²²³ As an adjunct to the dispute resolution procedures along the lines of the FTA Chapter 18 model, the Code might provide for both technical expert groups and dispute resolution panels such as those established by the Standards Code.²²⁴

The original signatories to a Trade and Environment Code would probably be OECD member countries, because their environmental policies, if not their environmental laws, reflect similarly high standards. Furthermore, as the world's largest traders, these countries have the most at stake economically. Cooperation on environmental matters by these countries is extremely important, since the OECD countries also account for most of the world's industrial pollution. The details of a Trade and Environment Code could be worked out within both GATT and the OECD's regular monthly meetings.

Over time, other countries could be expected to join, particularly China, India, and Brazil. The fact that India, Chile, Korea, Mexico, Pakistan, and the Philippines are signatories to the Standards Code²²⁵ suggests that many developing countries would also join a Trade and Environment Code.

221. *See id.*

222. Examples of such international agreements include the Montreal Protocol, the Basel Convention, and CITES. *See supra* note 96 and accompanying text.

223. Canada-United States Free Trade Agreement, *supra* note 82, arts. 1806-07, 27 I.L.M. at 384-86.

224. Standards Code, *supra* note 107, arts. 13-14, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp., at 22-26 (1980).

225. *See THE YEAR IN TRADE 1991, supra* note 62, at 48.

The market stability and predictability promoted by a Trade and Environment Code would provide incentives for all trading nations to become signatories. Exporters would be assured that PPM-based trade measures could not be imposed unilaterally on their products other than pursuant to internationally agreed upon PPM standards.

V. CONCLUSION

A multilateral Code approach would best serve the dual goals of maintaining an open trade climate while protecting the environment. The Stockholm and Rio Declarations make clear that threats to global development, free trade and the environment can be addressed without sacrificing one value for the sake of another. Nevertheless, the corresponding issues must be weighed and balanced against each other. Accommodation and cooperation—as opposed to unilateralism and confrontation—are necessary to achieve a balanced result. Unilateral approaches may yield short-term results, but the gains will be at best marginal. Economically resilient countries will resist the imposition of unilateral trade measures on environmental grounds; economically weaker countries that do submit will typically not be major polluters; and some major polluters who are economically vulnerable—such as India and China—will most likely resist unilateral attempts at forcing them to adopt specific environmental measures.

Unilateralism is far too blunt an instrument of change, as it follows a punitive approach rather than a constructive one. Despite any short-term symbolic value, unilateralism does not hold out great promise for achieving meaningful environmental reforms in other countries in the long run. Unilateralism's inflexibility might only serve to embitter the target country and stiffen its will to maintain the status quo.²²⁶

Unilateral action by the United States to restrict the impacts of products manufactured under processes considered to be envi-

226. See Ben Barber, *Clinton Faces China Trade Issue*, CHRISTIAN SCI. MONITOR, Apr. 30, 1993, at 3. Even in a multilateral setting, flexibility is important in order to keep countries engaged in the negotiating process. See, e.g., *Keep Whaling Commission Intact*, CHRISTIAN SCI. MONITOR, May 14, 1993, at 20 (noting that inflexible approach taken by International Whaling Commission toward Japan and Norway could lead to their withdrawal from the International Convention for the Regulation of Whaling).

ronmentally unsound does not advance the goals of either a cleaner environment or an open world trading system. As Stevenson and Frye note, "It is through multilateral undertakings . . . , not misguided unilateralism, that we can best display our dedication to human rights."²²⁷ Likewise, the United States can best display its mutual respect for free trade and the environment through multilateral action.

227. Stevenson & Frye, *supra* note 11, at 58.