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The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes

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THE ILLEGALITY OF UNILATERAL TRADE MEASURES TO RESOLVE TRADE-ENVIRONMENT DISPUTES

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INTRODUCTION

World trade and foreign investment have grown dramatically in the post-war era. Levels of environmental degradation and natural resource depletion have increased as well during that period. Some observers consider trade liberalization and environmental degradation to be locked in a direct cause-effect relationship.[1] Some commentators view this development with concern, while others, primarily environmentalists, view the poor fit between trade and environment with alarm.[2] A few environmentalists have even demanded an end to free trade. They argue that with free trade comes economic growth, and with economic growth comes unacceptable levels of pollution. Because market mechanisms do not always take full account of environmental costs, some environmentalists argue, a legal climate that promotes unbridled free trade could contribute to the unrestricted, transborder movement of hazardous products and waste.[3] The linkages and frictions, both legal and economic, between trade and the environment are undeniable.[4] Admittedly, the fit of

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[1] *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 39-43 [hereinafter Charnovitz I]; Scott Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT'L L.J. 591 (1994); John Hunt, *Free Traders Heading for Clash with Greens*, FIN. TIMES, Sept. 5, 1991, § I, at 6.

[2] *See* Steve Charnovitz, *Environmentalism Confronts GATT Rules*, J. WORLD TRADE , Apr. 1993, at 37; Symposium, *Greening the GATT: Setting the Agenda*, 27 CORNELL INT'L L.J. 447 (1994); Symposium, *Free Trade and the Environment in Latin America*, 15 LOY. L.A. INT'L & COMP. L.J. 1 (1992); 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 (1992).

[3] *See* Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 AM. J. INT'L L. 700 (1992); *Don't Green GATT*, ECONOMIST, Dec. 26, 1992, at 15.

[4] *See* World Trade Organization [hereinafter WTO], Comm. on Trade and Env't, *Selected Bibliography on Trade and Environment*, Doc. WT/CTE/W/49 (1997) (visited Oct. 25, 1998) <http://www.wto.org/wto/ddf/ep/public.html>. *See generally* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994). The WTO

international trade law and international environmental law is not well-tailored. Trade and environment policies have proceeded at times on diverging tracks, at times on parallel tracks, and at other times on the same track but headed on a collision course.[5] Many environmentalists have been unrelenting in their World Trade Organization (WTO)-bashing, casting the General Agreement on Tarriffs and Trade (GATT)-WTO system[6] in the role of environmental villain. The GATT has few friends among environmentalists, who vilify GATT and have made it their *bête noire*. Two events in the 1990s galvanized environmentalists in their antipathy toward GATT and free trade. The first was the 1991 GATT panel report in the *Tuna/Dolphin* dispute between Mexico and the United States.[7] The

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Committee on Trade and the Environment has compiled a bibliography of over 150 works on trade and the environment. Most WTO documents and decisions are available from the WTO web site at <http://www.wto.org> [hereinafter WTO Doc. Website].

In its 1992 report, *Trade and the Environment: Conflicts and Opportunities*, the congressional Office of Technology Assessment notes that "[t]he potential for conflict between environmental concerns and international trade is increasing." U.S. CONG., OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 3 (1992) [hereinafter OTA REPORT].

[5] *See* WORLD BANK, INTERNATIONAL TRADE AND THE ENVIRONMENT (1992); WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT (1992); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); Daniel C. Esty, *GATTing the Green, Not Just Greening the GATT*, 72 FOR. AFFAIRS 32 (1993); Charles R. Fletcher, *Greening World Trade Law: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341 (1996); Robert Housman & Durwood Zaelke, *Trade, Environment and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992); Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT*, J. WORLD TRADE, Feb. 1993, at 43; Christopher Thomas & Greg A. Tereposky, *The Evolving Relationship Between Trade and Environmental Regulation*, J. WORLD TRADE, Aug. 1993, at 23.

[6] General Agreement on Tariffs and Trade, Oct. 30, 1997, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[7] *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (unadopted, 1991) *reprinted in* 30 I.L.M. 1594 [hereinafter Tuna-Dolphin I Panel Report]; *see also* Matthew Hunter Hurlock, *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); Frederic L. Kirgis, Jr., *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221 (1992). *See generally* Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U.J. INT'L L. & POL'Y 751 (1994); Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save*

second was the successful completion of the trilateral North American Free Trade Agreement (NAFTA) negotiations among Canada, Mexico, and the United States. Both of these developments are discussed below.

Why have the GATT-WTO system and its progeny, NAFTA,[8] become the environmentalists' whipping boy?[9] The short answer is that the GATT-WTO system and NAFTA are viewed as at best indifferent to legitimate environmental concerns and at worst hostile to them.[10] What are environmentalists' specific misgivings about the GATT-WTO system and free trade? In a nutshell, environmentalists fear that countries with comparatively more stringent environmental standards will relax them under pressure from domestic industries. In an environmental version of Gresham's law,[11] stringent environmental standards will be lowered so that

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Whales, Dolphins and Turtles, 24 GEO. WASH. J. INT'L L. & ECON. 477 (1991).

For an overview of U.S. legislation that authorizes the imposition of unilateral trade sanctions on environmental grounds, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 131-35 (Comm. Print 1997).

[8] North American Free Trade Agreement, Dec. 8, 11, 14, 17, 1992, U.S. - Can. - Mex., 33 I.L.M. 289 (1993) (Parts I-III), 32 I.L.M. 605 (1993) (Parts IV-VIII) [hereinafter NAFTA].

[9] *See* Steve Charnovitz, *NAFTA's Link to Environmental Policies*, CHRISTIAN SCI. MONITOR, Apr. 21, 1993, at 19; John Dillin, *Trade-Pact Foes Sound Job Loss, Populist Alarms*, CHRISTIAN SCI. MONITOR, May 19, 1993, at 1, 4.

[10] For a comparative analysis of the way in which trade and environment issues are resolved within the WTO, the EU, and NAFTA, see Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231 (1997).

[11] The following is a non-exhaustive list of 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 rejects 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 will lead to a lowering of standards rather than a ratcheting up.

5. GATT prevents export bans on products (such as tropical timber), except in very narrowly defined circumstances.

6. GATT prevents the unilateral, extraterritorial imposition of environmental standards by one country on another.

7. GATT's most-favored-nation obligation prohibits countries from treating one country differently from another on the basis of different environmental policies in the two countries.

domestic producers can remain competitive at home, relative to imports from countries with less demanding environmental standards, and remain competitive abroad in export markets.[12] In addition, environmentalists seem convinced that developed countries, long the leaders in protecting the environment, will roll back their standards to discourage capital and job flight to countries where environmental regulation is lax or non-existent.

Environment and trade policies co-exist against a backdrop of significantly different economic and legal philosophies.[13] The market economic model of government non-interference with the free flow of goods across national borders has shaped the GATT-WTO system. This same model has not found a comfortable niche in international environmental law. The market economy solution to the problem of pollution (i.e., "externalities" in the jargon of economists) is to let the market, not government, determine how and whether pollution is to be abated. But a market approach to abating environmental pollution has not worked well in practice. For that reason, international environmental law is more reflective of an economic model that invites and arguably requires government regulation of the market.[14] For example, one solution to the

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8. GATT's dispute settlement mechanisms are secretive and do not permit environmentalists to intervene to present environmental considerations in the decision making process.

See A Catalogue of Grievances, ECONOMIST, Feb. 27, 1993, at 26. *See also* Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 31 (1992); Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary,* 86 AM. J. INT'L L. 728, 729 (1992).

[12] *See* Kym Anderson, *The Entwining of Trade Policy with Environmental and Labour Standards, in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 435 (Will Martin & L. Alan Winters eds., 1995); Hilary F. French, *The GATT: Menace or Ally?*, WORLD WATCH, Sept.-Oct. 1993, at 12; U.S. Int'l Trade Comm'n, *Trade Issues of the 1990s—Part I,* INT'L ECON. REV., Nov. 1994, at 17; Schoenbaum, *supra* note 3, at 701; U.S. Int'l Trade Comm'n, *Trade Liberalization and Pollution*, INT'L ECON. REV., Mar. 1995, at 17; *The Race for the Bottom*, ECONOMIST, Oct. 7, 1995, at 90.

As Edith Brown Weiss points out, there is little empirical evidence to substantiate the claim that countries with lax environmental standards attract foreign industries that are heavily regulated. *See* Weiss, *supra* note 11, at 729. Environmental costs are just one of a host of factors that figure in the decision to make a foreign investment. Other factors include tax and labor laws, joint venture laws, political stability, performance requirements, the ability to repatriate profits, currency stability, and compensation in the event of expropriation.

[13] *See generally* ROBERT REPETTO, TRADE AND ENVIRONMENT POLICIES: ACHIEVING COMPLEMENTARITIES AND AVOIDING CONFLICTS (1993).

[14] *See generally* ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY

pollution problem is to adopt the "polluter pays" principle.[15] That is, firms that pollute should be required to pay for the clean up and either absorb the cost or pass it on to the buyer in the form of higher prices for their goods (i.e., "internalize the costs" in the jargon of economists). But polluters are not likely to abate their pollution or pay for the cost of pollution controls voluntarily. Why not? For the simple reason that they cannot rely on their competitors voluntarily to do likewise. As a consequence, the government must mandate that they do so.

In short, disenchanted with market economy solutions to environmental problems, environmentalists challenge the assumption that markets are capable of protecting the environment effectively through prices.[16]

This article challenges the view that the United States and other Members of the WTO have a legal right under international law to engage in unilateral measures to resolve trade-environment disputes. On the contrary, as will be shown below, in light of the comprehensive legal regime created under WTO auspices to regulate all aspects of international trade in goods, the United States and all other WTO Members are forbidden from imposing unilateral measures to block imports of goods from other WTO Members in response to policies or practices that threaten the environment or the global commons. The legal permissibility of such unilateral measures aside, this article further rejects the view that unilateral approaches to resolving international environmental disputes is desirable as a policy matter, valid from a legal perspective, or necessary as a practical matter. The article begins with an overview of the core international environmental legal principles and treaties. It then examines

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INTEGRATED GOODS MARKETS (1995); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1231-32 (1992).

[15] *See generally* Candice Stevens, *Interpreting the Polluter Pays Principle in the Trade and Environment Context*, 27 CORNELL INT'L L.J. 577 (1994).

[16] *See* Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L.A. INT'L & COMP. L.J. 33-36 (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); Michael J. Kelly, *Overcoming Obstacles to the Effective Implementation of International Environmental Agreements*, 9 GEO. INT'L ENVTL. L. REV. 447 (1997); *NAFTA Implementing Legislation Uncertain but Wilson Says No Plan to Delay Passage*, 10 Int'l Trade Rep. (BNA), at 415-16 (March 10, 1993). *See generally* DAVID W. PEARCE & JEREMY J. WARFORD, WORLD WITHOUT END: ECONOMICS, ENVIRONMENT, AND SUSTAINABLE DEVELOPMENT (1993).

environmental issues in the GATT-WTO context, beginning with GATT 1947 and the GATT panel reports in the *Tuna/Dolphin* dispute. This article then analyzes how the Uruguay Round Agreements deal with trade-environment issues, including the Agreement on Technical Barriers to Trade, the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures, and the Agreement on the Application of Sanitary and Phytosanitary Measures. The work of the reactivated WTO Committee on Trade and Environment is also analyzed.

Following the examination of environmental issues in the WTO-GATT context, the article shifts focus to the NAFTA provisions dealing with trade and the environment, in particular the side agreement on environmental cooperation. It also discusses the bilateral environmental agreements concluded between the United States and Mexico.[17] It concludes that because a multilateral and trilateral framework for resolving trade-environment disputes exists to which the United States has made a legally binding commitment, multilateral and trilateral approaches to resolving trade-environment disputes is not only the preferable solution, but the only legitimate response.

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[17] The subject of U.S. environmental protection legislation is beyond the scope of this paper. Briefly, the United States has in place several pieces of legislation dealing with endangered species, the international conservation of marine species, and import restrictions under these laws. *See, e.g.*, Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421 (1994); International Dolphin Conservation Act of 1992, 16 U.S.C. §§ 1411-1418 (1994); Endangered Species Act of 1973, 16 U.S.C. § 1538 (1994); Fishermen's Protective Act of 1967 ("Pelly Amendment"), 22 U.S.C. § 1978 (1994); High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a (1994); Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4904, 4907 (1994). The Marine Mammal Protection Act of 1972 sparked the *Tuna/Dolphin* dispute. *See generally* John Alton Duff, *Recent Applications of United States Laws to Conserve Marine Species Worldwide: Should Trade Sanctions Be Mandatory?*, 2 OCEAN & COASTAL L.J. 1 (1996); Taunya L. McLarty, *WTO and NAFO Coalescence: A Pareto Improvement for Both Free Trade and Fish Conservation*, 15 VA. ENVTL. L.J. 469 (1996).

Litigation involving the U.S. implementation of a shrimp import ban under amendments to the Endangered Species Act brought a WTO complaint by India, Malaysia, Pakistan, and Thailand. *See* WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (1996), *available in* WTO Doc. Website, *supra* note 4. *See also* Earth Island Institute v. Christopher, 948 F. Supp. 1062 (Ct. Int'l Trade 1996). For an analysis of the CIT decision and the WTO dispute, see Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57 (1996-97). *See also New Role for NAFTA: Saving Fish?*, CHRISTIAN SCI. MONITOR, Jan. 23, 1996, at 18; Timothy E. Wirth, *Take the Final Step to Protect Dolphins*, CHRISTIAN SCI. MONITOR, Feb. 2, 1996, at 19.

I. INTERNATIONAL ENVIRONMENTAL LAW

A. *Introduction*

As a threshold matter, it is important to dispel the notion that international environmental law, as piecemeal and fragmented as it is, is hostile or antagonistic to international trade and growth. In a 1991 report, the U.S. International Trade Commission identified over 160 multilateral and bilateral agreements for the protection of the environment and wildlife.[18] Most of these agreements date from the 1970s.[19] Of these scores of treaties and conventions, no single document emerges as the centerpiece international environmental "constitution" analogous to GATT 1994 in the field of international trade.[20] International environmental law is, instead, a crazy quilt of treaties, conventions, and customary international law.[21]

Section 601 of the *Restatement (Third) of Foreign Relations* provides that under customary international law, states are obligated to prevent transboundary pollution that causes injury to another state.[22] Polluting states that violate this rule are liable for any injury caused by such transboundary pollution.[23] Section 601 provides in part:

> § 601. State Obligations with Respect to Environment of Other States and the Common Environment
>
> (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted

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[18] *See* U.S. INT'L TRADE COMM'N, USITC Pub. No. 2351, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE (1991).

[19] *See id.*

[20] *See* Weiss, *supra* note 11, at 729.

[21] *See generally* Jeffrey M. Lang, *Trade and the Environment, in* CONFRONTING TRADE AND ENVIRONMENTAL CONFLICTS: PROSPECTS AND PRACTICAL APPROACHES 8 (1993); Marc Pallemaerts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J.L. & COM. 623 (1996).

[22] RESTATEMENT [THIRD] OF FOREIGN RELATIONS § 601 (1987).

[23] *See id.*

> international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.
>
> (2) A state is responsible to all other states
>
> (a) for any violation of its obligations under Subsection (1)(a), and
>
> (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.[24]

Outside of this customary rule of international law, no single document universally recognized as the international environmental law "constitution" exists. However, two closely related documents do emerge as international environmental law manifestoes. They represent a distillation of the basic principles of international environmental law and policy reflected in section 601 of the Third Restatement of Foreign Relations. The first is the 1972 Stockholm Declaration on the Human Environment.[25] The second is the 1992 Rio Declaration on Environment and Development.[26]

B. *The Stockholm and Rio Declarations.*

The Stockholm and Rio Declarations are a series of twenty-six and twenty-seven guiding principles, respectively. Under these principles states commit themselves to achieving the complementary goals of promoting sustainable development and protecting the global

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[24] *Id.*

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

[26] Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5 (1992), 31 I.L.M. 876 (1992) [hereinafter Rio Declaration].

environment. Neither Declaration espouses environmental protection to the point of no economic growth.[27] In other words, neither document takes the position of the environment *uber alles*. Rather, both Declarations take a balanced approach to the trade-environment issue.

A distillation of the Declarations and their largely overlapping principles yields two potentially conflicting concepts: national sovereignty, on the one hand, and international cooperation, on the other. Representative of the sovereignty/cooperation dichotomy is Principle 21 of the Stockholm Declaration:

> States have, in accordance with the Charter of the United Nations and the principle 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.[28]

With the addition of "and developmental" to the phrase "pursuant to their own environmental policies," Principle 2 of the Rio Declaration tracks Principle 21's language verbatim.[29]

The importance of the national sovereignty principle to the drafters of the Rio Declaration is reflected in Principles 11 and 13.[30] These two Principles direct states to enact national legislation, rather than enter into international conventions, to deal with issues of environmental damage, liability, and compensation for victims of pollution.[31]

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[27] One economist has coined the acronym BANANA ("build absolutely nothing anywhere near anyone") to describe this position. Another popular acronym is NIMBY ("not in my back yard"), which describes a far more restrained, and far from altruistic, environmental position. *See* Craig VanGrasstek, *The Political Economy of Trade and the Environment in the United States Senate, in* INTERNATIONAL TRADE AND THE ENVIRONMENT, *supra* note 5, at 227, 233.

[28] Stockholm Declaration, *supra* note 25, at 1420.

[29] *See* Rio Declaration, *supra* note 26, at 876.

[30] *See generally* Jeffrey D. Kovar, *A Short Guide to the Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119 (1993); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599 (1995).

[31] Principle 11 of the Rio Declaration provides in part that "[s]tates shall enact effective environmental legislation." Rio Declaration, *supra* note 26, at 876. In this same connection, Principle 13 states in part that "[s]tates shall develop national law regarding

Relying exclusively on initiatives at the national level to address environmental issues is not likely to produce a comprehensive or coordinated international legal regime that adequately advances the goal of protecting the global environment. Recognizing this shortcoming, the Stockholm and Rio Declarations call upon states to cooperate with one another in developing international conventions to deal with issues of transboundary pollution.[32]

Besides attempting to mix the oil-and-water issues of national sovereignty and international cooperation, the Stockholm and Rio Declarations also wrestle with accommodating international environmental protection and international trade. Neither Declaration is hostile to international trade. On the contrary, as discussed below, both documents are sensitive to the importance of an open trading system. They show an awareness that environmental regulations ostensibly designed to protect the environment can be a pretext for trade protectionism.[33]

C. *Multilateral Environmental Agreements*

Three of the most important conservation and environmental conventions use trade restrictions and import bans as the vehicles for enforcing their terms. These conventions provide prima facie evidence for the current debate that multilateralism works, given sufficient political will. The first of these conventions is the Convention on International Trade in Endangered Species (CITES) that regulates or prohibits international trade in the scheduled endangered species.[34] The second is

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liability and compensation for the victims of pollution and other environmental damage." *Id.* at 878.

[32] *See* Stockholm Declaration, *supra* note 25, at 1420 (princs. 22, 24); Rio Declaration, *supra* note 26, at 878 (princs. 13, 14). To further this cooperative effort, states also commit to sharing scientific information. *See* Stockholm Declaration, *supra* note 25, at 1420 (princ. 20); Rio Declaration, *supra* note 26, at 827 (princ. 9).

For a criticism of state sovereignty as a political obstruction 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 (1990).

[33] *See generally* GARETH PORTER & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS (1996).

[34] *See* Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES]; William C. Burns, *CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal*, 8 DICK. J. INT'L L. 203 (1990);

the Vienna Convention for the Protection of the Ozone Layer,[35] together with the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[36] They provide for an eventual ban on imports of chlorofluorocarbons and halons, and an outright ban on imports from nonsignatory countries.[37] The third is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, prohibiting or restricting the export and import of scheduled hazardous waste.[38] These three multilateral environmental agreements are incorporated by reference in NAFTA.[39] None has been the subject of either a GATT or WTO panel proceeding.[40]

1. *CITES*

With 144 parties, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is one of the most widely-subscribed international conservation agreements. CITES categorizes endangered species, and parts of those species, into three

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Dale Andrew, Organization for Economic Cooperation and Development, *Experience With the Use of Trade Measures in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, OCDE/GD(97)106 (1997) (visited Oct. 25, 1998) <http://www.oecd.org/ech/docs/envi.htm>.

[35] Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, UNEP Doc. IG.53/5, 26 I.L.M. 1529 (entered into force Sept. 22, 1988) [hereinafter Vienna Convention.]

[36] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541 (entered into force for the United States Jan. 1, 1989) [hereinafter Montreal Protocol]. The Montreal Protocol is supplemented by the London and Copenhagen amendments that accelerate the timetable and broaden the coverage of the Montreal Protocol. *See* London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 (1991) [hereinafter London Amendments]; Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, Nov. 25, 1992, 32 I.L.M. 874 (1993) [hereinafter Copenhagen Amendments].

[37] *See* Vienna Convention, *supra* note 35; Montreal Protocol, *supra* note 36.

[38] *See* United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Final Act and Text of Basel Convention, Mar. 22, 1989, 28 I.L.M. 649 (1989) (entered into force May 5, 1992) [hereinafter Basel Convention].

[39] *See* NAFTA, *supra* note 8, art. 104.

[40] *See generally* Steve Charnovitz, *The World Trade Organization and Environmental Supervision*, 17 INT'L ENV'T REP. 89 (1994); Ilona Cheyne, *Environmental Treaties and the GATT*, 1 REV. EUR. COMM. INT'L ENVTL. L. 14 (1992).

groups depending on how close they are to extinction.[41] Appendix I lists species currently threatened with extinction that are or may be affected by trade.[42] Appendix II lists two sub-groups of endangered species: (1) those threatened with extinction unless trade in them is regulated, and (2) those for which trade must be regulated if species at risk are to be protected.[43] Appendix III lists other flora and fauna that are protected by signatory countries.[44]

For species listed in Appendix I, export is subject to permit.[45] Such permits may be granted only when the following conditions have been met: (1) a Scientific Authority of the exporting state has advised that such an export permit will not be detrimental to the survival of that species; (2) a Management Authority of the exporting state is satisfied that the specimen was not obtained in contravention of the laws of that state; (3) a Management Authority of the exporting state is satisfied that any living specimen will be shipped so as to minimize the risk of injury or damage; and (4) a Management Authority of the exporting state is satisfied that an import permit (which is subject to corresponding requirements) has been granted for the specimen.[46]

Appendix II species are subject to the same export requirements, but no corresponding import requirements are imposed.[47] Appendix III species may not be imported without a certificate of origin and an export permit from the country that listed the species in Appendix III.[48]

2. *The Montreal Protocol*

The 1985 Vienna Convention for the Protection of the Ozone Layer[49] and the 1987 Montreal Protocol on Substances that Deplete the

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[41] *See* CITES, *supra* note 34, art. II, 27 U.S.T. at 1092, 993 U.N.T.S. at 245-46.
[42] *See id.* art.II:1, 27 U.S.T. at 1092, 993 U.N.T.S. at 245.
[43] *See id.* art. II:2, 27 U.S.T. at 1092, 993 U.N.T.S. at 245.
[44] *See id.* art II:3, 27 U.S.T. at 1092, 993 U.N.T.S. at 246.
[45] *See id.* art. III, 27 U.S.T. at 1093, 993 U.N.T.S. at 246.
[46] *See id.* art. III:2, 27 U.S.T. at 1093, 993 U.N.T.S. at 246. Violations of CITES can result in the imposition of trade sanctions. Such sanctions were being considered by the United States against South Korea for its alleged importation of bear gallbladders and paws from North America. *See* Paula Dobbyn, *Hunters Target Bears to Feed Asian Appetite*, CHRISTIAN SCI. MONITOR, Apr. 9, 1997, at 3.
[47] *See* CITES, *supra* note 34, art. IV, 27 U.S.T. at 1095-97, 993 U.N.T.S. at 247-48.
[48] *See id.* art. V, 27 U.S.T. at 1097-98, 993 U.N.T.S. at 248.
[49] Vienna Convention, *supra* note 35.

Ozone Layer, together with the London and Copenhagen amendments,[50] regulate trade in ozone-depleting gases in three respects: (1) they impose regressive import quotas on chlorofluorocarbons (CFCs) and halons from parties to the Convention and Protocol; (2) they ban imports of such substances altogether from countries that are not signatories to the treaties; and (3) they impose domestic production controls.[51]

The 1990 London amendments add certain chemicals to the list of controlled substances.[52] The 162 parties to the Montreal Protocol further agreed to terminate the domestic production and consumption of CFCs by 2000.[53] They established a fund, the Multilateral Ozone Fund, to finance technology transfers to developing countries.[54]

Before the ink was dry on the London amendments, it was reported that ozone depletion was worse than thought. The parties responded by amending the Montreal Protocol again under the Copenhagen amendments to accelerate the phase-out of CFCs, carbon tetrachloride, and methyl chloroform by the end of 1995.[55] The Copenhagen amendments added methyl bromide, hydrochloroflourocarbons (HCFCs), and hydrobromoflurocarbons (HBFCs) to the list of controlled substances.[56]

3. *The Basel Convention*

The Basel Convention on the Control of Transboundary

[50] Montreal Protocol, *supra* note 36; London Amendments, *supra* note 36; Copenhagen Amendments, *supra* note 36.

[51] *See* Bryce Blegen, *International Cooperation in Protection of Atmospheric Ozone: The Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 DENV. J. INT'L L. & POL'Y 413 (1988); Anne Gallagher, *The "New" Montreal Protocol and the Future of International Law for Protection of the Global Environment*, 14 HOUS. J. INT'L L. 267 (1992); John Warren Kindt & Samuel Pyeatt Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L.J. 261 (1989). *See generally* LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 509 (1994).

For an overview of the terms and operation of the Montreal Protocol, see WTO Comm. on Trade and Env't, *The Montreal Protocol and Trade Measures–Communication from the Secretariat for the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer*, WT/CTE/W/57 (Aug. 28,1997) *available in* WTO Doc. Website, *supra* note 4.

[52] *See* London Amendments, *supra* note 36, at 552-53.

[53] *See id.* at 540.

[54] *See id.* at 549-51.

[55] *See* Copenhagen Amendments, *supra* note 36, at 876-78.

[56] *See id.* at 885-86.

Movements of Hazardous Wastes and Their Disposal lists certain hazardous wastes, the exportation or importation of which the parties must either prohibit or restrict.[57] Export of the scheduled hazardous wastes is prohibited to parties that prohibit their importation. In all other cases, export to another party requires the consent of the importing party in writing.[58] There are 112 parties to the Convention.

The Conference of the Parties established under Article 15 of the Convention is responsible for reviewing and evaluating its implementation.[59] The Conference decided in 1994 to prohibit immediately the exportation of all hazardous waste for final disposal from OECD countries to non-OECD countries, and to extend that export ban in 1997 to hazardous waste exported for recycling or recovery.[60] A 1992 OECD Council Decision to harmonize OECD members' control regimes governing the movement of transboundary shipment of hazardous waste was implemented by the United States in 1996.[61]

4. *Other MEAs*

Although full implementation of the aforementioned multilateral agreements has been hamstrung by underfunding and a lack of commitment on the part of signatories, two other potentially important multilateral environmental agreements (MEAs) dealing with the protection of the global commons have been established. The Convention on

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[57] *See* Basel Convention, *supra* note 38, art. 4, 28 I.L.M. at 661-63.

[58] *See id.* art. 4.1, 28 I.L.M. at 661. For an overview of the terms and operation of the Basel Convention, see WTO, Comm. on Trade and Env't, *Recent Trade-Related Developments in the Basel Convention: Communication from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,* WT/CTE/W/55 (Aug. 25, 1997), *available in* WTO Doc. Website, *supra* note 4.

[59] *See* Basel Convention, *supra* note 38, art. 15, 28 I.L.M. at 670-71.

[60] *See Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (visited Feb. 15, 1998) <http://www.oecd.org/env/docs/en/com_env_td9741finale.pdf>.

[61] *See* Organization of Economic Cooperation and Development Council, *Decision of the Council Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations*, C(92)39/Final (Mar. 30, 1992); Transfrontier Shipments of Hazardous Waste for Recovery Within the OCED, 40 C.F.R. §§ 262.80-262.89 (1997). *See also* Joy Clairmont, *Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision C(92)39 Concerning the Transfrontier Movement of Recoverable Wastes*, 3 ENVTL. LAW. 545 (1997).

Biological Diversity (the Biodiversity Convention),[62] and the Climate Change Convention[63] represent continuing international efforts to protect the global environment. The Biodiversity Convention's *raison d'être* is habitat conservation and the equitable distribution of intellectual property rights flowing from biotechnology.[64] The Climate Change Convention seeks to reduce the volume of global greenhouse gas emissions in order to slow global warming.[65] Neither of these Conventions obligates or commits the signatories to reach specific targets, although the 1997 Kyoto Protocol to the Climate Change Convention does take a modest first step to reduce greenhouse gas emissions 5.2 percent by 2012.[66]

These MEAs indicate that developing and developed countries so far appear to be working at cross purposes in addressing environmental priorities, with developing countries focused on water, housing, and poverty reduction, and the developed countries focused on ozone depletion, biodiversity, deforestation, and desertification.[67]

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[62] *See* Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter Biodiversity Convention]. The Convention has been described as a "remarkably weak instrument," principally because it lacks an adequate funding mechanism. *See* GURUSWAMY ET AL., *supra* note 51, at 855. *See generally* WTO, Comm. on Trade and Env't, *Multilateral Environmental Agreements: Recent Developments, Part I, Convention on Biological Diversity*, WT/CTE/W/44 (Mar. 20, 1997), *available in* WTO Doc. Website, *supra* note 4; WTO, Comm. on Trade and Env't, *The Convention on Biological Diversity and Its Relation to Trade*, WT/CTE/W/64 (Sept. 29, 1997), *available in* WTO Doc. Website, *supra* note 4.

[63] *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. No. 38, 31 I.L.M. 849 (1992). [hereinafter Climate Change Convention]. *See generally* Sean T. Fox, *Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere*, 84 GEO. L.J. 2499 (1996).

[64] *See* Biodiversity Convention, *supra* note 62, art. 1, 31 I.L.M. at 823.

[65] *See* Climate Change Convention, *supra* note 63, art. 2, 31 I.L.M. at 854.

[66] *See Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 10, 1997 (visited Oct. 25, 1998) <http://www.unfccc.de/fccc/docs/protintr.html>. Thirty-eight industrialized countries committed to reducing greenhouse gas emissions. Because no developing country made such a commitment, the prospects for Senate approval of the Protocol are dim. The text of the Kyoto Protocol is available on the Internet at <http://www.unfccc.de/fccc/docs/cop3/protocol.html> (visited Oct. 25, 1998). *See generally* James Cameron & Zen Makuch, *Implementation of the United Nations Framework Convention on Climate Change: International Trade Law Implications, in* TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE 116 (James Cameron et al. eds., 1994); Fletcher, *supra* note 5; Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841 (1996).

[67] *See* Robert M. Press, *A Year After Rio, North and South Still Debate Priorities*, CHRISTIAN SCI. MONITOR, May 19, 1993, at 3.

II. THE GATT-WTO SYSTEM: A COMPREHENSIVE INTERNATIONAL LEGAL REGIME FOR RESOLVING TRADE-ENVIRONMENT DISPUTES

A. *Introduction*

GATT and its policy of promoting liberal trade are in a broad sense resource conserving. By reducing trade barriers, resources are used more efficiently because the most efficient producers, regardless of their country of origin, are permitted to take advantage of their competitive edge. GATT strives for equal treatment of goods, regardless of their source of origin. GATT enforces this policy through a nondiscrimination principle that operates at two levels: (1) nondiscrimination by an importing country among importers, and (2) nondiscrimination between imported goods and the domestic like product.[68] At the same time, GATT does not prevent a country from setting its own domestic priorities regarding the level of environmental protection it wants to achieve at home.[69]

Broadly stated, any government regulation of or interference with international trade that deviates from the liberal trade philosophy of GATT is disapproved.[70] That is true, however, only as a general matter. Despite its commitment to the goal of liberal trade, GATT does permit government intervention in the market to regulate or prohibit the flow of goods across national borders under limited circumstances. Besides authorizing the imposition of tariffs on imported goods,[71] GATT also permits deviations from the liberal trade paradigm in several noteworthy instances.

First, notwithstanding Article XI's prohibition against quantitative restrictions, a WTO Member facing a balance-of-payments shortfall may impose "quantitative restrictions" (i.e., quotas) on imported goods temporarily until its balance-of-payments position improves.[72] Second, domestic industries seriously injured by imports of competing products may receive "safeguard" relief from their home government (known in the United States as Section 201 escape clause relief).[73] Such relief can take

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[68] *See* GATT, *supra* note 6, art. III.

[69] *See id.* art. XX.

[70] For a thorough legal treatment of the GATT-WTO system, see generally RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL TRADE ARRANGEMENTS, AND U.S. LAW (1998).

[71] *See* GATT, *supra* note 6, art. II.

[72] *See id.* art. XII.

[73] *See* Trade Act of 1974 § 201, 19 U.S.C. §§ 2251-2254 (1994).

the form of a temporary increase in tariffs, the imposition of quotas, or both, on competing imports.[74] Third, under the Article XX exceptions dealing with public health and safety measures, *inter alia*, and Article XXI dealing with national security, a Member may restrict or prohibit imports.[75]

Of the various GATT exceptions to the MFN and national treatment commitments, the most important in the context of trade and the environment are the Article XX exceptions.[76]

B. *The Article XX Exceptions*

In order to gain a better understanding of the scope of the Article XX general exceptions, they must be read against the backdrop of GATT Article III:4, the national treatment obligation. Article III:4 generally obligates WTO Members not to discriminate against imports vis-a-vis the domestic like product.[77] It provides in 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.[78]

When an importing Member's health and safety standards discriminate against imported goods in favor of the domestic like product, the exporting

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[74] *See* GATT, *supra* note 6, art XIX; 19 U.S.C. §§ 2251-54.

[75] *See* GATT, *supra* note 6, arts. XX, XXI. One recent use of these provisions occurred when Nicaragua filed a complaint with the GATT Secretariat challenging a 1985 U.S. trade embargo against Nicaragua. The United States invoked GATT Article XXI in defense of the embargo. It was lifted in 1990 when relations between the two countries improved. *See generally* Peter Kornbluh, *Uncle Sam's Money War Against the Sandinistas,* WASH. POST, Aug. 27, 1998, at C1; Joanne Omang, *Sanctions: A Policy by Default,* WASH. POST., May 8, 1985, at A1.

[76] *See* GATT, *supra* note 6, art. XX.

[77] *See* Jackson, *supra* note 14, at 1235-39. A parallel provision dealing with the tax treatment of imports vis-a-vis the domestic like product is contained in GATT Article III:2. *See* GATT, *supra* note 6. *See generally* Christian Pitschas, *GATT/WTO Rules for Border Tax Adjustments and the Proposed European Directive Introducing a Tax on Carbon Dioxide Emissions and Energy*, 24 GA. J. INT'L & COMP. L. 479 (1995).

[78] GATT, *supra* note 6, art III:4.

Member may have a legitimate complaint under GATT Article XXIII that a trade benefit has been nullified or impaired.[79] Similarly, to the extent the importing Member's health and safety regulations purport to have extraterritorial effect, for example, by targeting the production processes and methods (PPMs) by which the imported product was manufactured or processed in the exporting Member, Article III:4 also may be violated.[80] GATT imposes practically no legal constraints, however, on a Member that has set for itself the goal of protecting its environment by regulating domestic industries that use polluting production processes and methods.[81]

Notwithstanding Article III's national treatment commitment and GATT's overall liberal trade philosophy, Article XX nevertheless permits WTO Members to restrict imports on a number of specific grounds.[82] Of the ten enumerated general 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 laws and regulations.[83] These three exceptions provide:

> 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:
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> . . . .
>
> (b) necessary to protect human, animal or plant life

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[79] *See* GATT, *supra* note 6, art. XXIII; Josh Schein, Comment, *Section 301 and U.S. Trade Law: The Limited Impact of the 1988 Omnibus Trade and Competitiveness Act on American Obligations Under GATT*, PAC. RIM L. & POL'Y J., Winter 1992, at 105, 123-25.

[80] *See* GATT, *supra* note 6, art. III:4.

[81] *See* Schoenbaum, *supra* note 3, at 702.

[82] Article XX exceptions relate to protection of public morals, human, plant or animal life; national treasures; exhaustible natural resources; and importation and exportation of gold and silver. Additionally, Article XX permits restrictions related to protection of intellectual property rights and GATT-conforming intergovernmental commodity agreements. *See* GATT, *supra* note 6, art. XX.

[83] For an overview and inventory 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).

> or health;
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> . . . .
>
> (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, trademarks and copyrights, and the prevention of deceptive practices;
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> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[84]

Thus, in order for an importing country to impose a GATT-permissible health or safety import measure, that measure (1) must be necessary (i.e., no less trade-restrictive alternative is available), (2) must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail (i.e., it must be consistent with the MFN and national treatment obligations), and (3) must not be a disguised restriction on international trade.[85]

Considering the open-textured quality of the terms "necessary," "arbitrarily," and "unjustifiably," the health and safety exception has the obvious potential for being a rich source of formidable nontariff barriers to trade.[86] For example, does the exception for human life and health cover persons within the importing Member only, or does it extend to human health and life globally? Can health and safety measures have extraterritorial application? Given the vagaries of the public health and safety exception, the potential for abuse by economically powerful countries anxious to foist their own brand of environmental protection on weaker trading nations is ever present.[87] GATT practice generally has been to construe the Article XX exceptions narrowly in favor of open trade

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[84] GATT, *supra* note 6, art XX.

[85] *See generally* Charnovitz I, *supra* note 1; Schoenbaum, *supra* note 3, at 713.

[86] For the drafting history of GATT Article XX, see 1 WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 563-66 (1995) [hereinafter GUIDE TO GATT].

[87] *See* Jackson, *supra* note 14, at 1241.

and against protectionist barriers to trade.[88]

C. *The Uruguay Round and the Environment*

When the Uruguay Round was launched in 1986, not only was the link between trade and the environment far from most negotiators' minds, but the environment was not even on the Uruguay Round agenda.[89] Well into the Round, the 1992 GATT Report on Trade and the Environment was published, which concluded that trade restrictions used for environmental purposes are likely to be counterproductive because they reduce world prosperity.[90] Environmentalists were not pleased.

Reeling from its setbacks in the two *Tuna/Dolphin* decisions,[91] the United States successfully lobbied in the late stages of the Uruguay Round for the inclusion of environment-friendly provisions in several Uruguay Round texts.[92] Despite the many thorny and seemingly insoluble issues vying for their attention, the Uruguay Round negotiators managed to turn their attention to the issue of trade and the environment in the closing months of the Round. Several Uruguay Round documents reflect the negotiators' efforts.

First, the Preamble to the Agreement Establishing the World Trade Organization makes environmental protection a high priority for WTO Members. The Preamble states that the Members recognize:

> that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large

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[88] *See* OTA REPORT, *supra* note 4, at 81-90; GUIDE TO GATT, *supra* note 86, at 561-96. These three GATT Article XX exceptions and the role of GATT Article XX as an environmental regulatory tool are discussed in Jackson, *supra* note 14, at 1239-45.

[89] For an overview of environmental issues in the Uruguay Round, see OFFICE OF U.S. TRADE REPRESENTATIVE, THE GATT URUGUAY ROUND: REPORT ON ENVIRONMENTAL ISSUES, *in* URUGUAY ROUND TRADE AGREEMENTS, STATEMENT OF ADMINISTRATIVE ACTION, vol. 1, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1163 (1994) [hereinafter USTR REPORT ON ENVIRONMENTAL ISSUES].

[90] For comprehensive discussion of this report, see Hamilton Southworth, III, *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 (1992).

[91] *See* Tuna-Dolphin I Panel Report, *supra* note 7; GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, GATT Doc. No. DS20/R (June 1994), 33 I.L.M. 842 (1994) [hereinafter Tuna-Dolphin II Panel Report].

[92] *See* USTR REPORT ON ENVIRONMENTAL ISSUES, *supra* note 89.

> and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . . .[93]

The parallels with Principles 11, 12, and 16 of the Rio declaration are striking.[94] For the first time in a multilateral legal instrument on trade, the congruence between trade and the environment is acknowledged. The Preamble provides that environmental protection and conservation are to serve as markers for WTO Members along the road to trade liberalization.[95]

Second, the Ministerial Decision on Trade and Environment issued at the conclusion of the Uruguay Round reiterates the views expressed in the Preamble to the WTO Agreement, and adds the following:

> [T]here should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.[96]

In order to coordinate trade and environment policies, the ministers also

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[93] AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Apr. 15, 1994, 108 Stat. 4809, 4815, 33 I.L.M. 1125, 1144 (1994).

[94] *See* Rio Declaration, *supra* note 26, princs. 11, 12, 16.

[95] *See generally* Christine Cuccia, *Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Regulating Methods of Harvesting,* 13 B.U. INT'L L.J. 481 (1995); Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization,* 29 COLUM. J.L. & SOC. PROBS. 175 (1996); Kelly J. Hunt, Comment, *International Environmental Agreements in Conflict with GATT—Greening GATT After the Uruguay Round Agreement,* 30 INT'L LAW. 163 (1996).

[96] Ministerial Decision on Trade and Environment, April 14, 1994, 33 I.L.M. 1125, 1267 (1994).

established the Committee on Trade and Environment.[97] Its terms of reference include identifying the "relationship between trade and environmental measures" and making "recommendations on whether any modifications [to the GATT-WTO system] are required."[98] The work of the Committee is discussed later in this Section.

Third, four agreements directly bearing on environmental issues were concluded in the Uruguay Round. They are the Agreement on the Application of Sanitary and Phytosanitary Measures,[99] the Agreement on Technical Barriers to Trade,[100] the Agreement on Agriculture,[101] and the Agreement on Subsidies and Countervailing Measures.[102] A fifth agreement, the Understanding on Rules and Procedures Governing the Settlement of Disputes,[103] underscores that unilateralism is an impermissible route for resolving trade-environment disputes.[104]

D. *The SPS Agreement*

1. *Introduction*

Experience has shown that sanitary and phytosanitary (SPS)

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[97] *See id.* at 1268.

[98] *Id.*

[99] Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, GATT Doc. MTN/FA 11-AIA-4 [hereinafter SPS Agreement], *reprinted in* RAJ BHALA, DOCUMENTS SUPPLEMENT TO INTERNATIONAL TRADE LAW: CASES AND MATERIALS, at 137 (1996).

[100] Agreement on Technical Barriers to Trade, Dec. 15, 1993, GATT Doc. MTN/FA 11-AIA-6 [hereinafter TBT Agreement], *reprinted in* BHALA, *supra* note 99, at 168.

[101] Agreement on Agriculture, Dec. 15, 1993, GATT Doc. MTN/FA 11-AIA-3 [hereinafter Agriculture Agreement], *reprinted in* BHALA, *supra* note 99, at 110.

[102] Agreement on Subsidies and Countervailing Measures, Dec. 15, 1993, GATT Doc. MTN/FA 11-12 [hereinafter SCM Agreement], *reprinted in* BHALA, *supra* note 99, at 265. Environmental considerations are expressly mentioned in one other Uruguay Round Agreement. Article 27.2 of the TRIPS Agreement states that "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary . . . to avoid serious prejudice to the environment." *See* M. Bruce Harper, *TRIPS Article 27.2: An Argument for Caution*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 381 (1997).

[103] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, 33 I.L.M. 1226 [hereinafter DSU].

[104] *See* Todd S. Shenkin, Comment, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 566 n.131 (1994).

measures frequently are employed when other, more traditional barriers to trade, such as tariffs and quotas, are reduced or eliminated.[105] Many countries, including the United States, often have had the unhappy experience of negotiating tariff reductions and quota eliminations, only to be met with a suspect SPS measure that wipes out the benefit of the earlier bargain.[106] Before the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) was made a part of the GATT-WTO legal regime, Article XX(b) was the only GATT provision—and at best a skeletal one—dealing expressly with the subject of sanitary and phytosanitary measures.[107] Until the SPS Agreement, no multilateral trade agreement existed with a fully articulated set of rules governing a country's use of SPS measures in connection with imported goods.[108] The SPS Agreement fills this gap by circumscribing WTO Members' use of such measures as a nontariff barrier to trade.

2. *Coverage*

The SPS Agreement applies to all sanitary and phytosanitary measures that may, directly or indirectly, affect international trade.[109] The SPS Agreement does not create any substantive sanitary or phytosanitary

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[105] *See* Marsha A. Echols, *Sanitary and Phytosanitary Measures, in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 191, 191 (Terence P. Stewart ed. 1996).

[106] *See* Jennifer Haverkamp, *Provisions of the Uruguay Round with a Potential Effect on U.S. Environmental Laws and Regulations, in* THE GATT URUGUAY ROUND (Inst. on Current Issues in Int'l Trade ed. 1995).

[107] *See* GATT, *supra* note 6, art XX(b).

[108] By the time the Uruguay Round was concluded, one regional agreement existed governing sanitary and phytosanitary measures, namely, NAFTA ch. 7:B. *See* NAFTA, *supra* note 8, 32 I.L.M. at 377. Its rules are derived in large part from earlier drafts of the Uruguay Round Agreement on Sanitary and Phytosanitary Measures. *See* Echols, *supra* note 105, at 193-94.

[109] *See generally* John J. Barceló, III, *Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755 (1994); Echols, *supra* note 105; Robert M. Millimet, *The Impact of the Uruguay Round and the New Agreement on Sanitary and Phytosanitary Measures: An Analysis of the U.S. Ban on DDT*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 449 (1995).

The WTO Secretariat has published a booklet, UNDERSTANDING THE WORLD TRADE ORGANIZATION AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (1996). It is available from the WTO's website at <http://www.wto.org/wto/goods/spsund.htm> (visited Oct. 30, 1998).

measures per se. Instead, the Agreement sets forth a number of general procedural requirements to ensure that a sanitary or phytosanitary measure is in fact a scientifically-based protection against the risk asserted by the Member imposing the measure, and not a disguised barrier to trade.[110]

The Agreement expressly recognizes that Members have a legitimate right to protect human, animal, and plant life and health, and to establish a level of protection for life and health that they deem appropriate.[111] The provisions of the SPS Agreement are designed to preserve the ability of Members to act in this area while at the same time guarding against the use of unjustified SPS measures that are primarily designed to protect a domestic industry from foreign competition.[112] The Agreement establishes criteria and procedures to distinguish the former from the latter, which is not always an easy task, as illustrated by the ten-year dispute between the United States and the EU over the 1987 EU ban on U.S. beef from cattle fed with growth-inducing hormones.[113]

3. *Definition of SPS Measures*

The SPS Agreement provides a comprehensive definition of sanitary and phytosanitary measures. An SPS measure is any measure applied:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases

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[110] *See* SPS Agreement, *supra* note 99; David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 817 (1994).

[111] *See* SPS Agreement, *supra* note 99, pmbl.

[112] *See* Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L. L. 231, 237 (1997).

[113] *See* WTO Panel Report, *European Communities—EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997) *available in* WTO Doc. Website, *supra* note 4.

> carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.[114]

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements, and procedures governing *inter alia*, (1) end product criteria; (2) processes and production methods; (3) testing, inspection, certification and approval procedures; (4) quarantine requirements including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; (5) provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and (6) packaging and labeling requirements directly related to food safety.[115]

Whether a measure is an SPS measure depends on its intent. If a measure is not intended to protect against one of the risks just mentioned, then it is not an SPS measure.[116]

4. *Scientifically-Based Measures*

The basic right of Members under the SPS Agreement is the ability to take SPS measures necessary for the protection of human, animal, or plant life or health. This right is qualified by three provisos. Such measures (1) must be applied only to the extent necessary, (2) must be based on scientific principles, and (3) must not be maintained without sufficient scientific evidence, except that such measures may be imposed temporarily, when evidence is insufficient, pending receipt of additional information necessary for a more objective assessment of risk.[117]

Article 2.3 reiterates the threshold inquiry of the GATT Article XX chapeau, namely, that SPS measures must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and must not constitute a disguised restriction on international trade.[118] A Member's failure to satisfy Articles 2.2 and 2.3

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[114] SPS Agreement, *supra* note 99, Annex A, para. 1(a)-(d).
[115] *See id.* Annex A, para 1. *See also* Echols, *supra* note 105, at 194.
[116] *See* Echols, *supra* note 105, at 213 n.22.
[117] *See* SPS Agreement, *supra* note 99, arts. 2.2, 5.7.
[118] *See* GATT, *supra* note 6, art. XX; SPS Agreement, *supra* note 99, art. 2.3.

would in itself constitute a violation of GATT, regardless of the measure's consistency with the remainder of GATT.

A Member is free to establish its own level of sanitary and phytosanitary protection, including a "zero risk" level if it so chooses.[119] Regardless of the level of risk a Member chooses to adopt, however, a measure must be based on scientific principles and on sufficient scientific evidence.[120] The judgments to be drawn from that evidence are left to the Member because scientific certainty is rare. Many scientific determinations require judgments among competing scientific views (e.g., whether or not global warming is taking place; if it is, whether the cause is attributable to humans; and, if so, what the proper response is).

There is obviously a good deal of "play in the joints" of the SPS Agreement.

5. *Use of International Standards*

The SPS Agreement requires Members to harmonize their SPS measures by adopting international standards where such standards exist.[121] Such international standards, guidelines, and recommendations are developed by several international bodies. The most important are (1) the Codex Alimentarius Commission (the Codex), established in 1963 and jointly administered by the World Health Organization and the U.N. Food and Agriculture Organization, with over 130 members;[122] (2) the

[119] *See* SPS Agreement, *supra* note 99, arts. 2.2, 5; Zane O. Gresham & Thomas A. Bloomfield, *Rhetoric or Reality: The Impact of the Uruguay Round Agreement on Federal and State Environmental Laws*, 35 SANTA CLARA L. REV. 1143, 1147 (1995).

[120] *See* SPS Agreement, *supra* note 99, art. 2.2.

[121] *See* SPS Agreement, *supra* note 99, art 3.1 ("[m]embers *shall* base their sanitary and phytosanitary measures on international standards . . .") (emphasis added). These international standards, guidelines, and recommendations are further defined in Annex A:3 of the SPS Agreement to include those of the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention.

[122] The Codex Alimentarius Commission has issued more than 200 commodity standards and approximately 2,000 maximum limits for pesticide residues. *See* WTO, Comm. on Sanitary and Phytosanitary Measures, *Complete List of Codex Standards, Codes of Practice, Guidelines and Related Texts*, G/SPS/GEN/29 (Oct. 1, 1997), *available in* WTO Doc. Website, *supra* note 4.

General information about the Codex Alimentarius Commission, including the contents of the Codex Alimentarius, is available from the Commission's website at <http://www.fao.org/waicent/faoinfo/economic/esn/codex/codex.htm> (visited Oct. 25, 1998).

International Office of Epizootics (OIE), founded in 1924 and charged with the tasks of developing a worldwide livestock reporting system and expediting trade in livestock without increasing livestock disease;[123] and (3) the Secretariat of the International Plant Protection Convention (IPPC), an agreement intended to prevent the spread of plant pests.[124]

Although the SPS Agreement generally obligates Members to adopt international standards where they exist, the Agreement further provides that Members may adopt more stringent standards if, based on scientific justification, the relevant international standard fails to provide an adequate level of protection.[125]

Article 3.2 of the SPS Agreement offers an incentive for the adoption of international standards by establishing a rebuttable presumption that a national SPS measure based on an international standard is not only necessary to protect human, animal, or plant life or health, but also is consistent with GATT.[126] At the same time, the SPS Agreement recognizes the politically sensitive nature of SPS measures for Members that desire to give their consumers and environment the highest levels of protection. The drafters of the SPS Agreement bowed to pressure from environmental groups that feared that the SPS Agreement would lead to a ratcheting down of national standards if international standards became the mandatory maximum levels of protection a Member could

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[123] *See* International Agreement for the Creation at Paris of an International Office for Epizootics, 57 U.N.T.S. 135 (entered into force Jan. 17, 1925). General information about the governing body, the International Committee, including its publications, is available from its website at <http://www.oie.org> (visited Oct. 25, 1998).

[124] International Plant Protection Convention, 150 U.N.T.S. 67 (entered into force April 3, 1952). General information about the Convention is available from the Food and Agriculture Organization's website at <http://www.fao.org> (visited Oct. 25, 1998). *See* WTO, Comm. on Sanitary and Phytosanitary Measures, *International Standards for Phytosanitary Measures*, G/SPS/GEN/31 (Oct. 1, 1997), *available in* WTO Doc. Website, *supra* note 4.

[125] *See* SPS Agreement, *supra* note 99, art. 3.3. The Committee on SPS Measures has established a system under which standards, guidelines, and recommendations developed by the Codex, OIE, and IPPC that have a major trade impact are to be monitored. A list of standards, guidelines, and recommendations that have a major impact on international trade is to be established by the Committee. It may invite the appropriate international standards-setting body to consider reviewing the existing standard, guidelines, or recommendation. *See* WTO, Comm. on Sanitary and Phytosanitary Measures, *Procedure to Monitor the Process of International Harmonization*, G/SPS/11 (Oct. 22, 1997).

[126] *See* SPS Agreement, *supra* note 99, art. 3.2. For a discussion on burden of proof in SPS disputes, see Barceló, *supra* note 109, at 774-75.

adopt. This fear was based in part on the status of the Codex, the OIE, and the IPPC Secretariat as arbiters of food safety and animal and plant health issues. In the eyes of environmentalists, these organizations' deliberations are largely influenced by transnational corporations.[127] Thus, despite the encouragement to adopt international standards, Article 3.3 permits Members to adopt measures that result in a higher level of protection if a scientific justification exists.[128] Consequently, a Member's ability to adopt standards higher than those promulgated by these organizations is assured.[129]

6. *Mutual Recognition of Standards*

Because a range of SPS measures may be available to achieve the same level of protection, there may be differences among Members' SPS measures at the same level of protection. Article 4 requires Members to accept the measures of other Members as equivalent, even if they differ formally from those of the importing Member, if the exporting Member demonstrates that its measures achieve the importing Member's appropriate level of protection.[130] Members are further obligated to enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of equivalence of specified SPS measures.[131]

Experience suggests that recognition of equivalence is indeed very difficult to achieve even among countries that are economically integrated. For example, consider the experience of the EU which in 1996 imposed a ban on exports of UK beef and related products from cattle possibly infected with "mad cow" disease. The EU imposed the ban over the objections of the UK that its beef products posed no health risk and a threat to withdraw from the EU.[132]

In a more progressive vein, 1996 amendments to U.S. legislation on poultry and meat inspections authorized the Secretary of Agriculture to

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[127] *See* PHILLIP EVANS & JAMES WALSH, THE EIU GUIDE TO THE NEW GATT 23 (1994).
[128] *See* SPS Agreement, *supra* note 99, art. 3.3.
[129] *See id.*
[130] *See id.* art. 4.
[131] *See id.* art. 4.2.
[132] *See* Jeffrey Ulbrich, *EU Lifts Export Ban on British Beef; London Must Institute Series of Safeguards Against Cattle Disease*, WASH. POST, June 22, 1996, at A21; Fred Barbash, *Britain Fights Back Over Ban on Beef Exports; Major Says He Will Buck European Union Until 'Mad Cow' Limits Are Suspended*, WASH. POST, May 22, 1996, at A27.

certify that poultry and meat inspection systems of other countries are equivalent to those of the United States.[133] In 1997, the EU and the United States reached a framework agreement on veterinary equivalency.[134]

7. *Risk Assessment*

Because the levels of protection established by international bodies are regarded as the minimum level attainable, Article 5 permits Members to maintain higher levels of protection than those based on international standards.[135] A Member must have scientific evidence to justify such higher levels of protection or must show that it is "the appropriate level of sanitary or phytosanitary protection" as determined under the criteria of Article 5.[136] As long as there is a scientific justification for a particular SPS standard, a Member is free to choose its own level of protection after determining that the health or safety risk is genuine.[137] The SPS Agreement does not require "downward harmonization" through the adoption of less stringent SPS measures.[138]

An example of more stringent domestic standards are the U.S. Delaney Clauses, repealed in 1996, that prohibited the introduction of food or color additives in processed foods if the substances posed any risk of cancer in humans or animals.[139] The Delaney Clauses established a level of protection that reflected a congressional decision that there should be zero risk of cancer to humans from the substances those clauses covered. That congressional determination was based on scientific evidence available at the time of its enactment and a risk assessment (i.e., an

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[133] *See* Poultry Products Inspection Act § 17(d), 21 U.S.C.A. § 466 (1996); Federal Meat Inspection Act § 20(e), 21 U.S.C.A. § 620 (1996). The United States and the EU have been engaged in intense negotiations to conclude mutual recognition agreements on food and labeling requirements. *See U.S., EU Fail to Meet MRA Deadline; New Talks Slated for Later This Month,* 14 Int'l Trade Rep. (BNA) 225 (1997). *See generally* Elliot B. Staffin, *Trade Barriers or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade,* 21 COLUM. J. ENVTL. L. 205 (1996).

[134] *See U.S. and EU Agree on Framework On Veterinary Equivalency Except for Poultry,* 14 Int'l Trade Rep. (BNA) 807 (1997).

[135] *See* SPS Agreement, *supra* note 99, art. 5.

[136] *See id.*

[137] *See id.*

[138] *See id.*

[139] *See* Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (1994). *See also* 21 U.S.C. § 376(b)(5)(B) (1994).

evaluation of the potential for adverse effects on human life or health, even though the risk of carcinogenesis was slight). The evidence and assessment resulted in a level of zero risk of carcinogenesis.[140]

Under pressure from domestic farm groups, Congress repealed the Delaney Clauses in the Food Quality Protection Act of 1996[141] because advances in detection techniques had developed to the point that pesticide residues that fell far below levels considered to pose a serious health threat could be detected. A new health-based standard that permits less than a one in one million lifetime risk of cancer was enacted to replace the zero-risk standard set by the Delaney Clauses.[142]

Article 5 of the SPS Agreement identifies specific criteria to be used in evaluating the assessment of risk to human, animal, or plant life or health: (1) available scientific evidence; (2) inspection, testing, and sampling techniques; (3) relevant ecological and environmental conditions; (4) the existence of pest- or disease-free areas; and (5) relevant product and production measures (PPMs).[143] In the case of risks to animal and plant life and health, the economic impact and effectiveness of SPS measures for both the exporting and importing Members also are to be considered.[144] In all events, the objectives of minimizing negative trade effects, of avoiding discrimination or disguised restrictions on trade, and of adopting measures that are not more restrictive of trade than necessary to achieve the appropriate level of protection are to guide Members when imposing a level of protection higher than that provided under international standards.[145]

If a Member believes that another Member's SPS measure violates the Agreement, the burden rests on the complaining Member initially to identify a specific alternative measure that is reasonably available. A responding Member need not take steps that are deemed to be unreasonable. Next, the complaining Member must demonstrate that the alternative measure would make a significant difference in terms of its negative effect on trade. Once again, the responding Member is not expected to adopt an alternative measure if it would make only an insignificant difference on the impact on trade.[146]

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[140] *See* 21 U.S.C. § 348(c)(3)(A) (1994).
[141] Pub. L. No. 104-170, § 405, 110 Stat. 1489 (1996).
[142] *See id.*
[143] *See* SPS Agreement, *supra* note 99, art. 5.2.
[144] *See id.* art. 5.3.
[145] *See id.* arts. 5.4-5.6.
[146] *See id.* arts. 5.6 n.3, 5.8.

8. *Conformity Assessment Procedures*

Conformity assessment procedures (i.e., control, inspection, and product approval procedures) are to be conducted under guidelines found in Annex C of the SPS Agreement.[147] These procedures closely parallel those contained in the TBT Agreement.[148] Procedures are to be undertaken and completed without undue delay and are to be nondiscriminatory vis-a-vis the procedures for the domestic like product.[149]

The concept of disease-free areas and zones within an exporting Member is to be recognized by importing Members.[150] This concept ensures that exports of a particular product are not banned on a country-wide basis, if it can be shown that the exporting Member has implemented effective quarantine or buffer zone measures.[151]

9. *Transparency*

Article 7 and Annex B establish a number of transparency obligations. Among them is a requirement that SPS measures be published promptly and that a period for comment be made available before SPS measures take effect.[152]

10. *Dispute Settlement*

As is the case for all WTO disputes, the consultation and dispute settlement procedures of GATT Articles XXII and XXIII, as amplified by the Dispute Settlement Understanding, apply to disputes under the SPS Agreement.[153] If a dispute under the Agreement involves scientific or technical issues, the panel is directed to seek advice from experts chosen by the panel in consultation with the parties.[154]

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[147] *See id.* art. 6.
[148] *See id.*; TBT Agreement, *supra* note 100, arts. 5-9.
[149] *See* SPS Agreement, *supra* note 99, Annex C:1(a).
[150] *See id.* art. 6.
[151] *See id.*
[152] *See id.* art 7, Annex B:5.
[153] *See id.* art. 11.
[154] *See id.* art. 11:2. For example, in the 1997 WTO Hormone Beef panel proceeding, the panel consulted scientific experts. *See* WTO, Panel Proceeding, *European Communities Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA at 112-

11. *Administration*

A Committee on Sanitary and Phytosanitary Measures is established to provide a forum for regular consultations.[155] The Committee is responsible for maintaining close contact with the relevant international bodies in the field of sanitary and phytosanitary protection. Articles 3.5 and 12.4 of the SPS Agreement require the Committee to develop a procedure for monitoring the process of international harmonization and the use of international standards, guidelines, or recommendations.[156]

Members must notify the Committee on SPS Measures of new, or modifications to existing, SPS regulations that are not substantially the same as an international standard and that may have a significant effect on international trade. As of the end of 1996, the Committee had received 396 such notifications from 31 WTO Members.[157] Article 12.7 directs the Committee to review the operation and implementation of the Agreement three years after its entry into force.[158]

12. *Implementation at Sub-Federal Level*

Under Article 13 of the Agreement, Members are responsible for ensuring that their sub-federal levels of government and non-governmental organizations responsible for setting standards comply with the provisions of the Agreement.[159] Members are required to formulate and implement positive measures and mechanisms in support of observance of the Agreement by sub-national government bodies.[160]

159, Annex (Aug. 18, 1997), *available in* WTO Doc. Website, *supra* note 4. *See generally* Wirth, *supra* note 110.

[155] *See* SPS Agreement, *supra* note 99, art. 12.1.

[156] *See id.*, arts. 3.5, 12.1, 12.4.

[157] *See* WTO, Comm. on Sanitary and Phytosanitary Measures, *Report of the Committee on Sanitary and Phytosanitary Measures*, G/L/118 (Oct. 15, 1996), *available in* WTO Doc. Website, *supra* note 4.

[158] *See* SPS Agreement, *supra* note 99, art. 12.7; WTO, Comm. on Sanitary and Phytosanitary Measures, *Procedure to Review the Operation and Implementation of the Agreement*, G/SPS/10 (Oct. 21, 1997), *available in* WTO Doc. Website, *supra* note 4; OFFICE OF THE USTR, REVIEW OF THE WORLD TRADE ORGANIZATION AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (May 1998), *available in* USTR Website, <http://www.ustr.gov> (visited Jan. 21, 1999).

[159] *See* SPS Agreement, *supra* note 99, art. 13.

[160] *See id.*

State and local governments within the United States remain free to set their our SPS standards under the terms of the Agreement.[161] They are under no obligation to adopt federal standards, unless Congress so mandates under its commerce clause power.[162]

13. *Extraterritoriality*

The definition of sanitary and phytosanitary measures in Annex A of the SPS Agreement—"measures to protect human or animal life or health *within the territory of the Member*"[163]—settles an issue regarding the extraterritorial application of SPS measures that arose in the unadopted GATT panel report on *Restrictions on Imports of Tuna*.[164] The panel concluded that application of measures taken under Article XX(b) are limited to the territorial jurisdiction of the country imposing the measures.[165] Conceding that the U.S. ban on imports of tuna was not a disguised restriction on trade, but rather a bona fide measure designed to protect dolphins inadvertently caught with tuna in purse-seine nets, the panel still ruled that the U.S. measure could not extend beyond its territorial jurisdiction. As noted by the GATT panel, if the rule were otherwise, then

> each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal

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[161] *See id.*

[162] In 1997, tension was building between twelve states and the EPA over allegedly lax enforcement of clean air and clean water regulations by the states. The EPA was threatening to cut off federal funds and to limit the authority of those states to enforce those laws. *See States Feud with EPA Over Regulations*, CHRISTIAN SCI. MONITOR, Feb. 19, 1997, at 4.

[163] *See* SPS Agreement, *supra* note 99, Annex A (emphasis added).

[164] *See* Tuna-Dolphin I Panel Report, *supra* note 7, paras. 5.24-5.29, GATT B.I.S.D. (39th Supp.) at 198-200, 30 I.L.M. at 1619-20.

[165] *See id.*

regulations.[166]

The GATT panel concluded that unilateral, extraterritorial application by the United States of health regulations under Article XX(b) is impermissible.[167] Nevertheless, under the SPS Agreement, a Member may insist, for example, that imported food meet its health and safety standards, provided those standards are based on science and risk assessment.[168]

14. *Relationship With the Agreement on Agriculture*

Finally, the problem of misuse of SPS measures is especially acute in connection with imports of agricultural products that are frequently the target of legitimate, and not so legitimate, SPS measures.[169] There was concern in some quarters that as the Uruguay Round Agreement on Agriculture eliminates or reduces barriers to agricultural trade,[170] a new set of SPS measures would be introduced as contingent protection, with the sole purpose of protecting domestic agricultural producers from import competition. To counter preemptively such a development the SPS Agreement was negotiated in tandem with the 1994 Agreement on Agriculture to ensure that the benefits of liberalized agricultural trade are not diluted. Indeed, Article 14 of the Agreement on Agriculture underscores the importance of not allowing unjustified SPS measures to undermine the gains of the Agriculture Agreement. It provides: "Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures."[171]

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[166] *Id.* para. 5.27.

[167] *See id.* para. 7.1.

[168] *See* SPS Agreement, *supra* note 99, art. 5.

[169] *See* Echols, *supra* note 105, at 192.

[170] *See* Agreement on Agriculture, *supra* note 101; EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION § 14.22 (1995).

[171] Agriculture Agreement, *supra* note 101, art. 14. Article 14 of the SPS Agreement also provides that least-developed country members may delay the application of the SPS Agreement until 2000. Other developing countries were permitted to delay the application of the Agreement until January 1, 1997, if necessary because of a lack of technical expertise or infrastructure. No specific problems with regard to the implementation of the Agreement by developing country have been brought to the attention of the Committee on SPS Measures. *See* SPS Agreement, *supra* note 99, art. 14. *See also* MCGOVERN, *supra* note 170, § 14.41.

E. *The TBT Agreement*

A second Uruguay Round Agreement providing a multilateral response to trade-environment disputes is the Agreement on Technical Barriers to Trade (TBT Agreement).[172] The TBT Agreement builds on the fifteen-year experience of the Tokyo Round Standards Code.[173] The TBT Agreement balances the ability of governments and the private sector to implement legitimate standards and the procedures for assessing product conformity with those standards against their unjustified use to protect a domestic industry. The TBT Agreement establishes rules on distinguishing legitimate standards and conformity assessment procedures from protectionist measures and procedures in three areas: (1) the preparation and adoption of technical regulations and standards; (2) conformity assessment procedures and mutual recognition of other countries assessments; and (3) information and assistance about technical regulations, standards, and conformity assessment procedures.[174] Like its predecessor, the TBT Agreement does not establish or prescribe standards, technical regulations, or conformity assessment procedures. Rather, it establishes general procedural requirements to be observed when adopting or using such measures so they do not create unnecessary obstacles to trade.[175]

The TBT Agreement excludes from its scope of coverage sanitary and phytosanitary measures as defined in the SPS Agreement.[176] The SPS Agreement similarly provides that it does not affect Members' rights under the TBT Agreement with respect to measures outside the scope of the SPS Agreement.[177] Despite their mutual exclusivity, the substantive provisions of the two agreements mirror each other, in most respects.[178] A significant difference between the SPS and TBT Agreements is the test for determining whether a measure is impermissibly protectionist. Whereas the TBT Agreement relies on a nondiscrimination test,[179] the inquiry under

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[172] *See* TBT Agreement, *supra* note 100, Annex 1A.

[173] *See* MCGOVERN, *supra* note 170, § 1.11.

[174] *See* TBT Agreement, *supra* note 100, arts. 2-4 (Technical Regulations and Standards), arts. 5-9 (Conformity with Technical Regulations and Standards), arts. 10-12 (Information and Assistance). *See also* MCGOVERN, *supra* note 170, § 1.11.

[175] *See* TBT Agreement, *supra* note 100, art. 2.

[176] *See id.* art. 1.5; SPS Agreement, *supra* note 99, Annex A, para. 1.

[177] *See* SPS Agreement, *supra* note 99, art. 1.4.

[178] *See* MCGOVERN, *supra* note 170, § 7.2421.

[179] *See* TBT Agreement, *supra* note 100, art. 2.1.

the SPS Agreement is whether the measure has a scientific justification and is based on risk assessment.[180] A strict requirement of nondiscrimination would not be practicable for SPS measures that discriminate against imported goods based on their origin. Goods may pose a risk of disease precisely because the goods come from a Member where such disease is prevalent. The same risk might not be true for similar goods coming from another Member. Discrimination is, therefore, tolerated under the SPS Agreement, so long as it is not arbitrary or unjustifiable.[181]

1. *Definitions*

Besides incorporating all of the core principles of the Standards Code, the TBT Agreement provides definitions of several key terms in Annex 1 of the Agreement, thereby clarifying some ambiguities. The TBT Agreement defines a "technical regulation" as a "[d]ocument which lays down product characteristics or their related production processes and methods . . . with which compliance is mandatory."[182] A "standard" in turn is defined as a "[d]ocument approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory."[183] The difference between the two is that the former, being mandatory, is promulgated only by a government body. The latter, being voluntary, may be issued not only by a governmental body but also by recognized non-governmental standardizing bodies, such as the Society of Automotive Engineers.

Like its predecessor, the TBT Agreement does not cover services, sanitary and phytosanitary measures, or government purchasing specifications.[184] However, unlike the Standards Code, the TBT Agreement covers regulations and standards on production processes and methods (PPMs) to the extent they relate to product characteristics, but not as they relate to pollution caused by PPMs.[185]

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[180] *See* SPS Agreement, *supra* note 99, art. 5.1.

[181] *See id.* art. 5.

[182] TBT Agreement, *supra* note 100, Annex 1, para. 1.

[183] *Id.* Annex 1, para. 2.

[184] *See id.* arts. 1.3-1.5.

[185] On the subject of PPMs and PPM-based trade measures, see OECD, PROCESSES AND PRODUCTION METHODS (PPMS): CONCEPTUAL FRAMEWORK AND CONSIDERATIONS ON USE OF PPM BASED TRADE MEASURES (1997).

2. *Preparation, Adoption, and Application of Standards*

The TBT Agreement builds on the obligations of the Standards Code with regard to the preparation, adoption, and application of technical regulations and standards.[186] The TBT Agreement first restates the MFN and national treatment commitments.[187] The Agreement then directs Members not to prepare, adopt, or apply technical regulations that are an unnecessary obstacle to trade.[188] The Agreement defines "unnecessary" as a regulation that is "more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[189] Article 2.2 provides that in assessing risks, "relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products."[190]

Members are encouraged to base their technical regulations on international standards where they exist.[191] If Members do so, and the regulation is for one of the legitimate objectives (i.e., national security, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment),[192] then any other Member complaining about the regulation carries the burden of proving the regulation creates an unnecessary obstacle to international trade.[193] This Article establishes a burden of proof comparable to the one found in the SPS Agreement for Members challenging another Member's technical standards.[194] The complaining Member must show that another measure exists that (1) is reasonably available to the government; (2) fulfills the government's legitimate objectives, and (3) is significantly less restrictive to trade.[195] With respect to the third element, the United States delegation to the Uruguay Round negotiations sought to include a footnote similar to

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[186] *See* TBT Agreement, *supra* note 100, Code of Good Practice for Preparation, Adoption, and Application of Standards, Annex 3.
[187] *See id.* art. 2.1.
[188] *See id.* art. 2.2.
[189] *See id.*
[190] *See id.*
[191] *See id.* art 2.4.
[192] *See id.* art 2.2.
[193] *See id.* art. 2.5.
[194] *See* SPS Agreement, *supra* note 99, art. 4.
[195] *See* TBT Agreement, *supra* note 100, art. 2.2.

that in the sixth paragraph of Article 5 of the SPS Agreement.[196] Other delegations, however, were unprepared to add any language to the TBT Agreement in view of the time pressures to conclude the negotiations.[197]

The leading international body involved in the drafting and promulgation of international technical standards is the International Standards Organization (ISO).[198] The ISO is a federation of ninety-one national standards organizations whose standards are voluntary. The ISO is currently developing two series of standards bearing directly on the TBT Agreement. One series is known as the ISO 14000 series for environmental management systems, environmental auditing systems, life-cycle analysis, and environmental labeling.[199] These standards will have a far ranging impact on environmental management programs of firms located in Members adopting these standards.[200]

The second series is known as ISO 9000, a series of quality standards. These standards cover five areas in the production and manufacturing process: (1) design, development, production, installation, and servicing; (2) build-to-print, installation, and servicing without design; (3) assembly and test; (4) implementation and control; and (5) implementation of ISO 9000 (audits, certification, and registration).[201] The

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[196] This footnote provides:

> [A] measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of . . . protection and is significantly less restrictive to trade.

SPS Agreement, *supra* note 99, art. 5.6 n.3.

[197] *See* URUGUAY ROUND TRADE AGREEMENTS, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 316, vol. 1, 103d Cong., at 656, 780, 790-91, 1126 n.24 (1994).

[198] *See* MCGOVERN, *supra* note 170, § 7.23.

[199] *See generally* RICHARD BARRETT CLEMENTS, COMPLETE GUIDE TO ISO 14000 (1996); DON SAYRE, INSIDE ISO 14000: THE COMPETITIVE ADVANTAGE OF ENVIRONMENTAL MANAGEMENT (1996); TOM TIBOR & IRA FELDMAN, ISO 14000: A GUIDE TO THE NEW ENVIRONMENTAL MANAGEMENT (1996); Paula C. Murray, *The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Environmental Policy?*, 18 U. PA. J. INT'L ECON. L. 577 (1997).

[200] Information on the ISO 14000 series is available from the ISO's website at <http://www.iso14000.com> (visited Oct. 25. 1998). *See generally* Rafe Petersen, *ISO 14000 Internet Databases*, 3 ENVTL. LAW. 613 (1997). Information on the work by the U.S. member of the ISO on ISO 14000, the American National Standards Institute, is available from its website at <http://www.ansi.org/home.html> (visited Oct. 25, 1998).

[201] *See generally* JAYANTHA K. BANDYOPADHYAY, QS-9000 HANDBOOK (1996); ROBERT T. CRAIG, THE NO-NONSENSE GUIDE TO ACHIEVING ISO 9000 CERTIFICATION (1994); GREG HUTCHINS, THE ISO 9000 IMPLEMENTATION MANUAL (1994); JOHN T. RABBIT &

ISO 9000 standards have been adopted by the U.S. automobile industry where the Big Three require that suppliers of raw materials, component parts, subassemblies, and service parts meet ISO 9000 quality standards.[202]

3. *Regulations Based on Performance Characteristics*

Article 2.8 of the TBT Agreement retains the Code requirement that drafted technical regulations be based upon product performance rather than product design or descriptive characteristics.[203] The TBT Agreement leaves it to each manufacturer to determine how best to accomplish the goal of ensuring that the product will perform in a certain manner.[204]

4. *Sub-Central Levels of Government*

With respect to technical regulations and standards issued by state governments, central governments are required to give notice of such regulations and standards, thus enhancing transparency.[205] Central governments are obligated further under Article 3 to "formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 (respecting the preparation, adoption, and application of technical regulations by local government and non-governmental bodies) by other than central government bodies."[206]

5. *Code of Good Practice*

Regarding the preparation, adoption, and application of standards, the TBT Agreement includes a Code of Good Practice for the Preparation, Adoption and Application of Standards[207] that is binding on central

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PETER A. BERGH, THE ISO 9000 BOOK: COMPETITOR'S GUIDE TO COMPLIANCE AND CERTIFICATION (1993); Lisa C. Thompson & William J. Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155 (1997). Information on ISO 9000 is available from the ISO's website at <http://www.iso9000.com> (visited Oct. 25, 1998).

[202] *See* BANDYOPADHYAY, *supra* note 201, at 4.

[203] *See* TBT Agreement, *supra* note 100, art. 2.8.

[204] *See id.*

[205] *See id.* art. 3.2.

[206] *See id.* art 3.5.

[207] *See id.* Annex 3.

governments.[208] The Code of Good Practice was proposed by the EU during the Uruguay Round.[209] It reiterates the obligations of the Agreement applicable generally to central governments, and extends their application to local governmental and non-governmental standardizing bodies that elect to adopt the Code.[210] Eighty-four standardizing bodies had accepted the Code of Good Practice at the end of 1997.[211]

6. *Conformity Assessment Procedures*

The TBT Agreement updates and expands disciplines on conformity assessment procedures. Whereas the Standards Code applied only to testing, Annex 1 to the TBT Agreement defines "conformity assessment procedures" to include all aspects of conformity assessment, including laboratory accreditation and quality system registration.[212] Besides reiterating the national treatment commitment in carrying out conformity assessment procedures,[213] the TBT Agreement encourages acceptance of conformity assessment procedures by other Members, even when those procedures differ from their own.[214]

An issue of special concern to the United States was the formation in the EU of a regional certification system for the mutual recognition of quality assessments for electronics closed to outside suppliers. This development raised fears in the United States that countries outside the EU would not have open access to the certification procedures, thus putting United States electronics industries at a competitive disadvantage in a large and rapidly expanding market. Acceptance of test data generally by foreign laboratories was a high priority for the United States as it entered the Uruguay Round negotiations. Unless test results are mutually recognized, suppliers will be forced to repeat tests before their products can enter the territory of another Member. In this connection, Article 6.1

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[208] *See id.* art. 4.1.

[209] *See* U.S. INT'L TRADE COMM'N, USITC PUB. NO. 2403, OPERATION OF THE TRADE AGREEMENTS PROGRAM 58 (1991).

[210] *See* TBT Agreement, *supra* note 100, arts. 5-9.

[211] *See* WTO, Comm. on Technical Barriers to Trade, *First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, G/TBT/5, at 3, para. 11 (Nov. 19, 1997) [hereinafter WTO, *First Triennial Review*], *available in* WTO Doc. Website, *supra* note 4.

[212] *See* TBT Agreement, *supra* note 100, Annex I, para. 3.

[213] *See* TBT Agreement, *supra* note 100, art. 5.1.

[214] *See id.* art. 6.1.

directs Members to recognize other Members' test results, whenever possible.[215] As WTO Members adopt internationally-recognized accreditation standards for laboratory recognition that are promulgated by bodies such as the ISO and the International Electrotechnical Commission, the issue of mutual recognition of conformity assessment procedures should ultimately be defused.

The Agreement makes the minimum derogation principle expressly applicable to conformity assessment procedures by providing that "conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create."[216] To that end: procedures must be undertaken and completed as expeditiously as possible; the standard processing period must be published and the documentation promptly handled; the location of conformity assessments and sample selection must not be unnecessarily inconvenient; and a procedure must be established for reviewing complaints about the conformity assessment procedures.[217]

As is the case with technical regulations and standards, central governments are obligated to take "such reasonable measures as may be available to them," ensuring compliance by state and local government bodies and non-governmental bodies with the Agreement's conformity assessment procedures.[218]

Article 6.3 addresses accrediting persons, in the exporting Member, to perform conformity assessment procedures that are satisfactory to the importing Member. From the perspective of an importing WTO Member, unless the exporting Member's testing laboratories have been accredited by authorities of the importing Member, the validity of test data may be suspect. In this connection, Article 6.3 encourages Members to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures.[219] Mutual recognition agreements eliminate the need for duplicative product testing, inspection, or certification in both the exporting and importing Member. To that end, the

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[215] *See id.*
[216] *Id.* art. 5.1.2.
[217] *See id.* art. 5.2.
[218] *See id.* arts. 7, 8.
[219] *See id.* art. 6.3.

United States and the EU concluded mutual recognition agreements in 1997.[220]

7. *Enquiry Points*

Article 10 of the TBT Agreement endeavors to make national product regulations, standards, and conformity assessment procedures transparent by establishing "enquiry points" where all reasonable enquiries may be directed for obtaining relevant documents.[221]

8. *The Committee on Technical Barriers to Trade*

Article 13 establishes the Committee on Technical Barriers to Trade to oversee the operation of the Agreement and to conduct an annual review.[222] Pursuant to Article 14, disputes arising under the Agreement are resolved under the Dispute Settlement Understanding, the umbrella arrangement for resolving all GATT-WTO disputes.[223]

9. *Triennial Review*

Finally, Article 15.4 of the TBT Agreement provides that "[n]ot later than the end of the third year of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement . . . ."[224] The TBT Committee completed its first triennial

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[220] In June 1997, the United States and the EU concluded a package of mutual recognition agreements (MRAs) in six sectors covering approximately $50 billion in two-way trade. The MRAs will be phased in and fully implemented in 18 months for recreational craft, two years for telecommunication and electronic products, and three years for pharmaceuticals and medical devices. *See Agreement on Mutual Recognition Between the United States of America and the European Communities* (visited Feb. 15, 1999) <http://www.ustr.gov/agreements/mra/mra1.pdf>. Under the 1993 Maastricht Treaty on European Union, the European Communities or "EC" became the European Union. The Maastricht Treaty, however, did not vest the EU with international legal personality. Consequently, the entity that represents the 15-member EU in its trade relations with third countries is still referred to as the European Communities or EC.

[221] *See* TBT Agreement, *supra* note 100, art. 13. *See also* MCGOVERN, *supra* note 170, § 7.245.

[222] *See* TBT Agreement, *supra* note 100, art. 13.

[223] *See id.* art. 14.

[224] *Id.* art. 15.4.

review at the end of 1997. In that review, the Committee reached a number of conclusions: (1) an adjustment of the rights and obligations of the Agreement and amendments to its text are not necessary; (2) insofar as transparency and notification of national regulations and administrative decisions are concerned, Members as a whole have not implemented their Article 15.2 commitments satisfactorily; and (3) multiple product testing and certification have a restrictive effect on trade and, therefore, the principles of "one standard, one test," and "one certification, one time" should be pursued.[225]

F. *The Agreement on Subsidies and Countervailing Measures*

Before the adoption of the Agreement on Subsidies and Countervailing Measures (SCM Agreement),[226] the successor agreement to the Tokyo Round Subsidies Code, government subsidies to firms for the purpose of complying with pollution abatement laws received no special treatment. Products of firms receiving such subsidies, if not generally available to firms throughout the country, were subject to countervailing duties if they were exported to another GATT contracting party and caused injury to a domestic firm.[227] The SCM Agreement changes this result on a limited basis.

In the course of the Uruguay Round negotiations serious consideration was given to expanding the Tokyo Round Subsidies Code to authorize transitional assistance to firms for pollution abatement expenditures. That proposal was adopted in Article 8 of the SCM Agreement, which makes environmental subsidies non-actionable, provided narrowly drawn criteria are met.

Article 8.2(c) of the SCM Agreement provides that assistance to promote adaptation of existing facilities[228] to new environmental requirements imposed by law or regulation that result in greater constraints and financial burdens on firms are non-actionable, provided the assistance meets the following five criteria:

(1) it is a one-time, non-recurring measure;

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[225] *See* WTO, *First Triennial Review*, *supra* note 211, at 2, 7.

[226] SCM Agreement, *supra* note 102.

[227] *See* GATT, *supra* note 6, art. VI.

[228] The term "existing facilities" is defined as "facilities which have been in operation for at least two years at the time when new environmental requirements are imposed." SCM Agreement, *supra* note 102, art. 8.2(c) n.33.

(2) it is limited to twenty percent of the cost of adaptation;

(3) it does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms;

(4) it is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(5) it is available to all firms which can adopt the new equipment and/or production processes.[229]

All environmental subsidies must be notified in advance to the WTO Committee on Subsidies and Countervailing Measures in sufficient detail to permit monitoring for compliance with the SCM Agreement.[230] If a Member believes that an otherwise non-actionable environmental subsidy is having a seriously adverse effect on a domestic industry, then the Member may seek a determination of the matter from the SCM Committee.[231]

The SCM Agreement contains a sunset provision on environmental subsidies of five years, unless the SCM Committee agrees to extend it.[232]

G. *The Agreement on Agriculture*

A second Uruguay Round Agreement also permits environmental subsidies in limited circumstances.[233] Under the Agreement on Agriculture, developed-country Members agree to reduce their domestic agricultural subsidies twenty percent from 1986-88 base-period levels by 2000.[234] These reductions are based on an Aggregate Measurement of Support (AMS), which is a calculation of support payments received during the base period.[235] Generally excluded from the AMS calculation are support programs that have minimal trade-distorting effects on agricultural production.[236] Expressly excluded are payments received

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[229] *See id.*

[230] *See id.* art. 8.3. The U.S. implementing legislation is located at 19 U.S.C. § 1677(5B)(D)(ii).

[231] *See* SCM Agreement, *supra* note 102, art. 9.1.

[232] *See id.* art. 31.

[233] The SCM Agreement's provisions on actionable domestic subsidies does not cover agricultural subsidies. *See id.* art. 5.

[234] *See* Agreement on Agriculture, *supra* note 101, art.6.

[235] *See id.* art. 1(a).

[236] *See id.* Annex 2:1.

under environmental programs.[237]

To qualify for exclusion from the AMS calculation, the environmental program payments must be made under a clearly defined government environmental or conservation program and must be dependent upon the fulfillment of specific conditions under the program.[238] The payment must be limited to the additional costs or loss of income involved in complying with the government program.[239]

Under the Article 13 "peace clause" of the Agreement on Agriculture, no countervailing duty action may be brought against such environmental subsidies during the nine-year implementation period of the Agreement.[240]

H. *The Dispute Settlement Understanding*

Criticisms of the dispute settlement process under GATT 1947 are numerous, and explain in part why unilateral measures were sometimes used in resolving trade-environment disputes. The most frequently recurring complaints about dispute settlement under GATT 1947 included the following:

- GATT lacked an integrated dispute settlement procedure, with the Tokyo Round Codes containing separate dispute settlement mechanisms.
- GATT disputes were sometimes resolved through the grant of waivers.
- Small countries were handicapped in achieving effective results against large countries.
- The GATT panel process was lengthy and subject to delaying tactics.
- GATT contained no provision for the automatic establishment of a panel.
- Inadequate staff and experts often hamstrung panels in their factfinding.
- The insistence on approval of panel reports by consensus permitted the losing country to block adoption of reports.
- Effective enforcement and sanctions were almost nonexistent,

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[237] *See id.* Annex 2:12.
[238] *See id.*
[239] *See id.*
[240] *See id.* art. 13.

with the exception of bilateral retaliation.

- GATT did not require notification of the implementation of a panel recommendation.[241]

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding or DSU) addresses almost all of these criticisms. As noted in DSU Article 3.2, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."[242] To that end, the DSU establishes an integrated, rules-based dispute settlement process with a right of appellate review. The DSU virtually assures that all panel or Appellate Body reports will be adopted expeditiously and without modification.[243]

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[241] For an analysis of dispute settlement under GATT 1947 and criticisms of that process, see generally William J. Davey, *The GATT Dispute Settlement System: Proposals for Reform in the Uruguay Round, in* WORKSHOP ON THE MULTILATERAL TRADE NEGOTIATIONS OF GATT (1992); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 56-80 (1990); PIERRE PESCATORE, HANDBOOK OF GATT DISPUTE SETTLEMENT (1992); U.S. INT'L TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS (USITC Pub. 1793, 1995); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987); Robert E. Hudec, *A Statistical Profile of the GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1 (1993); Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, J. INT'L ARB., Dec. 1987, at 53.

Full texts of adopted GATT 1947 panel reports are available from the WTO's website. *See* WTO Doc. Website, *supra* note 4.

[242] DSU, *supra* note 103, art. 3.2.

[243] For additional analyses of the WTO dispute settlement process, see generally FRANK W. SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS: THE WORLD TRADE ORGANIZATION (WTO) AND DISPUTE RESOLUTION (1995); Grant Aldonas, *The World Trade Organization: Revolution in International Trade Dispute Settlements*, DISP. RESOL. J., Sept. 1996, at 73; Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416 (1996); Judith H. Bello & Alan F. Holmer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095 (1994); John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 69 (1997); Azar M. Khansari, *Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 20 HASTINGS INT'L & COMP. L. REV. 183 (1996); Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389 (1995).

DSU Article 1 integrates the dispute settlement process of the GATT-WTO system by extending the DSU's scope of coverage to all disputes brought under any of the GATT-WTO Agreements.[244] With the exception of certain special or additional rules contained in eight of the WTO multilateral trade agreements (MTAs) listed in Appendix 2 of the DSU, the rules and procedures of the DSU apply to all disputes.[245]

In a flank attack on unilateral actions taken by the United States under Section 301 of the Trade Act of 1974,[246] DSU Article 23, which is captioned "Strengthening of the Multilateral System," flatly prohibits Members from making unilateral determinations on the following matters: (1) whether an Uruguay Round agreement has been violated; (2) whether another Member has failed to implement a DSB recommendation within a reasonable period of time; or (3) whether the level of suspension of concessions is appropriate.[247] The DSU is the exclusive mechanism for resolving these issues, absent the mutual agreement of the disputing Members.[248]

The DSB observed in its 1996 annual report that "[t]here has been an evident tendency to use the DSU in settling trade disputes in accordance with the aim of Article 23 of the DSU . . . ."[249] Trade areas that are not the subject of an MTA (e.g., foreign direct investment) are outside the scope of the DSU. They may, therefore, be the subject of a Section 301 proceeding.[250] Nevertheless, with regard to trade-environment

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[244] *See* DSU, *supra* note 103, art. 1.1, app. 1. The parties to the Civil Aircraft Agreement have not yet agreed to submit disputes arising under that Agreement to the DSB.

[245] *See id.* art. 1.2. For example, Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures provides that in disputes involving scientific or technical issues, WTO panels should seek advice from experts chosen by the panel. *See* SPS Agreement, *supra* note 99, art. 11.2.

[246] 19 U.S.C. §§ 2411-2420 (1994).

[247] *See* DSU, *supra* note 103, art. 23.

[248] DSU Article 25 authorizes disputing Members to agree mutually to resolve their dispute through binding arbitration in lieu of DSU panel proceedings. *See id.* art. 25.

[249] DSB 1996 Annual Report, on file with author.

[250] *But see* Uruguay Round Agreements Act § 102(a)(2) (codified at 19 U.S.C. § 3512(a)(2)) which provides:

> Nothing in this Act shall be construed—
>
> (A) to amend or modify any law of the United States, including any law relating to—
>
> (i) the protection of human, animal, or plant life or health,
>
> (ii) the protection of the environment, or
>
> (iii) worker safety, or

disputes, considering the breadth of the SPS Agreement, the TBT Agreement, and GATT Article XX, there is little room for argument that a trade-environment dispute is beyond the jurisdiction of the GATT-WTO system.

I. *The WTO Committee on Trade and Environment*

As the Uruguay Round negotiators became increasingly aware of, and perhaps embarrassed by, the lack of attention environmental issues received in the Round, the negotiators resolved that the interaction of trade and the environment should receive more systematic consideration by the WTO. To that end, the Decision on Trade and Environment was included in the Uruguay Round Final Act.[251] The decision calls for the creation of a Committee on Trade and Environment (CTE), the successor body to the moribund GATT Committee on Trade and Environment.[252] The CTE has the following terms of reference:

> • identify the relationship between trade measures and environmental measures in order to promote sustainable development; and
>
> • make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable, and nondiscriminatory nature of the system.[253]

The CTE is charged with the tasks of investigating the links between trade and the environment, making recommendations on how to ease trade-environment conflicts, and developing a work program.[254]

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title, unless specifically provided for in this Act.

Id. See generally C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209 (1997).

[251] *See* WTO, *Ministerial Decision of 14 April 1994 on Trade and Environment*, 33 I.L.M. 1267 (1994).

[252] *See id.* at 1268.

[253] *Id.*

[254] *See* Hunt, *supra* note 95, at 178-81; Jennifer Schultz, *The GATT/WTO Committee on*

1. *WTO and CTE Relations with NGOs*

Many nongovernmental organizations (NGOs) within the environmental community complain that the work of the WTO and the CTE is closed to them.[255] The United States has pressed for making the work of the CTE, in particular, and the WTO in general, more open and transparent to the public. In this connection, in July 1996, the WTO General Council adopted a decision, "Guidelines for Arrangements on Relations with Non-Governmental Organizations."[256] Recognizing the important contribution that NGOs can make in increasing public awareness regarding its activities, the WTO agreed to improve transparency and to develop better lines of communication with NGOs in several respects. First, the WTO agreed to derestrict documents more promptly than in the past and to make them available on the WTO's on-line computer network.[257] Second, direct contacts with NGOs by the WTO Secretariat through symposia also are encouraged. For example, in May 1997, the WTO Secretariat organized a symposium with NGOs on trade, environment, and sustainable development.[258] Third, observer status at CTE meetings has been extended to the Secretariats of CITES, the Montreal Protocol, the Basel Convention, and the Framework Convention on Biological Diversity.

The WTO Secretariat periodically has held informal meetings with NGOs concerned with matters relating to the WTO's work on trade, the environment, and sustainable development. The first such meeting was

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Trade and the Environment—Toward Environmental Reform, 89 AM. J. INT'L L. 423, 432-34 (1995); Kristin Woody, *The World Trade Organization's Committee on Trade and Environment*, 8 GEO. INT'L ENVTL. L. REV. 459, 463 (1996).

[255] *See, e.g.*, Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996) [hereinafter Charnovitz II]; Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996).

[256] *See Trade and Environment Bulletin No. 16* (visited Oct. 25, 1998) <http://www.wto.org/wto/environ/teo16.html>.

[257] Formal procedures for the circulation and derestriction of WTO documents were adopted by the General Council on July 18, 1996. *See Procedures for the Circulation and Derestriction of WTO Documents*, WT/L/160/Rev.1 (1996) (visited Mar. 20, 1998) <http://www.wto.org/wto/environ/te016.htm>.

[258] For a summary of the proceedings, see *WTO Symposium on Trade, Environment and Sustainable Development*, Press/TE 019 (Aug. 14, 1997) *available in* WTO Doc. Website, *supra* note 4.

held in September 1996, at which approximately thirty-five NGOs representing environment, development, and consumer interests attended.[259] Many participants expressed disappointment with the WTO's Guidelines to the extent they fall short of the NGOs' goal of complete WTO transparency and public accountability. Of special concern was the lack of access for NGOs to WTO meetings. Additionally, concern was raised regarding the number of documents that did not have to be derestricted for up to six months. NGOs did, however, applaud the WTO's creation of the publication, *Trade and Environment Bulletin,* as a useful step toward increased transparency and improved dialogue.[260]

Whether and how to accommodate the desires of NGOs for greater participation in the work of the WTO remains an unresolved issue, at least for NGOs. To what extent, if any, should NGOs participate in the policy work of the WTO and its committees? Second, to what extent, if any, should NGOs participate in the WTO dispute settlement process, either as parties, intervenors, *amicus curiae*, witnesses, or observers?[261]

Regarding the first question, if the model for greater NGO participation in the policy work of the WTO is the role played by NGOs in other international organizations, such as the United Nations, the International Labor Organization, or CITES, then NGOs have a good argument for increased participation in that facet of the WTO's work.

Regarding the second question, NGOs insist on participatory rights in the WTO dispute settlement process, even to the point of having standing to initiate panel dispute proceedings as complaining parties. Currently, NGOs have no right to participate formally in WTO dispute settlement proceedings. The ability to provide WTO panelists with additional information could hardly be a bad thing, if fully informed decision making is the desideratum. NGO participation in the WTO dispute settlement process as *amicus curiae* could prove useful. Permitting NGO participation at the party or intervenor level, however, could only have the effect of burdening an ever-growing WTO panel docket,[262] delaying the dispute settlement process, and, even worse,

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[259] *See Trade and Environmental Bulletin No. 16, supra* note 256.

[260] *See id.*

[261] *See* Charnovitz II, *supra* note 255, at 340; Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997).

[262] As of December 1998, the WTO had received 154 consultation requests involving 117 distinct matters. An overview of the state-of-play of WTO disputes is available from the WTO's website. *See* WTO Doc. Website, *supra* note 4.

creating disenchantment with that process among its intended users, WTO Members. Recalling that one of the major complaints about GATT 1947 was the poor state of its dispute settlement process, avoiding the mistakes of the past is critical to the future success of the WTO Dispute Settlement Understanding. Thus, the argument for direct NGO participation in the WTO dispute settlement process is, on balance, not especially compelling.

In the WTO panel proceeding, *Regime for the Importation, Sale and Distribution of Bananas,*[263] lawyers representing private parties attempted to attend the panel meetings. Consistent with GATT practice and WTO dispute settlement proceedings, only representatives of governments may attend panel meetings.[264] Because private lawyers are not subject to DSU disciplinary rules, their presence in panel meetings could give rise to concerns about breaches of confidentiality.

Although private parties representing private interests have no right to participate directly in WTO panel proceedings, in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, several environmental NGOs submitted unsolicited *amicus* briefs with the panel that defended the U.S. import ban on shrimp. The panel concluded that under Article 13.2 of the DSU, only information that the panel *seeks* (i.e., actually solicits) may be considered by a panel. Nevertheless, the panel invited the United States, if it so desired, to include the NGO submissions as part of its own submission.[265] The Appellate Body affirmed the panel's decision to permit the United States to include the NGO submissions as part of its own submission, but reversed the panel's other conclusion, holding that a panel is free to accept unsolicited submissions from interested groups if such information would be helpful to the panel in reaching its decision.[266]

2. *The CTE's 1996 Report*

The CTE was directed to make a progress report at the WTO's first

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[263] WTO, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX (1997).

[264] *See id.* para. 7.11; DSU, *supra* note 103, app. 3:2. *See generally* Schleyer, *supra* note 261.

[265] *See* Report of the WTO Panel, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, para. 7.8 (1998).

[266] *See* Report of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, at 39, para. 110 (1998).

biennial meeting of the Ministerial Conference held in Singapore in December 1996.[267] The long-awaited inaugural report of the CTE came as a major disappointment for those observers who had expected more ambitious results.[268] In the view of traders, the CTE Report was very cautious in its conclusions and recommendations. Some WTO ministers expressed disappointment with the Report's failure to resolve most of the ten agenda items that the CTE addressed.[269] Some environmental groups savaged the Report for giving the WTO dispute settlement process primacy over any applicable dispute settlement mechanism in an MEA in cases where the WTO and the MEA had concurrent jurisdiction over a trade-environment dispute.[270] Regardless of one's political persuasion, the Report looks every bit the compromise document, that is, one designed to offend no one and thus guaranteed to displease everyone.

Two important assumptions guided the work of the CTE in the preparation of its 1996 Report: (1) WTO competence for policy coordination in this area is limited to trade; and (2) if problems of policy coordination are identified by the CTE, then they are to be resolved in a way that upholds and safeguards the principles of the multilateral trading system. The CTE Report addressed the following ten items, offering conclusions and recommendations on several of them.

First, the CTE addressed "[t]he relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements."[271] Noting that governments endorsed Principle 12 of the Rio Declaration that unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided, the CTE endorsed multilateral solutions to trade concerns.[272] The CTE urged

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[267] *See* WTO, *WTO Committee on Trade and Environment Concludes its Work and Adopts its Report to the Singapore Ministerial Conference*, PRESS/TE 015, para. 1 (Nov. 18, 1996).

[268] *See* WTO, Comm. on Trade and Env't, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996) [hereinafter CTE 1996 Report], *available in* WTO Doc. Website, *supra* note 4. For a summary of CTE activities during 1995, see Comm. on Trade and Env't, *Summary of Activities of the Committee on Trade and Environment (1995) Presented by the Chairman of the Committee*, WT/CTE/W/17 (Dec. 12, 1995) *available in* WTO Doc. Website, *supra* note 4.

[269] *See Ministers Voice Disappointment with Weakness of CTE Report*, 13 Int'l Trade Rep. (BNA) 1925 (1996).

[270] *See id.*

[271] CTE 1996 Report, *supra* note 268, item 1 & para. 171.

[272] *See id.* para. 171.

cooperation between the WTO and the institutions established under MEAs.

Second, the CTE examined "[t]he relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system."[273] While this issue is perhaps the most important—and certainly the knottiest—of all the items addressed by the CTE, the CTE dodged it by noting that further examination and analysis of these policies and measures is required. The CTE made no conclusions or recommendation.[274]

Third, the CTE considered "[t]he relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes,"[275] and "requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling, and recycling."[276] Under this agenda item the CTE focused on voluntary eco-labeling programs. The CTE viewed such programs as a positive development, subject to concerns over transparency in their preparation, adoption, and application.[277]

Fourth, the CTE reviewed "[t]he provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects."[278] The CTE concluded that no modifications to existing WTO transparency rules were required to ensure adequate transparency for existing trade-related environmental measures. The Committee recommended that the Secretariat compile all notifications of trade-related environmental measures and collate them in a single database accessible to WTO Members.[279]

Fifth, the CTE discussed "[t]he relationship between the dispute

[273] *Id.* item 2 & para. 179.
[274] *See id.* paras. 180-81.
[275] *Id.* item 3A & para. 182.
[276] *Id.* item 3B & para. 183.
[277] *See id.* paras. 183-84. *See generally* Staffin, *supra* note 133. In April 1997, the CTE published an overview of the current work being done within the Codex Alimentarius Commission, the International Trade Center, the OECD, UNCTAD, the United Nations Environment Program, the United Nations Industrial Development Program, and the ISO on eco-labeling. *See* WTO, Comm. on Trade and Env't, *Eco-Labelling: Overview of Current Work in Various International Fora*, WT/CTE/W/45 (Apr. 15, 1997) *available in* WTO Doc. Website, *supra* note 4.
[278] CTE 1996 Report, *supra* note 268, item 4 & para. 187.
[279] *See id.* para. 189-92.

settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements."[280] This agenda item was watched closely by NGOs, especially environmental groups. The CTE's resolution of it caused a stir. The CTE recommended that in the event a trade-environment dispute arises between WTO Members that also are parties to a controlling MEA, WTO Members have the right to bring the dispute to the WTO for resolution. The CTE noted:

> While WTO Members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA.[281]

The CTE thus encouraged such parties to resort to the dispute settlement mechanisms of the MEA, but gave primacy to the DSU. The United States took exception to the CTE's conclusion that "[t]here is no clear indication for the time being of when or how they [i.e., trade measures included in MEAs] may be needed or used in the future."[282] From the United States' perspective, there is no legal impediment for WTO Members that also are parties to an MEA to abide by the dispute resolution mechanism of the MEA and bypass resort to the WTO Dispute Settlement Understanding.[283]

Sixth, the CTE analyzed "[t]he effect of environmental measures on market access . . . and environmental benefits of removing trade restrictions and distortions."[284] This agenda item was the centerpiece of the CTE Report for developing-country Members. The CTE's focus was on ways in which the WTO can contribute to making international trade and environmental policies mutually supportive. Such policies, said the CTE, should include trade liberalization and development and environmental policies determined at the national level for the promotion

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[280] *Id.* item 5 & paras. 170-79.
[281] *Id.* para. 178.
[282] *Id.* para. 174(i).
[283] *See Environment: EPA Hopes to Shift WTO Panel Focus Away from Trade Provisions in Environmental Pacts*, 14 Int'l Trade Rep. (BNA) 19 (1997).
[284] CTE 1996 Report, *supra* note 268, item 6 & para. 195.

of sustainable development.[285] Recognizing that an open, equitable, and nondiscriminatory multilateral trading system and environmental protection are essential to promoting sustainable development, the CTE expressed concern that environmental measures might be used to deny developing countries market access to developed-country markets.[286] The CTE offered no concrete recommendations, however.

Seventh, the CTE dealt with the issue of exports of domestically prohibited goods.[287] It recommended that the WTO Secretariat gather relevant information on this issue. The Committee also encouraged Members to provide technical assistance to developing countries, often the export target for such goods.[288]

Eighth, the CTE examined relevant provisions of the TRIPS Agreement.[289] The Committee noted the importance of technology transfer of environmentally-sound technologies and products to developing countries to enable them to meet the terms and conditions stipulated in MEAs.[290]

Ninth, the CTE discussed "[t]he work program envisaged in the Decision on Trade in Services and the Environment,"[291] but was unable to identify any measures that Members arguably might want to impose for environmental purposes to trade in services not covered already under the health and safety exceptions of GATS Article XIV(b).[292]

In its final agenda item, the CTE considered "[i]nput to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO."[293] The Committee acknowledged the benefit of closer consultations with NGOs, and urged greater transparency in the work of the Committee. The CTE extended observer status to intergovernmental organizations, including those responsible for one or more MEAs.[294]

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[285] *See id.* para. 196.
[286] *See id.* para. 197.
[287] *See id.* item 7 & para. 200.
[288] *See id.* paras. 203, 205.
[289] *See id.* item 8 & para. 206.
[290] *See id.* para. 207.
[291] *Id.* item 9 & para. 210.
[292] *See id.* para. 210.
[293] *Id.* item 10 & para. 212.
[294] *See id.* para. 217.

3. *The CTE's Work Program*

The Ministerial Declaration adopted at the conclusion of the 1996 Singapore Ministerial Conference contains the following reference to trade and the environment:

> The Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, *inter alia*, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development . . . . The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report.[295]

One of the highest priorities for the CTE should be better integration of the GATT-WTO system with MEAs. To that end, the work program of the CTE will have to address: (1) discrimination among products based on process and production methods (PPMs); (2) the relationship of GATT and the WTO Agreements to MEAs; (3) the circumstances under which trade measures may be used on environmental grounds; and (4) the scope of the Article XX exceptions when invoked on environmental grounds. None of these issues was thoroughly addressed or resolved in the CTE's 1996 Report. The United States has identified these four issues as high priority items.[296] The CTE's work program for 1997 included all of the agenda items listed in its 1996 Report.[297]

J. *GATT and WTO Panel Reports Dealing with Environmental Disputes*

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[295] WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC, para. 16 (Dec. 13, 1996) *available in* WTO Doc. Website, *supra* note 4.

[296] *See* USTR REPORT ON ENVIRONMENTAL ISSUES, *supra* note 89, at 1291.

[297] *See* WTO, *The WTO Committee on Trade and Environment Establishes Its Work Programme and Schedule of Meetings for 1997*, PRESS/TE 017 (March 26, 1997) *available in* WTO Doc. Website, *supra* note 4. Updates on the progress of the CTE are available from *Trade and Environment News Bulletins*, which are posted on the WTO's website. *See* WTO Doc. Website, *supra* note 4.

While the trade-environment dispute settlement scorecard has sent, at times, environmentalists into apoplectic fits, the fact remains that an effective, binding dispute settlement mechanism exists for resolving trade-environment disputes to which the United States has unequivocally committed itself. Even if the results of that process have left environmentalists shaking their heads, the process is one that strengthens multilateral approaches to resolving such disputes.

1. *The Tuna/Dolphin Dispute*

The most notorious GATT panel decision involving trade measures taken on environmental grounds concerned the United States' import ban on tuna from Mexico.[298] The United States imposed the import ban under provisions of the Marine Mammal Protection Act limiting the number of dolphins that may be killed when harvesting tuna using the purse-seine method.[299] The United States justified its ban as being a necessary measure to protect animal life and to conserve exhaustible natural resources under Article XX(b) and (g), respectively.[300] Mexico countered that the ban violated the national treatment obligation of Article III and was an illegal quantitative restriction in violation of Article XI.[301]

The panel agreed with Mexico that the United States violated the national treatment obligation insofar as the tuna harvesting regulations were concerned. The regulations did not cover tuna products per se, but rather the method by which tuna were caught.[302] In the panel's view, the only regulations that are permissible under Article III are those that: (1) regulate the imported product and not the method used to produce or process the product; and (2) do not discriminate against the imported product in favor of the domestic product.[303] The U.S. regulations did not pass muster under either prong of this test because the regulations condemned the method of harvesting tuna, rather than the imported product per se.

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[298] *See* Tuna-Dolphin I Panel Report, *supra* note 7; *see also* Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?* 49 WASH. & LEE L. REV. 1407, 1409-22 (1992).

[299] *See* Marine Mammal Protection Act of 1972 § 101, 16 U.S.C. §1371 (1994).

[300] *See* GATT, *supra* note 6, art. XX(b) & (g).

[301] *See id.* arts. III, XI.

[302] *See* Tuna-Dolphin I Panel Report, *supra* note 7, paras. 5.9, 5.11-5.12.

[303] *See id.* paras. 5.11-5.12.

In addition, the U.S. domestic tuna fleet knew in advance the allowable dolphin kill. The Mexican fleet, on the other hand, had to guess at that figure. The fleet could learn what the figure was only after it had caught its tuna because the figure for foreign catches was based on a percentage of the actual dolphins killed by the United States fleet during that fishing season. The GATT panel found that this methodology discriminated in favor of the domestic fleet and, therefore, further violated Article III's national treatment obligation.[304]

Regarding the Article XX(b) and (g) exceptions, the panel conceded that those exceptions do not expressly prohibit the exercise of extraterritorial jurisdiction.[305] At the same time, the panel noted that if the U.S. interpretation was accepted, that is, that United States regulations could be applied extraterritorially, then Country A could unilaterally impose on any other country its own health and safety measures "from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."[306] The GATT panel rejected the unilateral approach that the United States took with Mexico, finding it contrary to GATT multilateralism, and thus making the ban not "necessary" within the meaning of Article XX(b).[307] The United States should have taken a different tack, the panel suggested, such as attempting to negotiate an international agreement with Mexico.[308]

Many of the legal issues analyzed in the 1991 panel report were reprised in 1994 in another dispute involving the United States embargo on imported tuna from countries that had unacceptably high dolphin-kill rates. In a complaint brought by the EU against the United States, a GATT panel once again agreed that the Marine Mammal Protection Act violates the national treatment commitment of Article III.[309]

The postscript to the *Tuna/Dolphin* dispute is that pursuant to the 1991 panel's suggestion that a bilateral or multilateral approach be taken by the United States, the Agreement for the Reduction of Dolphin

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[304] *See id.* para. 5.15.

[305] The Mexican fishing did not occur in U.S. waters. *See id.* para. 5.24-5.29.

[306] *Id.* para. 5.27.

[307] *See id.* para. 5.28.

[308] *See id.*

[309] *See* Tuna-Dolphin I Panel Report, *supra* note 7; *see also* Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10,567 (1994); Paul J. Yechout, *In the Wake of* Tuna II*: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247 (1996).

Mortality in the Eastern Pacific Ocean was concluded in 1992.[310] Mexico and the United States are active participants in the work of the Review Panel and Scientific Advisory Board established under that Agreement.[311] The Agreement establishes a per-vessel limit on dolphin mortalities that is reduced each year,[312] requires an observer on larger tuna purse-seine vessels,[313] and establishes a research program to develop new fishing gear and technologies to reduce, and, if possible, to eliminate, dolphin mortality.[314]

2. *Other GATT Panel Reports*

Although the 1991 *Tuna/Dolphin* decision is the best-known of the Article XX(b) and (g) GATT panel reports, it was preceded by three GATT panel reports dealing with import bans taken ostensibly on environmental and/or resource conservation grounds.[315] Two of those earlier GATT panel reports involved the interpretation of Articles XX(g) (resource conservation measures) and XI (the general prohibition against quotas).

In the first report, issued in 1982, Canada challenged a United States import ban on tuna from Canada.[316] The United States defended its action as a measure taken under the Article XX(g) exception for conservation of fish stocks.[317] Canada countered that the ban was imposed in retaliation for Canada's seizure of American-flagged fishing vessels caught taking tuna without permission within Canada's 200-mile exclusive economic zone off its Pacific coast.[318]

The GATT panel concluded that the United States ban could not be defended under Article XX(g) because the United States had not taken any

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[310] *See* Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June 1992, 33 I.L.M. 936 [hereinafter Dolphin Mortality Agreement].

[311] *See id.*, apps. II & IV.

[312] *See id.*, pmbl.

[313] *See id.* para. 12.

[314] *See id.* app. IV.

[315] For a discussion of the GATT dispute settlement process prior to 1994, see Judith H. Bello & Alan F. Holmer, *Settling Disputes in the GATT: The Past, Present, and Future*, 24 INT'L LAW. 519 (1990).

[316] *See* GATT Panel Report, *United States— Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT B.I.S.D. (29th Supp.) at 91 (adopted Feb. 22, 1982) [hereinafter *Tuna Restrictions* Report].

[317] *See id.* para. 3.5.

[318] *See id.* para. 3.13.

parallel domestic measures to limit the tuna catch of the United States domestic fleet. The ban, therefore, constituted an impermissible quantitative restriction in violation of Article XI.[319]

The second GATT panel report also dealt with the interpretation of Article XX(g).[320] In that 1988 report, the United States complained about a blanket export ban on unprocessed herring and salmon imposed by Canada. Because Canada had not placed any domestic restrictions on Canadian consumption of herring and salmon, the Canadian export ban was not "primarily aimed" at conservation, in the view of the GATT panel. The panel rejected Canada's argument that the so-called quality exception under Article XI:2(b) justified the ban.[321] Canada's export ban was across-the-board and did not permit shipments that might comply with the standards.[322]

The third GATT panel report involved a Canadian and EC complaint against a U.S. surcharge imposed on imported oil and chemicals to fund the Superfund environmental cleanup law.[323] Because the additional taxes on imported oil were higher than the comparable taxes on domestically produced oil, Canada argued that the Superfund tax violated GATT's national treatment obligation.[324]

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[319] *See id.* para 4.1-4.16.

[320] *See* GATT Panel Report, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT B.I.S.D. (35th Supp.) at 98 (adopted Mar. 22, 1988) [hereinafter *Herring and Salmon* Panel Report].

[321] *See id.* para 4.2-4.3.

[322] In the aftermath of the GATT panel report, Canada removed the export restrictions, but substituted regulations that required herring and salmon caught in Canadian waters to be landed in Canada before being exported. The United States brought a complaint under the Chapter 18 dispute resolution procedures of the Canada-U.S. Free Trade Agreement. The United States complained that although the new regulations were not a direct export ban, they had that effect because of the additional time and expense incurred in off-loading and processing the fish in Canada before export. The NAFTA 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 the CUSFTA incorporated through Article 407. *See* Ted L. McDorman, *International Trade Law Meets International Fisheries Law: The Canada-U.S. Salmon and Herring Dispute*, 7 J. INT'L ARB. 107 (1990).

[323] *See* GATT Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, GATT B.I.S.D. (34th Supp.) at 136 (adopted June 17, 1987) [hereinafter Taxes on Petroleum Report].

[324] *See id.*, para. 3.1; GATT, *supra* note 6, art. III:2. Article III:2 prohibits the imposition of taxes that discriminate in favor of the like domestic product relative to imports. Article

The GATT panel accepted Canada's position with regard to the tax on imported oil.[325] It agreed, however, with the United States that the tax on nonpetroleum chemical imports constituted a legitimate border-tax adjustment permitted under Article II:2(a).[326]

The last Article XX(g) panel report issued under GATT 1947 was the unadopted *Taxes on Automobiles* report.[327] The panel examined United States taxes on automobiles, domestic and imported, that are based on the fuel efficiency of the vehicle as determined under the Corporate Average Fuel Efficiency (CAFE) standards. The panel concluded that they were GATT-consistent in part when assessed on the basis of the product per se.[328] However, the panel also concluded that penalties imposed under CAFE rules on producers failing to meet CAFE standards for their automobile fleets violated the Article III national treatment commitment. Those penalties were not tied directly to the specific imported product.[329]

In summary, GATT panels have refused to give an importing country *carte blanche* to restrict trade on environmental and conservation grounds. They could not have done so without seriously compromising GATT's goal of promoting liberal trade. GATT 1947 never ruled out all trade-based responses to environmental concerns, provided those responses satisfied the criteria of either the health and safety exception of Article XX(b), or the natural resources conservation exception of Article

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III:2 provides in 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. . . ."

[325] *See* Taxes on Petroleum Report, *supra* note 323, para. 5.1.12.

[326] *See* Taxes on Petroleum Report, *supra* note 323, para. 5.2.10. GATT Article II:2(a) provides:

> 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 6, art. II:2(a).

[327] *See* Report of the GATT Panel, *United States—Taxes on Automobiles*, WT/DS31/R (Mar. 14, 1994) *available in* WTO Doc. Website, *supra* note 4 [hereinafter *Taxes on Automobiles*]; Eric Phillips, Note, *World Trade and the Environment: The CAFE Case*, 17 MICH. J. INT'L L. 827 (1996).

[328] *See Taxes on Automobiles*, *supra* note 327, para. 5.45.

[329] *See id.* paras. 5.39-5.55, 5.59-5.66; *see also* Steve Charnovitz, *The GATT Panel Decision on Automobile Taxes*, 17 Int'l Env't Rep. (BNA) 921 (Nov. 2, 1994).

XX(g).[330]

Many of these issues were revisited in the first panel report issued under WTO auspices, *Standards for Reformulated Gasoline*.[331]

3. *The Reformulated Gasoline Dispute*

Standards for Reformulated and Conventional Gasoline addressed the consistency of United States environmental rules regulating gasoline with Article XX of GATT.[332]

a. *The Panel Report*

In 1995, Brazil and Venezuela complained to the United States about regulations promulgated by the United States Environmental Protection Agency (EPA) under Clean Air Act amendments enacted by Congress in 1990.[333] The EPA regulations, entitled *Regulations on Fuels and Fuel Additives—Standards for Reformulated and Conventional Gasoline*,[334] provide that in geographical areas not meeting national ozone

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[330] Dissatisfied with what they perceived to be too limited a range of responses to environmental issues, critics of GATT proposed a variety of amendments both to GATT and to U.S. trade laws during the Uruguay Round. A number of bills and resolutions were introduced in Congress to address not only purported environmental shortcomings of NAFTA, but also to reform the GATT-WTO system so that environmental issues would receive greater consideration. *See* OTA REPORT, *supra* note 4, at 91-92; Hurlock, *supra* note 7, at 2113-17.

[331] *See* WTO, Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *Reformulated Gasoline* Panel Report], *reprinted in* 35 I.L.M. 274 (1996), *available in* WTO Doc. Website, *supra* note 4.

[332] *See id.* The panel report was appealed to the DSU Appellate Body, which in turn affirmed most of the panel's determinations. For an analysis of the *Reformulated Gasoline* dispute, see Dominique M. Calapai, *International Trade and Environmental Impact: The WTO* Reformulated Gasoline *Case*, 3 ENVTL. LAW. 209 (1996). The texts of WTO panel and Appellate Body reports are available from the WTO's website. *See* WTO Doc. Website, *supra* note 4. For a proposal on how environmental disputes should be resolved by the WTO, see Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?*, 16 NW. J. INT'L L. & BUS. 441 (1996).

[333] The Clean Air Act amendments pertaining to "reformulated gasoline for conventional vehicles" are codified at 42 U.S.C. § 7545(k) (1994).

[334] 40 C.F.R. §§ 80.40-80.91 (1998).

requirements, only reformulated gasoline may be sold.[335] In other areas, the sale of conventional gasoline is permitted. Reformulated gasoline must meet at least three compositional and performance specifications: (1) its oxygen content must not be less than 2 percent;[336] (2) its benzene content must not exceed 1 percent by volume;[337] and (3) the gasoline must be free of heavy metals, including lead and manganese.[338] The performance specifications require a fifteen percent reduction in emissions of certain organic compounds and toxic air pollutants, and no increase in emissions of nitrogen oxides.[339]

The statute and implementing regulations establish separate toxic-emission baselines for each refiner and blender, using 1990 as the baseline year and data supplied by the refiner or blender.[340] An individual baseline is used for each refiner or blender to determine whether the refiner's and blender's gasoline is compliant. In the absence of reliable data, the EPA establishes a statutory baseline applicable to those refiners and blenders based on average gasoline quality in the United States in 1990.[341]

Importers of gasoline were assigned the statutory baseline, unless they could establish their individual baselines using 1990 data. For domestic refiners unable to compile reliable 1990 data, two alternative methods for calculating individual baselines were permitted that were not made available to importers.[342] In the EPA's view, those alternative methods inherently apply only to refiners (the "Gasoline Rule").[343] For importers that are also foreign refiners, the alternative methods for determining individual baselines were made available to them, provided they exported seventy-five percent of their gasoline to the United States in 1990 (the "75-percent Rule").[344]

Venezuela and Brazil argued that the EPA regulations violated GATT in at least four respects. First, the regulations violate the Article I MFN commitment because they confer an advantage upon a particular

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[335] *See id.* §§ 80.70-80.74.
[336] *See id.* § 80.41(a) & (g).
[337] *See id.*
[338] *See id.* § 80.41(h)(i).
[339] *See id.* § 80.41.
[340] *See id.* § 80.91(a)(i).
[341] *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 2.5.
[342] *See id.* para. 2.6.
[343] *See id.* para. 2.8.
[344] *See id.* para. 2.7.

group of countries (in this case, upon one country, Canada).[345] Second, they violate the national treatment provision of Article III because imported gasoline has to comply with a more stringent statutory baseline, whereas domestic gasoline only has to comply with the less stringent United States refiner's individual baseline.[346] Third, they violate the MFN and national treatment obligations of Articles 2.1 and 2.2 of the TBT Agreement[347] because the Gasoline Rule creates an unnecessary obstacle to international trade.[348] Fourth and finally, they are not justified under any of the GATT Article XX exceptions.[349]

The United States responded, first, that the regulations are consistent with GATT Article I because they are neutral on their face and apply to all imported gasoline regardless of country of origin.[350] Second, the United States argued that the regulations are consistent with Article III because on average both importers and domestic refiners have to satisfy approximately the same 1990 United States gasoline quality baseline.[351] Third, the United States claimed, the regulations are outside the scope of the TBT Agreement because they are not "technical regulations" within the meaning of the Agreement.[352] Fourth and finally, in any event, the regulations fall within the exceptions of GATT Article XX(b), (d), and (g).[353]

i. *Consistency with Article III*

The panel first examined the contention that the Gasoline Rule violates Article III:4.[354] At the outset the panel rejected the United States

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[345] *See id.* para. 3.5-3.10.

[346] *See id.* para. 3.11-3.35.

[347] *See* TBT Agreement, *supra* note 100, arts. 2.1, 2.2.

[348] *See Reformulated Gasoline* Panel Report, *supra* note 331, para 3.73-3.83. In view of its findings under GATT 1994, the panel did not reach the issues raised under the TBT Agreement. *See id.* para. 6.43.

[349] *See id.* para. 3.1, 3.37-3.70. The EC and Norway made formal presentations in support of Venezuela and Brazil. *See id.* paras. 4.1-4.11.

[350] *See id.* para. 3.8.

[351] *See id.* paras. 3.17-3.20.

[352] *See id.* paras. 3.74-3.79.

[353] *See id.* para. 3.4; GATT, *supra* note 6, art. XX(b), (d) & (g).

[354] In considering whether the 75% Rule violates the MFN commitment, the panel deferred on the ground of "mootness," i.e., that the Rule was not currently in force because no importer had qualified under it by the deadline set by the EPA. *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.19.

argument that on average the treatment provided to imported gasoline is equivalent. The panel noted that this amounted to an argument that less favorable treatment in one instance could be offset by correspondingly more favorable treatment in another instance.[355] This same argument was advanced and rejected in the 1989 panel report in *Section 337 of the Tariff Act of 1930*. Such an interpretation of Article III, in the panel's view, "would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III."[356]

ii. *Unjustified under Article XX(b)*

Having concluded that the EPA regulations violate the national treatment obligation of Article III, the panel turned to the question whether they nevertheless are justified under one or more of the Article XX exceptions. First, under the human health exception of Article XX(b), the United States had to satisfy the following three-prong test:

> (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
>
> (2) that the inconsistent measures for which the exception was invoked were *necessary* to fulfil [sic] the policy objective; and
>
> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.[357]

Regarding the first prong, it was undisputed that the United States policy was to reduce air pollution resulting from the consumption of gasoline, a policy squarely concerning the protection of human, animal and plant life or health.[358] Turning to the question of whether the inconsistent measure was "necessary," the panel relied on the interpretation of that term in the

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[355] *See id.* para. 6.14.

[356] GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, GATT B.I.S.D. (36th Supp.) at 345, para. 5.14 (1989) [hereinafter *Section 337* Panel Report].

[357] *Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.20.

[358] *See id.* para. 6.21.

Section 337 panel report in the context of Article XX(d):

> [A] contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[359]

In other words, if consistent or less inconsistent measures were reasonably available to the United States, the "necessary" prong of the Article XX(b) test would not be met. For example, in the *Section 337* case, the GATT panel condemned general exclusion orders issued by the International Trade Commission as not necessary because they were overly broad. On the other hand, that same panel approved limited exclusion orders as being justified even though they were otherwise inconsistent with Article III:4.[360]

The *Reformulated Gasoline* panel concluded that one alternative would be a unitary statutory baseline applicable to all refiners and blenders. In lieu of that, the panel suggested that the EPA compute individual baselines for gasoline importers derived from evidence of the individual 1990 baselines of foreign refiners with whom the importers currently deal.[361] Even though that methodology could result in formally different regulation of imported and domestic products, the panel added that Article III:4's requirement to treat an imported product no less favorably than the like domestic product is satisfied if the different treatment results in maintaining conditions of competition for the imported product no less favorable than those of the like domestic product.[362]

In response to U.S. objections that verification of foreign refiners' baselines was not administratively feasible, the panel replied that data

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[359] *Section 337* Panel Report, *supra* note 356, para. 5.26; *accord* GATT Panel Report, *Thailand —Restrictions on Importation of Internal Taxes on Cigarettes*, GATT B.I.S.D. (37th Supp.) at 200, para. 75 (1990).

[360] *See Section 337* Panel Report, *supra* note 356, para. 5.32.

[361] *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.25.

[362] *See id.*

verification in other analogous international trade law enforcement contexts was demonstrably feasible. Consequently, the panel was unconvinced that any special difficulty existed in the imported gasoline context that was sufficient to warrant the United States statutory baseline method for importers.[363] The panel noted, for example, that the data that would have to be verified under the panel's proposed alternative method for determining importers' baselines was no less susceptible to verification than data submitted to the United States in enforcing domestic antidumping duty law.[364] The United States relied on data in the antidumping duty context that would be similar to the data submitted to substantiate compliance with the Gasoline Rule. If importers failed to submit accurate or unverifiable information, then the United States would be justified in resorting to a statutory baseline.[365] In addition, the imposition of penalties on importers that submitted false or inaccurate information would be an adequate deterrent, according to the panel.[366]

iii. *Unjustified Under Article XX(d)*

Having concluded that the EPA regulations were not justified under the Article XX(b) exception, the panel next focused on whether the regulations might nevertheless satisfy the Article XX(d) exception.[367] In order to justify a measure otherwise inconsistent with Article III:4 under the border enforcement exception of Article XX(d), the party invoking the exception bears the burden of proving the following three elements: (1) the measure must secure compliance with laws or regulations themselves not inconsistent with GATT; (2) the inconsistent measure must be necessary to secure compliance with those laws and regulations; and (3) the measure must be applied in conformity with the Article XX chapeau, i.e., not applied in a manner which would constitute either a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[368]

The panel concluded that since the various baseline methods of the Gasoline Rule did not themselves "secure compliance" with the baseline

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[363] *See id.* para. 6.26.
[364] *See id.* para. 6.28.
[365] *See id.*
[366] *See id.*
[367] *See id.* paras. 6.29, 6.30.
[368] See *id.* para. 6.31.

system, i.e., they were not a law enforcement mechanism or procedure per se, they failed to meet the first of the three criteria.[369] The baseline methods, therefore, were outside the scope of the Article XX(d) exception.[370]

iv. *Unjustified under Article XX(g)*

The final argument raised by the United States in support of the Gasoline Rule was that it was justified under the exhaustible natural resources exception of Article XX(g).[371] In order to prevail under this exception, a responding party has the burden of proving the following four elements: (1) the policy in respect of the measures for which Article XX(g) is invoked falls within the range of policies related to the conservation of exhaustible natural resources; (2) the measure is related to the conservation of exhaustible natural resources; (3) the measure is made effective in conjunction with restrictions on domestic production or consumption; and (4) the measure is applied in conformity with the Article XX chapeau.[372]

Turning to the first of these four elements, the panel agreed with the United States that its policy was related to the conservation of an exhaustible natural resource, namely, clean air, lakes, streams, parks, crops, and forests, all of which could be exhausted by air pollution.[373] In a critical concession to the United States, the panel agreed that even though air was a renewable resource if adequate pollution abatement controls were put in place (unlike, for example, fossil fuels), that did not preclude it from being an exhaustible natural resource for purposes of Article XX(g).[374]

In addressing the second and third elements, the panel in essence conflated the analysis. The second element asks whether the baseline methods of the Gasoline Rule are "related to" the conservation of clean air. In answering this question, the panel agreed with the 1987 *Herring*

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[369] *See id.* para. 6.33.

[370] *See id.*; *accord* GATT Dispute Panel, *EEC—Regulations on Imports of Parts and Components*, May 16, 1990, GATT B.I.S.D. (37th Supp.) at 132, paras. 5.12-5.18 (1991).

[371] *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.35.

[372] *See id.*

[373] *See id.* para. 6.36.

[374] *See id.* para. 6.37; *accord Herring and Salmon* Panel Report, *supra* note 320, para. 4.4; *Tuna Restrictions* Report, *supra* note 316, para. 5.13.

and Salmon panel report that the term "related to" is synonymous with "primarily aimed at."[375] While a trade measure does not have to be necessary or essential to the conservation of exhaustible natural resources in order to satisfy the Article XX(g) exception, it must at least be "primarily aimed at" the conservation of such resources in order to "relate to" conservation within the meaning of Article XX(g).

By a parity of reasoning, the panel observed that the term "in conjunction with" used in the third element of the Article XX(g) exception has to be interpreted in a way that ensures that the scope of action under Article XX(g) is limited to the pursuit of policies aimed at the conservation of natural resources.[376] Accordingly, the panel reached a conclusion that can best be described as cryptic and circular: a measure is made effective in conjunction with restrictions on domestic production or consumption if the measure also is aimed primarily at rendering effective such restrictions.[377]

The panel then moved to the question of whether the Gasoline Rule was aimed primarily at the conservation of exhaustible natural resources. The panel was unable to see the connection between discriminatory treatment of imported gasoline chemically identical with its domestic counterpart, and the United States objective of improving air quality.[378] The panel therefore concluded that the Gasoline Rule that treated imports less favorably than the domestic like product was not primarily aimed at the conservation of clean air.[379]

b. *The Appellate Body Report*

Pursuant to Article 16 of the Dispute Settlement Understanding,[380] the United States notified the Dispute Settlement Body on February 21, 1996, of its decision to appeal the ruling of the panel that the baseline methods of the Gasoline Rule do not constitute a measure relating to the

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[375] *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.39; *accord Tuna Restrictions* Report, *supra* note 316; *Taxes on Automobiles*, *supra* note 327; *see also Herring and Salmon* Panel Report, *supra* note 320, para 4.6.

[376] *See Reformulated Gasoline* Panel Report, *supra* note 331, para. 6.39.

[377] *See id.*

[378] *See id.* para. 6.40.

[379] *Id.* para. 6.40. In light of its finding, the panel deemed it unnecessary to determine whether the measure was "made effective in conjunction with restrictions on domestic production or consumption." *Id.* para. 6.41.

[380] DSU, *supra* note 103, art. 16.

conservation of clean air within the meaning of Article XX(g).[381] The Appellate Body affirmed the panel's report, but on different grounds.[382]

The Appellate Body criticized the panel's reasoning as opaque, observing that the panel incorrectly analyzed Article XX(g) by asking the wrong question.[383] In the Appellate Body's view, the panel had to first find that the measure provided less favorable treatment in violation of Article III:4 before it could even begin to consider whether the measure was excepted under Article XX(g).[384] After answering that threshold question in the affirmative, the panel should not have asked again whether the less favorable treatment of imported gasoline was primarily aimed at the conservation of exhaustible natural resources.[385] Instead, the panel should have asked whether the "measure"—the baseline methodology of the Gasoline Rule—was aimed primarily at the conservation of clean air.[386]

i. *Measures "Relating To" Conservation*

The Appellate Body turned to the specific question of whether the baseline methodology "relates to," that is, whether it is "primarily aimed at," the conservation of clean air.[387] It answered this question in the affirmative.[388] Examining the baseline methodology against the backdrop

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[381] *See* GATT Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), 35 I.L.M. 605, 613 (1996) [hereinafter *Reformulated Gasoline* Appellate Body Report] *available in* WTO Doc. Website, *supra* note 4. *See also* Maury D. Shenk, *International Decisions—United States—Standards for Reformulated and Conventional Gasoline*, 90 AM. J. INT'L L. 669 (1996) (analyzing the Appellate Body report).

A preliminary procedural issue addressed by the Appellate Body was whether Venezuela and Brazil properly raised on appeal the issue of the correctness of the panel's finding that clean air is an exhaustible natural resource. Neither country had cross-appealed that finding, but instead raised it for the first time in their Appellees' Submissions. *See Reformulated Gasoline* Appellate Body Report, *supra*, at 615. The Appellate Body agreed with the United States that Venezuela and Brazil had raised this issue in a procedurally improper manner that was inconsistent with the *Working Procedures for Appellate Review*, WT/AB/WP/1 (Feb. 16, 1996) *available in* WTO Doc. Website, *supra* note 4.

[382] *See Reformulated Gasoline* Appellate Body Report, *supra* note 381, at 633.

[383] *See id.* at 619-20.

[384] *See id.*

[385] *See id.*

[386] *See id.* at 623.

[387] *See id.*

[388] *See id.*

of the Gasoline Rule as a whole, the Appellate Body found a substantial, not merely an incidental or inadvertent, relationship between the baseline methodology and the conservation of clean air.[389]

ii. *"In Conjunction With" Domestic Restrictions*

Because the panel did not consider it necessary to address the other elements of the Article XX(g) exception, the Appellate Body addressed the third element of Article XX(g) (i.e., whether such measures are made effective in conjunction with restrictions on domestic production or consumption).[390] The Appellate Body interpreted this phrase as requiring that the measures concerned must impose some restrictions on both imported gasoline and domestic gasoline.[391] As the Appellate Body noted, "[t]he clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[392] That requirement did not demand, however, that the same restrictions be applied to both. In other words, equality of treatment is not required. If equal treatment were required, the Appellate Body noted, then the measure probably would not be inconsistent with Article III:4 in the first place, thus eliminating the need for the Article XX(g) exception.[393] The only thing required to satisfy the third element is that some restrictions be placed upon the domestic like product.[394]

The Appellate Body rejected Venezuela's suggestion that the measures must have some demonstrable effect on conservation.[395] The Appellate Body did agree that if a specific measure could not in any possible situation have any positive effect on conservation goals, then the measure could not be "primarily aimed at" the conservation of natural resources.[396]

iii. *The Article XX Chapeau*

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[389] *See id.*
[390] *See id.*
[391] *See id.* at 624.
[392] *Id.* at 625 (emphasis in original).
[393] *See id.*
[394] *See id.*
[395] *See id.*
[396] *See id* at 625-26.

Having concluded that the baseline methodology came within the terms of Article XX(g), the Appellate Body took up the question of whether it also met the requirements of the Article XX chapeau that is applicable to all Article XX exceptions.[397] Unlike the enumerated exceptions which address the substance of a challenged measure, the chapeau is concerned with the manner in which such measures are applied.[398] The chapeau was added to Article XX in order to prevent "abuse of the exceptions" that might frustrate or defeat the other GATT obligations.[399]

The chapeau prohibits the application of a measure, otherwise satisfying one or more of the Article XX exceptions, if it constitutes: (1) "arbitrary discrimination" between countries where the same conditions prevail; (2) "unjustifiable discrimination" between countries where the same conditions prevail; or (3) a "disguised restriction" on international trade.[400] One ambiguity in the chapeau is whether the phrase "between countries where the same conditions prevail" refers to conditions between an importing and exporting county (national treatment), conditions between two or more exporting countries (MFN), or both.[401] At the oral hearing, the United States argued that the phrase refers to both alternatives.[402] The Appellate Body agreed with the United States, considering that the opening clause of the chapeau provides that "*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party . . . ."[403] In other words, the exceptions listed in Article XX relate to *all* of the GATT obligations—national treatment, MFN, and others.[404]

The Appellate Body agreed with the panel finding that more than

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[397] *See id.* at 626.
[398] *See id.*
[399] *See id.*
[400] *See id.* at 627.
[401] *See id.* at 627-28.
[402] *See id.*
[403] *Id.* at 628 (citing GATT, *supra* note 6, art. XX) (emphasis in original).
[404] *See id.* The Appellate Body also noted that the term "countries" is unqualified: it does not say "foreign countries" or "third countries." *See id.* at 628 n.46. This interpretation contradicts two other GATT panels that have considered the chapeau as being merely an MFN obligation and concluded that the measures in question were not discriminatory because they treated all exporting countries the same. *See* GATT Conciliation Panel, *United States—Imports of Certain Automotive Spring Assemblies*, May 26, 1983, GATT B.I.S.D. (30th Supp.) at 107, para. 55 (1984); *Tuna Restrictions* Report, *supra* note 316, at 91, para. 4.8.

one alternative course of action was available to the United States. The United States could have applied a statutory baseline across the board, or it could have made individual baselines available to importers.[405] The Appellate Body, like the panel, rejected the United States argument of administrative burden and inconvenience in verifying the accuracy of information submitted by importers.[406] While cooperation would be required on the part of importers and foreign refiners in this regard, the Appellate Body faulted the United States for not having first attempted to conclude some cooperative arrangement with the governments of Venezuela and Brazil.[407] The Appellate Body also faulted the United States for having taken into consideration the costs domestic refiners would have incurred had statutory baselines been applied to them immediately, while not giving the same consideration to foreign refiners.[408]

The Appellate Body held, accordingly, that in its application the baseline methodology constituted "unjustifiable discrimination" as well as a "disguised restriction" on international trade.[409] The United States measure thus failed to meet the requirements of the Article XX chapeau.[410]

c. *Summary*

The Appellate Body's analysis of Article XX signals a fresh approach to resolving Article XX disputes. GATT panels had tended to focus on the enumerated paragraphs of Article XX, carefully parsing their language in answering the question whether a measure falls within the scope of one of those exceptions. Contrary to the practice of earlier GATT panels, which have tended to give the individual paragraphs of Article XX a narrow construction, the Appellate Body started with the language of Article XX(g) and gave it a fairly generous construction in favor of the United States. The Appellate Body did so in order to avoid hindering the pursuit of policies aimed at the conservation of exhaustible natural resources.[411]

As generous as the Appellate Body was in giving the enumerated Article XX exceptions a construction favorable to the United States, the

[405] *See Reformulated Gasoline* Appellate Body Report, *supra* note 381, at 629.
[406] *See id.* at 629-630.
[407] *See id.* at 630-31.
[408] *See id.*
[409] *See id.* at 632-33.
[410] *See id.*
[411] *See id.* at 619 (citing *Herring and Salmon* Panel Report, *supra* note 320, para. 4.6).

Appellate Body was as grudging in its construction of the Article XX chapeau. It closely scrutinized the challenged measure under the Article XX chapeau to ensure that the paragraph (g) exception was not being abused.[412] What struck the Appellate Body about the baseline methodology relative to the chapeau was that the measure was both patently discriminatory and clearly avoidable; that is, equally effective alternative measures were available that were nondiscriminatory and less trade restrictive.[413] While prior GATT panels have reached the same conclusion in the context of specific Article XX exceptions, their analysis has been limited to the Article XX paragraphs that use the terms "necessary" or "essential."[414] The Appellate Body adopted the novel approach of making that same inquiry in the context of the chapeau, which does not use either of those terms.

d. *Epilogue*

In early 1997, Brazil and Venezuela complained that the United States was dragging its feet in bringing the Gasoline Rule into compliance with GATT.[415] At the January 22, 1997 meeting of the Dispute Settlement Body, Venezuela and Brazil contended that the United States would not meet the fifteen-month deadline for compliance with the Appellate Body report. On August 20, 1997, the United States reported to Brazil, Venezuela, and the DSB that final regulations amending the regulations at issue had been implemented.[416] The United States thus completed the implementation process within the fifteen months required under Article 21.3 of the DSU. Under the EPA's new rule, foreign gasoline refiners are entitled to individual baselines, but only refiners in Brazil, Venezuela, and Norway have expressed an interest in having an individual baseline.

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[412] *See id.* at 22-29, 35 I.L.M. at 626-33. *See also* MCGOVERN, *supra* note 170, § 13.11.

[413] *See Reformulated Gasoline* Appellate Body Report, *supra* note 381, at 632-33.

[414] *See, e.g.*, GATT Conciliation Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991); GATT Dispute Panel Report, *United States—Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) at 155 (unadopted, 1993); *Section 337* Panel Report, *supra* note 356.

[415] *See Brazil, Venezuela Claim U.S. Slow to Implement Gasoline Ruling*, 14 Int'l Trade Rep. (BNA) 161 (1997).

[416] *See* WTO, Status Report Regarding Implementation of the Recommendations and Rulings in the Dispute, *United States—Standards for Reformulated and Conventional Gasoline*, Panel Report (WT/DS2/R) (Jan. 29, 1996) and Appellate Body Report (WT/DS2/AB/R) (Apr. 29, 1996) *available in* WTO Doc. Website, *supra* note 4.

4. *The Hormone Beef Dispute*

The first WTO panel dispute to address the consistency of a Member's health measures under the SPS Agreement was decided in 1997. The panel ruled in *EC Measures Concerning Meat and Meat Products (Hormones)* (the Hormone Beef dispute),[417] that EC measures restricting the importation of beef from cattle that were fed growth hormones violate the SPS Agreement.

a. *Background*

The events leading up to the WTO panel proceeding span ten years. Following consumer concerns over the safety of hormone-fed beef, in 1987 the EC imposed a ban on imports of animals and meat from animals fed six specific growth-promoting hormones.[418] The United States objected to this ban on the ground that the six hormones had been found safe for use in growth promotion by every country that has examined them. Canada brought a nearly identical complaint against the EC. Furthermore, not only did the Codex Alimentarius Commission review five of the six hormones and find them to be safe, but the EC itself twice commissioned experts to review these same five hormones, and on both occasions the experts found them to be safe.[419] Three of the hormones are

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[417] GATT Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997) *available in* WTO Doc. Website, *supra* note 4 [hereinafter *Hormone Beef Report-U.S.*]; GATT Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) Complaint by Canada*, WT/DS48/R/CAN (Aug. 18, 1997) [hereinafter *Hormone Beef Report-Can.*]. Both Canada and the United States brought WTO complaints against the EC's measures affecting livestock and meat. *See generally* Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 Int'l Trade Rep. (BNA) 1781 (1997).

[418] For additional background on the dispute, see generally Office of the USTR, *WTO Hormones Report Confirms U.S. Win*, Press Release 97-76, Aug. 18, 1997; Kristin Mueller, *Hormonal Imbalance: An Analysis of the Hormone Treated Beef Trade Dispute Between the United States and the European Union*, 1 DRAKE J. AGRIC. L. 97 (1996); Wirth, *supra* note 110; Allen Dick, Note, *The EC Hormone Ban Dispute and the Application of the Dispute Settlement Provisions of the Standards Code*, 10 MICH. J. INT'L L. 872 (1989).

[419] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 2.17-2.25, 2.33; *Hormone Beef Report-Can.*, *supra* note 417, paras. 2.17-2.25, 2.33.

naturally occurring in animals and humans, while the other three are artificially produced.

The United States raised the matter under the Tokyo Round Agreement on Technical Barriers to Trade (the Standards Code) in March 1987. Bilateral consultations between the United States and the EC failed to resolve the dispute. Contending that the EC ban was not supported by scientific evidence, the United States requested the establishment of a technical experts group under Article 14.5 of the Standards Code to examine the question. The EC rejected this request, stating that the issue was outside the scope of the Code.

On January 1, 1989, the United States imposed retaliatory measures of 100% *ad valorem* duties on imports of certain EC-origin goods. A joint U.S.-EC Task Force reached an interim agreement that permitted imports of United States beef that was certified hormone-free. The United States, in return, lifted some of its retaliatory tariffs. In June 1996, the EC requested the establishment of a WTO panel to examine the matter. A month later the United States removed the balance of its retaliatory tariffs pending the outcome of the panel proceeding. To determine whether there was a scientific basis for the EC ban, the panel appointed three scientific experts to advise the panel, pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU.[420]

b. *The Panel Report*

i. *Governing Law*

Both the United States and the EC invoked the SPS Agreement, the TBT Agreement, and GATT in support of their respective positions. As a threshold matter, the panel considered whether the SPS Agreement, which entered into force on January 1, 1995, could apply to measures that predate it. The panel concluded that under the general rules of treaty interpretation found in Article 28 of the Vienna Convention on the Law of Treaties, the EC measures are continuing situations that were enacted before the SPS Agreement entered into force, but which did not cease to exist after that date. The panel found no contrary intention in the SPS Agreement; in fact, it found that the Agreement generally applies to measures enacted before

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[420] For the experts' analysis and conclusions, see *Hormone Beef Report-U.S.*, *supra* note 417, paras. 6.1-6.241; *Hormone Beef Report-Can.*, *supra* note 417, paras. 6.1-6.240.

its entry into force but which are maintained in force after that date.[421]

Having found that the SPS Agreement is applicable to the dispute, the panel next concluded that the TBT Agreement *a fortiori* was inapplicable. By their terms, the TBT Agreement and the SPS Agreement are mutually exclusive.[422]

Finally, with regard to the applicability of GATT, the panel found that there is no requirement in the SPS Agreement that a prior GATT violation be established before the SPS Agreement applies. Moreover, even if a measure were to pass muster under GATT, it still would have to be examined for consistency with the SPS Agreement. Therefore, the panel limited its examination to the consistency of the EC measure under the SPS Agreement.[423]

ii. *Burden of Proof*

The United States argued that the burden of proof rested on the EC to provide evidence that there is a risk to be protected against and that there has been a risk assessment. The EC responded that the burden of proof rests on the party challenging the consistency of a sanitary measure under the SPS Agreement to provide evidence that the use of the hormones in dispute is safe and without risk.[424] The panel stated in this connection that:

> [T]he initial burden of proof rests on the complaining party in the sense that it bears the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement. It is, indeed, for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim that a sanitary measure is inconsistent with the SPS Agreement. In other words, it is for the United States to present factual and legal arguments that, if unrebutted, would demonstrate a violation of the

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[421] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.25-8.26; *Hormone Beef Report-Can.*, *supra* note 417, paras. 8.25-8.31.

[422] *See* TBT Agreement, *supra* note 100, art. 1.5; SPS Agreement, *supra* note 99, art. 1.4; *Hormone Beef Report-U.S.*, *supra* note 417, para. 8.29; *Hormone Beef Report-Can.*, *supra* note 417, para. 8.32.

[423] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.31-8.42; *Hormone Beef Report-Can.*, *supra* note 417, paras. 8.34-8.45.

[424] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.49-8.50.

> SPS Agreement. Once such a *prima facie* case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party.[425]

Accordingly, the United States had the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement. Once that initial burden was met, the burden would shift to the EC to demonstrate that its measures did not violate the SPS Agreement.

iii. *Measures Based on International Standards*

The panel began its analysis with Article 3.1 of the SPS Agreement that requires Members "to base their [SPS] measures on international standards, guidelines or recommendations, where they exist . . . ."[426] Annex A:3(a) of the SPS Agreement defines "international standards, guidelines or recommendations" as those established by the Codex Alimentarius Commission relating to veterinary drug residues.[427] In accordance with Article 3.1, if such Codex standards exist with respect to the six hormones in dispute, then, the panel stated, a sanitary measure taken by a Member should either be based on these standards or be justified under Article 3.3 of the SPS Agreement.[428]

Unless a Member's measure reflects the same level of protection as the standard, it is not "based on" that standard and violates Article 3.1. The panel found that Codex standards exist for five of the six hormones in issue.[429] The panel further found that the EC measures resulted in a different level of protection than would be achieved by measures based on the Codex standards.[430] The EC measures, accordingly, were not based on the Codex standards for purposes of Article 3.1.

iv. *Measures Not Based on International Standards*

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[425] *Id.* para. 8.51.
[426] *See id.* para. 8.56; SPS Agreement, *supra* note 99, art. 3.1.
[427] *See Hormone Beef Report-U.S.*, *supra* note 417, para. 8.5; SPS Agreement, *supra* note 99, Annex A:3(a).
[428] *See Hormone Beef Report-U.S.*, *supra* note 417, para. 8.57.
[429] *See id.* paras. 8.69-8.70.
[430] *See id.* paras. 8.72-8.73, 8.77.

Even though a Member's measures are not based on international standards, they are not inconsistent with the SPS Agreement *ipso facto.* Article 3.3 of the SPS Agreement provides an exception to Article 3.1. Article 3.3 permits Members to introduce measures that result in a higher level of protection than would be achieved under international standards, if there is a scientific justification for them, or it is the level of protection a Member determines to be appropriate after making a risk assessment under Article 5 of the Agreement. There is a scientific justification if, based on available scientific information, a Member determines that the international standards are not sufficient to achieve its appropriate level of protection.[431] This concept is sometimes referred to as "the acceptable level of risk."[432]

Once the United States established that the EC measures were not based on an international standard, the burden shifted to the EC to prove that its measures are justified under Article 3.3 and meet the risk assessment criteria of Article 5.[433] A risk assessment is "the evaluation of the potential for adverse effects on human or animal health arising from the presence of . . . contaminants . . . in food, beverages or feedstuffs."[434] The EC thus had the burden of identifying the adverse effects on human health caused by the presence of hormones in meat products, and then, if any such adverse effects existed, evaluating the potential or probability of occurrence of these effects.[435]

After considering all of the sources cited by the EC in support of the first prong of the two-pronged risk assessment test, the panel concluded that none of the scientific evidence cited by the EC indicated that an identifiable risk arises for human health from the use of the growth hormones in issue.[436] In fact, all of the studies cited by the EC indicated that such hormones are safe when used in accordance with good practice.

Once the risks are assessed, the next step is risk management (i.e., the decision by a Member as to what risks it can accept or its "appropriate level of sanitary protection"). If a risk assessment is based on scientific evidence, then a Member can set its own acceptable level of risk, provided the level is not arbitrary or unjustifiable, takes into account the objective

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[431] *See* SPS Agreement, *supra* note 99, art. 3.3 n.2.

[432] *See id.* Annex A:5; *Hormone Beef Report-U.S.*, *supra* note 417, para. 8.79.

[433] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.87-8.89.

[434] SPS Agreement, *supra* note 99, Annex A:4.

[435] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.98-8.100.

[436] *See id.* para. 8.124.

of minimizing negative trade effects, and is not a disguised restriction on international trade.[437]

Because there was no scientific evidence of an identifiable risk associated with the growth hormones, the panel found that no basis exists under the SPS Agreement for the EC's adoption of any measure to achieve any level of protection. If it were otherwise, then the obligations of Article 5 would be eviscerated. Assuming *arguendo* that such scientific evidence did exist, the panel continued, the EC measures were arbitrary, unjustifiable, discriminatory, and a disguised restriction on trade in connection with naturally occurring hormones.[438] The panel concluded that the measures distinguished between products with higher hormone residues that are endogenous or naturally occurring, such as eggs and soya oil that were not subject to an import ban, and the imported meat and meat products with lower hormone residues that are endogenous as well.[439] With regard to the synthetic hormones, the EC measures set a "no residue" level for those hormones when used as growth promoters, but set an unlimited residue level for naturally occurring hormones. Because the EC could not justify the significant difference in treatment, the panel was drawn to the conclusion that the measure was arbitrary, unjustifiable, and discriminatory.[440]

The panel summed up:

> (i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
>
> (ii) The European Communities, by adopting arbitrary and unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application

[437] *See* SPS Agreement, *supra* note 99, arts. 2.3, 5.4, 5.5.
[438] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.161, 8.197, 8.203, 8.206.
[439] *See Hormone Beef Report-U.S.*, *supra* note 417, paras. 8.194, 8.197, 8.203.
[440] *See id.* para. 8.206.

of Sanitary and Phytosanitary Measures.

(iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements contained in Article 3.1 of that Agreement.[441]

Claiming that the panel had distorted the scientific evidence and misinterpreted several key articles of the SPS Agreement, the EC sought appellate review of the panel report.[442]

c. *The Appellate Body Report*

On January 16, 1998, the Appellate body issued a lengthy report affirming, modifying, and reversing the findings and conclusions of the panel, but agreed that the EC import ban on meat products produced using growth-promoting hormones violates the SPS Agreement.[443] The Appellate Body addressed ten issues on appeal: (1) whether the panel correctly allocated the burden of proof; (2) whether the panel applied the appropriate standard of review under the SPS Agreement; (3) whether the precautionary principle is relevant in interpreting the SPS Agreement; (4) whether the SPS Agreement applies to measures enacted before the entry into force of the WTO Agreement; (5) whether the panel made an objective assessment of the facts pursuant to DSU Article 11; (6) whether the panel acted within the scope of its authority in its selection and use of experts; (7) whether the panel correctly interpreted Article 3.1 and 3.3 of the SPS Agreement; (8) whether the EC measures are "based on" a risk assessment within the meaning of Article 5.1 of the SPS Agreement; (9) whether the panel correctly interpreted and applied Article 5.5 of the SPS Agreement; and (10) whether the panel appropriately exercised judicial economy in refraining from making findings on the consistency of the EC

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[441] *Id.* para. 9.1. *See Fare Trade*, ECONOMIST, May 17, 1997, at 20. For criticisms of the panel's decision, see Charnovitz, *supra* note 255.

[442] *See* Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) paras. 1, 7 [hereinafter *Hormone* Appellate Body Report].

[443] *See id.* para. 253.

measures with Articles 2.2 and 5.6 of the SPS Agreement.[444]

i. *Allocating the Burden of Proof under the SPS Agreement.*

In addressing the panel's allocation of burden of proof, the Appellate Body concluded that the panel erred in placing the initial burden on the EC to prove that its measures are justified under the exceptions provided for in Article 3.3 of the SPS Agreement.[445] The panel put that burden on the EC because its measures were not based on international standards.[446] The Appellate Body found that even though the EC measures were not based on international standards, that fact did not relieve the United States and Canada from the burden of establishing a *prima facie* case showing the absence of the risk assessment required by Article 5.1 and the failure of the EC to comply with the requirements of Article 3.3.[447]

ii. *The Standard of Review*

The EC argued that the panel should have applied a standard of review in evaluating the consistency of the EC measures under the SPS Agreement that gives deference to the factual findings of the competent EC authorities.[448] In response to the EC's argument, the Appellate Body found the SPS Agreement to be silent on this point and so turned to Article 11 of the DSU.[449] Article 11 provides in pertinent part that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ."[450] Thus, the applicable standard of review is neither *de novo* nor one of total deference, but rather an intermediate "objective assessment of the facts" standard. The Appellate Body concluded that the panel applied the appropriate standard of review.[451]

iii. *Relevance of the Precautionary Principle*

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[444] *See id.* paras. 9-39.
[445] *See id.* para. 108.
[446] *See id.* paras. 103-104.
[447] *See id.* para. 108.
[448] *See id.* paras. 13-15.
[449] *See id.* paras. 114-18.
[450] DSU, *supra* note 103, art. 11.
[451] *See Hormone* Appellate Body Report, *supra* note 442, para. 119.

The panel rejected the EC's contention that the precautionary principle should be adopted and used to override the explicit terms of Articles 5.1 and 5.2 of the SPS Agreement.[452] The EC argued that the precautionary principle has become a customary rule of international law, that its measures were precautionary in nature, and that they, therefore, satisfied the risk assessment requirements of the Agreement.[453]

The Appellate Body refused to take a position on whether the precautionary principle is a customary rule of international law or merely an emerging principle that has yet to ripen into such a rule.[454] The Appellate Body did find that the precautionary principle is reflected in various provisions of the SPS Agreement, especially in Article 3.3 that recognizes a Member's right to establish its own appropriate level of sanitary protection, which may be higher than international standards.[455] The Appellate Body nevertheless concluded that, whatever its legal status, the precautionary principle cannot override the express terms of Articles 5.1 and 5.2.[456]

iv. *Application of the SPS Agreement to Pre-1995 Measures*

The EC measures were enacted before the entry into force of the WTO Agreement on January 1, 1995. The Appellate Body rejected the EC's argument that the temporal application of the SPS Agreement is restricted to events that occurred after 1995. The EC cited Article 28 of the Vienna Convention on the Law of Treaties that "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force."[457] The Appellate Body continued that the SPS Agreement does not contain any provision limiting its temporal application.[458] Moreover, Article XVI:4 of the WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its

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[452] *See id.* para. 125.
[453] *See id.* para. 121.
[454] *See id.* para. 123.
[455] *See id.* para. 124.
[456] *See id.* para. 125.
[457] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (1969). *See Hormone* Appellate Body Report, *supra* note 442, para. 128.
[458] *See Hormone* Appellate Body Report, *supra* note 442, para. 128.

obligations as provided in the annexed Agreements."[459] Accordingly, the Appellate Body affirmed the panel's finding with regard to the temporal application of the SPS Agreement.[460]

v. *The Panel's Objective Assessment of the Facts*

The EC claimed that the panel disregarded, distorted, and misrepresented the evidence the EC submitted.[461] The Appellate Body noted at the outset that under Article 17.6 of the DSU its scope of review is limited to questions of law. The Appellate Body added, however, that if the panel deliberately disregarded, distorted, or misrepresented such evidence, then it failed to make an objective assessment of the facts as required under Article 11 of the DSU.[462] The Appellate Body noted that such conduct would be a denial of fundamental fairness and due process.[463]

The Appellate Body reviewed the expert scientific evidence and the panel's analysis of it. The EC charged that the panel failed to refer to all of the evidence presented. The Appellate Body responded that "[t]he Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."[464] The Appellate Body reviewed the panel's assessment of the evidence and conceded that the panel had misquoted some experts and failed to consider some of the evidence.[465] Nevertheless, the Appellate Body concluded that the mistakes the panel made did not amount to manifest misrepresentation, deliberate distortion, or egregious disregard of the evidence.[466] In the end, the Appellate Body accorded the panel great deference in fact findings.

vi. *The Selection of Experts*

The panel consulted experts in their individual capacity rather than establish a review group to examine the scientific evidence. Noting that

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[459] DSU, *supra* note 103, Art. XVI:4. *See Hormone* Appellate Body Report, *supra* note 442, para. 128.
[460] *See Hormone* Appellate Body Report, *supra* note 442, para. 130.
[461] *See id.* para. 131.
[462] *See id.* paras. 132-33.
[463] *See id.* para. 133.
[464] *Id.* para. 138.
[465] *See id.* paras. 135, 138, 140-42.
[466] *See id.* paras. 139, 141, 144.

nothing in Article 11.2 of the SPS Agreement or Article 13.2 of the DSU prohibits a panel from seeking information from individual experts, the Appellate Body concluded that "both the SPS Agreement and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate."[467] The parties to the dispute acknowledged that the panel consulted with them in the appointment of the experts.

vii. *The Interpretation of Articles 3.1 and 3.3*

The Appellate Body rejected the panel's conclusion that the term "based on" in Article 3.1 is synonymous with "conform to" and that, therefore, Article 3.1 requires WTO Members to harmonize their SPS measures with international standards. "It is clear to us," the Appellate Body stated, "that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*."[468]

With regard to the panel's interpretation of Article 3.3, the Appellate Body noted that if there is scientific justification, Article 3.3 permits a Member to adopt SPS measures that achieve a higher level of protection than would measures based on a relevant international standard.[469] The EC contended that no risk assessment is necessary under Article 5.1, so long as there is a scientific justification for the higher level of protection.[470] The Appellate Body noted that Article 3.3 is not a model of drafting clarity: it pointed to the last clause in the Article that requires that such measures "shall not be inconsistent with any other provision of this Agreement."[471] Accordingly, the Appellate Body agreed with the panel that the EC must undertake a risk assessment to conform with Article 5 of the Agreement.[472]

viii. *Basing SPS Measures on a Risk Assessment*

The Appellate Board evaluated the EC's compliance with the

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[467] *Id.* para. 147.
[468] *Id.* para. 165 (emphasis in original).
[469] *See id.* para. 172.
[470] *See id.* para. 174.
[471] *See id.* para. 175.
[472] *See id.* para. 176.

Article 5.1 requirement of risk assessment, and it noted that for SPS measures to be "based on" a risk assessment, some rational nexus must exist between the supporting scientific evidence and an identifiable risk to human health or safety.[473] Against that interpretative backdrop, the Appellate Body agreed with the panel that the EC relied upon scientific reports that did not rationally support the EC import prohibition.[474]

ix. *Article 5.5 and Discriminatory Trade Measures*

Three elements are necessary to establish a violation of Article 5.5 of the Agreement.[475] First, the Member imposing the measure must have adopted its own level of protection, rather than an international standard. Second, that level of protection must exhibit arbitrary or unjustifiable differences in its treatment of different situations. Third, the arbitrary or unjustifiable differences must result in either discrimination or a disguised restriction on trade.[476]

The Appellate Body focused on the second and third prongs of this three-part test and agreed that the levels of protection established by the EC were arbitrary and unjustifiable in some instances, (e.g., the different levels of protection for carbadox and olaquindox).[477] The Appellate Body next turned to the question of whether these levels of protection resulted in discrimination or a disguised restriction on trade, and it rejected the panel's conclusion that such discrimination existed:

> We are unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of the hormones here in dispute for growth promotion purposes in the beef sector were not really designed to protect its population from the risk of cancer, but rather to keep out US and Canadian hormone-treated beef and thereby to protect the domestic beef producers in the European Communities.[478]

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[473] *See id.* para. 193-94.
[474] *See id.* paras. 197, 200.
[475] *See id.* para. 214.
[476] *See id.*
[477] *See id.* paras. 226-35.
[478] *Id.* para. 245.

Accordingly, the Appellate Body concluded that the panel's finding of discrimination was unjustified and erroneous as a matter of law.[479]

x. *Issues Reserved by the Panel*

The final issue the Appellate Body addressed was the panel's refusal to decide the claims of the United States and Canada under Articles 2.2 and 5.6 of the SPS Agreement.[480] The Appellate Body found this issue moot in view of the panel's other findings and conclusions.[481] In the interests of judicial economy, the Appellate Body held that the panel did not err when it refrained from making findings on Articles 2.2 and 5.6.[482]

d. *Summary*

This important precedent requires an importer to show that scientific evidence suggests that a product poses a health risk. A rule that required the exporter to show that the product is safe would have dealt a serious blow to the SPS Agreement and open trade because such a standard would be nearly impossible to meet. These reports also show that the WTO dispute settlement mechanism is capable of resolving technically complex trade-environment disputes.

5. *The Shrimp/Turtle Dispute*

a. *Background*

In a reprise of the issues addressed in the *Tuna/Dolphin* dispute, the WTO was asked to determine the GATT-consistency of a U.S. import ban on shrimp from India, Malaysia, Pakistan, and Thailand. The Endangered Species Act lists as endangered or threatened with extinction five species of sea turtles that live in U.S. waters and on the high seas. U.S. shrimp trawlers are required to use turtle excluder devices (TEDs) in their nets when they fish in areas where a significant likelihood of encountering sea turtles exists. Under Section 609 of the Endangered

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[479] *See id.*
[480] *See id.* paras 247-52. The United States and Canada cross-appealed from that decision.
[481] *See id.* paras. 250-52.
[482] *See id.* para. 252.

Species Act,[483] shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless the harvesting nation is certified to have a regulatory program and an incidental turtle-take rate comparable to that of the U.S. shrimpers.[484] For all practical purposes, in order to be certified under Section 609, countries having one of the five species of endangered sea turtle within their jurisdiction must require their shrimpers to harvest shrimp using TEDs.[485]

b. *The Panel Report*

i. *NGO Submissions*

Several environmental NGOs submitted unsolicited *amicus* briefs with the panel that defended the U.S. import ban on shrimp. The panel concluded that under Article 13.2 of the DSU, only information that the panel *seeks* (i.e., actually solicits) may be considered by a panel. Nevertheless, the panel invited the United States, if it so desired, to include the NGO submissions as part of its own submission.[486]

ii. *Unjustifiable Discrimination in Violation of Article XX*

Having found the import ban to be a violation of the GATT Article XI prohibition against quantitative restrictions on imports, the panel turned its attention to GATT Article XX. Employing a "chapeau-down"

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[483] 16 U.S.C. § 1537 (1994).

[484] *See* Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, paras. 2-6 (1998).

[485] Litigation involving the U.S. implementation of the shrimp import ban was brought in the U.S. Court of International Trade. *See* Earth Island Institute v. Christopher, 942 F. Supp. 597 (Ct. Int'l Trade 1996) (holding that State Department regulations allowing the import of shrimp from certain non-certified countries violates Section 609), *vacated*, 147 F.3d 1352 (Fed. Cir. 1998); Earth Island Institute v. Christopher, 948 F. Supp. 1062 (Ct. Int'l Trade 1996) (holding that shrimp harvested by manual methods that does not harm sea turtles can be imported from non-certified countries), *vacated*, 147 F.3d 1352 (Fed. Cir. 1998). For an analysis of the CIT decisions and the WTO dispute, *see* Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 U.C.L.A.J. ENVTL. L. & POL'Y 57 (1996-97). *See also New Role for NAFTA: Saving Fish?* CHRISTIAN SCI. MONITOR, Jan. 23, 1996, at 1; Timothy E. Wirth, *Take the Final Step to Protect Dolphins*, CHRISTIAN SCI. MONITOR, Feb. 2, 1996, at 19.

[486] *See* Report of the WTO Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, para. 7.8 (1998).

analytical approach, the panel did not inquire whether the U.S. measure was provisionally justified under either Article XX(b) or (g). Instead, the panel focused exclusively on the Article XX chapeau. With that focus, the panel concluded that the U.S. import ban unjustifiably discriminated against shrimp imports from the complaining Members, in violation of the Article XX chapeau. The panel rested its conclusion on the view that if the U.S. import ban was upheld, it could undermine the multilateral trading system.

> In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.[487]

Accordingly, the panel stated, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, the U.S. import ban constitutes unjustifiable discrimination between countries where the same conditions prevail.[488]

c. *The Appellate Body Report*

i. *NGO Submissions*

In connection with the NGO submissions, the Appellate Body found that the panel's reading of Article of the DSU was too narrow.

> We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under

[487] *Id.* para. 7.45.
[488] *See id.* para. 7.49.

> Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.[489]

The Appellate Body thus concluded that a panel is free to accept unsolicited submissions from interested groups if such information would be helpful to the panel in reaching its decision.

ii. *The Article XX Analysis—Introduction*

The Appellate Body was critical of the panel's analytical approach to Article XX. First, the Appellate Body noted, the general design of a measure is to be distinguished from its application.[490] The general design of a measure is relevant in determining whether the measure falls within one of the Article XX exceptions following the chapeau.[491] The application of the measure is to be examined in the course of determining whether it violates the chapeau.[492] The panel's analysis was flawed, according to the Appellate Body, because it "did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception*."[493]

The Appellate Body reiterated that an Article XX analysis is a two-step process: (1) determine whether the measure satisfies any of the exceptions listed in the paragraphs of Article XX following the chapeau, and (2) appraise the same measure under the chapeau.[494] The sequence is important: "The standard of 'arbitrary discrimination', for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labor."[495]

iii. *The Article XX(g) Exception*

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[489] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (Oct. 12, 1998) para. 110 [hereinafter *Shrimp-Turtle* Appellate Body Report].
[490] *See id.* para. 116.
[491] *See id.*
[492] *See id.*
[493] *Id.*
[494] *See id.* para. 118.
[495] *Id.* para. 120.

Article XX(g) covers measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[496] First, the Appellate Body concluded that textually Article XX(g) is not limited to non-living natural resources, but extends to living resources as well.[497] Rejecting Malaysia's "original intent" argument that Article XX(g) was intended to cover non-living resources only, the Appellate Body stated:

> The words of Article XX(g), "exhaustible natural resources," were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. . . .
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> . . . .
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> 130. From the perspective embodied in the preamble of the *WTO Agreement* [explicitly acknowledging the objective of sustainable development], we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary."[498]

Moreover, the Appellate Body added, two adopted GATT 1947 panel reports[499] found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). Accordingly, the Appellate Body held that measures to conserve exhaustible resources, whether living or non-living, may fall within Article XX(g).[500] The Appellate Body further found that sea turtles are an exhaustible natural resource.

Turning next to the issue of whether the U.S. measure was one "relating to the conservation of" exhaustible natural resources, the Appellate Body found a substantial relationship between Section 609 and

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[496] GATT, *supra* note 6, art. XX(g).

[497] *See Shrimp-Turtle* Appellate Body Report, *supra* note 489, para. 128.

[498] *Id.* paras. 129-130.

[499] *See Tuna Restrictions* Report, *supra*, note 316; *Herring and Salmon* Panel Report, *supra* note 320.

[500] *See Shrimp-Turtle* Appellate Body Report, *supra* note 489, para. 131.

its implementing regulations, on the one hand, and the conservation of sea turtles, on the other. "The means [TEDs] are, in principle, reasonably related to the ends [the conservation of sea turtles]."[501]

Addressing the last Article XX(g) criterion—that the measure is made effective in conjunction with restrictions on domestic production or consumption—the Appellate Body found that this requirement was easily satisfied.[502] U.S. shrimpers who fail to use TEDs face serious civil and criminal penalties, including forfeiture of their trawlers. "We believe," the Appellate Body concluded, "that, in principle, Section 609 is an even-handed measure."[503]

iv. *The Article XX Chapeau*

Having concluded that Section 609 is provisionally justified under the Article XX(g) exception, the Appellate Body next tackled the thorny issue of whether Section 609 violates the Article XX chapeau. Reflecting on the preambular language of the WTO Agreement that calls for "the optimal use of the world's resources in accordance with the objective of sustainable development," and the creation of the Committee on Trade and Environment and its terms of reference, the Appellate Body noted that these developments "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."[504] Nevertheless, the Appellate Body found it unacceptable

> for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.[505]

The Appellate Body added that the protection and conservation of highly migratory species of sea turtles demands concerted and cooperative efforts

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[501] *Id.* para. 141.
[502] *See id.* para. 144.
[503] *Id.*
[504] *Id.* para. 153.
[505] *Id.* para. 164 (emphasis in original).

on the part of the many countries whose waters are traversed by sea turtles. With the exception of the Inter-American Convention for the Protection and Conservation of Sea Turtles, the United States had failed to exhaust multilateral efforts, in the Appellate Body's view.[506] Rather than attempt to exhaust international mechanisms, the United States instead pursued the unilateral application of Section 609. In a footnote, the Appellate Body underscored this point with the observation that the United States, a party to CITES, made no attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee.[507] The Appellate Body also faulted the United States for acting in a discriminatory manner vis-a-vis shrimp exporting Members,[508] as well as for the lack of adequate transparency in the administration of the Section 609 certification procedures.[509]

Anticipating the firestorm of criticism that its decision would create within the environmental community, the Appellate Body launched a preemptive first strike in the following closing observations:

> In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[510]

In sum, the Appellate Body found Section 609 flawed chiefly in the manner in which the United States administered it, not with the substance

[506] *See id.* paras. 167-168, 171-172.
[507] *See* id. para. 171.
[508] Central and South American shrimp exporters were given preferential treatment under Section 609 vis-a-vis shrimpers from the four Asian complaining Members. *See id.* para. 175.
[509] *See id.*
[510] *Id.* para. 185 (emphasis in original).

of the law per se or its objectives.

6. *The Salmon Dispute*

a. *Background*

In 1996 Australia imposed an import ban on uncooked salmon from the Pacific rim of North America ostensibly to prevent the introduction of certain exotic diseases in the country. Fresh, chilled, or frozen salmon could be imported into Australia only if it was heat treated prior to importation into Australia. Canada complained that the import ban violated the SPS Agreement to the extent that the Australian import prohibition was not based on a risk assessment conducted in conformity with Article 5 of the Agreement.

b. *The Panel Report*

The panel agreed with Canada that Australia violated Articles 5.1 and 2.2 of the SPS Agreement by not conducting or relying on a proper risk assessment when imposing the import prohibition on ocean-caught Pacific salmon.[511] The panel concluded that because the heat-treatment requirement was not based on a risk assessment, it violated the SPS Agreement.[512]

The panel also concluded that Australia's import prohibition violated Article 5.5 of the SPS Agreement because it made an arbitrary or unjustifiable distinction between the SPS measures applicable to salmon products, which were subject to more onerous standards, and those measures applicable to four categories of other imported fish and fish products, which amounted to a disguised restriction on international trade.[513]

c. *The Appellate Body Report.*

The central question presented to the Appellate Body was the same as the one presented in the *Hormone Beef* dispute: Did Australia carry out

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[511] Report of the WTO Panel, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R (June 12, 1998) para. 8.59 [hereinafter *Salmon* Panel Report].
[512] *See id.* para 8.63.
[513] *See id.* paras. 8.133-8.134, 8.160.

a proper risk assessment under Article 5.1 of the SPS Agreement? While agreeing with the panel that Australia's import prohibition on Pacific salmon violates the SPS Agreement, the Appellate Body reversed the panel's finding that the SPS measure at issue was the heat-treatment requirement, rather than the import prohibition.[514] Australia contended that a 1996 Final Report constituted a risk assessment for purposes of Article 5.1 of the SPS Agreement.[515] Turning to the definition of "risk assessment" in Annex A of the SPS Agreement,[516] the Appellate Body found that a proper risk assessment must (1) identify the diseases whose entry or spread the Member wants to prevent, (2) evaluate the *probability* of entry of a pest or disease, not just the *possibility* of such entry, and (3) evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.[517] Because the 1996 Final Report did not contain (1) an evaluation of the likelihood of entry, establishment or spread of the diseases of concern, or (2) an evaluation of the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied, the 1996 Final Report could not qualify as a risk assessment.[518] Australia, therefore, acted inconsistently with Article 5.1 of the SPS Agreement.

The Appellate Body also upheld the panel's finding that Australia's import prohibition was arbitrary, unjustifiable, and a disguised restriction on international trade.[519] The Appellate Body did, however, reverse the panel's finding that Australia violated Article 5.6 of the SPS Agreement relating to alternative SPS measures that are reasonably available to the Member. Because no evidence was offered to show what level of protection could be achieved by each of the four alternative SPS measures mentioned in the 1996 Final Report, it was not possible to state definitely that Australia had or had not violated Article 5.6.

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[514] *See* Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, AB-1998-5, WT/DS18/AB/R, at 72, para. V.7 (1998) [hereinafter *Salmon* Appellate Body Report].

[515] *See id.* para. V.8. The 1996 Final Report concluded that imports of uncooked salmon should be prohibited in order to prevent the introduction and spread of exotic diseases within Australia.

[516] Annex A:4 defines "risk assessment" in part as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences . . . ."

[517] *See Salmon* Appellate Body Report, *supra* note 514, para. V.10-12.

[518] *See id.* at 76, 79.

[519] *See id.* at 93.

In important dictum the Appellate Body reconfirmed that Members have the right to determine their own appropriate level of SPS protection. However, the "appropriate level" is to be distinguished from the actual SPS measure adopted. The SPS measure adopted has to be rationally related to achieving the appropriate level of protection. Also, whatever appropriate level of protection a Member chooses, a Member cannot choose "zero risk" as an appropriate level of protection under the SPS Agreement. The Appellate Body clarified that

> [I]t is important to distinguish . . . between the evaluation of "risk" in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in *European Communities--Hormones*, the "risk" evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed." This does not mean, however, that a Member cannot determine its own appropriate level of protection to be "zero risk."[520]

The Appellate Body's decision is instructive in answering the question of what constitutes a proper risk assessment in the context of the spread of pests and diseases. Together with the *EC Hormones* decision on what constitutes a proper risk assessment in the context of additives or contaminants to food, the *Salmon* decision is an important addition to WTO jurisprudence under the SPS Agreement.

III. NAFTA AND THE ENVIRONMENT

A. *Introduction*

For proponents of free trade in North America, the 1991 GATT *Tuna/Dolphin* report[521] could not have come at a more inopportune time. That report preceded by just a few months the conclusion of the NAFTA negotiations between Canada, Mexico, and the United States. It cast a dark shadow over its prospects in Congress.

NAFTA[522] has been the target of spirited attacks, the most vigorous

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[520] *Id.* at 75 (footnote omitted).
[521] *Tuna-Dolphin I* Panel Report, *supra* note 7.
[522] NAFTA, *supra* note 8.

of which have come from labor and environmental groups. Labor groups emphasized that low wage jobs in the United States would move south to Mexico. Environmentalists also delivered heavy salvos.[523] They claimed that Mexico, whose environmental laws are not aggressively enforced, would become a pollution haven to which "dirty" U.S. industries would quickly relocate to avoid the more stringent U.S. air and water standards.[524]

Environment and labor side agreements concluded in 1993 allowed NAFTA to ride out the storm of anti-trade sentiment that swept the United States following the *Tuna/Dolphin* decision.[525] In 1997, President Clinton released the three-year review of the operation and effect of NAFTA.[526]

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[523] *See generally Environmental Groups Coalition Proposes Stronger NAFTA Safeguards*, 9 Int'l Trade Rep. (BNA) 1096 (1992); *Public Citizen Says NAFTA Summary Falls Short on Many Key Environmental Issues*, 9 Int'l Trade Rep. (BNA) 1502 (1992). Environmentalists even brought unsuccessful court challenges against NAFTA. *Compare* Public Citizen v. United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992) (holding that the U.S. Trade Representative's Office is not required to prepare an environmental impact statement for NAFTA pursuant to the National Environmental Policy Act), *and* Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993) (holding that NAFTA is not final agency action and, therefore, not subject to the notice and comment requirements of the Administrative Procedure Act), *with* Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993) (holding that the presumption against the extraterritorial application of U.S. statutes, including the National Environmental Policy Act, does not apply where the conduct regulated by the statute occurs primarily in the United States and the extraterritorial effect of the statute will be felt in Antarctica, a continent without a sovereign). *See also* Christina J. Bruff, *NAFTA Meets NEPA: Trade and the Environment in the 1990s*, 34 NAT. RES. J. 179 (1994); Dana E. Butler, *The Death Knell of the Legislative Environmental Impact Statement: A Critique of* Public Citizen v. U.S. Trade Representative, 17 LOY. L.A. INT'L & COMP. L.J. 122 (1994); Peter Fitzgerald & Vania J. Leveille, *When the National Environmental Policy Act Collides with the North American Free Trade Agreement: The Case of* Public Citizen v. Office of the United States Trade Representative, 9 ST. JOHN'S J. LEGAL COMMEN. 751 (1994).

[524] For an evaluation of Mexico's environmental laws, regulations, and their enforcement, see DANIEL MAGRAW, NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 445, 583 (1995). *See generally USTR Hills Says There Will Be No "Downward Harmonization" Under NAFTA*, 9 Int'l Trade Rep. (BNA) 1096 (1992); Brenda S. Hustis, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589 (1993); Joel L. Silverman, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 24 GA. J. INT'L & COMP. L. 347 (1994).

[525] *See* MAGRAW, *supra* note 524, at 15.

[526] *See* Letter of Transmittal from the President to Congress, Study on the Operation and Effect of the North American Free Trade Agreement (1997) (visited Oct. 1, 1998)

Chapter 4 of that review, *The North American Environment: Cooperation, Institutions, and Enforcement*, makes three assessments. First, it notes that Mexico is improving enforcement of its environmental laws. Second, two NAFTA institutions, the Border Enforcement Cooperation Commision (BECC) and North American Development Bank (NADBank) are helping communities along the U.S.-Mexico border area design and fund infrastructure projects that will improve conditions for border residents.[527] Third, another NAFTA institution, the Commission for Environmental Cooperation (CEC) has launched a number of environmental projects that will benefit the North American environment.[528]

B. *NAFTA's Environmental Provisions*

Originally NAFTA had no single chapter exclusively dedicated to environmental issues. The North American Agreement on Environmental Cooperation (NAAEC)[529] closed this gap.[530] NAFTA does, however, address trade and environment issues in its preamble and in the various chapters.[531]

1. *The Preamble*

NAFTA's preamble identifies fifteen goals.[532] Four of them have important environmental aspects. These goals are: (1) to promote trade liberalization in a manner consistent with environmental protection and conservation; (2) to promote sustainable development; (3) to strengthen

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<http://www.ustr.gov/reports/index.html> [hereinafter Operation and Effect of NAFTA].

[527] *See id.*

[528] *See id.*

[529] North American Agreement on Environmental Cooperation, Sept. 8, 9, 12, 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

[530] *See* MAGRAW, *supra* note 524, at 81.

[531] For additional analyses of these provisions and of the Environmental Side Agreement, see OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES (1993), *reprinted in* MAGRAW, *supra* note 524; Joseph G. Block & Andrew R. Herrup, *The Environmental Aspects of NAFTA and Their Relevance to Possible Free Trade Agreements Between the United States and Caribbean Nations*, 14 VA. ENVTL. L.J. 1 (1994); Colin Crawford, *Some Thoughts on the North American Free Trade Agreement, Political Stability and Environmental Equity*, 20 BROOK. J. INT'L L. 585 (1995); Raymond B. Ludwiszewski, *"Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection*, 27 INT'L LAW. 691 (1993).

[532] *See* NAFTA, *supra* note 8, pmbl.

the development and enforcement of environmental laws and regulations; and (4) to create new employment opportunities and improve working conditions and living standards within North America.[533]

2. *Article 104*

Article 104, *Relation to Environmental and Conservation Agreements,* together with Annex 104.1, provides that in the event of any inconsistency between NAFTA and three MEAs (i.e., CITES, the Montreal Protocol, and the Basel Convention), or the U.S.-Mexican Agreement on Improvement of the Environment in the Border Area (since replaced by the Border XXI Program, described below), the obligations of the latter prevail.[534]

3. *Sanitary and Phytosanitary Measures*

NAFTA Chapter Seven, Agriculture and Sanitary and Phytosanitary Measures, contains two sections.[535] Section A deals with agricultural trade, including market access for agricultural products and government subsidies.[536] Section B deals with sanitary and phytosanitary measures.[537] Like the Uruguay Round SPS Agreement, Chapter 7:B does not impose any specific standards on the Parties. Instead, Chapter 7:B establishes guidelines to ensure that parties take SPS measures for scientific reasons and not for trade protection.[538]

Under Chapter 7:B, each Party has the right to adopt any SPS measure it deems necessary for the protection of human, animal, or plant life. A Party may establish any level of protection it desires, so long as scientific evidence exists to support the measure, and the Party has made a risk assessment appropriate to the circumstances.[539] Once the Party has established a need for protection, the appropriate level is left to each Party to decide.[540] In other words, the appropriate level of protection is a value judgment, not a scientific one.

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[533] *See id.*
[534] *See id.* art. 104 & annex 104.1.
[535] *See id.* art. 701-24.
[536] *See id.* art. 701-708.
[537] *See id.* art. 709-24.
[538] *See id.* art. 712.
[539] *See id.* art. 712.1-.3.
[540] *See id.* arts. 712, 715.

The ability of a Party to set its own level of risk is tempered, however. The Parties agree that SPS measures will not be adopted and applied in a manner that arbitrarily or unjustifiably discriminates between domestic goods and imported products.[541]

Article 714.1 attempts to minimize differences among the three NAFTA Parties' SPS measures. It provides that an importing Party must accept a measure of an exporting Party as equivalent if the exporting Party's measure achieves the importing Party's level of protection.[542] The Parties further agree that they will apply SPS measures only to the extent necessary to achieve the appropriate level of protection, taking into account technical and economic feasibility.[543]

Although the agreement encourages Parties to adopt international standards where they exist, Article 713.3 permits the NAFTA parties to adopt SPS measures that are more stringent than international standards. This provision is important to environmental protection if a NAFTA Party considers international standards to be inadequate. SPS measures are presumptively valid if they conform to an international standard.[544] Nonconformity with an international standard alone, however, does not establish a presumption of invalidity under NAFTA.[545] In either event, a Party challenging another Party's SPS measure bears the burden of establishing the inconsistency.[546]

Article 717.4 provides that an importing Party may require governmental approval for the use of an additive or for establishing a tolerance for a contaminant prior to granting access to the importing Party's domestic market for food, beverages, or feedstuff containing that additive or contaminant.[547]

Article 718 on transparency requires advance public notice and an opportunity to comment on proposed SPS measures or amendments to existing SPS measures.[548] Article 718.4 requires a delay between the publication of an SPS measure and its effective date.[549]

One key difference between Chapter 7:B and NAFTA Chapter

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[541] *See id.* art. 712.4.
[542] *See id.* art. 714.2.
[543] *See id.* art. 712.5.
[544] *See id.* art. 713.2.
[545] *See id.* art. 713.2.
[546] *See id.* art. 723.6.
[547] *See id.* art. 717.4.
[548] *See id.* art. 718.1.
[549] *See id.* art. 718.4.

Nine on standards-related measures is the test used to determine whether a measure is protectionist and, therefore, illegal. As described below, Chapter Nine uses a test of non-discriminatory treatment.[550] Chapter 7:B, on the other hand, relies on a test of scientific evidence and risk assessment.[551] As noted above in connection with the Uruguay Round SPS Agreement, a strict test of non-discrimination is not possible for SPS measures because SPS measures must at times discriminate against imported products from a particular country because such goods pose a different health or safety risk than the same product from another country.[552] As long as the discrimination is not arbitrary or unjustifiable, it is permissible under Chapter 7:B.

4. *Standards-Related Measures*

NAFTA Chapter Nine, Standards-Related Measures, complements the Chapter 7:B environmental provisions. Article 903 affirms the Parties' rights and obligations to each other under environmental and conservation agreements to which they are a Party. Article 904.2 entitles each NAFTA Party to establish the levels of protection it considers appropriate in pursuing legitimate health, safety, and environmental protection objectives and to set those standards at a level to be determined by the Party. Unnecessary obstacles to trade are barred.[553] So long as the demonstrable purpose of the measure is to achieve a legitimate objective, and the measure does not exclude imports from a Party that meet that legitimate objective, an environmental measure is not an "an unnecessary obstacle to trade."[554]

In contrast with Article 712.3(b), which requires the Parties to base SPS measures on an assessment of risk and scientific principles, Article 904 does not obligate the Parties to conduct a risk assessment or to base their standards-related measures on a risk assessment.[555] A Party may, however, conduct such an assessment in pursuing its legitimate objectives.[556]

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[550] *See id.* art. 904.3.

[551] *See id.* art. 712, 714.

[552] *See supra* notes 105 through 171 and accompanying text.

[553] *See id.* art. 904.4.

[554] *See id.*

[555] *See generally id.* art. 904.

[556] *See id.* art. 907.1. When conducting a risk assessment, Article 907.1 directs the Parties to consider (1) available scientific evidence; (2) intended end uses; (3) processes

Article 904 not only reserves to the Parties the right to establish the levels of protection they deem appropriate in pursuing legitimate objectives of health and safety,[557] it also reserves to the Parties the right to prohibit the importation of another Party's goods that fail to comply with applicable standards-related measures of the importing Party.[558] Furthermore, an importing Party has the right to continue to prohibit the importation of such products until completion of any domestic approval procedure.[559]

In order to ensure that existing levels of high protection do not move in a downward trajectory, Article 906.2 obligates the Parties to harmonize ("make compatible" in the language of the Article) their respective standards-related measures, but in doing so not to reduce the level of environmental protection.[560] Article 906.2 ought to alleviate fears that NAFTA heralds the demise of effective environmental protection in North America, and, specifically, in the United States. Article 906.2 is designed to prevent the feared "ratcheting down" of environmental standards and enforcement to the lowest common denominator. At a minimum, Article 906.2 establishes a standstill in existing environmental laws and regulations within the United States. It calls for a ratcheting up of such standards and enforcement levels in Mexico, to the extent that its standards and enforcement levels are lower than, and thus incompatible with, the standards and enforcement levels set in the United States.

Article 906.4 obligates an importing Party to treat as equivalent to its own standards-related measures those of an exporting Party where it is demonstrated that the latter's technical regulations adequately fulfill the importing Party's legitimate objectives.[561]

Article 909 requires advance public notice and an opportunity to comment of at least sixty days (in the case of federal measures) on proposed new standards-related measures or modifications of existing standards-related measures.[562]

Article 914.4 on burden of proof parallels Article 723.6 by providing that in any dispute over a standards-related measure, the burden

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or production, operating, inspection, sampling or testing methods; and (4) environmental conditions. *See id.*

[557] *See id.* art. 904.2.

[558] *See id.* art. 904.1.

[559] *See id.* art. 904.1.

[560] *See id.* art. 906.2.

[561] *See id* art. 906.4.

[562] *See id.* art. 909.1

of proving an inconsistency with or violation of NAFTA rests with the challenging Party.[563]

Finally, to oversee the harmonization effort, Chapter Nine establishes a Committee on Standards-Related Measures whose functions include "facilitating the process by which the Parties make compatible their standards-related measures."[564] In addition, businesses and firms within the NAFTA Parties have decided not to wait for their governments to act and have taken the initiative. They are engaged in on-going negotiations to harmonize products standards and to conclude mutual recognition agreements.[565]

Before turning to the Environmental Side Agreement, the environmental provisions in two other NAFTA chapters, Investment and Dispute Settlement, will be analyzed.

5. *Investment*

One of the most serious misgivings harbored by NAFTA's opponents—captured in part by Ross Perot's "giant sucking sound" metaphor—is that Mexico will not only draw low-wage jobs from the United States, but that it also will become a pollution haven for the "dirtiest" U.S. industries. In connection with the latter, the fear is that polluting U.S. industries will move operations to Mexico where they purportedly can pollute at will. The Labor Side Agreement,[566] concluded concurrently with the Environmental Side Agreement[567] after the NAFTA negotiations were closed, is designed to address at least in part the first concern. Chapter Eleven on investment deals with the second concern.[568]

Article 1114, *Environmental Measures*, is an environmental sword and shield. The sword, Article 1114.1, provides that nothing in NAFTA is to be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with Chapter Eleven that it considers appropriate to ensure that investment activity in its territory is

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[563] *See id.* arts. 914.4, 723.6.
[564] *Id.* art. 913.2(b).
[565] *See NAFTA Industries Meet to Harmonize Standards,* 14 Int'l Trade Rep. (BNA) 262 (1997).
[566] North American Agreement on Labor Cooperation, Sept, 8, 9, 12, 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 (1993).
[567] NAAEC, *supra* note 529.
[568] *See* NAFTA, *supra* note 8, arts. 1101-39 & Annexes.

undertaken in an environmentally-sensitive manner.[569] The shield, Article 1114.2, bars the Parties from relaxing, waiving, or derogating from health, safety, or environmental measures as a way of encouraging foreign investment from another Party.[570]

6. *Chapter Twenty Dispute Settlement*

The NAFTA Chapter Twenty dispute settlement provisions carve out special procedures applicable to a challenge brought against a Party's environmental measures. These procedures were included in response to the *Tuna/Dolphin* panel report as a hedge against a replay of that GATT panel proceeding within the NAFTA context.

As a general matter, NAFTA trade disputes may be resolved under either NAFTA or WTO auspices at the option of the complaining Party.[571] Two exceptions exist, however, to this choice-of-forum option. First, Article 2005.3 provides that if the responding Party claims that its action is governed by Article 104 (giving priority to the three MEAs and the Border XXI Program in the event of a conflict between them and NAFTA), and requests that the matter be resolved under Chapter Twenty, the complaining Party thereafter can have recourse solely to the NAFTA dispute settlement procedures.[572]

Second, upon request of the responding Party, Article 2005.4 channels disputes arising under Chapters 7:B or Nine into Chapter Twenty if they concern a measure: (1) that is adopted or maintained by a Party to protect its human, animal, or plant life or health, or to protect its environment; or (2) that raises a factual issue concerning the environment, health, safety, or conservation, including directly related scientific matters.[573]

What explains these special dispute resolution provisions giving NAFTA preference over the WTO or other international bodies as the forum for resolving the Parties' trade-environment disputes? At the time NAFTA was concluded in 1992, the Uruguay Round negotiations on the Dispute Settlement Understanding had not been completed. At that time it was not clear to anyone, including the NAFTA Parties, whether the much-

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[569] *See id.* art. 1114.1.
[570] *See id.* art. 1114.2.
[571] *See id.* art. 2005.1.
[572] *See id.* art. 2005.3.
[573] *See id.* art. 2005.4.

maligned GATT dispute settlement process would be improved and, if so, whether dispute settlement under WTO auspices would present a hospitable or hostile forum for resolving trade-environment disputes. Given these uncertainties and the widespread dissatisfaction with the GATT dispute settlement process—a dissatisfaction fueled in large part by the *Tuna/Dolphin* decision[574]—the NAFTA Parties included exclusive jurisdiction provisions in Chapter Twenty for environmental disputes that otherwise would have fallen within the concurrent jurisdiction of NAFTA, the WTO, and/or some other international forum.

Finally, environmental disputes also receive special treatment vis-a-vis the NAFTA Free Trade Commission. The Commission, which is comprised of cabinet-level representatives of the Parties and charged with the task of supervising the implementation of NAFTA and resolving NAFTA disputes,[575] must convene to resolve a NAFTA environmental dispute if a complaining Party so requests.[576] The Commission may seek the advice of technical experts.[577] In the event the Commission is unsuccessful in resolving the dispute within thirty days, any Party may request the establishment of an arbitral panel whose reports are final and binding.[578] Environmental disputes which are referred to a Chapter Twenty arbitral panel may in turn be referred to scientific review boards to answer factual issues concerning environmental, health, safety, or other scientific matters.[579] In preparing its report, the arbitral panel must take the board's report into account.[580]

C. *The Environmental Side Agreement*

NAFTA has been called "the 'greenest' trade agreement ever."[581] The reason for this accolade is the NAAEC, or Environmental

[574] *See Tuna-Dolphin I* Panel Report, *supra* note 7.
[575] *See* NAFTA, *supra* note 8, arts. 2001.1, 2001.2(a) & (c).
[576] *See id.* arts.2007.1, 2007.2, 2007.4.
[577] *See id.* art. 2007.5(a).
[578] *See id.* arts. 2008.1, 2008.2.
[579] *See id.* art. 2015.1. The board is selected by the panel from among highly qualified, independent experts, after consulting with the disputing Parties. *See id.* art. 2015.2. Panel proceedings also may involve the use of technical experts to provide information and advice. *See id.* art. 2014.
[580] *See id.* art. 2015.4.
[581] Daniel C. Esty, *Making Trade and Environmental Policies Work Together: Lessons from NAFTA, in* TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE 373, 379 (James Cameron et al. eds., 1994).

Cooperation Agreement, signed one year after the conclusion of the NAFTA negotiations.[582] It augments the environmental provisions of NAFTA and its commitment to sustainable development. The NAAEC also delivered a preemptive strike against anti-NAFTA lobbying efforts in Congress by environmental and business groups in the United States.

The USTR took the lead in developing many of the Environmental Cooperation Agreement's provisions, in collaboration with an environmental negotiating sub-group co-chaired by the Environmental Protection Agency and the Department of State, with representatives from the Departments of Agriculture, Commerce, Justice, and Interior. The sub-group consulted with concerned business and environmental groups.

As an executive agreement, implementing legislation or congressional approval was not required. The NAFTA implementing bill, however, made NAFTA's entry into force contingent upon an exchange of

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[582] NAAEC, *supra* note 529. The NAAEC has generated a flood of legal commentary. *See generally* PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); Raymond B. Ludwiszewski & Peter E. Seley, *"Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 375 (Judith H. Bello et al. eds., 1994); MAGRAW, *supra* note 524; Frederick M. Abbott, *The NAFTA Environmental Dispute Settlement System as Prototype for Regional Integration Arrangements*, 4 Y.B. INT'L ENVTL. L. 3 (1994); Block & Herrup, *supra* note 531; LaRue Corbin et al., *The Environment, Free Trade, and Hazardous Waste: A Study of the U.S.-Mexico Border Environmental Problems in the Light of Free Trade*, 1 TEX. WESLEYAN L. REV. 183 (1994); Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW. 111 (1996); Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439 (1995); Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483 (1994); Reid A. Middleton, *NAFTA & The Environmental Side Agreement: Fusing Economic Development with Ecological Responsibility*, 31 SAN DIEGO L. REV. 1025 (1994); Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC As a Model for Future Accords*, 25 ENVTL. L. 31 (1995); J. Owen Saunders, *NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 273 (1994); Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT'L LAW. 751 (1993); Christopher Thomas & Gregory A. Tereposky, *The NAFTA and the Side Agreement on Environmental Co-operation—Addressing Environmental Concerns in a North American Free Trade Regime*, J. WORLD TRADE , Dec. 1993, at 5 (1993).

diplomatic notes among Canada, Mexico, and the United States stating that the supplemental agreement on the environment had entered into force.[583] Presidents Clinton and Salinas and Prime Minister Campbell signed the NAAEC in their respective capitols on September 14, 1993.[584]

The NAAEC is applicable throughout the territory of the United States and Mexico. The Agreement binds Canada with respect to all matters subject to Ottawa's control.[585] Canada is committed to using its best efforts to make the Agreement applicable to as many provinces as possible.[586] Canada is restricted in its ability to invoke the dispute settlement process to the extent of provincial participation.[587] As of late 1997, only Quebec and Alberta have signed the Environmental Cooperation Agreement.[588]

The NAAEC does not amend any NAFTA provisions, but does supplement the rights and obligations contained therein. The Agreement specifically commits the Parties to effective enforcement of their environmental laws, although its key feature is its institutional provisions. The Agreement establishes the Commission for Environmental Cooperation (CEC), whose competence covers any environmental or natural resource issue that may arise among the NAFTA Parties.[589] In addition, any environmental issue—from the protection of endangered species to transboundary pollution—may be the subject of consultations between the interested Parties under CEC auspices.[590]

Despite its trailblazing features, the NAAEC has not received

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[583] *See* NAFTA Implementation Act § 101(b)(2), 19 U.S.C. § 3311(b)(2) (1994). The Act also authorizes the establishment of the multilateral and bilateral commissions and administrative offices created under the NAAEC. *See id.* §§ 531-533, 19 U.S.C. §§ 3471-3473.

[584] *See* NAAEC, *supra* note 529, 32 I.L.M. at 1496.

[585] *See id.* art. 41 & Annex 41; *see also* Zen Makuch, *The Environmental Implications of the NAFTA Environmental Side Agreement: A Canadian Perspective, in* INTERNATIONAL TRADE AND THE ENVIRONMENT, *supra* note 5, at 387.

[586] *See* NAAEC, *supra* note 529, Annex 41:7.

[587] *See id.* Annex 41:3. The NAAEC dispute resolution provisions are not available to Canada until provinces representing 55% of Canada's gross domestic product have signed. This requirement means that Ontario's accession is critical.

[588] Ottawa drafted the Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation through which the provinces commit to the NAFTA Environment Agreement. A text of the Canadian Intergovernmental Agreement is available from Environment Canada at (819) 997-7475.

[589] *See* NAAEC, *supra* note 529, art. 8.

[590] *See id.*, arts. 22, 23.

universal acclaim. Some fear that NAFTA, even with the Environmental Cooperation Agreement, still will result in a "ratcheting down" of the enforcement of environmental laws by the Parties.[591] One commentator has described the Environmental Cooperation Agreement as "tepid," "lukewarm," an agreement that gives NAFTA's environmental provisions "some dull teeth."[592] This criticism persists in the face of a comparative study of Mexico's environmental laws, standards, and regulations conducted by the U.S. Environmental Protection Agency in 1993 that concluded that the U.S. and Mexican environmental regulatory regimes are designed to achieve comparable levels of protection.

1. *Preamble and Objectives*

The NAAEC's preamble reaffirms the international principle of good neighborliness, that is, the responsibility of states to ensure that activities within their territory do not cause damage to the environment of neighboring states. The preamble also reaffirms the principles declared in the 1972 Stockholm Declaration and the 1992 Rio Declaration, discussed above.[593]

The NAAEC has an ambitious agenda. Among its ten enumerated objectives are protecting the environment, promoting sustainable development, fostering cooperation on environmental law enforcement, and promoting transparency and public participation in the development of environmental laws, regulations, and policies.[594]

2. *Obligations*

The Agreement generally obligates the Parties to (1) prepare reports periodically on the state of the environment, (2) promote education in environmental matters, (3) promote the use of economic instruments for the efficient achievement of environmental goals, and (4) consider prohibiting the export to other NAFTA Parties of pesticides or other toxic

[591] Statements and letters from interested business and environmental groups addressing NAFTA and the environment, both in support of and in opposition to NAFTA, are collected in MAGRAW, *supra* note 524, at 629-755.

[592] *See* Joel L. Silverman, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 24 GA. J. INT'L & COMP. L. 347, 359, 364, 365 (1994).

[593] *See* NAAEC, *supra* note 529, pmbl.

[594] *See id.* art. 1.

substances whose use is prohibited within the Party's territory.[595]

Article 3 directs the Parties to maintain high levels of environmental protection.[596] More specifically, Articles 4 and 5 require the Parties to adopt fair, transparent, and impartial domestic administrative and judicial procedures so that private parties who are nationals of the Party have a means of redressing violations of that Party's environmental laws.[597] Decisions must be in writing and state the reasons on which they are based.[598]

Article 6 requires that private persons have a means of requesting their government officials to investigate alleged violations of that Party's environmental laws, as well as access to administrative and judicial forums for enforcing that Party's environmental laws and regulations.[599] NAFTA Parties, however, are not obligated to give nationals of another NAFTA Party any access to their courts or administrative agencies.[600]

3. *Institutional Provisions*

Part Three of the NAAEC establishes the Commission for Environmental Cooperation, consisting of the Council on Environmental Cooperation, a Secretariat, and a Joint Public Advisory Committee.[601]

a. *The Council*

The Council is comprised of cabinet-level representatives of the Parties and is required to meet at least once each year.[602] The Council serves as the CEC's governing body and performs the following functions: (1) it serves as a forum for discussion of environmental matters; (2) it oversees the implementation of the NAAEC; (3) it has oversight responsibility for work of the Secretariat; (4) it addresses questions and

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[595] *See id.* arts. 2.1, 2.3.
[596] *See id.* art. 3.
[597] *See id.* arts. 4, 5.
[598] *See id.* art. 7.2(a).
[599] *See id.* art. 6.1-6.3.
[600] *See id.* art. 38.
[601] *See id.* art. 8. For a summary of the CEC's operations through 1997, see Operation and Effect of NAFTA, *supra* note 526, at 132-36.
[602] *See* NAAEC, *supra* note 529, arts. 9.1, 9.3. *See generally* Jason Coatney, *The Council on Environmental Cooperation: Redaction of "Effective Enforcement" Within the North American Agreement on Environmental Cooperation*, 32 TULSA L.J. 823 (1997).

differences that may arise between the parties regarding the interpretation and application of the NAAEC; and (5) it approves the CEC's annual work program and budget.[603]

In connection with the CEC's annual cooperative work program, five major themes have been identified as the focus for 1997 and subsequent years: environmental conservation, protection of human health and environment, enforcement cooperation, environment and trade, and public outreach.[604] Regarding environmental conservation, the CEC Secretariat is coordinating efforts with NGOs to identify areas important to the long-term viability of bird populations.[605] The CEC also is coordinating efforts to conserve marine ecosystems, including regional implementation of the Global Program of Action for the Protection of the Marine Environment from Land Based Activities, signed by 101 countries in November 1995.[606] Regarding the protection of human health and environment, regional action plans are being developed for the management and/or elimination of four toxic substances: PCBs, DDT, mercury, and chlordane.[607] A program also is being developed to monitor and assess long-term air quality in North America, transboundary air pollution, and greenhouse gases.[608]

The CEC has oversight responsibility for the North American Fund for Environmental Cooperation. The Fund was created in 1995, but with a budget of less than $2 million.[609] The Fund supports community-based projects and studies on local environmental issues within the NAFTA Parties.[610] Thirty-five projects were approved under this program for 1996.

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[603] *See* NAAEC, *supra* note 529, art. 10.1.

[604] The CEC 1997 work program includes projects on (1) environmental conservation, (2) protecting human health and the environment, (3) environment, trade, and the economy, (4) enforcement cooperation and law, and (4) information and public outreach. *See* Comm'n on Envtl. Cooperation, *Annual Program and Budget 1997*, May 14, 1997 (visited Jan. 16, 1998) <http://www.cec.org> [hereinafter CEC Website].

[605] *See* CEC Website (visited Jan. 16, 1998) <http://www.cec.org/english/resources/publications/budgol96. cfm#01>.

[606] *See id.*

[607] *See id.*

[608] *See id.*

[609] *See* CEC Website (visited Jan. 16, 1998) <http://www.cec.org/english/nafec/flyer. cfm?format=2>.

[610] A summary of the projects approved by the CEC under the North American Fund for Environmental Cooperation is available from CEC Website (visited Jan. 16, 1998) <http://www.cec.org/english/nafec/index.cfm?format=1>.

Thirty-two projects have been approved for 1997.[611]

b. *The Secretariat*

The CEC Secretariat is headquartered in Montreal and is headed by an Executive Director who is appointed by the Council for a three-year term.[612] The position rotates consecutively between nationals of the NAFTA Parties.[613] In the performance of their duties, and in a striking parallel to the independence that Commissioners appointed to the EU Commission must have from their home governments, the Executive Director and the Secretariat's staff must neither seek nor receive instructions from any government or any other authority external to the Council.[614]

The Secretariat is responsible for providing technical, administrative, and operational support to the Council and to committees and groups established by the Council.[615] The annual program and budget of the CEC is prepared by the Executive Director, subject to Council approval.[616] The Secretariat also is responsible for preparing the CEC's annual report.[617]

Finally, under NAAEC Article 13, the Secretariat may prepare a report on any matter within the scope of the CEC's annual work program.[618] In response to a complaint from private groups concerning massive migratory bird deaths at the Silva Reservoir in Mexico, the Secretariat prepared an Article 13 report in 1996.[619] In response to that report, the NAFTA Parties negotiated a resolution that called for scientific cooperation on the problem.[620]

c. *The Joint Public Advisory Committee*

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[611] *See id.*
[612] *See* NAAEC, *supra* note 529, art. 11.1.
[613] *See id.*
[614] *See id.* art. 11.4.
[615] *See id.* art. 11.5.
[616] *See id.* art. 11.6.
[617] *See id.* art. 12. The CEC's annual reports are available from its website. *See* CEC Website (visited Jan. 16, 1998) <http://www.cec.org>.
[618] *See* NAAEC, *supra* note 529, art. 13.
[619] *See id.* arts. 13, 14.
[620] *See id.* art. 13.

The last of the three CEC institutions is the fifteen-member Joint Public Advisory Committee (JPAC). As its name suggests, the JPAC provides citizen advice to the Council on any matter within the scope of the NAAEC, and technical, scientific, or other information to the Secretariat.[621]

The NAAEC is maddeningly short on detail as to the role of the JPAC.[622] Only one article, consisting of seven sections, is devoted to the JPAC. Given the lack of infrastructure, the absence of clearly defined functions, and the requirement that it meet only once a year, JPAC's role within the CEC may be ad hoc.[623]

4. *The Private Petition Process*

The Secretariat may consider a submission from any NGO or private person asserting that a NAFTA Party is failing to enforce effectively its environmental laws.[624] To be in proper form, a submission must meet the following six criteria: (1) it must be in writing and in the language designated by the Party that is the target of the submission; (2) it must clearly identify the person or NGO making the submission; (3) it must provide sufficient information to allow the Secretariat to review the submission; (4) it must appear to be aimed at promoting environmental enforcement rather than at harassing industry; (5) it must indicate that the matter has been communicated in writing to the responsible authorities of the Party and indicate the Party's response; and (6) it must be filed by a

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[621] *See id.* arts. 16.4, 16.5. Each NAFTA Party appoints five members. *See id.* art. 16.1.

[622] *See id.* art. 16.

[623] *See id.* art 16.3; *see also* Saunders, *supra* note 582, at 295-96. Additional information on the JPAC and its members is available from the CEC website. *See* CEC Website, *supra* note 604.

[624] *See* NAAEC, *supra* note 529, art. 14.1. To assist persons in the preparation of Article 14 submissions, the Secretariat has prepared a booklet, GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLE 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION. *See* CEC Website, *supra* note 604, at <http://www.cec.org/english/citizen/Guide08.cfm?format=2>. For critiques of the petition process, see Jorge A. Gonzalez, Jr., *The North American Free Trade Agreement*, 30 INT'L LAW. 345 (1996); Michael J. Kelly, *Bringing A Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger, But Movement in the Right Direction*, 24 PEPP. L. REV. 71 (1996); Jay Tutchton, *The Citizen Petition Process under NAFTA's Environmental Side Agreement: It's Easy to Use, but Does It Work?*, 26 ENVTL. L. REP. 10018 (1996).

person or NGO residing in a NAFTA Party.[625] Given the broad discretion vested in the Secretariat in screening submissions, petitioners must necessarily depend on the Secretariat's good faith administration of Article 14.

If a submission meets these six criteria, the Secretariat next determines whether it merits a response from the target Party.[626] To guide the Secretariat in this threshold determination of merit, Article 14.2 instructs the Secretariat to consider (1) whether the submission alleges harm to the person or NGO making the submission; (2) whether the submission raises matters whose further study would advance the goals of the NAAEC; (3) whether private remedies are available under the Party's laws and, if so, whether they have been pursued; and (4) whether the submission is drawn exclusively from mass media reports.[627]

After the Secretariat concludes that the submission warrants developing a factual record, it notifies the Council. The Council in turn instructs the Secretariat whether to develop a factual record.[628] In preparing a factual record, Article 15.4 provides that the Secretariat may consider virtually any relevant technical, scientific, or other information submitted by the NGO, by the responding NAFTA Party, by the Joint

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[625] *See* NAAEC, *supra* note 529, art. 14.1. As of late 1997, a total of 13 citizen petitions had been received by the Secretariat under Article 14 (two in 1995, four in 1996, and seven as of January 1998). The Secretariat maintains a Registry of Submissions on Enforcement Matters. *See* CEC Website, *supra* note 604.

[626] *See* NAAEC, *supra* note 529, art. 14.2.

[627] *See id.* NAAEC Article 14.3 gives the affected Party up to 30 days, or 60 days where exceptional circumstances warrant, to apprise the Secretariat whether private remedies exist and have been pursued, and whether the matter is the subject of a pending administrative or judicial proceeding. In the event of a pending domestic proceeding, the Secretariat must terminate the Article 14 proceedings. *See id.* art. 14.3.

[628] *See id.* art. 15.2. An affirmative vote of the Council requires a two-thirds majority. In August 1996, for example, the Council instructed the Secretariat to prepare a factual record regarding the environmental impact assessment done on a public harbor terminal in Cozumel, Mexico. As of September 1997, the Council had not yet directed the Secretariat to prepare a factual record in any of the seven citizen petitions submitted in 1997. Four of those petitions involve Canada, one the United States, and two involve Mexico.

Under Article 13, the Secretariat also has the option of preparing a report for the Council on any matter within the scope of the annual program. In response to a submission concerning massive migratory bird deaths at the Silva Reservoir in Mexico, the Secretariat prepared an Article 13 report, which lead to a negotiated resolution of the matter among the NAFTA Parties. *See* CEC Website, *supra* note 604.

Public Advisory Committee, or developed by the Secretariat itself.[629] The Secretariat's function under Article 14 is inquisitorial, rather than accusatorial.

A draft factual record is submitted to the Council for its comments on accuracy.[630] Once the Secretariat completes the final factual record and submits it to the Council, the Council may make it publicly available within 60 days.[631]

For the petitioning private party, the Article 14 petition process ends with the transmittal of the final factual record to the Council. The NAAEC does not provide private remedies and does not create any private right of action against a NAFTA Party.[632] A petitioner must either persuade its own government to pursue the matter further under NAAEC Article 23, or persuade an NGO or private individual who is a national of the offending NAFTA Party to pursue available domestic legal remedies.[633]

As of December 1998, the Secretariat has received nineteen Article 14 submissions, concerning all three NAFTA Parties.[634] Three have concerned the United States, six have concerned Canada, and four have concerned Mexico.[635] A few of those submissions have been rejected by the Secretariat under Article 14.1 for not involving a failure by a Party to enforce its environmental law (e.g., a 1995 Endangered Species Act petition, a 1995 National Forest Logging petition, and a 1997 Canadian Environmental Defence Fund petition).[636]

5. *Information Exchange*

Part Four of the NAAEC, Cooperation and Provision of Information, requires the Parties at all times to endeavor to agree on the interpretation and application of the NAAEC.[637] Article 20.2 requires each Party, to the maximum extent possible, to notify other Parties of any

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[629] *See* NAAEC, *supra* note 529, art. 15.4.

[630] *See id.* art. 15.5.

[631] *See id.* art. 15.7. A two-thirds vote in the affirmative is required. As one commentator has noted, making the factual record publicly available is not the same as publishing and disseminating it. *See* Kelly, *supra* note 624, at 81.

[632] *See* NAAEC, *supra* note 529, art. 38.

[633] *See* Kelly, *supra* note 624, at 82.

[634] *See supra* note 582 and accompanying text.

[635] *See id.*

[636] *See* Gonzalez, *supra* note 624, at 355-56; Kelly, *supra* note 624, at 91-95.

[637] *See* NAAEC, *supra* note 529, art. 20.1.

proposed or actual environmental measure that might affect materially the operation of the Agreement. When requested by another Party, a Party must provide promptly information and respond to questions pertaining to any such proposed or actual environmental measure.[638] The Parties are free to notify any other Party if credible evidence exists of possible violations of the latter's environmental laws.[639]

Article 21 requires a Party to provide information to the Council or the Secretariat when so requested that is necessary to the preparation of reports or factual records.[640] If a Party declines the Secretariat's request, it must notify the Secretariat of its reasons for doing so in writing.[641]

6. *Dispute Settlement*

In addition to the mechanisms available to private persons to submit petitions about a NAFTA Party's failure to effectively enforce its environmental laws, Part Five of the Agreement creates a mechanism for Party-to-Party dispute resolution in the event there has been "a persistent pattern of failure by [a] Party to effectively enforce its environmental law."[642]

Article 45 defines the three key terms "persistent pattern," "effectively enforce," and "environmental law."[643] The term "persistent pattern" is defined as "a sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement."[644] Rather than state when a Party has failed to "effectively enforce its environmental law," Article 45.1 instead states when a party has *not* failed to "effectively enforce its environmental law":

> [W]here the action or inaction in question by agencies or officials of that Party:
> (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or

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[638] *See id.* art. 20.3.
[639] *See id.* art. 20.4.
[640] *See id.* art. 21.1. If a Party deems a request from the Secretariat to be unduly burdensome, it may notify the Council, which may in turn revise the Secretariat's request by a two-thirds vote. *See id.* art. 21.2.
[641] *See id.* art. 20.3.
[642] *Id.* art. 22.1.
[643] *See id.* art. 45.
[644] *See id.* art. 45.1.

> compliance matters; or
> (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities . . . .[645]

Finally, Article 45.2 defines "environmental law" as any statute or regulation whose primary purpose is the

> protection of the environment, or the prevention of a danger to human life or health, through
> (i) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants,
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes . . . , or
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in a party's territory.[646]

The term "environmental law" does not include any statute or regulation the primary purpose of which is managing the commercial harvesting or exploitation, including aboriginal harvesting, of natural resources. A provision's primary purpose is determined by reference to that provision's primary purpose, not to the primary purpose of the statute or regulation of which it is a part.[647]

Article 22 establishes a Party-to-Party consultative mechanism by which these issues are addressed first. In the event the consulting Parties are unable to reach a mutually satisfactory resolution of their dispute within sixty days, Article 23 permits either Party to request a special session of the Council.[648] The Council may attempt to resolve the matter. To that end, it may call upon technical advisors, establish working groups, make recommendations, and have recourse to good offices, conciliation, or mediation.[649] If the Council is unable to resolve the Parties' dispute, it may

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[645] *Id.*

[646] *Id.* art. 45.2.

[647] *See generally* Fulton & Sperling, *supra* note 582, at 129-31; Garvey, *supra* note 582; Raustiala, *supra* note 582, at 40-43; Thomas & Tereposky, *supra* note 582, at 27-32.

[648] *See* NAAEC, *supra* note 529, art. 23.1.

[649] *See id.* art. 23.4. In addition, Article 23.5 provides that if the Council decides that a matter is more properly covered by another agreement to which the Parties are

refer the Parties to arbitration in a narrow range of cases, described next.[650]

a. *Arbitration*

The NAAEC establishes a detailed, regularized arbitration procedure for resolving Party-to-Party disputes.[651] The arbitration procedure is only available, however, where the alleged persistent pattern of failure by the responding Party to enforce effectively its environmental law relates to a situation involving "workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party."[652]

i. *Panel Selection*

Panelists are selected from a roster of forty-five individuals established by the Council.[653] Appointments to the roster are for three-year renewable terms.[654] Arbitral panels are comprised of five members.[655] The

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signatories, it shall refer the matter for appropriate action in accordance with such other agreement. For example, if the dispute concerns the transboundary shipment of hazardous waste, the Council might refer the Parties to the Basel Convention for resolution of their dispute.

[650] *See id.* art. 24.1.

[651] *See id.* arts. 24-32; Saunders, *supra* note 582, at 299-302. The third NAFTA Party may intervene as a complainant as of right if it has a substantial interest in the matter. *See* NAAEC, *supra* note 529, art. 24.2. In any event, upon proper notice to the disputing Parties and the Secretariat, a nondisputing Party is entitled to attend all hearings, to make written and oral submissions, and to receive the disputing Parties' written submissions. *See id.* art. 29.

[652] *Id.* art. 24.1.

[653] *See id.* art. 25.1. Roster members are selected using the following four criteria: (1) they must have expertise in environmental law or its enforcement, technical or professional experience or expertise, or experience in resolving international trade disputes; (2) they must be selected strictly on the basis of their objectivity, reliability, and sound judgment; (3) they must be independent of, and not affiliated with or take instructions from, any party, the Secretariat, or the JPAC; and (4) they must comply with the code of conduct established by the Council. *See id.* art. 25.2. Roster members with a conflict of interest in the particular dispute are disqualified from serving as a panelist. *See id.* art. 26.1.

[654] *See id.* art. 25.1(a).

[655] *See id.* art. 27.1.

panel chair is chosen by agreement of the Parties within fifteen days after the Council votes to convene a panel. In the absence of such agreement, the chair is selected by one of the disputing Parties, with the selecting Party chosen by lot, but the chair may not be a citizen of the selecting Party.[656] Within fifteen days after selecting the chair, each Party to the dispute selects two panelists who are citizens of the other disputing Party.[657] If a disputing Party fails to make its selection, panelists are selected by lot from among roster members who are citizens of the other disputing Party.[658] This default selection provision creates an incentive for disputing Parties to participate in the arbitral proceeding.[659]

Panelists are selected normally, but not exclusively, from the roster.[660] In the event an individual is selected as a panelist who is not on the roster, a Party may exercise a peremptory challenge.[661] Similarly, if a panelist has been selected from the roster whom another Party believes is in violation of the code of conduct, that panelist may be removed if the disputing Parties so agree.[662]

ii. *Conduct of the Hearing*

Panel proceedings are conducted under the Model Rules of Procedure established by the Council.[663] The Model Rules include a right to at least one hearing before the panel, the opportunity to make written initial and rebuttal submissions, and anonymity of panelists insofar as which panel members are associated with majority or minority opinions.[664] Unless the Parties otherwise agree, a panel's standard terms of reference (i.e., its competence or subject matter jurisdiction) are as follows: "To examine, in light of the relevant provisions of the Agreement, including

[656] *See id.* art. 27.1(b).
[657] *See id.* art. 27.1(c).
[658] *See id.* art. 27.1(d).
[659] In cases involving a dispute among all three NAFTA Parties, the selection of panelists is modified. The responding Party selects two panelists, one who is a citizen of one of the complaining Parties, and another who is a citizen of the other complaining Party. The complaining Parties together choose two panelists who are citizens of the responding Party. The default selection procedures are the same as those applicable in bilateral Party disputes. *See id.* art. 27.2.
[660] *See id.* art. 27.3.
[661] *See id.*
[662] *See id.* art. 27.4.
[663] *See id.* art. 28.1.
[664] *See id.*

those contained in Part Five, whether there has been a persistent pattern of failure by the Party complained against to enforce effectively its environmental law, and to make findings, determinations and recommendations in accordance with Article 31(2)."[665]

Under Article 30, on request of a disputing Party or on its own initiative, a panel may seek information and technical advice from any person or body that it deems appropriate, subject to any terms or conditions the disputing Parties may impose.[666]

The panel submits an initial report and a final report. The initial report is submitted within 180 days after the last panelist is selected.[667] The report is based on the submissions and arguments of the Parties, together with any information furnished to the panel under Article 30.[668] The initial report consists of (1) findings of fact, (2) the panel's determination whether there has been a persistent pattern of failure by the responding Party to effectively enforce its environmental law, and (3) in the event of an affirmative determination, a panel recommendation for the resolution of the dispute.[669] A typical recommendation would suggest that the responding Party adopt and implement an action plan sufficient to remedy the pattern of non-enforcement.[670]

A disputing Party may submit written comments to the panel on its initial report within thirty days.[671] In light of those comments the panel may request the views of the other participants, reconsider its report, and make any further examination that it deems appropriate.[672]

Article 32 requires the panel to submit its final report within sixty days after its initial report.[673] The disputing Parties must in turn transmit it to the Council within fifteen days, along with their comments, on a confidential basis and the final report is published five days after it is transmitted to the Council.[674]

b. *Implementation of Final Report*

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[665] *Id.* art. 28.3.
[666] *See id.* art. 30.
[667] *See id.* art. 31.2.
[668] *See id.* art. 31.1-31.2.
[669] *See id.* art. 31.2.
[670] *See id.*
[671] *See id.* art. 31.4.
[672] *See id.* art. 31.5.
[673] *See id.* art. 32.1.
[674] *See id.* art. 32.2-32.3.

If the panel's final report is affirmative, the disputing Parties are free to conclude a mutually satisfactory action plan.[675] If the Parties are unable to reach such an agreement within sixty days after the final report, or if there is disagreement over whether the responding Party is fully implementing an action plan, a disputing Party may request that the panel reconvene.[676]

When a panel has reconvened under the first circumstance (i.e., failure to reach agreement on an action plan), the panel must either approve the responding Party's action plan or establish one of its own that is consistent with the responding Party's environmental laws.[677] The panel also may impose a monetary penalty, where warranted, no greater than .007 percent of the total trade in goods between the Parties during the most recent year for which data are available.[678] In determining the amount of the assessment, the panel is to take into account the following factors: (1) the pervasiveness and duration of the party's persistent failure to effectively enforce its environmental law, (2) the level of enforcement that could be reasonably expected of a party given its resource constraints, (3) the reasons given by the party for not fully implementing an action plan, (4) efforts made by the party after the final report to begin remedying its pattern of non-enforcement, and (5) any other relevant factors.[679] Any penalty is paid into the North American Fund for Environmental Cooperation controlled by the CEC for the improvement of the environment.[680]

When a panel reconvenes under the second circumstance (i.e., failure to implement an action plan), the panel must determine whether the responding Party has, in fact, failed to implement fully the action plan.[681] The panel may impose a monetary penalty if it determines that the Party complained against has failed to implement fully the action plan.[682]

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[675] *See id.* art. 33.

[676] *See id.* art. 34.1. If no action plan is agreed upon, a request to reconvene is untimely unless it is made within 120 days after the final report is issued. If an action plan was agreed to but allegedly is not being fully implemented, a request to reconvene may be made no sooner than 180 days after the action plan was approved. *See id.* art. 34.2-34.3.

[677] *See id.* art. 34.4.

[678] *See id.* art. 34.4, Annex 34.1.

[679] *See id.* Annex 34.2.

[680] *See id.* Annex 34.3.

[681] *See id.* art. 34.5.

[682] *See id.* art. 34.5(b).

Determinations of a reconvened panel, including penalty assessments, are final.[683]

c. *Suspension of Benefits*

If a responding Party fails to pay a monetary assessment within 180 days, Article 36 permits a complaining Party to suspend the application of NAFTA benefits in an amount no greater than that sufficient to collect the monetary assessment.[684] Suspension of NAFTA benefits may include an increase in the rates of duty on goods from the responding Party, not to exceed the lesser of (a) the rate that was applicable when NAFTA entered into force, or (b) the applicable Most-Favored-Nation duty rate on the date the Party suspends benefits.[685]

In considering what tariff commitments or other benefits to suspend, a complaining Party first must attempt to suspend benefits in the same sector as that in respect of which there has been a persistent pattern of failure to enforce environmental laws (e.g., suspension of benefits on agricultural goods in retaliation for non-enforcement of environmental laws affecting agriculture).[686] Failing that, a complaining Party may suspend benefits in other sectors.[687]

The Council may reconvene the panel to determine whether the monetary assessment has been paid or the action plan fully implemented. In either case, the suspension of benefits is to be terminated.[688] The Council also may reconvene the panel to determine whether the suspension of benefits is manifestly excessive.[689]

To date, there have been no requests to initiate the Article 23 dispute resolution process.

7. *General Provisions*

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[683] *See id.* art. 34.6.
[684] *See id.* art. 36.1.
[685] *See id.* Annex 36B. Special enforcement and monetary assessment collection procedures apply to Canada that require panel reports to be filed with a Canadian court and judgment entered thereon, which then becomes enforceable in Canada. *See id.* Annex 36A.
[686] *See id.* Annex 36B(2).
[687] *See id.*
[688] *See id.* art. 36.4-36.5.
[689] *See id.* art. 36.5.

Part Six of the NAAEC contains a number of provisions of general application. First, Article 37 makes clear that nothing in the Agreement empowers a Party to undertake environmental law enforcement activities in the territory of another Party.[690] Second, Article 38 provides that no Party may provide for a right of action under its domestic law against any other Party on the ground that another Party has acted in a manner inconsistent with the Agreement.[691] In other words, the right of private persons within one NAFTA Party to make submissions to the Secretariat under Article 14 alleging that another NAFTA Party has failed to enforce effectively its environmental law is exclusive.[692] Third, Article 39 protects from disclosure business confidential and proprietary information.[693] Finally, Article 42 carves out a national security exception that permits Parties to take any action they consider necessary for the protection of their essential security interests relating to arms, munitions, and nuclear weapons.[694]

D. *U.S.-Mexico Border Environment Cooperation Agreement*

The United States and Mexico have concluded a supplemental bilateral environmental agreement to develop environmental infrastructure in the border area.[695] The Border Environment Cooperation Agreement creates two institutions. The first is the Border Enforcement Cooperation Commission (BECC), consisting of a Board of Directors, a General Manager, a Deputy General Manager, and an Advisory Council.[696] The BECC's responsibility is to help border communities plan and develop environmental infrastructure projects.[697]

The second institution is the San Antonio-based North American

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[690] *See id.* art. 37.

[691] *See id.* art. 38.

[692] *See id.* art. 14.

[693] *See id.* art. 39.

[694] *See id.* art. 42.

[695] *See* Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, 32 I.L.M. 1545 (1993) [hereinafter BECC/NADBank Agreement]; *see also* Gonzalez, *supra* note 624, at 356-57; Steinberg, *supra* note 112, at 245-53.

[696] *See* BECC/NADBank Agreement, *supra* note 695, art. III, §§ 3-5.

[697] *See id.* art. I § 1; Gonzalez, *supra* note 624, at 357. Additional information on the work of the BECC is available on the internet. *See* BECC Website (visited Oct. 25, 1998) <http://cocef.interjuarez.com>.

Development Bank (NADBank), which is responsible for generating financial resources for infrastructure construction of pollution-control and waste-water treatment facilities.[698] NADBank was funded with $225 million by the U.S. and Mexican governments. These public funds are to leverage up to $3 billion in private money in capital markets to finance the construction of border environmental projects.[699]

The BECC has certified sixteen projects. NADBank has approved the financing for four of these projects, two on each side of the border. The BECC also has received a $10 million grant from the U.S. EPA to identify, develop, and assist water-related projects in both countries. In 1996, the two countries signed an agreement to improve air quality in the El Paso-Ciudad Juarez area. Some water pollution problems also were being addressed in 1996 by the BECC and NADBank. Seven water treatment plants had been certified by BECC as of 1996.[700]

E. *U.S.-Mexico Border XXI Program*

Another bilateral spin-off agreement from NAFTA is the 1996 Border XXI Program designed to improve the environment of the U.S.-Mexico border area. The program is the successor arrangement to the Integrated Border Environmental Plan, a bilateral arrangement between the United States and Mexico concluded in February 1992. That Plan in turn built on the 1983 La Paz Agreement between Mexico and the United States.[701] The Border XXI Program now forms the core of the U.S. environmental cooperative relationship with Mexico.[702] It is designed to provide for the long-term protection of human health and the environment along the U.S.-Mexico border area. Its objectives are (1) to strengthen enforcement of existing environmental protection laws, (2) to reduce pollution and improve the quality of the border area through new initiatives, (3) to increase cooperative planning, training, and education,

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[698] *See* Raul Hinojosa-Ojeda, *The North American Development Bank: Forging New Directions in Regional Integration Policy,* 60 J. AM. PLAN. ASS'N 301 (1994). *See generally*, NADBank Website (visited Oct. 25, 1998) <http://www.nadbank.org>.

[699] *See* Steinberg, *supra* note 112, at 247.

[700] For a summary of the activities of the BECC and NADBank, *see* Operation and Effect of NAFTA, *supra* note 526, at 126-32. *See also* Robert Bryce, *US and Mexico Tackle Air Pollution, But Set Water Issues Aside*, CHRISTIAN SCI. MONITOR, May 16, 1996, at 4.

[701] *See* Agreement on Cooperation for Protection and Improvement of the Environment in the Border, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827.

[702] *See* Operation and Effect of NAFTA, *supra* note 526, at 116-23.

and (4) to improve understanding of the border area environment.

IV. SUMMARY AND CONCLUSION: INTEGRATING OPEN TRADE AND ENVIRONMENTAL PROTECTION

As the foregoing amply demonstrates, the United States and the other Members of the WTO have committed to a comprehensive international trade law regime under the auspices of which all trade-environment disputes are to be resolved in a multilateral/bilateral forum. The core GATT obligations not to discriminate against imports regardless of their origin (the Article I MFN commitment), the obligation not to discriminate against imports vis-a-vis the domestic like product (the Article III national treatment obligation), and the commitment not to impose quotas on imports (the Article XI prohibition on quotas) create a legal framework that ensures that trade in goods will not be impeded. Regardless of whether this legal regime now is deemed to be harmful to the environment, the inescapable fact is that the United States and the other WTO Members have made a legal commitment to these rules. Unilateralism has been forsworn.

Beyond these three core GATT obligations, the Uruguay Round Agreements dealing with SPS measures, technical measures, subsidies, and dispute resolution put a substantial amount of flesh on the bare bones of the core GATT commitments. As has been shown, the scope of these agreements is broad. They establish a comprehensive legal regime that regulates the imposition of border measures on the grounds of health, safety, and other environmental concerns. The binding dispute settlement mechanism established under the DSU gives WTO Members an adequate forum for resolving trade-environment disputes bilaterally. Once again, unilateral responses to trade-environment disputes are rejected.

In addition, the NAFTA environmental side agreement, NAECA, is even broader in scope than the WTO agreements to the extent that it has established an institutional framework for the study, negotiation, and resolution of environmental issues among the three NAFTA parties. Indeed, the cooperative nature of the NAFTA environmental programs could serve as a possible model for the WTO membership.

As the foregoing has shown, the GATT-WTO system and NAFTA have in place a number of institutional and substantive provisions designed to address trade disputes in the context of the environment. Their overarching goal is to prevent trade protectionism while at the same time protecting the environment. Their institutional framework calls for

the resolution of trade-environment disputes in a multilateral and/or bilateral context. Unilateralism is rejected totally as an option.

The United States, as a signatory to both the WTO Agreement and NAFTA, is obligated to perform its obligations under those agreements in good faith. Its resort to unilateral trade measures to resolve trade-environment disputes, in the face of international agreements that provide a bilateral/multilateral dispute resolution mechanism for resolving such disputes, violates international law. Beyond the question of the validity of unilateral measures to resolve trade-environment disputes, as a policy matter the United States has learned the hard way that unilateralism is a double-edged sword. In its recent dispute with the EU over the use of leghold traps, the United States came close to being on the receiving end of a unilateral EU import ban on fur from animals caught with leghold traps. It was only after extensive bilateral negotiations that the parties were able to reach a mutually satisfactory settlement of their dispute.[703]

The GATT-WTO rules are deeply sensitive to the fact that a national regulation that is nominally for the protection of the environment may be pretextual, that is, it may be nothing more than a thinly disguised trade protectionist measure. The Stockholm Declaration[704] does not directly address the question of the impact of environmental regulation on growth and international trade. The Rio Declaration does provide in three places a broad framework for harmonizing environmental and trade concerns, essentially giving trade issues primacy over environmental concerns in the event the two conflict.[705] In Principles 11, 12, and 16, the Rio Declaration specifically warns that pursuing aggressive environmental policies may have a potentially adverse impact on international trade.[706]

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."[707] In other words, Principle 11 reminds countries that when developing international environmental standards, compare apples to apples. In addition, Principle 11 mildly admonishes developed countries to avoid "eco-imperialism" (i.e., the act of demanding that developing countries

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[703] *See EU, U.S. Reach Accord on Phaseout of Leghold Traps, Averting Fur Import Ban*, 14 Int'l Trade Rep. (BNA) 2076 (1997).

[704] *See* Stockholm Declaration, *supra* note 25.

[705] *See* Rio Declaration, *supra* note 26.

[706] *See id.* princs. 11, 12, 16.

[707] *Id.* princ. 11.

adopt excessively stringent, costly, and arguably inappropriate environmental standards or risk import bans on shipments of goods to developed countries).[708]

Second, Principle 12 addresses the crux of the environment-trade debate, namely, environmental measures that are disguised trade protectionism. It 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 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.[709]

Principle 12 has a substantive and procedural message. On the substantive level, when trade measures are used in the name of environmental protection, means and ends should be linked closely and causally. On the procedural level, unilateralism and extraterritorial application of domestic laws are unacceptable. Multilateral approaches and consensus building are strongly encouraged.[710]

Third, Principle 16 expands on Principle 11's direction to compare apples with apples, and Principle 12's charge to avoid unilaterally imposed environmental measures that are a disguised form of trade protectionism. Principle 16 counsels against the adoption of environmental policies that might distort world trade patterns: "National authorities should endeavour to promote the internalization 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

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[708] *See id.*
[709] *Id.* princ. 12 (emphasis added).
[710] *See id.*

investment."[711] Principle 16's "polluter pays principle" is tempered by Principle 11's warning to developed countries not to impose environmental standards on developing countries and by Principle 12's rejection of unilateralism and avoidance of trade protectionism in the name of environmental protection.

If the Stockholm and Rio Declarations are reasonably accurate reflections of world opinion on the interrelationship of trade and the environment,[712] then a consensus exists that economic growth should not be sacrificed or the open world trading system wrecked in the name of environmental protection. Both Declarations encourage states to reflect carefully before pursuing economic policies that could damage the environment. Conversely, both Declarations urge states to exercise restraint and avoid environmental policies that could damage the world trading system it took fifty painstaking years to build.[713]

The GATT-WTO system predates the emergence of a significant environmental movement by at least two decades.[714] Nevertheless, when measured against its liberal trade philosophy, the Stockholm and Rio Declarations are in large measure harmonious with the GATT-WTO system. The two declarations stress the importance of balancing trade and economic growth with environmental protection. Similarly, GATT-WTO rules stress the importance of open, unrestricted trade, but recognize that importing countries have legitimate health and safety concerns and, on those grounds, may restrict or ban certain imported goods.

Few will quarrel that protecting the environment should be a high priority for every country, and especially for the developed-country Members of the WTO. Are the GATT-WTO system and NAFTA obstacles to achieving this goal? Although environmentalists portray them as being at best indifferent to environmental issues and at worst hostile to them, can environmental concerns be accommodated adequately under the GATT-WTO system?[715]

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[711] *Id.* princ. 16.

[712] The vote on the Stockholm Declaration was 103 countries for, zero against, and 12 abstaining. *See* BURNS H. WESTON, ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 943 (1990). The Rio Declaration was adopted by consensus by the 175 countries attending the Rio Conference. *See* Kovar, *supra* note 30, at 119.

[713] *See* Stockholm Declaration, *supra* note 25; Rio Declaration, *supra* note 26.

[714] *See* Goldman, *supra* note 16, at 1289.

[715] *See generally* K. Gwen Beacham, *International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 655 (1992);

The need for greater integration of trade and environmental policies is undeniable. As an initial matter, such policies need not be mutually exclusive.[716] As one economist has observed, "[m]ost environmental policies are not in conflict with basic GATT rules."[717] Environmentalists seem to have an endless list of grievances with the GATT-WTO system. If their real concern is that liberal trade may reduce worldwide environmental standards to the lowest common denominator, then the problem lies with the market's failure to reflect environmental costs in prices and in government subsidization of polluting industries.[718]

Resorting to trade sanctions to address environmental issues may be misguided for several reasons. First, trade sanctions, such as a ban on imported goods produced by polluting production processes and methods, rarely, if ever, attack the root of the problem. Second, such trade sanctions, when advocated by environmental groups with the support of domestic business groups, may have as its primary aim trade protectionism, not environmental protection. Such advocacy can be especially pernicious because it is so socially respectable.[719] Trade sanctions can in turn lead to an escalation of trade tensions that trigger retaliatory trade responses from exporting countries.

Economic studies have shown, moreover, that tough environmental standards at home do not, standing alone, cause companies to relocate abroad.[720] Other factors, such as labor costs, transportation infrastructure, market access, and political stability figure more prominently in the

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Dunoff, *supra* note 298, at 1047; Jackson, *supra* note 14; Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185 (1994); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997).

[716] *See, e.g.*, CONFRONTING TRADE AND ENVIRONMENTAL CONFLICTS: PROSPECTS AND PRACTICAL APPROACHES (ABA 1993); C. FORD RUNGE, ET AL., FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS (1994); TRADE AND THE ENVIRONMENT, *supra* note 581; DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995); Jonathan Scott Miles, *Doing the Right Thing for Profit: Markets, Trade, and Advancing Environmental Protection*, 44 DRAKE L. REV. 611 (1996); Wold, *supra* note 56.

[717] Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns, in* INTERNATIONAL TRADE AND THE ENVIRONMENT, *supra* note 5, at 327.

[718] *See id.* at 325 n.3.

[719] *See* Anderson, *supra* note 12, at 441.

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

location/relocation decision.[721]

It is not surprising that international trade measures have become the mechanism of choice for responding concretely to other countries' behavior that threatens the environment. First, trade sanctions are high profile and, therefore, potentially of great symbolic value. Second, trade measures do not involve or threaten the use of armed force (excepting, of course, "quarantines" such as the one imposed against Cuba by the United States during the Cuban missile crisis or against Iraq during the Gulf War). When trade sanctions are imposed, generally no soldier is deployed in a theater of war and ordered to put his or her life in harm's way while performing a combat role. Third, building a national or international consensus on the need for or the wisdom of imposing trade sanctions presents policy makers with a supremely delicate challenge.[722] Nevertheless, it is undoubtedly easier to build a consensus on unilaterally initiating trade sanctions than it is to commit and deploy troops abroad either unilaterally or multilaterally, absent an act of war by the target country against the sending country or the special case of an Iraqi invasion of a Kuwait.[723]

Against this backdrop, it comes as no surprise then that environmentalists have borrowed a page from the national security and human rights book and embraced import bans and restrictions as the preferred method for forcing nations that trade with the United States to adopt measures to protect the environment. Indeed, the use of trade measures to enforce environmental standards can be compelling particularly when international trade is the direct cause of the environmental damage as, for example, with trade in hazardous waste or in endangered species.

Although trade sanctions have an obvious and understandable appeal, the one question environmentalists have either failed to ask or have ignored is whether trade sanctions are effective. Do trade sanctions work? The symbolic value of trade sanctions, highly touted in the human rights arena, should not be discounted completely even when the ends are

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[721] *See id.*

[722] A perennial example is the tug-of-war between Congress and Presidents Bush and Clinton over China's continued most-favored-nation trade status. *See Senate Sustains President's Veto of Bill Conditioning MFN Status for China*, 9 Int'l Trade Rep. (BNA) 518 (1992); Ann Scott Tyson, *China Reacts to US Trade Decision*, CHRISTIAN SCI. MONITOR, May 25, 1990, at 3.

[723] *See* Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y INT'L BUS. 263 (1992).

environmental. At the same time, the role of symbolism should not be overrated or overemphasized. Symbolism may be a necessary condition for imposing trade sanctions against a country with a less than exemplary environmental track record, as measured by U.S. standards. Symbolism standing alone, however, should never be a sufficient condition for imposing such sanctions.

Moving beyond symbolism, the primary focus needs to be on the effectiveness of trade sanctions as a tool for achieving certain environmental ends. The question that needs to be asked and answered in the affirmative before unilateral trade sanctions are imposed is whether the imposition of sanctions will cause the exporting country to change its environmental policies. The effectiveness of trade sanctions ought to be the initial focus and, ultimately, the bottom line. Otherwise, legitimate environmental concerns, when coupled with strong trade protectionist pressures at home, can result in the imposition of trade sanctions that are imposed ostensibly on environmental grounds but which have the potential for delivering a crippling blow to the world economy.

Environmental protection, in combination with trade protectionism, can lead to an undisciplined, discriminatory use of trade sanctions. Consequently, when trade sanctions are invoked on environmental grounds, they need to be used in a very disciplined and discriminating fashion.[724] Once a country imposes trade sanctions, it may be impossible to avoid the downward spiral of retaliation and counter-retaliation, leading to an all-out trade war.[725] In any such war, the environment could be the big loser. An importing country's use of trade restrictions to block imports in the name of environmental protection may actually be at cross-purposes with the goal of environmental protection.

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[724] For a 1990 case study on the use of economic sanctions as a foreign policy tool that offers some insights to this question, see GARY C. HUFBAUER, ET AL., ECONOMIC SANCTIONS RECONSIDERED, HISTORY AND CURRENT POLICY (1990). To the question, "Are economic sanctions effective?" Hufbauer, Schott, and Elliott give a guarded answer of "sometimes":

> 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.

Id. at 92. The authors conclude that sanctions are seldom effective in bringing about major changes in the policies of the target country.

[725] *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.

Such restrictions may promote environmental degradation by protecting less efficient manufacturers and producers from more efficiently produced imports.

In the name of environmental protection, a substantial volume of import trade could be affected significantly through the use of trade measures imposed ostensibly to advance environmental goals but which are in fact pretextual and nothing more than disguised nontariff barriers to trade.[726] Domestic business interests and unions anxious to erect barriers to import competition from low-wage countries may drape themselves in the green flag and join forces with environmental groups.[727] Together they may forge a coalition to pressure government regulators to keep the playing field level by restricting imported products that are manufactured or processed by heavily polluting industries in countries where environmental controls are either less stringent, loosely enforced, or non-existent.

One writer has compared this informal coalition among protectionist domestic business interests, unions, and environmental groups to an unholy alliance between the Baptists and the bootleggers.[728] The environmentalists are the Baptists who support prohibition on grounds of morality and health. Business and labor groups are the bootleggers who support prohibition in order to preserve jobs and their share of the domestic market from import competition. The lesson here is beware of domestic manufacturers and unions who lament the state of the environment in other countries. The environment may not be their real concern.

In short, instead of viewing free trade and environmental protection as mutually reinforcing, environmentalists' working premise is that the GATT-WTO system is an obstacle to environmental protection. Short of a no-growth economic stance, this is a false premise. The GATT-WTO system and free trade are not environmental villains. As explained by one

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[726] *See* John Dillin, *With US Jobs at Stake, Congress Takes Wary View of Trade Pact*, CHRISTIAN SCI. MONITOR, Mar. 17, 1993, at 4 ("[S]ome Mexicans worry that the US will use environmental standards as a form of protectionism against their products").

[727] As reported in The Economist, "[o]ne recent attack on GATT by Public Citizen [headed by Ralph Nader] was signed by over 300 groups. They included the International Ladies' Garment Workers Union, the United Methodist Church, the American Cetacean Society and the Sierra Club." *The Greening of Protectionism*, ECONOMIST, Feb. 27, 1993, at 25.

[728] *See* David Vogel, *Discussant's Comments*, *in* INTERNATIONAL TRADE AND THE ENVIRONMENT, *supra* note 5, at 245.

economist, "Environmental problems arise from various types of market (prices not reflecting environmental costs) and government failure (subsidies to polluting activities) or lack of clear property rights."[729] In other words, if GATT-WTO disciplines were honored less in the breach and more in the observance, then the GATT-WTO system would be at least a partial solution to the world pollution problem. By opening markets and lifting government restrictions on trade as GATT directs, resources will be consumed by the most efficient producers, causing less damage to the environment in the long run.

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[729] Sorsa, *supra* note 717, at 325 n.3.