Searching for GATT’s Environmental Miranda: Are Process Standards Getting Due Process

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Introduction

While the clairvoyant may have anticipated it earlier, the policy struggle between environmental protection and liberal trade effectively began in August 1991. That month, as has been recounted numerous times,1 a

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General Agreement on Tariffs and Trade (GATT) arbitral panel declared that provisions of the U.S. Marine Mammal Protection Act\(^2\) (MMPA) were contrary to existing GATT rules.\(^3\) Although the panel’s decision had several distinct legal elements, the crux of the dispute brought by the government of Mexico—and the basis of the panel’s decision—was the U.S. executive’s mandate to ban the importation of certain tuna caught by a fishing technique that kills and maims dolphins.\(^4\) Today, this tuna/dolphin decision has come to characterize the entire debate over trade and environment.

This paper analyzes the GATT’s fear of legitimizing trade-based production and process methods (PPMs) by dissecting the pertinent facts of the two tuna/dolphin cases, analyzing the GATT’s jurisprudence on GATT Articles III and XX, examining the rather ugly philosophical underbelly of the free trade system,\(^5\) and presenting a new vision for “sustainable development”\(^6\) in an interdependent world economy.

I. The Setting: What Goes Around Comes Around

What do canned tuna, recycled plastic, sustainably-cut timber, and reformulated gasoline have in common? They are all consumer products that have been “produced”—manufactured, harvested, extracted, built, or prepared—in an environmentally conscious manner. When trade restrictions regulate the environmentally destructive methods of production of an afflicted product, these restrictions are generally known as “process standards,”\(^7\) or perhaps more accurately, as PPM trade measures. Whatever


(3) Id. at para. 7.1; see also MMPA, 16 U.S.C. § 1371(a)(2) (“The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards.”).


(5) See The World Commission on Environment and Development, *Our Common Future* (1987) [hereinafter The Brundtland Report]. Development is sustainable if it meets the needs of the present without compromising the ability of future generations to meet their own needs.” Id. at 8.

(6) Symptomatic of the entire “trade and environment” debate, terms often mean different things to “environmentalists” and to “traders.” Such is the case with “stan-
their label, these trade measures have become a primary focus of a larger international policy debate that threatens to make economic growth and ecological protection needlessly antagonistic.

From an environmental perspective, PPMs cut to the very heart of environmental protection. Clean air and water are not possible without laws that control the PPMs causing excessive pollution. Excessive solid waste and persistent hazardous waste are both the result of harmful PPMs and, as such, are regulated accordingly. Because indiscriminate PPMs have led to depleted fisheries, denuded forests, and species extinctions, conservation law seeks to manage them in a variety of ways. Even statutes that directly regulate products like toxics, pesticides, and other hazardous chemical compounds must ultimately address production methods. In example after example, all environmental problems can eventually be traced to environmentally destructive PPMs. Without the ability to regulate PPMs, environmental law would be virtually useless.

Of course, environmental treaties or laws that seek to influence PPMs are not by themselves in conflict with international trade. Only if a standards. The trade community defines mandatory compliance trade measures as technical regulations and those for which compliance is not mandatory as standards. The U.S. environmental community defines standards as binding legal requirements a legislature or regulatory agency created, while it defines regulations as administrative rules that implement statutory law. This paper uses the environmental set of definitions.

8. Trade measures do not always enforce PPM requirements. It is also important to note the distinction in trade law between PPM standards that directly relate to the product itself (where the country of consumption directly feels the environmental consequence of a production externality) and PPM standards that do not directly relate to the product (where there exists an environmental externality occurring at the production site). See generally ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), INTERIM CONCEPTUAL FRAMEWORK FOR PPM MEASURES, COM/TD/ENV(94)39 (Apr. 6-7, 1994). This distinction is the result of the trade principle "like product," discussed infra part IV. For purposes of this paper, "PPM" will refer to standards seeking to regulate behavior at the production site, regardless of the consumption effects.


13. See, e.g., Pollution Prevention Act, 42 U.S.C. §§ 13101-13109 (Law. Co-op. 1989 & Supp. 1993); BARRY COMMONER, MAKING PEACE WITH THE PLANET 41-55 (1990); Sandra Postel, Carrying Capacity: Earth's Bottom Line, in STATE OF THE WORLD 3 (Lester Brown ed., 1994). Of course, overall world consumption patterns are also critical to achieving sustainable development. Yet even here, one could argue that a PPM trade measure based on the natural resource use intensity of a given product would adequately internalize environmental costs at consumption.
try wishes to control harmful PPMs with restrictions on imports or exports do these trade restrictions run into trouble with the General Agreement on Tariffs and Trade.\footnote{14} But quite often in today's international community, the most effective means of enforcing a process standard is with trade leverage. This is not to say that trade restrictions can cure all environmental woes or that they will always have the desired environmental effect. Nonetheless, the situation today is that innovative domestic and international efforts to limit environmentally harmful PPMs are in grave jeopardy because of existing interpretations of international trade law.

In many ways, the GATT—the umbrella agreement governing international trade law—is a victim of its own success. From its inception in 1947 to the end of the Tokyo Round of GATT in 1979, tariffs around the world dropped precipitously and will sink further as a result of the Uruguay Round.\footnote{15} Consequentially, trade negotiators have begun, starting with the Tokyo Round in 1973, to address the many types of non-tariff barriers—including environmentally based trade measures—as potentially disguised or arbitrary trade barriers. Although non-tariff barrier negotiations stalled during the preceding Kennedy Round of GATT talks,\footnote{16} the Tokyo Round produced the Agreement on Technical Barriers to Trade (TBT), or the "Standards Code."\footnote{17} Although the Standards Code explicitly addresses environmental standards, it shares the flaw of its apparent suc-


\textsuperscript{15} On December 15, 1993, the 117 signatories to the GATT reached a tentative agreement on the so-called Uruguay Round of negotiations. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter Final Agreement], GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994) reprinted in OFFICE of THE U.S. TRADE REPRESENTATIVE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (VERSION OF 15 DECEMBER 1993) (1993). These negotiations lowered tariff barriers and non-tariff barriers on a number of trading items (e.g., manufactured products such as steel, textiles, and computer parts) and established rules in new trading disciplines (e.g., services, agriculture, and intellectual property rights). The GATT parties also created the World Trade Organization (WTO), which will serve as the formal institution enforcing trade disciplines established by the Uruguay Round and previous GATT rules. Agreement Establishing the Multilateral [World] Trade Organization (WTO), GATT Doc. MTN/FA II (Dec. 15, 1993) [hereinafter WTO Agreement], in Final Agreement, supra. The Uruguay Round was signed on April 15, 1994 in Marrakesh, Morocco, and now each party must implement its accord. See also PATRICK LOW, TRADING FREE: THE GATT AND U.S. TRADE POLICY 70 (1993). Traditional macro-economic theory states that the drop in tariffs after World War II led to unprecedented global growth.

\textsuperscript{16} Low, supra note 15, at 173.

\textsuperscript{17} Agreement on Technical Barriers to Trade, B.I.S.D., supra note 3, 26th Supp. 8 (1980).
cessor, the Uruguay Round's Agreement on TBTs. While the environmental community has made the most noise about this issue, PPMs are also central to business enterprises as they can significantly affect costs and profit margins throughout a product's life cycle. Business umbrella groups, such as the International Organization for Standardization (ISO), often create multilateral standards to increase harmonization, prevent protectionism, and increase economic efficiency. What is new to business about trade-based environmental PPMs is that they are usually mandatory and are sometimes even used unilaterally. Yet environmental PPM standards hold the promise not only of improving the global environment, but also of promoting the $200 to 400 billion per year "enviro-tech" goods and services industry.

At its core, however, the debate over PPMs and much of the trade/environment relationship is fundamentally about democracy. Who decides when and why trade restrictions based on PPMs are appropriate? Citizens of a country speaking through their legislature? Or an international trade organization, directly accountable only to member governments and career bureaucrats? How much legal authority the World Trade Organization (WTO) and similar institutions receive and how such institutions settle disputes are vitally important democratic questions related to PPMs. Ironically, both the trade and environmental policy areas are in the general long-term interests of the public, but they are often targets for short-sighted special interests. Because of the power of modern technology, citizens around the globe are increasingly linked by both trade and common environmental threats.

Thus, in a world where national governments are unable to control

18. Agreement on Technical Barriers to Trade, GATT Doc. MTN/FA II-AIA-6 (Dec. 15, 1993) [hereinafter TBT Agreement], in Final Agreement, supra note 15.
19. See, e.g., Patrick Cooke, Office of Standards Services, U.S. Dep't of Commerce, Trade Implications of Process and Production Methods (PPMs), Mar. 1990, at 1. "The explosion in technological development has broadened and deepened the need for standardization. In these process-intensive high technology industries, the application of PPM standards . . . are becoming much more prevalent, with PPM-related provisions frequently required in the determination of conformity to regulatory requirements." Id. at 2.
every event, a successful resolution of the PPMs and overarching trade/environment debate will turn on whether international trade law is able to adapt to the general public's simultaneous desire to protect the environment and to live comfortably. It can be expected that multinational corporations, which account for roughly three quarters of all world trade, will vigilantly defend their turf by pressing for open markets and investment protection. Lesser developed countries (LDCs) will balk if PPM standards are perceived to be unfairly limiting their market access to the developed world. Yet despite such complicated international politics, rules linking environmental protection and liberal trade can and must be forged. If not, both the sustainability of the planet's rich natural resources and the viability of the world trading system will be in grave danger.

II. Rocking the Boat, Part I: Tuna/Dolphin I

The political flap over PPMs began in earnest with the original and infamous tuna/dolphin GATT decision. Although this case has already been analyzed countless times, it is startling how many legal commentators—including the GATT panelists themselves—either omit or misstate pivotal facts relating to this seminal decision. Instead of recounting the entire tuna/dolphin saga, which by itself could fill the space of a book, key points relating to this conflict will be emphasized. In short, this still unresolved case centers on U.S. restrictions of yellowfin tuna imports from those countries whose nationals kill an excessive number of dolphins in the process of catching tuna in the eastern tropical Pacific Ocean.

24. See, e.g., Peter Drucker, Trade Lessons From the World Economy, 73 FOREIGN AFF. 99, 104-08 (1994). Although Drucker does not make the argument, one could even argue that his discussion of global investment patterns suggests that the seemingly unrelated problems of trade/environment and U.S.-Japan bilateral trade are connected by disputes over money flows.

25. See TIM LANG & COLIN HINES, THE NEW PROTECTIONISM 34 (1993). Furthermore, over 40% of world trade is conducted within multinational corporations. Id.


27. See, e.g., President's News Conference with European Union Leaders in Brussels, 30 WEEKLY COMP. PRES. DOC. 33 (Jan. 11, 1994). “[W]e simply have to assure that our economic policies also protect the environment . . . and our common interest in enhancing environmental protection throughout the globe.”

28. Though infamous to environmentalists and others, the GATT Secretariat has been notably less concerned as it not only has publicly supported the panel decision, but it has also rejected any notion that present trade rules and environmental objectives are at all incompatible. GATT SECRETARIAT, 1 INTERNATIONAL TRADE 90-91, 22-23 (1992).

29. Tuna/Dolphin I, supra note 3.

30. See supra note 1.

31. It should be noted from the outset that the modus operandi of the purse seine fishery at issue here is to intentionally cast nets on schools of dolphin in order to catch the large yellowfin tuna that flock beneath them.

32. The MMPA has forced the U.S. Secretary of the Treasury to ban the import of yellowfin tuna from Mexico, Venezuela, and Vanuatu for violating “comparability”
Perhaps the most misleading characterization of the tuna/dolphin dispute is that it is merely an "animal welfare" issue. While the public campaign to end the purse seine fishery has certainly used the "Flipper" angle to advocate a dolphin-safe tuna policy, it would be surprising for any conservationist to claim that the slaughter of over seven million dolphins by the fishery since the late 1950s is not a serious conservation problem.

Indeed, subsequent to the GATT panel decision, several dolphin species directly impacted by the fishery were listed as "depleted" under the MMPA. These designations have placed additional restrictions upon the remaining three U.S. boats that continue to set nets on dolphins, which in turn has made the MMPA's "comparability" criteria for foreign fleets more stringent.

Another persistent mischaracterization of the tuna/dolphin conflict is that the United States has unilaterally bullied other countries in a way that offends others' national sovereignty. Sovereignty, however, is a two-edged sword. If there is a danger in the United States telling other countries how to produce certain goods, there is at least an equal danger in the GATT requiring the United States to accept products regardless of their environmental effect. In addition, the GATT's preoccupation with unilateral measures ignores the fact that international environmental agreements do not simply appear out of thin air.

dolphin kill standards. 16 U.S.C. § 1371(a)(2). The MMPA also prohibits the importation of any fish caught with large-scale high seas driftnets. Id.

33. This is not to imply that "animal welfare" issues do not raise serious moral and conservation questions.

34. Some now contend that setting nets on dolphins is biologically preferable to catching free swimming yellowfin tuna because bycatch is lower and the effect on tuna stocks is better. This is a preposterous argument. Considering the fact that there is presently a glut of cheap canned tuna on the world market (from both eastern tropical Pacific (ETP) and non-ETP tuna fisheries), any negative conservation effects from nondolphin tuna fishing should be remedied by regulating entry into the ETP fishery, not by allowing the sets on dolphins. Even in the ETP today, where dolphin setting persists, fishermen often set purse seine nets on mature free swimming yellowfin because it is economically advantageous for them to do so. There are abundant stocks of tuna elsewhere around the world, most notably in the western tropical Pacific ocean where tremendously large numbers of fast reproducing skipjack tuna exist. Telephone interview with David Phillips, Executive Director of Earth Island Institute, in San Francisco, Cal. (Feb. 7, 1994).


38. See U.S. CONST. art. I, §8. Although the GATT does not possess the legal authority to change or override U.S. law, it can, nonetheless, place undue economic pressure on certain trade-based laws by permitting retaliatory trade measures against countries with GATT-inconsistent trade restrictions. GATT, supra note 14, art. XXIII.

almost always necessitate leadership from a progressive country. Indeed, the tuna/dolphin panel completely ignored years of effort by the U.S. to negotiate an international agreement through the Inter-American Tropical Tuna Commission (IATTC).

Mexico's strongest argument against the U.S. MMPA tuna import requirements may center on the issue of business certainty. Despite the fact that the MMPA makes allowances for foreign fleets and despite the fact that Mexican fishermen can obtain current information on U.S. dolphin kill rates from the IATTC, Mexico's daily fishing practices and U.S. export opportunities are dependent upon the activities of the U.S. tuna fleet in a way that made strategic economic planning difficult. One simple solution, of course, would be to revoke the U.S. permit for setting nets on dolphins, thereby creating the highly certain comparability standard of zero. Another answer might be to "cap" a low annual kill/set ratio for both the U.S. and the foreign fleets at the beginning of each year and have such a regime vigorously enforced by an international body.

Yet another potential solution would be to ban the importation of tuna by each violative fishing vessel, not by each country's aggregate vessel performance. The advantages of this approach are that the trade restric-

40. For instance, Great Britain unilaterally forbade the human slave trade in the 19th century, which eventually led to international consensus on the subject. Regardless of one's opinion on dolphin protection, the MMPA has been extraordinarily effective in reducing dolphin kills in the ETP, as the number of dolphin deaths caused by U.S. fishermen dropped from 19,714 in 1988 to 115 in 1993, and the number of overall dolphin deaths in the ETP dropped from over hundreds of thousands in the mid-1980s to less than 4000 in 1993. Telephone interview with David Phillips (based on publicly available Inter-American Tropical Tuna Commission (IATTC) numbers), supra note 34.

41. One prominent reason explaining the failure of the IATTC to broker a successful dolphin accord is that the organization has historically been more interested with tuna as a commodity than with dolphins as a conservation concern. Thus, in 1992, the United States and Mexico attempted to negotiate a bilateral agreement to stop dolphin deaths by the tuna fishery, but Mexico balked at the last minute. See International Dolphin Conservation Act of 1992 (IDCA), Pub. L. No. 102-523, 106 Stat. 3425 (codified at 16 U.S.C. §§ 1361, 1411-1418 (Supp. V 1993) [hereinafter IDCA].

42. Tuna/Dolphin I, supra note 3, para. 5.28. "[T]he Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards." Id.

43. The MMPA's dolphin kill limits, for example, permit foreign fleets a 25% cushion when calculating comparability to U.S. kill/set ratios. 16 U.S.C. § 1371(a) (2) (B) (II).

44. Imagine a U.S. industry being similarly held directly hostage to the daily pollution or output fluctuations of a foreign industry.

45. See, e.g., IDCA, supra note 41. The bilateral agreement would establish a moratorium on the practice of setting nets on dolphins to catch tuna. Although the U.S. fleet has only three boats still setting on dolphins (Mexico has roughly 40), the moratorium approach would quash any talk of U.S. hypocrisy concerning dolphin conservation. Telephone interview with David Phillips, supra note 34.

46. This more "direct" regulatory approach was advocated by some during the NAFTA side agreement debate on whether and how to apply "sanctions" for failure to enforce established environmental laws. The negotiated NAFTA environmental agreement will apply sanctions only against governments not individuals or corporations. Environmental Side Agreement, supra note 14, art. 36. For a discussion of a Foreign Environmental Practices Act, see infra, part VIII.D.
tions would be directly tied to the undesirable behavior, and individual fishermen would possess a real incentive to fish dolphin-safely. Cutting against this approach, however, is the danger of effectively subsidizing dolphin-unsafe practices by commonly owned fleets, who could sell dolphin-safe tuna to the United States while selling dolphin-unsafe tuna elsewhere. In addition, by embargoing all Mexican yellowfin tuna based on the national kill/set ratio, dolphin-safe fishermen possess a strong incentive to change Mexican policy.

Whatever the final resolution to the tuna/dolphin epic, it should be clear that the events leading up to and following the GATT panel decision are far from simple. The panel’s treatment of this case at best demonstrated the GATT’s insensitivity toward hard-fought conservation victories won in democratic fora, and at worst it revealed the GATT’s insidious desire to exempt international commerce from any legitimate or reasonable regulatory oversight. From a legal perspective, the panel decision raised many more questions than it answered.

III. Rocking the Boat, Part II: Tuna/Dolphin II

Just one year after the successful GATT challenge by Mexico against the U.S. primary embargo provisions, the European Community (now Union) and the Netherlands challenged the MMPA’s intermediary embargo provisions as violative of U.S. GATT obligations. In May 1994, a GATT arbitral panel found that both the primary and intermediary country embargoes were not justified under several relevant GATT provisions. Although the Tuna/Dolphin II Panel was not as obstreperous or strident against the

47. Note the important distinction between trade sanctions, which target imported products unrelated to the objectionable behavior and PPM trade measures, which target imported products directly related to the objectionable behavior. See, e.g., Steve Charnovitz, Trade and the Environment: The Environment vs. Trade Rules: Defogging the Debate, 23 Envtl. L. 475, 491-92 (1992).

48. Approximately ten Mexican boats are already fishing dolphin-safely. In addition, because the U.S. market is roughly 65% of the world market, many potential fishermen want access. Telephone interview with David Phillips, supra note 34.

49. This is particularly true with Mexico because one-third of all boats are owned by the government, none of which are fishing dolphin-safely. Id. If a “boat” policy were implemented, the government could catch and sell dolphin-safe tuna to the United States (where it sells at higher prices) and continue to catch and sell dolphin-unsafe tuna elsewhere. A potential solution to this problem could be to cap dolphin kills at an acceptably low level at the start of each year.

50. This assumes a publicly accountable democratic government.

51. The Mexican complaint is not alone. The European Union has challenged the MMPA’s intermediary tuna embargoes under the GATT rules, and this will be discussed in part III of this paper, infra. Intermediary embargoes are required under the MMPA when countries who import tuna from primarily embargoed countries seek to then export such tuna to the United States. See MMPA, 16 U.S.C. § 1371(a)(2)(C); Earth Island Inst. v. Mosbacher (Earth Island II), No. 88-1380 (N.D. Cal. Jan. 9, 1992).


MMPA as its judicial predecessor, its reasoning and final decision were not much different. This assertion deserves elaboration.

Under GATT Article III, an importing country can make laws or regulations affecting internal sales, offerings for sale, transportation, distribution, or use as long as such measures apply to both domestic products and to imported products. However, the Panel, like that in Tuna/Dolphin I, made a distinction between actual products and practices that produce such products. Harvesting tuna is a practice which does not change the characteristics of tuna as a product. Thus, according to both tuna/dolphin panels, an importing country cannot distinguish between products not produced in conformity with its domestic policies. Under present international trade law, a can of tuna is a can of tuna—regardless of whether thousands of dolphins were killed in the process of catching that tuna.

Under GATT Article XI, with some limited exceptions, the importing country cannot create prohibitions or restrictions other than duties, taxes, or other charges against imported products. Both tuna/dolphin panels found that the embargoes (or "zero") were unallowable quantitative restrictions. Thus, the U.S. measures were found to be inconsistent with Article XI.

GATT Article XX contains a number of "exceptions" to GATT rules, including those relating to environmental and natural resource protection. Accordingly, the Tuna/Dolphin II Panel also considered justification of the intermediary embargo measures under Article XX(b), (d), and (g). These provisions state:

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

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

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement;

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

54. GATT, supra note 14, art. III.
55. Tuna/Dolphin II, supra note 53, para. 5.8.
56. Id.
57. GATT, supra note 14, art. XI.
58. Tuna/Dolphin II, supra note 53, para. 5.10.
59. GATT, supra note 14, art. XX.
The Panel applied a three prong analysis in evaluating the MMPA under Article XX's environmental exceptions:

1) Whether the policy with respect to the legal provisions of the MMPA fell within the range of Article XX environmental exceptions;

2) Whether the measure for which the exception was being invoked fell within the range of Article XX; and

3) Whether the measure was applied in a manner that did not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The MMPA's primary and intermediary country embargo provisions passed the first prong under both XX(b) and XX(g). Under XX(g), the Panel found that dolphins were an exhaustible natural resource. And, in one of the few promising, albeit baby step, developments in international trade law, it also found for several reasons that XX(g) may apply to policies related to the conservation of exhaustible natural resources, even if those resources are outside a contracting party's territorial jurisdiction. First, the text of XX(g) did not limit the location of the resources. Second, two other GATT panels on migratory fish under XX(g) made no distinction between fishing inside or outside territorial jurisdiction. The GATT possesses no absolute proscription on conservation measures outside a party's territorial jurisdiction, unlike the extraterritorial proscription it can impose on products made with prison labor. Finally, under general international law, states may regulate their citizens' and vessels' conduct with respect to persons, animals, plants, and natural resources outside their territories.

However, the MMPA's primary and intermediary embargo nation provisions did not pass the second prong of the Panel's test under either XX(b) or XX(g). Under XX(b), the United States argued that "necessary" meant "needed," while the EU argued that it meant "indispensable" or "unavoidable." The Panel, following previous panel decisions, agreed that the United States should look for reasonably consistent alternatives, and if no such alternatives exist, then it should look for the one which entails the least degree of inconsistency with other GATT provisions. Significantly, the Panel did not take into account that some alternatives might be more environmentally sustainable, more politically achievable, or more enforceable than others, despite greater "inconsistency" with the GATT.

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60. Tuna/Dolphin II, supra note 53, paras. 5.12, 5.29.
61. Id. para. 5.13.
62. Id. para. 5.20.
63. Id. para. 5.15.
64. Id.
65. Id. para. 5.16; GATT, supra note 14, art. XX(e).
66. Tuna/Dolphin II, supra note 53, para. 5.17.
67. Id. para. 5.34.
68. Id. para. 5.35.
Similarly, under XX(g), the EU argued that the measures had to be "primarily aimed" at the conservation of exhaustible natural resources and at rendering effective the restrictions on domestic production and consumption. The Panel agreed, by noting that the intermediary country embargo included all tuna whether or not it was harvested in a dolphin-safe manner and whether or not the country had implemented practices comparable to U.S. practices. Consequently, the Panel found that the primary country and intermediary country embargoes could not by themselves further the U.S. dolphin conservation objectives, but they were only effective if the primary countries changed their practices of harvesting tuna. The Panel concluded that the U.S. embargoes force other countries to change their policies with respect to conservation practices in their own jurisdictions in order for the U.S. measures to be effective in protecting dolphins.

Despite the Panel's conclusions on XX(g), it is disputable whether the EU's conservation policies are in fact comparable to the U.S. practices. In any event, to say that embargoes used for environmental objectives by themselves will be "ineffective" is to deny the strong influence trade leverage possesses over trade-related objectionable behavior like dolphin-deadly fishing practices. The Tuna/Dolphin II Panel injected a "causation" test found or supported nowhere in the text of Article XX.

While the supposed objective of the GATT is to discourage protectionism and to encourage open access to markets, there is no provision mandating that a country must open its border to any product regardless of its environmental consequences. Examined under this light, both tuna/dolphin panels are not solely about rights of market access, but they are also about a sovereign country's ability to implement even-handedly a conservation law in accordance with its citizens' desires. Thus, the assertion by the Tuna/Dolphin II Panel that the EU possesses "comparable" dolphin protection measures, even if true, raises the vital issue of democratic accountability under GATT jurisprudence.

The Panel also specifically examined whether measures under XX(b) and (g) could include measures that forced other countries to change

69. Id. para. 5.21.
70. Id. para. 5.23.
71. Id. para. 5.24.
72. Because of the GATT's closed door panel deliberation policy, no conservation law experts were allowed to address this point.
73. See, e.g., Japan: Ozone Concerns Spur Calls for Apple Import Ban, GREENWIRE, June 7, 1994, available in LEXIS, News Library, Curnws File (citing JAPAN TIMES, June 6-12, 1994). This article reports that Japanese citizen groups are campaigning against the import of apples from New Zealand and the US [sic] because ozone-destroying methyl bromide is used on the fruit before it enters Japan. The apples are treated to destroy "harmful" codling moths reportedly not found in Japan. "Why has Japan to import apples when such imports lead to environmental destruction? The country produces sufficient apples at home," said Machiko Tsuji of the Anti-Pesticide Network of Tokyo.
their policies within their own jurisdictions. Looking to the purpose of the GATT, the Panel chose to interpret Article XX very narrowly. The Panel blithely asserted that if environmental trade measures were allowed to force changes in other countries’ jurisdictions, then the balance of the GATT would be upset and the GATT objectives would be impaired. A cynic could ask, “What balance?” and “What objectives?”

Because the MMPA dolphin-safe provisions did not pass the second prong of the Article XX environmental exception analysis, the Panel did not analyze the third prong. The U.S. measures were read to be not justified under Articles XX(b) or XX(g). And, under XX(d), the Panel found that because the primary embargo was inconsistent under Articles III and XI, there was no justification for the intermediary embargo.

In analysis that sheds light upon the GATT’s self-defined interpretation of its international standing, the Panel examined the Vienna Convention on the Law of Treaties in order to interpret the GATT in relation to other international environmental agreements. In short, the Panel found that most bilateral or plurilateral treaties were not relevant as a primary means of interpreting the text of the GATT. This analysis, while not technically incorrect, surprisingly implies that these international environmental agreements are inconsequential.

Now that the formation of a global trade organization is on the verge of reality, the precedent set in this decision could have highly significant consequences. In particular, the Panel’s concern that the bilateral and plurilateral environmental agreements lacked all of the GATT members’ enlistment leads to the rather dangerous implication that the GATT is the supreme international agreement when any trade restriction is implemented. If this is indeed the precedent the Panel is trying to set, serious questions are raised about the structure of power between the proposed World Trade Organization (WTO) and presently sovereign countries.

From a purely environmental perspective, the Tuna/Dolphin II decision is yet another example of international trade law’s insensitivity toward natural resource stewardship. The Panel’s way of framing the issue as the United States trying to use trade measures to force changes outside its own jurisdiction shows that the GATT continues to be hostile toward unilateral, or even regional, trade measures as levers of change. Alternatively, the

Id.

74. Tuna/Dolphin II, supra note 53, para. 5.25.
75. Id. para. 5.26.
76. Id. paras. 5.27, 5.39.
77. Id. para. 5.41.
78. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention]. The Vienna Convention is used for interpreting treaties. However, at least by U.S. ratification procedures, the GATT is not formally a treaty. Thus, not only is the Panel’s application of the Vienna Convention to the GATT legally questionable, but its attempt to have the GATT override other trade and environment treaties of undisputed legal status is doubly so.
79. Tuna/Dolphin II, supra note 53, para. 5.19.
80. See Final Agreement, supra note 15.
81. Tuna/Dolphin II, supra note 53, para. 5.19.
U.S. position could be framed as the right of a sovereign state to answer the demands of its consumers to buy only dolphin-safe tuna and to set standards for the protection of natural resources and the environment. Presumably, the main reason for negotiating and implementing trade agreements is to avoid protectionism. Yet no country has claimed outright that dolphin-safe tuna standards are protectionist. If protectionism is the claim, then this should be the focus of the debate.

IV. "Like" Products: The Undefined Obstacle

To both tuna/dolphin panels, a fundamental problem with the MMPA was that the United States was unfairly "discriminating" against Mexican and EU yellowfin tuna, despite the fact that the United States has more stringent tuna restrictions for its own nationals. While those who communicate in plain English might be confused by this assertion, it must be remembered that the liberalized trade, which the GATT seeks to promote, is based upon a notion of economic efficiency that often belies lay person reasoning. The goal, under this view, is to make products quickly, transport and sell those products cheaply, and dispose of any waste hassle-free. Probing environmental inquiries about production methods serve only to block or to delay profits.

Consequently, to a GATT bureaucrat primarily seeking to facilitate the free flow of goods and services, non-discrimination has an especially narrow meaning; it applies only to "like" products. If two shrimp platters have the same nutritional value and contain no contaminants, it is presently GATT irrelevant that highly endangered sea turtles were killed.

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82. See Tuna/Dolphin I, supra note 3, paras. 5.9-5.16; Tuna/Dolphin II, supra note 53, paras. 5.6-5.10.
83. The word "[d]iscriminate" is defined as "to distinguish by discerning or exposing differences." MERRIAN-WEBSTER'S NEW COLLEGIATE DICTIONARY (1993).
84. For an alternative business view of trade and the environment, see Robert J. Morris, A Business Perspective on Trade and the Environment, in TRADE AND THE ENVIRONMENT 121 (Durwood Zaelke et al. eds., 1993).
85. Free traders also worry that trade distinctions based upon PPMs will lead to a slippery slope of disguised protectionism or even "chaos." See GATT SECRETARIAT, supra note 28; Jagdish Bhagwati, The Case for Free Trade, Sci. Am., Nov. 1993, at 42. This response totally begs the question about formulating reasonable trade rules on PPMs and other environmental concerns.
86. "Like products" are an integral part of two important GATT principles. First, there is the most-favored-nation principle, which states that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, supra note 14, art. I (emphasis added). Second, there is the principle of national treatment which requires that "[t]he 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." Id. art. III (emphasis added). In other words, preferential treatment generally cannot be given to domestic products over imported products.
for one plate. If two truck loads of timber are of the same pliability and size, it is GATT irrelevant that one load was felled by a large, unsustainable clear-cut.

If two fur coats are of equal quality and color, it is GATT irrelevant that one was harvested by a steel leg-hold trap, which causes needless animal suffering and indiscriminate killing.

The examples of this environmentally limited and nonsensical approach to like products are virtually infinite, particularly in the area of natural resource protection. Although it would seem practical to define products by their plain meaning, for GATT connoisseurs, it is not that simple.


88. See, e.g., Federal Law for the Labelling of Tropical Timber, BGB1. 309 (1992) (Aus.), cited in Lilly Sucharipa-Behrmann, Eco-Labelling Approaches for Tropical Timber: The Austrian Experience (background paper for the OECD Workshop on Life-Cycle Management and Trade) (on file with author). This proposal was never implemented. Although the Tuna/Dolphin Panel ruled that the U.S. dolphin-safe labelling provision of the MMPA was GATT consistent, labelling requirements based on PPMs are beginning to draw the attention of governments and business. See, e.g., United States Council for International Business, supra note 20, at 1 ("The increasing use of eco-labelling can result in trade distortions if not brought under necessary discipline. Eco-labelling schemes are, in a real sense, a PPM standard applied unilaterally by the country adopting the scheme."); Veena Jha & Simonetta Zarrilli, Ecolabelling Initiatives as Potential Barriers to Trade—A Viewpoint from Developing Countries, July 20-21, 1993 (paper prepared for Informal Experts Workshop, OECD Environment Directorate) (on file with author).

89. The EU enacted a ban that would block the imports of fur obtained from animals trapped by leg-hold traps or methods which do not meet internationally agreed humane trapping standards. See European Union Council, Regulation No. 3254/91, O.J. (L.308) 1991 [hereinafter Steel Leg-Hold Trap]. This case exemplifies the complexity of the entire PPM and trade and environment relationship. The EU wants to overturn the U.S. MMPA provisions on dolphin-safe fishing in the name of free trade, but it wants to block trade in order to save animals from needless suffering. The United States wants to have its dolphin-safe provisions respected, but it does not want to abide by the EU's humane trapping standards. Neither party appears free from economic self-interest and hypocrisy. If the issue truly is differentiating disguised protectionism and genuine environmental protection policies, neither party has aided in clarifying the situation.


91. Even international treaties dealing with direct human threats are not immune from the PPM foolery. Under present interpretations, a country could easily be found to be violating the GATT if it blocks the importation of an appliance made with ozone-
Tellingly, the GATT drafters did not have a precise definition for like products. Nevertheless, they did agree that the original International Trade Organization (ITO) would have to make a study of the term and arrive at a definition. However, since the ITO never came into existence, the GATT has been functioning without a clear definition of like products since its inception.

The 1970 GATT Working Party Report on “Border Tax Adjustments” (Border Tax Report) found that because there was no conclusive definition of like or similar products, the interpretation of the term should be determined on a case-by-case basis. Over time, a history of reports and panel decisions have emerged with certain criteria delineating like products, arguably without ever reaching consensus by all GATT parties.


92. It was noted that “the expression had different meanings in different contexts.” GATT Draft Charter, London, EPCT/CII/65, p. 2 [hereinafter GATT Draft Charter]. Moreover, the term had been used in commercial treaties for many years. EPCT/C.II/PV.12, p.7. The Economic Committee of the League of Nations had suggested that “like product” meant “practically identical with another product.” EPCT/C.II/36, p.8. Various examples of like product categorization were presented: wheat but not other cereals, cars weighing less than 1500 kilos but not cars weighing more, and reliance on systems of tariff classification. EPCT/C.II/PV.12, p.7; E/CONF.2/C.III/SR5, p.4.


94. Suggested factors to consider were the “product's end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality, . . . .” GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 141 (6th ed. 1994) [hereinafter ANALYTICAL INDEX].


96. “The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or subpositions as appropriate.” Spain—Unroasted Coffee, supra note 95, paras. 4.4-4.10. Spain had divided unroasted coffee into five tariff classifications. ANALYTICAL INDEX, supra note 94, at 37.
products have the same tariff treatment. On the other hand, products grouped under the same classification may not be like products, but rather related products. Nonetheless, there continue to be examples where products seem to have been listed in different tariff categories by PPM characteristics.

Other panels, including both tuna/dolphin panels, have depended on the physical characteristics and end-uses of the products to define like products. However, as has already been discussed, end-uses or physical properties alone will not and should not always determine whether the products are like products. Furthermore, the EC representative on the EEC Animal Feed Panel argued that price could be a factor in defining like products. The Panel did not comment on this point, however, leaving unresolved the possibility of whether price could be used as a factor in distinguishing among products which had different costs due to the extent of environmentally sustainable methods involved in their production.

Another extremely interesting example, argued by Japan in the SPF Report, is the idea of product differentiation based on consumer perception. The SPF case is not the only report that has referred to consumer

97. Analytical Index, supra note 94, at 37. In this way, discrimination stemming from specially created categories could be prevented.
98. See Rene Vossenaar & Veena Jha, UNCTAD, Environmentally Based Process and Production Method Standards: Some Implications for Developing Countries (Apr. 22, 1994) (paper prepared for OECD Workshop on "Trade and Environment: PPM's Issues") (on file with author). The Customs Cooperation Council has in the past established separate tariff headings, such as handicrafts and hand loom cloth, which in some cases have been based on criteria which could be considered as PPM-related.
99. See, e.g., United States—Taxes on Petroleum and Certain Imported Substances, Report of the Panel, B.I.S.D., supra note 3, 34th Supp. 136, para. 5.1.1. (1988) (the domestic and imported products were either identical or served substantially identical end-uses in the market); EEC—Restrictions on Imports of Apples from Chile, Report of the Panel, B.I.S.D., supra note 3, 27th Supp. 98, para. 4.4 (1981) [hereinafter Chile Apples] (Chilean apples were an agricultural product and although of different varieties, were "a like product" to EC apples); Japan—Alcoholic Beverages, supra note 95, para. 5.5 (the alcoholic beverages were like products in terms of Article III because of their similar properties, end-uses, and uniform tariff classification).
100. See SPF Report, supra note 95, para. 3.19-3.20. This Panel found that the Canadian dimension lumber was not like other processed lumber. Japan successfully argued that the end-uses in construction were different, the dimension lumber came from different species with different physical properties, and there was no universal tariff classification for dimension lumber.
101. EEC—Animal Feed, supra note 95, para. 3.4.
102. This possibility is a kind of variation on the concept of border tax adjustments. Border tax adjustments encourage sustainable production by equalizing the cost differentiation at the border between products that are produced by environmentally sustainable methods and products that are not. See Raoul Stewardson, Climate Change, Carbon Taxes and Border Tax Adjustments (Apr. 6, 1994) (on file with author). Price differentiation would first distinguish products by their production costs and then, by categorizing them as "unlike products," give them different treatment under GATT Articles I and III.
103. See SPF Report, supra note 95, para. 3.52. The Japanese representative argued that consumers perceived dimension lumber differently from other lumber and that this consumer perception was an important factor in determining "likeness."
perception. However, no panel has directly addressed the possibility that consumer perception could be used to differentiate between products. Yet consumer taste and habits, which change from country to country, were factors the GATT Border Tax Report listed in its criteria for defining like products. The controversy over dolphin-unsafe tuna and the consequent labelling of cans in the United States, for instance, demonstrated that American consumers perceive a distinction between tuna harvested in a dolphin-safe manner and tuna that is not. Considering that a basic purpose of trade is to bring desired products to consumers, it follows that consumers should be able to choose not only which products to buy but also how to differentiate among those products.

The Japan-Alcoholic Beverages Panel affirmed the idea that the term like products needed to be defined within the context of the particular trade provision in question. Under GATT Article III, the Panel sought to determine whether the imported and domestic products were "like" or "directly competitive or substitutable" and whether the internal taxation or regulation discriminated against imported products. However, the Panel dismissed, as too narrow, the interpretation of like products as meaning "more or less the same products" and found Japan's provisions GATT-inconsistent.

104. See, e.g., Spain—Unroasted Coffee, supra note 95, para. 3.8 (Consumers' preference for various types of coffee was well established.); Chile Apples, supra note 99, para. 3.10 (Chilean apples were bought by selective consumers ready to pay a premium for them.); Japan—Alcoholic Beverages, supra note 95, para. 3.10 (Japan argued that certain traditional alcohol had lower social status, whereas western alcohol had higher social status.).

105. ANALYTICAL INDEX, supra note 94.


107. This conception of trade as a means to consumer welfare may not be universal. See Karel van Wolferen, No Chance—East and West Trade Won't Meet, Wash. Post, June 26, 1994, at C3 (positing that for Japan, trade is a vehicle to national power). If this incompatibility between countries' conceptions of trade is accurate, then the logjam over trade and environment reflects fundamental divisions over the purpose of trade liberalization and the meaning of sustainable development. Meanwhile, the GATT continues to make determinations as to whether countries' policies are "discriminatory" without taking into account any of these incompatibilities.

108. Japan—Alcoholic Beverages, supra note 95, paras. 5.1-5.6. An example of directly competitive or substitutable products is where one country has a domestic apple industry but no domestic orange industry, and the country heavily taxes imported oranges (oranges and apples not being like products). The consequence is that the tax protects the domestic apple industry from foreign orange competition. ANALYTICAL INDEX, supra note 94, at 145. Thus, while the GATT distinguishes between "directly competitive or substitutable products" and "like products," the products are usually treated the same under Article III to prevent domestic industry protection. See Ammonium Sulphate, supra note 95, para. 8.

109. "The drafting history confirms that Article III:2 was designed with 'the intention that internal taxes on goods should not be used as a means of protection.'" Japan—Alcoholic Beverages, supra note 95, para. 5.5 (emphasis added).

110. Japan—Alcoholic Beverages, supra note 95, para. 5.5. In the SPF Report, Canada argued that because Articles I and III set out trade-creating obligations, a narrow defini-
Similarly, the 1992 Beer II Panel examined two U.S. measures within the context of Article III.111 Under the first provision in question, where different wines were taxed at different rates, the Panel determined that in interpreting like products under Article III “it is necessary to consider whether such product differentiation is being made so as to afford protection to domestic products.”112 Under the second measure, which devised different regulatory schemes for low alcohol and high alcohol beer, the Panel did not find that the different schemes were discriminatory.113

Some panel decisions appear to allow GATT contracting parties to focus on solutions to environmental or PPM problems without regard to overly rigid trade rules. The German Sardines Panel, for instance, based its decision on previous negotiations between the parties.114 Such reasoning suggests that the use of bilateral or plurilateral agreements to define like products for the particular agreement may be a constructive option to explore.115 In addition, neither the language in Article III nor in previous panel decisions indicates that a country’s domestic regulations relating to a PPM cannot be a constructive factor in defining like products. As the Beer II Panel stated:

the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsis-

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112. Id. para. 5.25. The particular grape variety in question grows only in the United States and the Mediterranean. The United States, it was found, did not proffer any public policy reason for the tax, and the Panel found it to be protectionist and discriminatory towards the Canadian like product. Id.

113. The Panel found that although the physical characteristics of the beers were similar, the regulatory burden weighed equally on both domestic and imported beers. Moreover, despite some overlap, the consumer target market was discernibly different. The Panel also considered the public policy goals of protecting human life and health and public morals, as well as the legislative background, where the focus of the drafters may have been to raise a new source of revenue. Id. paras. 5.71-5.74.

114. Treatment by Germany of Imports of Sardines, Report of the Panel, B.I.S.D., supra note 3, 1st Supp. 53, para. 12 (1953). This Panel did not determine whether different preparations of the clupeoid family constituted separate products, but it found that Germany had treated the preparations of the fish as separate products during negotiations.

115. In the context of distinguishing products by PPMs, there are certain advantages to this approach. For countries that are similarly situated, and even for countries that are not, it may be easier to negotiate an agreement that incorporates an appropriate standard of PPMs, taking into account the countries’ economic and technological capabilities. However, while the 1952 German Sardines Panel willingly deferred to the parties’ prior negotiations, the 1994 Tuna/Dolphin II Panel was not nearly as deferential in its interpretation of the relationship between the GATT and other multilateral agreements. See supra part III.
tent with Article III even if the regulation is not "applied . . . so as [to] afford protection to domestic production." In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.\textsuperscript{116}

The authors find this statement to be an eminently fair starting point for a major re-evaluation of Article III.

Although the panel decisions show that there is no one criterion or even a combination of criteria that defines a like product, there is a disturbing trend to interpret the term quite expansively. Yet the issue should not really be a matter of defining the term broadly or narrowly but rather deciding the policy purposes behind the like product concept. Previous Article III panel decisions themselves demonstrate a number of trade mechanisms capable of distinguishing products based on unsustainable PPMs: tax and pricing systems, tariff schedules, consumer perceptions, and international agreements. In addition, there exists the gnawing question of why like product analysis must exclude PPM considerations when there is no language in the GATT that prohibits PPM trade measures and when kindergarten logic dictates that physically similar products are not always alike.

V. Article XX: Making Environmental Law by Exception

Another potential mechanism for allowing sensible trade restrictions is GATT Article XX,\textsuperscript{117} which provides exceptions to basic trade rules such as non-discrimination. Although Article XX does not explicitly mention the word "environment," two clauses undeniably address environmentally-based trade measures: those "necessary to protect human, animal or plant life or health" and those "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."\textsuperscript{118} The only limit to Article XX—at least apparent from a plain reading of the text—is that the trade restriction in question may not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."\textsuperscript{119} Because of the relatively broad language of Article XX, many commentators have

\textsuperscript{116} Beer II Panel, supra note 111, para. 5.72 (emphasis added).
\textsuperscript{117} See GATT, supra note 14, art. XX (General Exceptions).
\textsuperscript{118} Id. art. XX (b), (g) (emphasis added). Article XX also allows measures necessary to protect public morals, measures necessary to secure compliance with laws or regulations "not inconsistent" with the GATT, measures relating to the products of prison labor (a non-environmental PPM), and measures imposed for the protection of "national treasures." Id. In addition, Article XXI provides exceptions for "essential security interests." Id. art. XXI.
\textsuperscript{119} Id. art. XX. It is plausible to argue that the term "where the same conditions prevail" means that countries with different environmental "conditions" can justify weak or unsustainable environmental standards. Yet for trade to be as sustainable as the WTO claims it will be, certain trade restrictions based on legitimate environmental concerns must be permitted. WTO Agreement, supra note 15.
urged that PPM measures can and should fall within its gambit.\textsuperscript{120}

Aside from the philosophical objection to relegating serious environmental concerns into a trade exception,\textsuperscript{121} the use of Article XX to maintain national sovereignty over PPM trade measures raises several practical problems. First, while the Tuna/Dolphin II Panel found that Article XX did not restrict a country from applying conservation measures to protect natural resources outside its own territorial jurisdiction, it still found that the use of import embargoes by the United States was not covered by Article XX exceptions and placed heavy emphasis on "the right of access to markets."\textsuperscript{122} While it is clear that both tuna/dolphin panels frowned upon import embargoes,\textsuperscript{123} it is not clear what, if any, trade measures would have been deemed acceptable.\textsuperscript{124}

In addition, the term "necessary" in Article XX has been interpreted to mean "least trade restrictive" or "least inconsistent with GATT" by several panels.\textsuperscript{125} These market dominated definitions not only emasculate the plain meaning of Article XX, but also threaten any acceptable overall balance between trade and the environment by totally dismissing the political difficulties of passing effective environmental legislation.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{120} See, e.g., Steve Charnovitz, Exploring the Environmental Exceptions in GATT Article XX, 25 J. World Trade 37 (1991).
  \item \textsuperscript{121} Some have similarly suggested that certain environmental concerns could be addressed by the waiver provision in GATT Article XXV. See, e.g., John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, in Trade and the Environment, supra note 84, at 219, 228.
  \item \textsuperscript{122} See Tuna/Dolphin II, supra note 53, paras. 5.20, 5.26, 5.42.
  \item \textsuperscript{123} Import bans related to a repugnant or reprehensible environmental practice run counter to the GATT's general prohibition against quantitative restrictions because zero is considered a quantity. See GATT, supra note 14, art. XI ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . ."); see also Tuna/Dolphin I, supra note 3, para. 5.18; Tuna/Dolphin II, supra note 55, para. 5.10.
  \item \textsuperscript{124} There have been seven GATT panel reports where Article XX(b) and (g) exceptions have been raised, none of which have been successful. Of the seven, only four disputes seem to raise legitimate environmental concerns. See Tuna/Dolphin I, supra note 3; Tuna/Dolphin II, supra note 53; Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel, B.I.S.D., supra note 3, 37th Supp. 200 (1991) [hereinafter Thai Cigarettes]; Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, Report of the Panel, B.I.S.D., supra note 3, 35th Supp. 98 (1989) [hereinafter Canada—Salmon]. The trade measures employed by the challenged countries ranged from import embargoes in Tuna/Dolphin I and II, to import restrictions and licensing requirements in Thai Cigarettes, and to prohibited exports or sale of the products in Canada—Salmon.
  \item \textsuperscript{125} See, e.g., Tuna/Dolphin II, supra note 53; Thai Cigarettes, supra note 124.
  \item \textsuperscript{126} See, e.g., Charles Arden-Clarke, Worldwide Fund for Nature (WWF), Necessity and Proportionality—The Search for an Environmental Definition, (June 1992) (critiquing the European Community's submission to the GATT Working Group on Environmental Measures and International Trade, GATT Doc. TRE/W/5, Nov. 17, 1992). In fact, one of the environmental community's main objections to the Uruguay Round centers upon a disagreement over the interpretation of the "trade restrictive" tests. See Agreement on the Application of Sanitary and Phytosanitary Measures, GATT Doc. MTN/FA II-A1A-4, para. 21 (Dec. 15, 1993), in Final Agreement, supra note 15 ("least
GATT panels have determined that the country utilizing Article XX exceptions bears the burden of proof, and this principle has been adopted by the Council.\footnote{127}

If the Article XX roadblocks erected by the GATT are stripped of their technicalities, it is fairly obvious that the GATT panel antipathy toward PPM trade measures is the root problem. The "like" product requirement and the Article XX baggage are merely flip sides of the same outdated PPM coin. But the GATT's treatment of Article XX—the only place where environmental protection is even remotely considered by the GATT—more starkly exposes the naked irrationality of present trade rules.

Environmental degradation, which knows no political boundaries, often occurs precisely because of the trade that the GATT promotes. It is occurring fast enough without being shackled by procedural burdens. Dirty air from a Mexican power plant near the United States, for instance, does not magically stop at the U.S. border.\footnote{128} Species extinction can be directly related to the financial investments spurred by the sometimes unsustainable export-driven growth protected, if not promoted, by trade agreements.\footnote{129} Areas owned by no country, such as the high seas, are not better protected by making cautious countries pay for the right to conserve their natural resources.\footnote{130} The sobering reality of present environmental threats dictates that countries look outside their borders for potential solutions, irrespective of whether trading patterns are disrupted.\footnote{131} Environmental considerations must sit at the table when trade rules are negotiated, not confined to the periphery as a feel-good exception.

\footnote{127. Tuna/Dolphin I, supra note 3, para. 5.22. "[T]he practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation." \textit{Id.} This rule actually may not be unreasonable. Instead, it demonstrates the danger of pigeonholing environmental protection into a trade exception.}


\footnote{130. For areas no country owns, such as the high seas, the upper atmosphere, and Antarctica, "freedom in a commons brings ruin to all." Garrett Hardin, \textit{The Tragedy of the Commons}, 162 SCI. 1243, 1244 (1968).}

\footnote{131. "Trade should thus not be seen just as an aspect of economic development, to be managed only by economists, but as the essential flux of materials and information that are increasingly integrating our world into a single global human system." Arthur Dahl, \textit{Global Sustainability and Its Implementation for Trade}, 1993 (on file with author).}
VI. An Aging Philosophy: The Theory of Comparative Advantage

There is no shortage of explanations as to why legitimate environmental considerations are still knocking on trade's front door. At one extreme, some environmentalists claim that corporate-driven free traders are consciously seeking to manipulate trade rules to avoid established regulatory standards. Conversely, many free trade disciples defend the present system, claiming that environmentally based trade rules will create a slippery slope for disguised protectionism and will threaten national sovereignty by making it subservient to natural resource protection.

While both of these trade/environment extremes probably possess a kernel of truth, the real culprit might just be confusion as to what "free trade" actually is. To listen to most mainstream newspapers and politicians who regularly extol the virtues of open markets, one gets the impression that free trade enables John and Jane Average from Main Street, U.S.A., to sell their homemade wares in shops around the world. Whatever the economic benefits of multilateral trade deals, this cozy impression is fundamentally incorrect.

Interestingly, despite the growing awareness that the traditional post-World War II economic paradigm serves neither the economy nor the environment, leading economists continue to pay homage to a 19th century doctrine that literally dominates contemporary thinking about liberalized trade. The theory of comparative advantage basically posits that a country makes products (i.e., engages in a specific PPM) which best suit it—both with regard to other countries and within its own country. In a simple example, if Japan is good at making VCRs but not equipped to grow bananas, and Ecuador is good at growing bananas but not well suited

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133. *See, e.g.*, Bhagwati, supra note 85.

134. *See, e.g.*, Alan Deardorff, Economic Effects of the Uruguay Round: Estimates from the Literature, July 6, 1994 (paper presented at The Brookings Institution) (on file with author). Deardorff concludes that "the quantifiable effects of the Uruguay Round are positive but somewhat small." *Id.*

135. *See Drucker, supra note 24; Lang & Hines, supra note 25*. While different conclusions are drawn from each of these sources, both agree that the globalization of the economy is rapidly and radically changing the way humans interact with each other and with the natural environment. *See also* Thomas L. Friedman, *When Money Talks, Governments Listen*, N.Y. TIMES, July 24, 1994, at D3 (discussing the effects of a daily $1 trillion trade in global currencies).

136. For an excellent description of the changes gripping the world's economy, see Daly & CoBB, supra note 5. Much of the discussion in this section is drawn from the work of Herman Daly, who raises questions about sustainability that proponents of free trade are either unwilling or unable to answer.

137. *See, e.g.*, Low, supra note 15, at 146 ("If one were to try to identify the theoretical underpinning of the GATT, it would certainly be articulated around the theory of comparative advantage . . . ."); *see also* Krugman, supra note 5, at 250 ("Comparative advantage turns out to be an idea that many self-styled experts fail to understand."). We agree by noting that Krugman virtually ignores natural resource conservation and the concept of sustainable development in his most recent work.
to produce VCRs, then these two countries should and will trade with each other for maximum efficiency.

In many ways, the theory of comparative advantage is merely an extension of Adam Smith's individual-driven capitalism, where the division of labor is linked to available markets. Without sustainable controls, unbridled comparative advantage dictates that each country should possess the sovereign right to exploit or even abuse its resources as a basis for efficiency. But all PPMs are not created equal. Just as the practical and political limits of capitalism have been accepted by the advent of national antitrust, social security, food safety, and environmental laws, so too there must be necessary limits to the doctrine of comparative advantage and "free trade." In the context of trade law and PPMs, unsustainable production methods should at least not become the basis of any advantage—comparative, competitive, or otherwise.

In any event, unlike the formal doctrine where countries magically trade with each other, it is multinational corporations and private individuals who perform the vast majority of world commerce. The primary drivers in private trade, capital, labor, and technology are no longer confined to the country of export or import. Today, the "comparative advantage" that allows VCRs to be made profitably in Japan can be transferred to many other countries, or maybe it can even be kept in Japan with non-Japanese ownership. Capital simply seeks its absolute highest rate of return, often irrespective of nationality and blind to good faith environmental practices.

138. See Adam Smith, **The Wealth of Nations** (1776).

139. Although there have been no GATT disputes on point, it is quite possible that existing interpretations of Article III (product non-discrimination) and Article XI (general prohibition against quantitative restrictions) could make it GATT-illegal to regulate exports of vital natural resources such as timber and water. GATT, supra note 14. For instance, NAFTA, which generally incorporates GATT articles by reference, specifically excludes raw logs from the prohibition against such export bans or limits. NAFTA, supra note 14, art. 309, Annex 301.3. No such NAFTA exception exists for water. See generally, Steven Shrybman, **International Trade and the Environment**, 20 ECOLOGIST 90 (1990).


142. "By several calculations, some Japanese cars are more American than those made in Detroit." Too Late for Champions, ECONOMIST, Feb. 5, 1994, at 14.

143. Some claim that environmental costs are not a primary cause for businesses to relocate. See, e.g., Patrick Low & Alexander Yeats, *Do Dirty Industries Migrate?*, in INTERNATIONAL TRADE AND THE ENVIRONMENT 89 (Patrick Low ed., 1992). Yet persistent anecdotal evidence, as well as business' general complaints about environmental regulation, indicates that environmental costs play a significant part in corporate business locations. See, e.g., William S. Ferguson, Note, **International Implications of Pollution Control**, 58
The implication of capital mobility on the global environment is profound. Not all countries are willing or able to regulate environmental threats caused by damaging PPMs, particularly those countries starving for investment capital. Local politicians of all stripes understandably become starved for investment. Furthermore, in a world where there are now increasingly fewer environmentally related actions that can be called wholly “domestic,” evidence suggests that the earth cannot sustain developed-style growth in lesser-developed countries, even assuming that developed-country-dominated multinational corporations are generally benevolent entities that spread environmentally friendly production methods. The accepted Ricardo notion of comparative advantage looks rather incongruous when compared to any notion of sustainability.

A potential avenue out of this eco-traffic jam is to turn toward the “free” market which created it but with the appropriate incorporation of environmental costs spawned by a PPM. Until an accepted national accounting system that adequately reflects environmental costs is adopted, the only recourse is for countries unilaterally to capture environmental costs in a given transaction. Traditional free-traders, however, immediately balk at such proposals because of their protectionist potential and the uncertain nature of the calculation of environmental costs. Countervailing and anti-dumping duty mechanisms, quite common in non-environmental sectors, are among the compensating options most frequently cited. Aside from those PPMs that are so repugnant or objectionable

144. See, e.g., Chapman, supra note 143; Reich, supra note 141; Daly & Cobb, supra note 5; Drucker, supra note 24; Lang & Hines, supra note 25.

145. Some have advocated that at the very least, the United States should require U.S. owned corporations to abide by U.S. environmental standards, including those governing PPMs, when operating abroad. See, e.g., Alan Neff, Not In Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act, 17 Ecology L.Q. 477 (1990).

146. This is partly the classic problem of, “Do as I say, not as I do.” But given that natural resources are finite, and assuming that human technology cannot indefinitely overcome this fact, developed countries have an obligation to control their own production and consumption habits and to aid developing countries in achieving sustainable economic growth. See, e.g., Herman Daly, The Perils of Free Trade, Sci. Am. 50-57 (1993); Mahathir Mohammed, End the North’s Eco-Imperialism, L.A. Times, June 2, 1992, at B7. The key, well beyond the scope of this paper, is to craft a new notion of economic development.

147. See Ricardo, supra note 5.

148. Considering the large number of environmental and other social externalities involved in any “free” transaction, “[n]o one is really free unless everyone is bound by laws that are just.” Andrew Bard Schmookler, The Illusion of Choice 280 (1993). Wealth from a certain transaction, conversely, “goes to those who satisfy the wants of wealth.” Id. at 47.


150. See, e.g., Morris, supra note 84; Bhagwati, supra note 85.

151. See generally GATT, supra note 14, art. VI (“Anti-dumping and Countervailing Duties”), art. XIV (“Exceptions to the Rule of Non-Discrimination”), art. XVI (“Subsi-
that all trade is simply cut off, the vast majority of environmentally threatening production methods could and should reflect the public cost of natural resource degradation.\footnote{5}

This is not to say that all PPMs are environmentally harmful and deserve tariffs, duties, or product bans. It is worth repeating that not all PPMs are created equal. To the contrary, trade can increase wealth which in turn can increase environmental protection and utilization of sustainable PPMs.\footnote{152}

Trade can also foster environmentally friendly PPMs and products which would otherwise not be available.\footnote{154} In one example that received considerable attention during the NAFTA debate, trade can promote the export of environmental technologies, and the goods and services made with those technologies, from countries with relatively high standards (e.g., the United States) to countries seeking to raise or enforce their own standards (e.g., Mexico).\footnote{155}

\footnote{5} Id.; International Pollution Deterrence Act of 1991, S. 984, 102d Cong., 1st Sess. § 3 (1991) [hereinafter International Pollution Deterrence Act]. This bill, introduced by Senator Boren (D-OK), would have set a duty equal to the cost which would be incurred by the producer of the foreign article if the foreign government imposed the same environmental standards in existence for U.S. producers. \textit{Id.} See \textit{also} \textit{Albert Gore, Earth in the Balance: Ecology and the Human Spirit} 343 (1992).

Just as government subsidies of a particular industry are sometimes considered unfair under the trade laws, weak and ineffectual enforcement of pollution control measures should be included in the definition of unfair trading practices \ldots . The mixture of environmental protection with trade negotiations is volatile, but so is any other consideration with trade talks.

\footnote{152} Id. \textit{See, e.g., Guiding Principles Concerning International Economic Aspects of Environmental Policies (Polluter Pays Principle), Organization for Economic Cooperation and Development (OECD) Doc. C(72)128 (May 26, 1972). However, the Polluter Pays Principle rejects the use of unilateral duties to offset externalized environmental costs.}


\footnote{154} For instance, villagers in the Dominican Republic use photovoltaic cells shipped in from the United States to light their homes. As recently as 1990, \textit{Greenpeace} magazine imported paper from a Swedish mill because no U.S. facility could supply paper produced with a chlorine-free bleaching system. And fuel-efficient Japanese cars reduced air emissions in the United States and forced U.S. manufacturers to develop more fuel-efficient models during the seventies.


\footnote{155} \textit{See, e.g., U.S. Congress, Office of Technology Assessment (OTA), Development Assistance, Export Promotion, and Environmental Technology} (Background Paper, 1993); Letter from Chris Marcich, Assistant U.S. Trade Representative for Environment and Natural Resources, to Donald Connors, Chairman, Environmental Business Council and Rodger Schlickeisen, President, Defenders of Wildlife (Sept. 24, 1993) (regarding the use of environmental industry expertise as part of the dispute...
The key to environmentally sound trade is not to restrict the flow of goods and services in a knee-jerk fashion, but to examine what is currently known about trade's environmental implications. Economic output is no longer solely based, as it was in the nineteenth and first half of the twentieth centuries, upon industrial production and relative immobility. Consequently, we desperately need a fresh look at the theory of comparative advantage that recognizes the stress on global natural resources, as well as the importance of human education and thoughtful infrastructure development. Ironically, there exists a growing body of value-adding production methods and technologies which are either neutral or beneficial to the global environment. But for those PPMs that remain environmentally "harmful," the suffocating grip of comparative advantage must be substantially loosened if sustainable trade is to become more than an ivory tower pipedream.

VII. Participatory Democracy: A Missing Link in Trade

Even the best formulated theories in the world will inevitably fail if local, national, and global citizens do not have a meaningful say in the policies that shape their lives. Of all the disturbing aspects surrounding the tuna/dolphin decision, perhaps the most troubling was the GATT panel's disregard for the twenty year political process and effort that had gone into establishing a dolphin-safe tuna policy. This fact largely explains the outrage about the panel decision expressed by dolphin conservationists toward the unelected and unaccountable GATT institutional machinery.

settlement mechanism in the environmental supplement with Mexico and Canada) (on file with author).

156. See, e.g., REICH, supra note 141, at 82. Nonetheless, as Reich himself acknowledges, the transition to "high-value" production in the developed world has meant significant "high volume" production in LDCs. Id.

157. Of the three essential elements of a national economy—human education, natural resources, infrastructure (capital, roads, buildings, equipment)—only natural resources are inherently a factor in determining a country's "comparative advantage." Although natural resource exploitation is often the surest way to short-term competitive (and comparative) advantage, PPM trade restrictions in this area may be less problematic to developing countries, and less prone to protectionism, than industrial PPM standards. This area is ripe for considerable research. See generally DALY & COBB, supra note 5; DAN ESRY, GREENING THE GATT 159 (1994).

158. For example, in 1992 world exports of commercial services amounted to $1 trillion, which was over one-fifth of all world exports and represented a 12% increase from 1991. World Trade in Commercial Services, 1992, ECONOMIST, Jan. 29, 1994, at 113.


160. See, e.g., DANIEL C. DILLER, RUSSIA AND THE INDEPENDENT STATE 113 (1993). In reforming the former Soviet Union, one of Gorbachev's fundamental aims (demokratizatsia) for the Soviet people was to allow them to "once again take charge of their own destinies." Id.

161. Tuna/Dolphin I, supra note 3, para. 6.1. "The Panel wished to underline that its task . . . did not call for a finding on the appropriateness of the United States' and Mexico's conservation policies as such." Id.
Indeed, fundamental accountability problems run through both the negotiation and the implementation of trade agreements like the GATT. For starters, environmental assessments of trade agreements should precede the conclusion of all such agreements.\(^1\) Once signed and operative, the agreement's dispute settlement procedures should promote openness and access to environmental expertise.\(^2\) If trade agreements facilitated and did not hinder democratic openness, domestic laws enacted through publicly accountable political processes would more likely be afforded appropriate deference.\(^3\)

**VIII. Global PPM Leadership**

Much has been made in the post-Cold War era of the United States' relative economic and military dominance. But most impressive is the triumph of American democracy. Despite its fits, starts, and occasional excesses, there probably exists no system as rigorous in its quest for public accountability.\(^4\) If U.S. democratic leadership in the world is accepted, then it will necessarily fall on the shoulders of the U.S. government and people to advance an environmental agenda—centered on the pivotal PPM dilemma—in international trade fora like the GATT.

The problem, however, is that much of the world remains skeptical of either the need to integrate trade and the environment or U.S. leadership or unilateralism on the issue.\(^5\) This will probably have a chilling effect

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\(^{163}\) Although the proposed Uruguay Round agreement and the recently passed NAFTA allow the use of environmental experts during dispute settlement proceedings (a novelty that the Tuna/Dolphin I Panel could have used considering the several key factual errors it made), the provisions fail to meet even a minimalist democratic test. Under both agreements, citizens can neither appear before nor submit information to dispute panels. Citizens also cannot see country pleadings and can even be prevented from seeing the final decision if both parties to a dispute so agree. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT Doc. MTN/FA II-A2 (Dec. 15, 1993), in Final Agreement supra note 15; NAFTA, supra note 14, ch. 20.


\(^{165}\) See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1988), which ensures public participation in almost all executive branch actions mandated by Congress or the Constitution.

\(^{166}\) As a result of the Tuna/Dolphin Panel decisions and the U.S. proclivity to apply trade sanctions unilaterally for various unfair trading practices, like those relating to intellectual property rights, see Trade Act of 1974, 19 U.S.C. §§ 2242, 2411 (1988 & Supp. V 1993), it appears that most GATT parties appear unconvinced that the U.S. trade/environment agenda is genuine. This sentiment, however, neglects not only the
on the U.S. government's desire to apply PPM trade measures to items like driftnet-caught fish or to utilize related non-PPM environmental trade sanctions.\textsuperscript{167} In the face of identifying and correcting severe or acute environmental problems, and consequent trade-distorting PPM externalities,\textsuperscript{168} the question of how to enforce responsible behavior in an international vacuum remains unanswered.\textsuperscript{169}

A. Green 301

If the world recognizes responsible U.S. leadership on trade and the environment, one possible solution is a "Green 301" provision, which could be added to the U.S. Trade Act.\textsuperscript{170} Such an amendment could be either part of the Uruguay Round implementing legislation\textsuperscript{171} or the Generalized System of Preferences (GSP) reauthorization bill,\textsuperscript{172} and it could be explicitly tied to unsustainable PPMs. A Green 301 proposal would essentially stipulate that certain foreign production methods constitute an unfair international trading practice.\textsuperscript{173}

historical interest of the United States in limiting environmentally damaging trade but also recent concerns. See, e.g., International Convention—Fur Seals, 37 Stat. 1542-1547 (convention between the United States, Great Britain, Russia, and Japan to protect fur seals and sea otters); H.R. Res. 246, 102d Cong., 2d Sess. (1992) (by a vote of 362-0, the House of Representatives expressed its sense of the Congress regarding the relationship between trade agreements and U.S. health, safety, labor, and environmental laws).


168. See Repetto, supra note 149.


170. See Trade Act of 1974, 19 U.S.C. § 2242. Section 301 allows the United States to take unilateral trade measures against countries whose actions are "unjustifiable and burdens or restricts U.S. commerce."

171. Whenever a trade agreement changes U.S. legislation, the President must seek "fast track" authority if he does not want the agreement or its implementing legislation altered by Congressional amendment. After receiving implementing legislation from the executive, usually drafted in consultation with the legislative branch, Congress must vote "yes" or "no" on the implementing legislation within 90 days of its introduction. 19 U.S.C. § 2191 (1988 & Supp. V 1993).


Once the notion of a Green 301 was accepted, drafters would need to identify a legal "trigger" for its application, as well as an equitable "compensatory mechanism;" in other words, when would Green 301 be utilized and how much would it cost the offending country? Although a plethora of options exist, a Green 301 should probably be based on an environmental injury related to trade, not on a trade injury related to environmental competitiveness. This environmental emphasis not only addresses the primary issue at hand, but it also helps avoid disguised green protectionism. Thus, when an environmental PPM of another country is directly harming the United States or a "global interest" (defined as a global common entity or a resource protected by international agreement), the United States should be able to levy a duty equal to the approximated cost of the environmental injury caused by the PPM in question.

While a Green 301 might seem radical or heavy handed to some, it is really only an extension of several existing international trends. First, if based on unsustainable PPMs, a Green 301 would merely expand allowable product bans or tariffs to cover the product's full life cycle. Also, to the extent that duties are levied against products from offending PPMs, such tariffication is consistent with GATT Article XI. Most importantly, once a goal of preventing or controlling damaging PPMs was established and accepted, strong standards would enhance international competitiveness. Green 301, therefore, could become the catalyst for environmental and economic forces already underway.

B. Precautionary 1901

A variant on the Green 301 approach would more fully embrace the "precautionary approach" in international trade negotiations and implementation. Such an approach, which we will call "Precautionary 1901," could

file with author). "I refuse to accept the notion that we should lower our environmental standards so that our companies can compete more effectively . . . [A Green 301] would allow a stronger U.S. response to inadequate pollution control and worker protection around the globe."

174. See id. "We must get other countries to enforce their laws." (lax enforcement as trigger); International Pollution Deterrence Act, supra note 151.

175. See, e.g., Trail Smelter Arbitral Tribunal Decision (U.S. & Can.), reprinted in 35 Am. J. Int'l L. 684 (1941) [hereinafter Trail Smelter].


178. See GATT, supra note 14, art. XI.


180. In addition, monies generated from a Green 301 could be used to finance the U.S. Agency for International Development (USAID) projects or other foreign assistance programs.

combine the best elements of unilateral\textsuperscript{182} and multilateral\textsuperscript{183} trade actions. If an international agreement on a particular environmental problem cannot be reached, the United States (or any other country) should be permitted to impose unilateral quantitative or added-duty trade measures for a set period of time (\textit{e.g.}, eight to ten years). Then, after that time, if no international agreement was struck, the country using the trade measure must either compensate the complaining party(ies)\textsuperscript{184} or rescind the offending trade measure.\textsuperscript{185} Significantly, some unilateral PPMs and certain sanctions should be automatically protected without resorting to the Precautionary 1901 approach.\textsuperscript{186} Nonetheless, this approach could solve the large bulk of potential PPM and trade problems.

C. An International Commerce Clause?

Trade pressure should only be a means to a greater end. Ideally, political leverage by environmentalists will eventually enable the United States and other like-minded countries to negotiate reasonable trade and environment rules that would make unilateral trade measures unnecessary.\textsuperscript{187} What would this global policy look like? Only clues exist. A particularly

\begin{itemize}
\item \textsuperscript{182} See, \textit{e.g.}, Rio Declaration, \textit{supra} note 140, at Principle 12. "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." \textit{Id.}
\item \textsuperscript{183} Although the legal status of multilateral agreements on PPMs in relation to the GATT is unsettled and made even murkier by the Tuna/Dolphin II Panel, both the United States and the European Union appear to believe that such agreements will generally take precedence over the GATT. \textit{See The GATT and the Trade Provisions of Multilateral Environmental Agreements}, Group on Environmental Measures and International Trade (EMIT), GATT Doc. TRE/W/5 (Nov. 17, 1992) (submission from the European Community); \textit{see also} Vienna Convention, \textit{supra} note 78.
\item \textsuperscript{184} \textit{See} GATT, \textit{supra} note 14, art. XIX (Emergency Action on Imports of Particular Products).
\item \textsuperscript{186} Specifically, unilateral trade responses to environmental actions that directly harm the United States or cause species extinctions would be explicitly protected. \textit{See, e.g.}, \textit{Hearing Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science and Transportation} (Feb. 3, 1994), available in LEXIS, Legis Library, Cngtst File (statement of Timothy E. Wirth, Counselor, State Dept.); Berlin & Lang, \textit{supra} note 185, at 48; Trail Smelter, \textit{supra} note 175.
\item \textsuperscript{187} The point, here, is that countries would tend to be a lot more receptive to negotiations linking trade and the environment if there were costs in delaying. \textit{See} Letter from Jolene Unsoeld (D-WA) and 80 other members of the House to President Clinton (Feb. 14, 1994) (on file with author).
\end{itemize}

We would like to propose that, prior to or simultaneous with the April Ministerial declaration to be signed in Marrakech, Morocco, GATT members agree to a moratorium on challenges to environmentally inspired trade measures until a Green Round (or negotiations) can address the issue in its full complexity. \ldots

Just last year the European Parliament called for a "two year moratorium on all GATT-panel judgements [sic] concerning the environment pending the strengthening of GATT articles and practices."
intriguing analogue is the U.S. Commerce Clause, which, inter alia, governs the trade rules between the states and the federal government. Under this framework, the GATT's dispute settlement procedures and legal tests would be central, with three basic legal principles guiding the panels. First, a country challenging a facially non-discriminatory environmental law would have the burden of proving that the law has a discriminatory effect. Second, if a country challenging an environmental law demonstrated a discriminatory effect, then the defending country could still justify the law by showing that it served a legitimate public interest and that there are no available less-discriminatory alternatives. Third, even in cases where there is discriminatory intent in the questioned law, the defending country could nonetheless still show that it serves a legitimate environmental purpose and is the only means available to achieve that purpose. Although it might be dangerous to carry the analogy too far, U.S. law could at the very least assist the GATT in instituting environmental (and PPM) deference by more fully deferring to democratically accountable decision-makers.

Id.

188. U.S. CONST. art. I, § 8, cl. 3.
190. For reasons already described, the GATT's dispute settlement procedures are hardly open or environmentally sensitive. See supra part VII. Some propose creating a new international environmental institution expressly to counter the influence of the GATT. Esrey, supra note 157, at 78-98. Adding fuel to the fire is a clause in the proposed WTO text which states, "Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." WTO Agreement, supra note 15, art. XVI, § 4.
191. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (holding that Arizona's food safety standards were not even-handed, related to the stated objective, and were overly burdensome on commerce). This test would have a dramatic effect upon the European Union's recent challenges to the U.S. fuel efficiency standards and "gas guzzler" taxes. See Establishment of Dispute Settlement Panel Concerning Certain U.S. Automobile Taxes and Corporate Average Fuel Economy (CAFE) Requirements, 58 Fed. Reg. 31,788 (1993).

A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. . . . Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.

Id. The latter point is nothing more than the domestic iteration of the international "precautionary principle" embraced by the Rio Declaration and Agenda 21, supra note 140.

193. In such cases, the defending party's law would undergo "strict scrutiny." See Maine v. Taylor, 477 U.S. at 147-48; Hughes v. Oklahoma, 441 U.S. 322 (1979) (holding that, in such cases, courts will strictly scrutinize the state's objectives and available alternatives).

D. Foreign Environmental Practices Act

Other countries, particularly developing countries, have begun to react with increasing consternation to the U.S. use of unilateral trade measures. However, for reasons already outlined, countries sometimes need to resort to unilateral measures for effective environmental protection. In the trade area, these unilateral measures have generally followed a pattern whereby other countries are sanctioned for proscribed actions. Yet this kind of action is not the only type of unilateral measure available that countries can employ. Countries could also control their own actions or those of their own citizens abroad. The United States, for example, could pass a law requiring that its transnational corporations (TNCs) comply with U.S. environmental regulations, including PPM requirements while operating abroad.

Briefly, the principal sections of a FEPA would include a provision providing that in the event of a conflict of laws between the United States and the host country, U.S. TNCs must comply with whichever of the laws of the host country or the United States that gives the greatest level of protection to the host country’s environment, although in no case would compliance infringe upon a foreign country’s sovereign authority to enforce its own laws. Other provisions would set out the criminal penalties and civil actions for violations of the act and establish the regulatory structure for the administration of the act.

FEPA raises a number of political and legal issues such as defining a U.S. TNC, enforcement of the act and questions of sovereignty.

197. Thus in the case of a direct conflict of laws, the host country’s laws would prevail.
198. Criminal penalties would put the full force of the U.S. prosecuting system behind this legislation making it a more powerful deterrent. Civil actions would give standing to U.S. citizens and allow them to take part in the monitoring process. It could well be that non-governmental organizations (NGOs) would be the most vigilant watchdogs.
199. The administrative section would be set up so that the the federal agencies which already have jurisdiction over specific environmental laws would continue that jurisdiction but now would include U.S. TNCs operating abroad in their scope of oversight. In promulgating compliance requirements for U.S. TNCs, the federal agencies would have to take into account the extent of the host country’s infrastructural capabilities and other differences between the United States and the host country.
200. Defining what constitutes a U.S. TNC is not an easy task. Possible options could include the place of incorporation, the use of the Internal Revenue Code concepts on “look thru” provisions to determine ownership and foreign controlled corporations, see generally 26 U.S.C. §§ 861-962 (1988 & Supp. V 1993), or the concept based on the location of decision-making centers and the amount of influence parent entities exert over subsidiaries (found in the United Nation’s Draft Code on Conduct of Transnational Corporations, U.N. Doc. E/1988/39/Add.1 (1988) [hereinafter Draft Code]). None of these options are truly sufficient by themselves, but there are also two jurisdictional theories based on jurisdiction to adjudicate and jurisdiction to prescribe, which could be adapted to define a U.S. TNC. See Restatement (Revised) of the Foreign
and competitiveness. Although these issues are important, an in-depth discussion of them is beyond the scope of this article. Nevertheless, there are two fundamental objectives that are central to potential passage of FEPA by the Congress.

First, at its core, FEPA is about regulating TNCs. TNCs are by far the greatest participants in trade. Thus, where trade negatively impacts the environment, TNCs are likely to be in a position to take responsibility for some of those effects. Indeed, agreements such as NAFTA and the Uruguay Round of the GATT have manifestly served to increase the power and rights of TNCs, at the expense of individuals and sovereign governments. Now it is only fitting that these enterprises begin to take on some of the responsibilities that go along with those rights.

Second, FEPA is a way for the United States to maintain a leading role in global environmental protection. FEPA demonstrates the U.S. sincerity

RELATIONS LAW OF THE UNITED STATES, Introductory Note, pt. IV (Tentative Draft No. 6, 1985). The jurisdiction to adjudicate theory would be based on the "minimum contacts" requirement. See International Shoe Co. v. Washington, 326 U.S. 310 (1945). Thus, any TNC meeting the "minimum contacts" requirement would be considered a U.S. TNC for the purposes of the act. The jurisdiction to prescribe theory would be based on the "economic effects" principle whereby a country can achieve jurisdiction over a corporation located outside its borders on the grounds that the corporation's conduct creates economic effects felt inside the country. See Daniel W. Schenck, Jurisdiction Over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory, 11 U. Pa. J. Int'l. Bus. L. 495 (1989). These two jurisdictional theories are very broad and therefore could be very controversial. However, the difficulties of trying to apply any of these options to define a U.S. TNC highlights the problem that one country faces in regulating transnationals.

201. Enforcement raises both a practical question and a legal question. Practically, it involves first, the amount of bureaucracy that will be required to make the act work and second, who will actually report violations (foreign citizens, NGOs, or competing TNCs). More importantly, the legal question of enforcement raises the issue of the extraterritorial application of U.S. domestic law and also the potentially sensitive situation of the United States being in the position of enforcing other countries' laws.

202. It may be that countries would view FEPA as an aid in protecting their own environment or as unwarranted meddling in their internal affairs. Neff, supra note 145, at 523-27. Perhaps one solution is to ensure that decisions are made in full consultation with the host countries.

203. The competitiveness argument can play out in two ways. First, there is the question of whether U.S. businesses will be harmed or benefitted in the global market. Overall, the empirical data does not show that there has been a discernible competitiveness effect upon U.S. firms. Id. at 508, 527-28. Second, there is the question of whether the products of U.S. TNCs will be less competitive after the costs of complying with U.S. environmental regulations have been factored. This problem, however, is the very PPM problem that this article is trying to resolve. Thus, any solutions such as border taxes or a "green 301," supra part VIII.A, could potentially also be applied to other corporations' products that do not take environmental costs into account.

204. Although an international attempt was made to regulate TNCs under the Draft Code, supra note 200, the code is virtually ignored. See Richard J. Barnet & John Cavanagh, Global Dreams (1994).

205. See Lang & Hines, supra note 25.

206. See Mitchell Zuckoff, Foul Trade, BOSTON GLOBE, July 10, 1994, at 1, July 11, 1994, at 1, July 12, 1994, at 1. This was a three-part series on U.S. business practices in developing countries, including the dumping of toxic wastes and the selling of U.S. banned pesticides.
of commitment to doing its part in taking care of the environment. In light of the North-South rift, it also shows goodwill and may help developing countries to continue developing without contributing to greater destruction of their environment. FEPA also encourages the spread of “enviro-technology” and PPM standards without the harshness of sanctions, which are the hallmarks of other unilateral trade measures. At the very least, FEPA can be a tool to spark greater dialogue at both the national and international levels about how to handle the subject of sustainable development and the role commercial enterprises should play in that process.

E. Wild Bird Conservation Act

The U.S. Wild Bird Conservation Act of 1992 (WBCA) is an exemplary piece of legislation that employs the use of PPM trade measures to regulate unsustainable trade in wild birds. The WBCA can be used to serve as a case study for the NAFTA Commission on Environmental Cooperation (CEC) through which the issue of PPMs can be addressed. Such an examination will facilitate deliberations on the issue of PPMs in other fora and assist in specifying criteria for identifying laws that restrict trade based on harmful PPMs.

The WBCA was enacted in 1992 for the purpose of ensuring that the import of wild birds into the United States is conducted on a sustainable basis and in a manner that does not in any way jeopardize wild populations. At its core, the Act aims to distinguish birds based on their method of production by promoting the use of captive-bred, not wild-caught birds or birds that were sustainably harvested rather than taken under an unregulated and unsustainable regime.

The Act also uses the three appendices of CITES as a shorthand for identifying species that Congress believes deserve protection through quantitative import restrictions. On the enactment date, the Act placed an immediate moratorium on the importation of the ten bird species listed in CITES Appendix II that have been hardest hit by the commercial trade. One year later, the importation of all CITES-listed species was

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207. See, e.g., Tuna/Dolphin I, supra note 3; Tuna/Dolphin II, supra note 58; Steel Leg-Hold Trap, supra note 89.


209. See Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (1994), which states that [i]n accordance with Article 10(2) of the Environmental Cooperation Agreement, it is the policy of the United States to promote the consideration of, with a view towards developing recommendations and reaching agreement on, the following priorities within the Council of the Commission for Environmental Cooperation . . . pursuant to Article 10(2)(m), the environmental impact of goods throughout their life cycles, including the environmental effects of processes and production methods . . . . (emphasis added).


211. See GATT, supra note 14, art. III; NAFTA, supra note 14, art. 103.

prohibited under the Act, unless that species was placed on an "approved" list or was imported under an allowed exemption. A captive-bred CITES-listed species can be placed on the approved list if it was bred at a facility approved by the Fish and Wildlife Service (FWS) or if it is a species that is commonly bred in captivity and for which there are no wild-caught birds of the species in trade. For a wild-caught CITES-listed species to be placed on the list, the country of origin must have an FWS-approved scientifically-based management plan that provides for the conservation of the species and its habitat and ensures that trade is conducted on a sustainable basis.

The WBCA makes an excellent case study for several reasons. First, prior to the enactment of the Wild Bird Conservation Act, the United States was the world's largest importer of wild birds. Second, the WBCA furthers the measures contained in CITES, a treaty expressly incorporated by NAFTA. Third, the WBCA is achieving environmental goals. Fourth, the Act operates primarily to promote captive breeding and the sustainable management of wild bird populations in countries of export and does not seek to end the trade of birds per se or in a protectionist manner. Fifth, all three NAFTA parties contributed to the decline of wild bird populations. Sixth, wildlife trade, both legal and illegal, is expected to increase between Canada, Mexico, and the United States with

215. Id.
216. Between 1980 and 1989 nearly seven million wild birds were imported into this country. GRETA NILSSON, IMPORTATION OF BIRDS INTO THE UNITED STATES 5 (1992) [hereinafter IMPORTATION REPORT] (on file with author). U.S. consumers generated a global demand that threatened the survival of bird species and their habitats as well as undermined the laws of foreign countries.
217. NAFTA, supra note 14, art. 104. In proposing standards for defining what constitutes a sound sustainable management plan or an acceptable foreign captive-breeding facility, the drafters of the WBCA used as guidelines the scientifically-based standards of CITES. Jane Earley, Office of the U.S. Trade Representative, The Case of PPM’s and Trade in Wild Birds, Remarks at the OECD Informal Workshop on Trade and Environment: PPM Issues, Helsinki 5-6 (April 6-7, 1994) (transcript on file with author). Furthermore, the WBCA was a necessary complement to wild bird protection measures adopted by the CITES parties to stem imports into the United States.
218. According to FWS law enforcement personnel stationed at ports of entry, bird imports have declined dramatically since enactment of the WBCA. Telephone interviews with Wildlife Inspectors, FWS (New York and Miami Ports) (1994).
219. The WBCA established mechanisms for financial and technical assistance for foreign bird conservation programs.
220. See generally DEBRA A. ROSE, A NORTH AMERICAN FREE TRADE AGREEMENT: THE IMPACTS ON WILDLIFE TRADE (1991) [hereinafter TRAFFIC REPORT] (on file with author). Mexico is a known center for illegal trade in wildlife, particularly in wild birds. Despite a national law generally banning the export of native species, many of Mexico's rare species are illegally smuggled across the Texas-Mexico border where they are sold for a high price in the international market. Id. The lax enforcement of Mexico's regulations governing trade in non-native species has also contributed to making the country a center for the transshipment of bird species originating in South America, Africa, and Asia. Moreover, many believe that Canada is a haven for wildlife smuggling and that as the United States enacts legislation that restricts wildlife imports, such as the WBCA, the flow of affected species (e.g., birds) will simply shift northward, entering Canada to
the implementation of NAFTA and the Uruguay Round. Finally, wild-caught birds are carriers of several diseases known to infect both livestock and humans.

What should the CEC do with the WBCA? First, the CEC should conduct an analysis of existing domestic legislation regulating wildlife and/or bird trade in all three countries. Second, the CEC should investigate legal and illegal wildlife trade along the common borders and how that trade has and will continue to change with the implementation of NAFTA. Third, the CEC should devise an action plan for the management of wildlife trade that incorporates cooperative efforts that are to be undertaken by Canada, Mexico, and the United States. Fourth, the CEC should initiate cooperative efforts between bird breeders in Canada, Mexico, and the United States to encourage the establishment of captive-breeding programs that facilitate trade. Fifth, because CITES is an important area for cooperation among Canada, Mexico, and the United States, the fulfillment of CITES provisions by NAFTA members would then help to facilitate the CEC's task of monitoring trade and will promote continuity among the countries' import and export of wildlife. Sixth, an explicit link should be established between the CEC, the public advisory

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221. Monitoring incoming wildlife shipments will become increasingly more difficult with an increase in the flow of goods across the borders. In addition, as tariffs are lowered, the U.S. Customs Department will lose its traditional financial incentive to aid the U.S. Fish and Wildlife Service in enforcing wildlife trade laws.

222. Infectious diseases such as the exotic Newcastle disease, psittacosis and salmonellosis are sometimes found in imported birds, thereby posing serious health risks. Importation Report, supra note 216, at 66.

223. This analysis should center on the effectiveness of each country's legislation in regulating the trade, with particular emphasis on enforcement. All three countries have extensive domestic legislation for the protection of native and non-native wildlife in trade. To promote consistency among these regulations, discrepancies should be identified and efforts should focus on supporting those provisions that offer greater protection. See, e.g., Robert A. Pastor, Integration With Mexico: Options For U.S. Policy 74 (1993).

224. Traffic Report, supra note 220, at 3. Particular attention should be paid to the ability of law enforcement officers to distinguish otherwise "like" birds on the basis of how they were harvested. Also of concern should be the likely increase of outbreaks of avian-transmitted diseases.

225. Included in the action plan would be several initiatives for enhancing enforcement capabilities. The CEC can improve the enforcement of these regulations by initiating a unified effort among the three countries to strengthen enforcement along the borders, particularly in terms of the number of enforcement personnel. Training programs need to focus on NAFTA-related activities. Inspectors must be familiar with the wildlife laws and regulations of each NAFTA member.

226. Since the enactment of the WBCA, bird breeders within the United States have started to set up networks in which those breeding a particular species work collectively to establish an extensive and well organized breeding program. Participants benefit from information-sharing on what strategies or practices are beneficial, and they are also able to exchange breeding birds for enhancing genetic diversity. They have also established studbooks to assist in maintaining records concerning genetic variability. Laurella Desborough, President's Message, A.F.A. Watchbird (American Fed'n of Aviculture, Phoenix, Ariz.), Dec. 1993, at 22.
committees, and other interested parties on the management of the wild
bird trade. Finally, the CEC should develop a program of public out-
reach and education on the wild bird trade.

The seven activities outlined above are designed not only to promote
compliance with the WBCA in a cooperative manner, but also to demon-
strate the environmental importance of distinguishing like products in
certain circumstances. The goal of such a work plan is not to institutional-
ize the use of all PPM trade measures per se, but to identify a specific envi-
ronmental PPM-related problem that illustrates the substantial limits of
present international trade law in this area. Once a series of PPM-related
environmental problems are resolved, a more general rule defining their
legal acceptability should emerge. The WBCA project identified here rep-
resents an early but important step in this process. Thus, the CEC should
agree that the trade in wild birds is a legitimate and serious conservation
problem, facilitate cooperative trade and enforcement actions necessary to
attain the goal of wild bird conservation, and identify the trade lessons
learned from the WBCA work program. Once these tasks are complete,
the NAFTA CEC will be able to report its results to the GATT/WTO,
OECD, the United Nations Environment Program (UNEP), the United
Nations Commission on Sustainable Development (UNCSD), and other
international trade/environment bodies.

Conclusion: Even Truffulas Need Sustainable PPMs

You're in charge of the last of the Truffula Seeds.
And Truffula Trees are what everyone needs.
Plant a new Truffula. Treat it with care.
Give it clean water. And feed it fresh air.
Grow a forest. Protect it from axes that hack.
Then the Lorax and all of his friends may come back.

A wide variety of environmental problems now seriously threaten life
all over the world. Most if not all of these problems can be directly linked
to damaging production and process methods, and the international com-
monality has responded to some of these PPMs with multilateral agree-
ments. But these same PPMs are anathema to the legal international

227. NGOs can play a valuable role in assisting with enforcement issues, research,
education, and information sharing. Often these groups have the capability to investi-
gate and monitor suspected cases of illegal wildlife trade or problems in enforcement.
For example, Defenders of Wildlife is currently in the process of conducting a survey of
FWS Law Enforcement Personnel in order to identify obstacles that hinder the enforce-
ment of CITES and domestic wildlife laws.

228. With the implementation of NAFTA, tourism among the three countries is
expected to increase. Citizens need to be aware of the laws and regulations of all
NAFTA members governing the purchase and import of wildlife specimens and prod-
ects and other relevant factors such as the risk of disease. A substantial amount of
illegal noncommercial wildlife imports entering the United States are associated with
uninformed tourists returning from vacation in NAFTA member countries. TRAnC
REPORT, supra note 220, at 2.

trading system. If a country attempts to limit trade in a product based on a PPM, such action will almost certainly violate GATT rules. It seems apparent that the legal regime which fosters such a result must be changed.

But "change" is not and will not be easy. Entrenched economic interests tend to dislike additional regulatory oversight. Institutional bureaucracies become accustomed to established rules and practices. The fears of the poor are usually not assuaged by paternal environmentalism. Even assuming political will is found, accurately communicating what exactly needs to be fixed, and how to do it, is difficult at best.

Defining and implementing the GATT's exact reform agenda with regard to PPMs and other environmental concerns will not occur overnight. A modern understanding of sovereignty, the role of individual citizens, and the fate of the world's living natural resources are all at stake. From even a purely economic vantage, however, the objectives of the GATT/WTO must be more clearly elucidated. At present, the GATT seems to be more concerned with saving corporate investments than combating "protectionism." Trade barriers need not be lowered for their own sake. For instance, if protectionism is not being alleged against U.S. dolphin-safe tuna laws, then the question arises why the United States has been brought before a GATT dispute settlement panel and twice lost.

Therefore, it seems likely that GATT articles will need to be amended or reinterpreted if trade is to become truly sustainable. Also necessary is a radical restructuring of the process by which international trade rules are made and enforced. While the additional points of view that openness provides may make the trading system a bit more cumbersome, increased public participation will prevent seismic political tremors down the road. Indeed, the often vociferous disagreements on the degree of substantive and procedural reforms needed by the GATT serve only to underscore the high political stakes in reconciling trade and the environment.

Without serious and determined reform, not only U.S. environmental laws, but also global sustainability efforts, will continue to receive the same old GATT decisions and neglect in a powerful WTO. The EU, for example, has recently targeted legitimate U.S. federal and state legislation as illegal trade barriers under the WTO. The Clinton administration, as well as members of Congress on both sides of the aisle, must not cede U.S. environmental sovereignty. The United States must relentlessly push for the legitimization of PPM standards that achieve real environmental success. After all, this debate at its root is about defining sustainable development—that conceptually appealing, but factually ambiguous concept.

\[230.\] Defining this term is literally the $64,000 question. We define protectionism as erecting trade barriers that shelter an economic interest from a competitor who does not seek to gain a commercial advantage at the expense of a larger, defined societal interest. \textit{See generally} \textsc{Robert Heilbroner, Beyond the Veil of Economics} (1988).

\[231.\] The GATT has not been amended since 1965.

\[232.\] \textsc{European Commission, Report on United States Barriers to Trade and Investment} (1994).

\[233.\] \textit{See} \textsc{The Brundtland Report, supra note 6}.