Precaution, Participation and the "Greening" of International Trade Law

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Naomi Roht-Arriaza

Precaution, Participation, and the "Greening" of International Trade Law

INTRODUCTION

The interrelationship between trade laws and agreements and protection of the environment is a much-debated topic these days. Everyone from the Secretariat of the General Agreement on Tariffs and Trade (GATT) to the governor of California to international environmental organizations has jumped into the fray. While some argue that free trade is the best hope for reversing environmental degradation, others see it as a primary cause of such degradation.

Institutions and agencies have begun to move. The GATT recently reactivated its long-dormant Working Group on Environmental Measures and International Trade. The Working Group, originally established in 1971 to study whether the trade-related provisions of international environmental agreements conform to GATT, had never convened. Additionally, the Organization for Economic Co-Operation and Development (OECD) has been working for several years on the issue through its Trade and Environment Directorates, starting from the principle that states should recognize the "importance...
of preserving both the environment and the open multilateral trading system." However, a February 1992 effort to establish guidelines to harmonize trade and environment ended inconclusively when experts from each field could not agree. Similarly, the United Nations Conference on Environment and Development (UNCED) has touched on the issue. For example, Principle 12 of the Rio Declaration on Environment and Development calls for an open trading system as the best way to ensure environmental protection, while Rio’s Agenda 21 and its Forestry Principles also refer to the need for open trade.

"Greening" international trade law will not be easy. Trade specialists and environmentalists start from different premises and privilege different values. While trade specialists generally prefer to see unfettered markets, environmentalists point to market failures and condemn common trade practices which externalize environmental costs. Simi-

5 Joint Report on Trade and the Environment 3, OECD Doc. Com/ENU/EC/ TD(91)14/REV.2 (May 14, 1991). A 1991 meeting of experts from these two directorates set out the issues involved in the trade-environment interface as:

[T]he possible negative effects on the environment of certain economic policies which affect trade patterns and trade practices, in the absence of internalisation of environmental costs or the absence of adequate environmental regulations. Also there is concern that trade policies and agreements do not sufficiently consider environmental impacts. Trade concerns relate primarily to the increasing use and suggestions to use restrictive trade measures to enforce diverging national environmental policies and the risk that environmental justifications may be abused in disguising protectionist motives.

Id.


7 Principle 12 declares:

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


10 See generally Herman E. Daly & John B. Cobb, Jr., For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future (1989).
larly, while trade specialists often focus on economics, many environmentalists view market forces as subordinate to moral values and concerns for planetary survival.

Several authoritative sources establish the principles and rules of trade law. The most important is the General Agreement on Tariffs and Trade (GATT),11 which was first signed in 1947, and which now regulates trade among over a hundred member countries. The body of GATT law includes not only the specific text of GATT, but also various interpretations of the text made over time by expert panels formed to resolve disputes between member states. GATT rules also form the basis for existing and proposed regional trade agreements in Europe and North America.

Ascertaining basic principles of international environmental law and policy is less straightforward, since few binding treaties specifically enunciate these principles. Although most environmental treaties focus on sectoral issues, such as pollution of a given area or protection of certain species, rather than broadly applicable overriding principles, it is nonetheless possible to derive certain overriding principles by examining oft-repeated treaty provisions. In addition, non-binding resolutions, declarations, and statements of conferences and expert commissions provide guidance in defining how a global environmental law should look. These include the Stockholm Declaration on the Human Environment,12 the World Charter for Nature,13 the legal principles proposed by experts working with the Brundtland Commission,14 and the results of several regional conferences on the environment.15 These principles constitute "soft law." That is, while they are not technically binding on states as are treaties, they may over time create international legal obligations based on ordinary custom and usage, and may be incorporated into more traditional treaty instruments.16

This article focuses on two major emerging principles of environmental law, the precautionary principle and the participatory imperative, and

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14 The Brundtland Commission produced an influential report on sustainable development, which outlines a set of legal principles necessary to accompany the changes envisioned. See WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE (1987).
15 See infra notes 115-118 and accompanying text.
contrasts them with the current rules of trade agreements. Parts I and II examine the current structure of GATT in light of these principles, and conclude that while simple amendments to the GATT language will suffice in some areas to bring GATT law into line with these environmental principles, in other areas more fundamental differences exist which are not easily resolved within the structure of the current agreements. Parts III and IV propose modifications to the agreement, and recommend institutional changes necessary to bring the trade rules more closely into line with the precautionary and participatory principles. The author hopes that an understanding of the underlying differences in the trade and environmental paradigms will facilitate the development of the guiding principles necessary to make trade agreements better serve planetary sustainability.

I

THE PRECAUTIONARY PRINCIPLE: BURDENS OF PROOF, CLEAN PRODUCTION, AND PREVENTATIVE ACTION

A. The Precautionary Principle

The precautionary principle recognizes the need for environmental regulation to proceed in the face of inevitable scientific uncertainty: "[i]ts purpose is to encourage perhaps even oblige decisionmakers to consider the likely harmful effects of their activities on the environment before they pursue those activities." Accordingly, the precautionary principle represents a fundamental shift in approach to environmental regulation.

The precautionary approach developed in response to several decades of ineffective pollution control regulations. These emissions- and waste-related regulations assume the environment has the capacity to assimilate and detoxify a vast quantity and variety of harmful contaminants; their aim is to ensure that contaminants are dispersed, diluted, or transformed to render them virtually harmless. Under this regulatory approach, industry complies through "add-on" or "end-of-the-pipe" pollution control technologies rather than through changes in industrial or agricultural processes and practices.

As we now know, this assimilative capacity approach fails to recognize the complex interactions that have turned substances previously thought harmless, such as carbon dioxide (CO₂), chlorofluorocarbons (CFCs), and methane gas (CH₄), into some of the world’s most challenging environmental problems. Many toxic substances accumulate in the atmosphere, oceans, and rivers, and subsequently in the tissues of plants, animals, and humans. Moreover, it is impossible for regulators to establish “acceptable” discharge or emission limits on even a fraction of the substances used in modern industry, much less discover the complex interactions and synergies among them. Furthermore, studies show that environmental quality improves consistently over time only where contaminants are no longer used, rather than simply reduced or transferred from one medium to another. All these factors have led to a reevaluation of the need for an approach which stops potentially dangerous substances from entering the environment rather than cleaning them up afterward.

The precautionary principle is rapidly assuming a central role in international environmental law. The World Charter for Nature phrased the principle in terms of the burden of proof:

Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed.

More recent endorsements of the principle include the 1987 Second International Conference on the Protection of the North Sea, the 1990 Bergen Ministerial Declaration, the 1990 Ministerial Declaration on

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19 For example, a review of pollution control regulations in the United States found the assimilative capacity approaches behind the Clean Air and Clean Water Acts had not worked well. Since the mid-1970s, air quality across the country has improved marginally, while water quality has, in most areas, remained constant or worsened. See Geiser, supra note 18, at 67 (citing study by Barry Commoner). In contrast, where contaminants were banned or phased out, such as lead in paint, strontium 90 in milk, mercury in the Great Lakes, and DDT and PCBs generally, environmental persistence and bioaccumulation of the contaminants decreased substantially. Id.


21 Second International Conference on the Protection of the North Sea: Ministerial Declaration Calling for Reduction of Pollution, Nov. 25, 1987, art. VII, 27 I.L.M. 835, 838 (1988) (“A precautionary approach is necessary which may require action to control inputs of [dangerous] substances even before a causal link has been established by absolutely clear scientific evidence.”).

22 Bergen Ministerial Declaration on Sustainable Development in the ECE Region, May 16, 1990, art. 7 [hereinafter Bergen Declaration] (“Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”).
Environmentally Sound and Sustainable Development in Asia and the Pacific, and the most recent meeting of the United Nations Environmental Program (UNEP) Governing Council. The precautionary principle also is a major component of the Bamako Convention on Hazardous Wastes in Africa.

The precautionary approach contains several elements which are relevant to trade and environment concerns. One is that pollution should be prevented, not controlled, because prevention is better than cleanup and cleanup is not always possible. To achieve prevention, environmental concerns must be built into public and private economic activity at the source of pollution, rather than addressed as an afterthought.

A second aspect concerns the burden of proof:

The burden of proof should not be on one concerned with the protection of the environment to demonstrate conclusive harm but rather on the prospective polluter to demonstrate no harm if the pattern of environmental degradation is to be reversed. Adoption of the precautionary approach implies a shift in approach from giving the contaminant the benefit of the doubt to giving the benefit of the doubt to the environment and human health. When doubt exists regarding the impact on the environment and human health, let us err on the side of safety rather than risk significant and irreversible damage.

A third aspect of the precautionary principle concerns the quantum of proof required for action. In the face of limited scientific evidence, the threat of environmental degradation, even without proof of a causal link between emissions and effects, should be enough to justify regulation.

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25 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa, Jan. 29, 1991, art. 4.1.f., 30 I.L.M. 773, 781 (1991) (requiring a precautionary approach to prevent release into the environment of substances which may harm humans or the environment without waiting for scientific proof regarding such harm).

26 GREENPEACE INT'L, PROTECTION OF THE ENVIRONMENT THROUGH THE "PRECAUTIONARY ACTION" APPROACH 3 (July 1990). See also Cameron & Abouchar, supra note 17, at 12 ("[P]recautionary action, properly understood, involves some shift in the burden of proof, towards those who would pollute, of demonstrating that the pollution is not serious or likely to cause irreversible harm.").

27 See Hey, supra note 18, at 308-09, for a thorough discussion of the quantum of proof required for action under the precautionary approach.
Trade law, as exemplified by GATT, violates all these aspects of the precautionary approach. The "grow now, pay later" approach to economic growth propounded by free trade advocates is inimical to precautionary principles. Trade law places the burden of proof for environmental regulation on the regulating state, not on those seeking to overcome the regulation to sell goods more easily. As discussed below, current interpretations of GATT make the switch to pollution prevention and clean production processes more difficult.

B. Growth and Environmental Protection

Free trade advocates argue that trade enhances environmental protection by creating the economic growth necessary to allow countries to spend more on environmental regulation and enforcement. Society, therefore, should concentrate on growing, which requires an open trading system grounded in free market principles. Once growth is achieved, or once per capita income passes a certain threshold, countries will then spend the funds necessary to clean the environment. There is no need to incorporate environmental concerns into the economic system itself. Rather, environmental protection naturally will result from the system's proper and unfettered operation. Arguments that expanded economic growth has led to environmental degradation are met with the response that more growth will solve the problem. The U.S. administration used this argument to defend putting environmental considerations on a separate "parallel" track to the North American Free Trade Agreement (NAFTA) talks, rather than incorporating them directly into the negotiations.

The fundamental problem with this argument is that it reflects a two-step approach at odds with the concept that ecology must be integrated into economy. As the Brundtland Commission stated: "the ability to anticipate and prevent environmental damage requires that the ecological dimensions of policy be considered at the same time as the eco-

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28 The GATT Secretariat endorses the view linking per capita income with emission levels of certain pollutants. See Trade and the Environment, supra note 1, at 18. The Secretariat relies on a study describing decreases in sulfur dioxide (SO₂) emissions when per capita gross domestic product (GDP) exceeds $5000 (1988 U.S. dollars). Id. (citing G.H. Grossman & A.B. Krueger, Environmental Impacts of a North American Free Trade Agreement 15 (1991) (prepared for a conference on the U.S.-Mexico Free Trade Agreement, Princeton University, Oct. 1991)). The inference is clear: if per capita income increases to some theoretical threshold, then society will voluntarily spend more on environmental protections, and the consequences of unregulated industrialization and urbanization will take care of themselves.

onomic, trade, energy, agricultural and other dimensions."

Following this two-step approach, the best way to protect the environment is to expand global economic deregulation through trade liberalization, and unleash more growth to pay for environmental safeguards. Indeed, trade liberalization is the aim of the current round of GATT talks. But a "pollute it to grow now, clean it later with the proceeds" approach is not ecologically sound. Many instances of environmental degradation are irreversible or have unforeseen ramifications. In any case, it is much more expensive to remedy existing environmental damage than to prevent it.

To incorporate a preventative approach, trade agreements should focus attention on their environmental consequences from the start. Additionally, funds resulting from expanded trade should be earmarked for increased environmental protection. This requires a departure from

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30 World Comm'n on Env't and Dev., supra note 14, para. 28.
32 Alexandre Kiss & Dinah Shelton, International Environmental Law 6 (1991) (preference for preventative over remedial action). A good example is Taiwan, where after years of export-driven growth with little thought for the environmental consequences, the Taiwanese are finding dead lakes and rivers which will be difficult if not impossible to revive. See Charles P. Wallace, Pollution is Price of Asia Boom, L.A. Times, Feb. 15, 1991, at A1.
33 For example, critics have pointed to the explosive trade-led growth in Mexico's maquiladora region as a case study in the negative environmental effects of unregulated trade liberalization. See, e.g., Poisoning the Border, U.S. News & World Rep., May 6, 1991, at 34-41; National Wildlife Fed'n, Environmental Concerns Related to a U.S.-Canada-Mexico Free Trade Agreement 4-20 (1990). In the maquiladora region, the Mexican government created a special trade zone just south of the U.S. border to induce foreign industrial development and production. As large corporations relocated to the border area to reap the substantial benefits of low wages and lax environmental enforcement, air, land, and water pollution reached dangerous heights, prompting the American Medical Association to label the border area "a virtual cesspool and breeding ground for infectious diseases." A Permanent U.S.-Mexico Border Environmental Health Commission, 263 J.A.M.A. 3320 (1990). While the current administration has recognized the severity of these problems, see, e.g., Office of the U.S. Trade Rep., supra note 29, at 58-188, its response falls in line with its domestic trickle-down economic policies: the expanded financial resources made available through trade eventually will result in additional allocations for environmental protections. See President George Bush, Address at the Hispanic Free Trade Breakfast (Apr. 8, 1991), reprinted in Fast Track and Trade Opportunities, 2 U.S. Dep't Com. Dispatch 253 (1991). Yet like the GATT Secretariat, the current administration has never clearly explained how or why these additional financial resources will translate into enhanced environmental protections, nor have there been assurances that such trade-generated revenues will not filter down to other uses, such as increased luxury consumption, real estate investment, or other social priorities.
Precaution, Participation, and the "Greening" of International Trade Law

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unfettered trade liberalization and deregulation. The market can be harnessed to serve environmental goals, but only in conjunction with other approaches; it cannot be trusted to do the job alone.

C. Shifting the Burden of Proof

Trade rules, as typified by GATT, are designed to ensure the fewest possible barriers to trade. For example, the most-favored-nation (MFN) provisions of GATT require countries which confer tariff or other benefits or restrictions on one trading partner to apply the same benefits or restrictions to all other trading partners. In addition, GATT's national treatment provisions require domestic and foreign industry to be treated alike with respect to taxes, standards, and other regulations. Moreover, even regulations that by their terms treat domestic and imported products alike may be challenged as violations of the national treatment obligation if their effect is to favor domestic industry. Subsidies to domestic industry are discouraged if they increase exports or reduce imports, and quotas, bans, or licensing systems on either imports or exports are prohibited.

Environmental and health regulations have been challenged under one or more of these GATT provisions, despite GATT Article XX, which provides exceptions to these rules for regulations concerning, inter alia, human, animal, or plant health, or conservation of exhaustible natural resources. The fundamental problem with Article XX is that it is

34 In addition, moving to the integrated vision of ecologically sound development will require a redefinition of what constitutes growth. So long as Gross Domestic Product (GDP) remains the basic measure, growth simply will be a function of physical output. This must change. Environmentally destructive activities count as a contribution to GDP, as do the activities needed to clean up their mess. Growth should not be seen as an end in itself, but as a means to equitably distributed and ecologically sound development. See Daly & Cobb, supra note 10, at 368-75.


36 GATT, supra note 11, art. I.


38 Jackson, supra note 37, at 215-19.

39 GATT, supra note 11, art. XVI.

40 Id., art. XI.

41 Importantly, nowhere does GATT explicitly mention the word "environment." The provisions of Article XX relevant to environmental concerns read:

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
framed as an exception to the GATT rules, and as such is to be narrowly construed. By putting the burden of proof on the party defending its regulations rather than on the party proposing the activity conflicting with those regulations, trade assumes primacy over the preservation of the world's environment. This burden of proof is contrary to the precautionary principle, which requires that potentially damaging activities be regulated or prohibited unless no doubt exists as to their safety. Conversely, GATT casts a presumption in favor of the proposed activity, which must be allowed unless those seeking to prohibit or regulate the activity meet a specified burden. And, as the following cases show, the burden of proof is a heavy one.

Under Article XX(b)'s measures "necessary to protect human, animal or plant life or health," the key word is "necessary," and several decisions of GATT dispute resolution panels have developed a restrictive and subjective meaning for that term. In the Thai Cigarette case, U.S. cigarette manufacturers challenged the Thai government's ban on imported cigarettes, arguing it constituted disguised protection for the local government cigarette monopoly. Thailand argued that even though it allowed domestic cigarette sales, the government carefully controlled the amounts and types sold as part of a program to decrease smoking; that U.S. cigarettes were more aggressively marketed towards new smokers; and that imported cigarettes contain additives that encouraged new smokers. The GATT Panel rejected these arguments, holding the import ban was "necessary" within the meaning of Article XX(b) only

adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health; [or] ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Id., art. XX.

Environmental advocates proposed adding a new section to cover environmental protection more explicitly. See, e.g., Eric Christensen & Samantha Geffin, GATT Sets Its Net on Environmental Regulation: The Gatt Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System, 23 MIT INT'L L.J. 569, 608 (1991) (proposing to allow trade restrictions "imposed for the protection of the environment, ecological or biological resources, consumer or animal welfare, whether within or outside the jurisdiction of the Contracting Party enacting the measure."). Although this proposal would clarify the scope of the environmental exception, it would not affect the current allocation of the burden of proof.

In other words, doubts about whether Article XX applies in a given case will be resolved against its application. See, e.g., Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. 1/6268, Nov. 20, 1987, reprinted in Basic Instruments and Selected Documents (B.I.S.D.) 35S/98, 114 (1989) [hereinafter Unprocessed Herring case](narrowly applying Article XX(g)).

if there was no "alternative measure which [the regulating state] could reasonably be expected to employ and which is not inconsistent with other GATT provisions."\textsuperscript{44}

The Panel went on to find that alternative anti-smoking strategies existed, such as ingredient disclosure labels on packages and limits on advertising,\textsuperscript{45} despite the questionable effectiveness of such alternatives.\textsuperscript{46} In reaching its conclusion, the Panel rejected the views of the World Health Organization, which relied on experiences elsewhere to conclude that "the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking."\textsuperscript{47} Thus, the Panel found the Thai measures unnecessary despite evidence both that the measures were legitimate means to reduce the incidence of smoking and that alternatives would not be as effective.

The \textit{Thai Cigarette case} implies that if no GATT-consistent measures are available, GATT requires governments to use the least trade-restrictive measure available, regardless of its efficacy in health or safety terms.\textsuperscript{48} While it is possible to imagine a wide range of possible regulatory responses to health, safety, or environmental problems, the Panel insisted that a single criterion, trade efficiency, should replace both environmental and health concerns, and neglected the sometimes delicate balancing of interests that goes into domestic rulemaking.

In the recent decision on tuna and dolphins (\textit{Tuna-Dolphin decision}),\textsuperscript{49} a GATT Panel upheld a Mexican challenge to the portions of the U.S. Marine Mammal Protection Act (MMPA) which imposed a ban on tuna imports harvested in a manner resulting in excessive dolphin mortality.\textsuperscript{50} The Panel held the import ban violated GATT Article XI's prohibition on quantitative trade restrictions, and did not fall within the GATT Article XX exceptions. Interpreting Article XX(b), the Panel required the United States to show it had exhausted all other reasonably available options before turning to import restrictions. Accordingly,

\textsuperscript{44} Id., para. 74.
\textsuperscript{45} Id., paras. 74-81.
\textsuperscript{47} \textit{Thai Cigarette case}, supra note 43, para. 55.
\textsuperscript{48} See id., para. 75.
the Panel found the United States should have sought a multilateral solution, such as through treaty, since the threatened dolphins traverse several national jurisdictions and the high seas. Importantly, the Panel considered the multilateral option an alternative, not a complement, to national laws. Furthermore, the Panel considered the validity of the MMPA provisions as public policy, finding they were not "necessary" because they were based on "unpredictable conditions."\textsuperscript{51} Whether or not one agrees with the Panel's characterization of the MMPA as a policy matter, surely there is no legal basis for such an interpretation of "necessary," which seems to depend on the Panel's ability to second-guess the domestic rule-making process.\textsuperscript{52}

Article XX(g), dealing with conservation of exhaustible natural resources, has similarly strict requirements. In a dispute involving Canada's export restrictions on unprocessed herring and salmon, a GATT dispute resolution panel held that measures justified under Article XX(g) must be "primarily aimed at conservation," although they need not be "necessary or essential."\textsuperscript{53} In practice, however, the two standards merge. For instance, a recent dispute resolution Panel convened under the U.S.-Canada Free Trade Agreement (FTA)\textsuperscript{54} considered a Canadian requirement that 100% of herring and salmon caught in Canadian waters be "landed" in Canada before export, as part of a complex fisheries management scheme.\textsuperscript{55} To determine whether the Canadian measure was "primarily aimed at conservation," the Panel found it necessary to examine "whether there is a genuine conserva-

\textsuperscript{51} Tuna-Dolphin decision, \textit{supra} note 49, para. 5.28.

\textsuperscript{52} The ability of unelected GATT officials to override decisions of elected lawmakers in member countries is a potent source of opposition to the current shape of trade law and institutions. \textit{See} Lori Wallach & Tom Hilliard, The Consumer and Environmental Case Against Fast Track 20 (May 1991) (unpublished report, Public Citizen, Wash., D.C.).

\textsuperscript{53} Unprocessed Herring case, \textit{supra} note 42, para. 4.b. The dispute centered on Canada's prohibition on the export of certain species of salmon and herring not processed in Canada. Canada argued that while the export restrictions were not \textit{per se} conservation measures, they enhanced conservation efforts by providing a statistical foundation for harvesting restrictions, and worked in tandem with other fish conservation programs. \textit{Id.}, para. 4.7. The United States argued the export restrictions were aimed at favoring domestic processors. \textit{Id.}, para. 3.11. The Panel rejected the Canadian contentions, finding that the statistical and fish conservation aims of the law could be achieved through less trade restrictive alternatives, without export restrictions. \textit{Id.}, para 4.7.


Precaution, Participation, and the "Greening" of International Trade Law

...n reason for choosing the actual measure in question as opposed to others that might accomplish the same objective."\(^{56}\) Only if the measure would have been adopted for conservation reasons alone would it withstand scrutiny. Because Canada could not prove that its 100% landing requirement was necessary on the basis of existing data, and because the Panel found alternative ways to meet the admittedly legitimate conservation objectives, it held the landing requirement violated GATT, and therefore the FTA.

Another FTA panel decision applying Article XX(g) illustrates the limits of this approach. While a majority of the Panel declined to reach the issue, the minority report in the *Lobster case*\(^{57}\) found that an amendment to the Magnuson Act\(^{58}\) prohibiting the sale or transport in or from the United States of whole live lobsters smaller than a certain size, including those originating in foreign countries, did not come within the strictures of Article XX(g). The Panel began by stating that it did not require the United States to use the least trade-restrictive method; yet it found against the United States, in part because the Magnuson amendment had been passed "without any apparent discussion of alternative enforcement methods which might be less restrictive on trade,"\(^{59}\) thereby importing a "least-restrictive" requirement into the language of XX(g). Next, the Panel considered the legislative history of the amendment. It found statements underscoring the conservation rationale for the measure, but also statements of concern for the trade in undersized lobsters. These statements merely pointed out the obvious: U.S. lobster fishers were at a competitive disadvantage because they were subject to more stringent conservation regulations than the

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\(^{56}\) Id. at 30.

\(^{57}\) Lobsters from Canada, Final Report of the Panel, USA 89-1807-01, 1990 FTAPD LEXIS 11, pt. 9 (May 25, 1990), available in LEXIS, Intlaw Library, USCFTA File [hereinafter Lobster case]. The dispute between the majority and minority members of the panel centered on whether the ban on the sale of undersized lobsters was a quantitative restriction under Article XI (minority view) or an internal regulation under Article III (majority view) subject only to the national treatment requirements of Article III. Because the majority did not find the existence of a quantitative restriction, and because discrimination against foreign producers under Article III was outside the panel’s terms of reference, the majority did not reach the Article XX issue. *Id.*, paras. 2.6, 11.2.1, 11.3.2. Thus, while the discussion of Article XX is not part of the official panel holding, it is an indication of how similar panels might analyze the issue in the future.


\(^{59}\) Lobster case, supra note 57, paras. 9.4.2, 9.6.2.
Canadians. Thus, the Panel concluded that the objectives of the amendment were both of a conservation nature and a trade restriction. Given that the burden of proof was on the United States, the United States "had not made their case strongly enough to lead . . . members to the conclusion that the measures were primarily aimed at conservation."61

Additionally, to come within the coverage of Article XX(g), the trade restriction must be imposed in conjunction with restrictions on domestic production or consumption.62 This excludes cases where there is no domestic production or consumption, or where the restricted resource differs from that being conserved. For example, in a 1982 dispute involving U.S. import restrictions on Canadian tuna,63 a GATT Panel found Article XX did not apply because there were no restrictions on domestic tuna consumption and the restrictions on production did not extend to all kinds of tuna from Canada.

It is true that health and environmental regulations can be used in a discriminatory or protectionist fashion to bar goods from certain countries or to protect domestic interests. Southern countries64 are especially worried that such regulations will be used to deny them access to the valuable markets of larger industrialized nations.65 However, these legitimate concerns can be addressed without second-guessing domestic

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60 This is generally true where commercial competitors face differing environmental regulations. See infra pt. III.C.
61 Lobster case, supra note 57, para. 9.9.1.
62 This requirement has been interpreted to mean that a regulation affecting imports or exports must be "primarily aimed at rendering effective these [domestic] restrictions." Unprocessed Herring case, supra note 42, at 30 (emphasis added).
64 Throughout this article, I refer to Southern countries rather than "developing" or "less developed" countries. I am well aware that the term is geographically inaccurate, but the alternatives are even less satisfactory. References to "developing" imply that the "developed" have arrived at some predefined and desirable goal while the "developing" are still trying to get there. The collapse of the "second world" Eastern Bloc makes "third world" an anachronism. Hence my resort to "Southern."
65 Southern countries have long pushed for opening the markets of OECD countries to their products, especially natural resource-based products and textiles. Industrialized nations have protected their own natural resource and textile sectors through such devices as tariff escalation and creation of the Multifibre Agreement. See UNCED UNDERMINED, supra note 3, at 6 n.24. Thus, it is not surprising that Southern countries would be suspicious of non-tariff barriers to their imports imposed by industrialized nations. See, e.g., GATT Council, Minutes of Meeting, GATT Doc. C/M/247, Agenda Item 10 (Feb. 5, 1991) (opposition to reactivation of the GATT Working Group on the Environment; Tanzanian delegate expressed concern that international trading system will impose conservation costs on primary commodity producers without remuneration; Thai and Moroccan delegates stated misgivings about injecting environmental issues into GATT).
policy choices.  

Rather than treating such regulations as an exception, trade agreements should state positively that health, safety, conservation, and environmental regulations are allowed even if they have trade-restricting effects, unless they violate certain conditions. The requirement that such regulations may not discriminate arbitrarily among countries provides one important safeguard against abuse. So too does the stipulation that the measures not be intended as disguised restrictions on trade, without any environmental justification. Incidental effects on trade, or a mixed set of motives for establishing a restriction, should not be enough to overcome a presumption of validity, although major incidental effects may of course constitute evidence of protectionist intent. The fact that domestic industry, if it exists, is treated significantly more leniently than imports could similarly evidence a protectionist intent. But as long as a policy choice serves a legitimate purpose and does not arbitrarily discriminate, the fact that a dispute resolution panel believes other methods would be superior, or even equivalent, should not matter.

Through trade rules, we may choose to privilege either commercial benefit or the environment, while taking both into account. The starting point from which we balance these often conflicting interests will frequently determine the outcome. By shifting the burden of proof and making measures aimed at environmental, human health, and consumer protection presumptively valid, trade agreements can be brought into line with precautionary principles of environmental protection.

66 In contrast to GATT Article XX, Article XXI, dealing with national security, leaves the interpretation of what constitutes national security entirely to the contracting party invoking the exception. The security exception, too, may be used in ways considered protectionist, see John H. Jackson, World Trade and the Law of GATT 752 (1969), yet the broad discretion given national governments under Article XXI to decide what is a proper subject for application of that exception contrasts sharply with the strict interpretation under Articles XX(b) and (g). For example, in 1986 a GATT panel declined to consider a Nicaraguan complaint that a U.S. trade embargo violated GATT, citing the broad discretion allowed under Article XXI. See Latin America: Embargo on Nicaragua Did Not Violate Obligations Under GATT, Dispute Panel Rules, 3 Int'l Trade Rep. (BNA) 1368-69 (Nov. 12, 1986) (summarizing unadopted GATT panel report).

67 There are, of course, inherent difficulties in ascertaining legislative or regulatory intent, but it remains a valid tool for decisionmaking. See, e.g., Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 Cardozo L. Rev. 1597 (1991) (analyzing approaches of legal process, practical reasoning, textualist, and other methods of ascertaining legislative intent).

68 Domestic legislation is often promoted by alliances of groups with very different motivations. The fact that environmentally sound laws are supported by lawmakers more interested in their constituents' competitive advantage should not make such laws invalid.
D. Harmonization and the Quantum of Proof

A third aspect of the precautionary principle concerns the quantum of proof required for action: in the face of limited scientific evidence, the threat of environmental degradation is enough to justify regulation, even without proof of a causal link between emissions and harm.69 This facet is relevant to the determination of the appropriate scientific basis for health- or environment-based legislation. The dispute between the United States and the European Economic Community (EEC) over use of Bovine Growth Hormone (BGH), for instance, turns in part on an EEC determination that BGH in beef may have unwanted effects on health, while the United States argues there is an insufficient scientific basis for this determination.70

Current efforts to harmonize food safety standards have also raised the issue of what constitutes an acceptable scientific basis for regulation. The draft Uruguay Round GATT agreement contains language that appears to prohibit technical and food safety standards which exceed those set by international bodies, unless the standards are supported by scientific consensus.71 The country with the stricter standards bears the burden of showing that the standards are scientifically justified or meet specified risk assessment criteria.72 The flaw in this approach is that unanimous scientific agreement on the level of risk a society should

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69 See generally Hey, supra note 18.
70 See John H. Jackson, Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round, 14 U. ARK. LITTLE ROCK L.J. 430, 435 (1992). The United States sought to resolve the issue under the dispute settlement mechanism of the Agreement on Technical Barriers to Trade (Standards Code), while the EEC preferred GATT itself as the forum. The dispute is still pending. Id.
71 The draft text requires standards for pesticide residues, food additives, and the like to be "based on scientific principles and not maintained against available scientific evidence." Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, at L.36, para. 6, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel text].
72 The risk assessment procedures mandate that parties take into account economic factors, including the "relative cost-effectiveness of alternative approaches to limiting risks," as well as "the objective of minimizing negative trade effects." Id. In addition, parties must justify cases where they apply different levels of protection in different situations. Id. Some observers have noted these provisions appear to be aimed at the Delaney Clause of the Federal Drug and Cosmetic Act, 21 U.S.C. §§ 348 (c)(3)(A), 376 (b) (5) (B) (1988), which mandates that processed foods may not be sold with any amount of residue of pesticides or additives known to be carcinogenic. See Les v. Reilly, 968 F.2d 985 (9th Cir. 1992) (overturning EPA interpretation of Delaney Clause allowing "de minimis" carcinogenic residues); Memorandum from Lori Wallach, on Dunkel Draft (Public Citizen, Wash., D.C., Dec. 1991).
tolerate is impossible.\footnote{Of course, these provisions could be interpreted merely to require \textit{some} level of scientific backing, rather than unanimity. If this is a proper interpretation, the wording should be clarified. Even that interpretation, however, would thwart legitimate food safety or environmental measures taken for reasons other than science, such as maintaining family farms or satisfying consumer preference.} These decisions are political and social, not scientific. By relying so heavily on scientific consensus, this aspect of the harmonization provisions violates the precautionary principle.

\section*{II}
\textbf{CLEAN PRODUCTION: PROCESSES AND PRODUCTS}

One of the corollaries of the precautionary principle is that the surest way to avoid environmental risks is through clean production methodologies. Rather than relying on measures which disperse, filter, or dispose of pollutants after they are produced, clean production systems avoid using or creating hazardous products and wastes, do not use hazardous processes, and use a minimal amount of raw materials, water, and energy.\footnote{See \textsc{Greenpeace Int'l}, supra note 26, at 3.} For example, in agriculture, clean production focuses on limiting the use of chemical inputs. Such an approach was adopted in the U.N. Conference on Environment and Development (UNCED) preparatory meetings\footnote{See, e.g., \textit{Adoption of Agreements on Environment and Development (Agenda 21)}, U.N. Doc. A/CONF.151/L.3/Add.9 (1992) (supporting promotion of less polluting and more efficient technologies and processes in industries); U.N. Doc. A/CONF.151/4 pt. II, at 140 (1992) (precautionary and anticipatory approach to preventing degradation of marine environment requires, \textit{inter alia}, clean production techniques).} and by participants in the London Dumping Convention.\footnote{A German submission to the Convention is illustrative: \textit{Emission standards alone also cannot prevent insidious alterations. But precautionary action which adapts these standards to technical means and thereby leads to techniques of recycling, reduction and avoidance of wastes can help to reduce \ldots the probability of insidious alternations which otherwise could lead to drastic events. Precautionary action thus means solving technical and economical problems.} 

The question then becomes how to encourage a shift to clean production methods. Doing so requires a new focus on how things are produced, not just on disposal of production by-products. It may include discouraging or prohibiting the use of certain production inputs, such as hazardous chemicals, or requiring redesign of production or harvesting facilities. It may also involve making disposal of hazardous ma-
aterials or by-products difficult and costly enough that producers seek safer alternatives. A move to clean production will require differentiation of products based not only on their end-uses, but also on how they are produced. From an environmental point of view, it makes a difference whether or not tuna is caught by "setting" on dolphins. Similarly, it matters whether fish are caught with drift nets which indiscriminately kill many other forms of sea life, whether timber is sustainably harvested or destructively clearcut, or whether computer chips are made using solvents that destroy the ozone layer or with water-based solvents. Unfortunately, the language and interpretations of current trade agreements make the move to clean production more difficult. GATT interpretations have characterized goods as "like products" based on whether they have "substantially identical end-uses," without regard to how they are produced. Thus, under GATT law, tuna is tuna, wood is wood, and chips are chips.

The most-favored-nation (MFN) provisions of GATT Article I make clear that barriers raised and incentives granted to exports from one country must be equally applied to all other countries. Thus, if a country wishes to encourage more sustainable production methods or discourage destructive ones, it cannot do so by favoring imports from countries whose producers employ the more environmentally sound practices. Nor can it, under current rules, limit, tax, or prohibit imports from countries where a lack of health and environmental regulation allows goods to be produced more cheaply, even if such imports undercut domestic producers who must comply with such regulations. Finally, under GATT rules, a country cannot use its trade leverage to provide incentives for other countries to stop environmentally destructive activities, for instance by denying access to its markets in related goods. Thus, if GATT is not to be an impediment to the switch to

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78 Current GATT rules permit countries to ban imports of products which are in themselves dangerous or damaging to the environment so long as domestic production is similarly curtailed, but they do not permit countries to ban goods solely because they are produced in an unsound manner. GATT, supra note 11, art. 1.

80 See infra pt. III. C.

81 For example, U.S. law allows the President to suspend other countries' fishing rights in the 200-mile U.S. Exclusive Economic Zone (EEZ) when that country undermines the effectiveness of a fishing or whale conservation agreement. 16 U.S.C. § 1821(e)(2) (1985) (Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act). The President may also embargo wildlife product imports when a country diminishes the effectiveness of a conservation program for fisheries or endangered or threatened species. 22 U.S.C. § 1978 (Supp. 1992) (Pelly
clean production, the definition of "like product" must be changed to take into account a product's impact on the environment.

The alternative is to differentiate on the basis not of countries, but of producers. That is, rather than focus on whether the government of State A provides a regulatory environment which encourages environmentally destructive production, the focus would be directly on the producer. Goods which, in themselves or because of their production or extraction processes, harm the environment would be prohibited or restricted, while those using more sustainable processes would be allowed entry, or even granted tariff concessions.

Nothing in the language of GATT precludes this approach, and it is consistent with the MFN and national treatment requirements. In addition, historical precedents exist for this proposal: a 1906 treaty prohibited the production and importation of matches made using white phosphorus because of the effects of the production process on workers. Another regional convention prohibited trade in fish caught by methods having "an injurious effect upon the spawning and preservation" of fisheries.

Nonetheless, production process-based differentiation was explicitly ruled out by the GATT Panel in the Tuna-Dolphin decision. The Panel considered whether a U.S. regulation requiring an embargo on tuna caught by setting purse seines on dolphin came within the provisions of Article III:4, which permits regulations which apply to both imports and like domestic products to be enforced at the point of importation. Under the Panel's interpretation of Article III, internal regulations are allowed only if they do not afford special protection to domestic industry.
and taxes, laws, and regulations may be imposed as "border tax adjustments" only so long as they are levied directly on the product at issue. According to the Panel, the regulations at issue "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product." The Panel held the regulations were not levied directly on tuna within the meaning of Article III, and could therefore not be considered a permissible internal regulation rather than an impermissible import prohibition.

Any move towards clean production requires an ability to distinguish between goods made in an environmentally sound manner and those which are destructive. The Tuna-Dolphin decision precludes that possibility. It is becoming possible to identify cases where clearly environmentally superior production methods and clearly destructive ones coexist for the same products; the tuna, timber, and semiconductor chip examples cited above illustrate this point. Other examples of harmful processes or product constituents include those using asbestos, mercury, chlorine, or leaded gas. Further down the road, nuclear or fossil-fuel generated processes might be included in the same category. As these cases are identified, the trade system should take account of the differences. Countries should be able to identify two different types of imports: those made using environmentally destructive methods, and those made by more environmentally sound means. Differential tariffs, and if necessary, quotas or prohibitions, should then be allowed on these goods. This would allow the trade system to move from creating ecologically inappropriate incentives to implementing environmentally sound ones.

87 Id., para. 5.14.
88 Id., paras. 5.9-5.14.
89 Indeed, the Tuna-Dolphin Panel seemed to foreshadow this approach in its treatment of the Dolphin Protection Consumer Information Act. The Act prevents fraudulent labeling of tuna as "dolphin-safe" by according the right to use that label for tuna harvested in the Eastern Tropical Pacific (ETP) only if accompanied by documentary evidence that it was not harvested with purse seine nets intentionally deployed to encircle dolphins. In response to Mexico's complaint of discriminatory treatment, the Panel found the Act consistent with the MFN obligation because the regulations governing tuna caught in the ETP did not distinguish between products originating in Mexico and products originating in other countries.
90 Implementation of such a system need not be as administratively daunting as it might seem. Private or publicly-run labeling or certification systems would facilitate the task and could be self-financing. The number and types of processes or inputs subject to these provisions would depend on clearly delineated guidelines; in this respect, the proposal differs from the compensatory environmental tariff scheme discussed later in this article. See infra notes 145-48 and accompanying text. Once
Another incentive to clean production will arise if unsound production processes become more costly, thereby making the necessary investments in new methods more cost-effective. For industrial producers, one area of concern is disposal of the by-products of production, especially hazardous wastes. If such wastes can be disposed of quickly and at little apparent cost, little incentive exists to minimize waste generation. As costs of disposing of hazardous substances and wastes have risen in OECD countries, producers have begun exporting wastes to less industrialized countries, where disposal costs are lower and fewer regulatory controls exist. In addition to lower costs, disposal abroad reduces the political and social pressure on producers to "clean up their act," as the public health and environmental effects of the toxic wastes are felt far away, outside the scrutiny of the domestic political system.

Several factors, including these disincentives to clean production, have spurred attempts to limit or stop trade in hazardous wastes. Those efforts, however, are threatened by the current rules of free trade. For example, the Bamako Convention prohibits imports of hazardous waste into Africa, while allowing trade in waste by African countries, subject to stringent notification procedures. Because the Convention allows domestic waste producers to continue disposing of wastes while prohibiting imports, it violates both the national treatment and quantitative restriction provisions of GATT. In addition, by differentiating between African and non-African countries, the Convention violates the MFN clause. Even the much less stringent Basel Convention, which allows countries to ban the entry or disposal of foreign wastes, may...
well violate the same GATT provisions. ¹⁴

Even laws limiting waste trade on a national level may run into problems. It makes sense, from an environmental viewpoint, to distinguish between national producers, who are subject to national social and political pressure to reduce their waste, and foreign producers, who avoid both this pressure and the presumably higher costs of disposing the waste in their own countries. Nonetheless, attempts to ban foreign waste have been challenged as unwarranted and protectionist barriers to the free flow of goods.

In a case recently decided by the European Court of Justice (ECJ), the European Commission and the Advocate-General argued that an attempt by the Belgian region of Wallonia to prohibit waste imports unlawfully discriminated against foreign waste producers. ⁹ The Commission argued that Article 30 of the Treaty of Rome, protecting the free movement of goods and prohibiting quantitative restrictions on imports, meant that Wallonia could not restrict the entrance of waste "goods." ⁹

The ECJ, fortunately, rejected this expansive interpretation, holding that under an exception to the free trade imperative of Article 30, governments can restrict trade for environmental purposes. Restricting waste imports is not per se discriminatory, due to the special, potentially dangerous nature of waste, although it might incidentally favor local producers. To this extent, the ECJ established a much more en-

¹⁴ Of course, the regulating state, if challenged under GATT, could argue that Article XX(b) provides an exception to the rules for measures that protect human health. However, as discussed above, the burden would be on the regulating state to show an import ban was necessary and that no less trade-restrictive approach (for example, better handling of wastes) was available.

⁹ Case 2/90, Commission v. Belgium (July 9, 1992) (not yet published; see summary in 15 Int'l Envtl. Rep. (BNA) 462 (1992)).

⁹ The state government enacted the ban in response to reports of health care problems among the populace of Mellery, site of a large dump receiving wastes from Germany and the Netherlands, among others. See David Gardner, EC Court Refuses to Block Toxic Waste, Fin. Times, July 10, 1992, at 3.

⁷ The ECJ had previously considered the interplay between free movement of goods and protection of the environment. In a 1988 case, the ECJ recognized that laws aimed at protecting the environment are an allowed exception to Article 30. Case 302/86, Commission v. Denmark (In Re Disposable Beer Cans), 1988 E.C.R. 4607. Nonetheless, while the ECJ upheld part of a Danish law mandating recycling of bottles and cans, it struck down the more environmentally beneficial reuse provisions because they would unduly burden importers.

Recycling and reuse laws have generated trade disputes in other contexts. The United States has recently accused Canada of violating GATT because of an Ontario 10 cent per can levy on beer cans. Returnable bottles are exempt from the levy. Because most U.S. beer is sold in cans, while Canadian beer comes mostly in bottles, the United States argues the levy is discriminatory. U.S. Seeks Retaliation in GATT Against Canadian Beer Restrictions, 9 Int'l Trade Rep. (BNA) 1204 (July 15, 1992).
Precaution, Participation, and the "Greening" of International Trade Law

vulnerably sensitive rule than that of GATT.98

However, the ECJ followed this positive general statement with a less positive application. Because an EEC directive99 had already set up notification and monitoring procedures for hazardous wastes, the ECJ held Wallonia could not go beyond the directive, but could only try to convince the Commission to strengthen it. The ironic result is that Wallonia may ban all imports of non-hazardous waste, but may not ban the more dangerous waste covered by the directive because to do so would conflict with the harmonization intended by the directive. Despite the limited nature and spotty implementation of the directives,100 EC law prohibits member states from shoring up their own waste programs. The next section explores this tension between global or regional agreements and national solutions.

III

THE PRECAUTIONARY PRINCIPLE, MULTILATERALISM, AND NATIONAL LAWS

Parts I and II of this article explored how the present GATT rules conflict with a precautionary approach. Another set of trade-related problems involves the application of precautionary principles to the goal of global regulation, in light of current international economic, envi-

98 The U.S. Supreme Court, by contrast, has held that states may not close their landfills to out-of-state waste, because doing so violates the dormant Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617 (1978). Unlike the GATT or EC cases, however, in the United States a popularly elected Congress may establish uniform national rules overriding such a holding in order to promote waste reduction. The Senate has recently done just that. See Keith Schneider, Senate Approves Bill Curbing Interstate Garbage Shipments, N.Y. TIMES, July 24, 1992, at A16.

99 Two directives were at issue. The ECJ found that Wallonia had not run afoul of a 1975 Directive on waste, Council Directive 75/442, which did not specifically deal with trade in wastes. On the other hand, the 1984 Council Directive 86/631 (amended by Directives 86/279 and 87/112), while permitting an importing country to refuse a specific shipment of waste for environmental or health reasons and setting out notification procedures, does not permit a total ban on waste imports. The court ruled that Wallonia's action was an impermissible step beyond the latter directive.

100 The directives take effect only when incorporated into national laws, and have been poorly implemented. See Patrick Thieffry & Peter Nahmias, The European Community's Regulation and Control of Waste and the Adoption of Civil Liability, 14 HASTINGS INT'L & COMP. L. REV. 949, 962 (1991); Marguerite M. Cusack, International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference?, 5 AM. U. INT'L L. & POL'y 393, 404-05 (1990). Only Greece, Belgium, and Denmark have incorporated the directives into national law. Cusack, supra, at 404-05. Although the 1984 Directive was amended in 1986 to require prior informed consent for exports, id. at 404, a promised new directive has not yet been approved. Thieffry & Nahmias, supra, at 963.
ronmental, and political realities. Underlying the conflict between trade rules and environmental principles is a pervasive contradiction: the globalization of both economic life and ecological problems has not been accompanied by a corresponding globalization of regulatory and political institutions and accountability mechanisms. A precautionary approach, recognizing this gap, would strengthen existing regulatory structures while attempting to build new, global ones. In reality, trade rules opt for inaction. By making national and sub-national regulation over environmental problems more difficult, GATT rules and decisions undermine the most effective levels of regulation. While purporting to promote a high-minded multinationalism, in effect GATT doctrine leaves the global economy with no effective environmental regulation. GATT's treatment of export restrictions, "extraterritorial" measures, and compensatory tariffs for conservation purposes illustrate the problem.

A. Export Bans

Sovereignty over natural resources is an oft-repeated principle of international law,101 and there is, to date, no global authority empowered to promote the conservation of global resources. Only in very specific areas, such as endangered species, have any inroads been made.102 As a result, the principal responsibility for conservation of resources within national boundaries lies with national governments. Yet GATT rules make it more difficult for states to make the choices necessary to control the rate at which they exploit their resources.

As discussed above, GATT Article XI prohibits most quantitative restrictions, including quotas and export bans.103 Export bans have been


103 Article XI reads: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on [imports or exports]." GATT, supra note 11, art. XI. GATT provides exceptions for temporary shortages of foodstuffs or other essential products, for the classification or grading of commodities, and for agricultural and fisheries products under certain narrow circumstances. Id.
employed most notably in the forest sector, where countries like Indonesia, the Philippines, and several states or provinces of Malaysia, Canada, and the United States have banned exports of raw logs, requiring domestic processing. These bans have been justified as conservation measures, among other reasons. Yet Japan has challenged the Indonesian ban under GATT, and a British Columbia ban is the subject of a U.S. International Trade Commission dispute.

From a trade perspective, a unilateral export ban on a natural resource is illegitimate because it protects a domestic industry which uses the same resources. The product becomes cheaper on the domestic market as supplies rise, and more expensive on the international market as global supplies decline. As a result, foreign producers bear the brunt of the effect of export curbs, while domestic producers benefit.

Yet such restrictions may be legitimate and necessary parts of resource conservation strategies. For example, one of the main obstacles to forest conservation is a perception by local populations that mill jobs will be lost if logging is restricted. By requiring local processing of timber, with a higher value-added content than raw logs, jobs and income can be preserved with a much smaller number of trees cut. Similarly, for Southern countries, local processing can reduce pressure on the sensitive tropical forest resource base, while allowing continuing generation of foreign exchange.

See, e.g., 16 U.S.C. §§ 489(a), 620(a),(c),(e) (Supp. I 1990) (U.S. law banning raw log exports). See generally Robert Gillis & Malcolm Repetto, Public Policies and the Misuse of Forest Resources (1988). The export ban issue also arises in regard to exports of domestically restricted or prohibited pesticides. If the export ban is justified because the pesticide will be reimported as residue on food imports (the "circle of poison" argument), it could arguably be allowed under GATT Article XX(b). But if pesticide exports are banned because they kill fish or wildlife or poison farmworkers or consumers in the importing country, such a ban would be prohibited as a quantitative restriction affecting resources outside the regulating state's jurisdiction. See infra notes 111-35 and accompanying text, discussing extraterritorial application of conservation measures.


In the Pacific Northwest, where litigation involving the spotted owl has tied up timber sales in old growth forests, many feel that the decline in timber-related jobs is a direct result of restricted harvesting plans. See, e.g, Jeff Mapes, President Takes Up Cry On Owls, OREGONIAN, Sept. 15, 1992, at A1.

Tariff escalation (imposing higher tariffs on processed goods than on raw materials) by Northern countries has slowed the development of natural resources processing industries as an income-generating strategy in Southern nations. Thus, one of the aims of Southern countries in trade negotiations has been to reduce or eliminate tariff escalation, and to expand Northern markets for Southern wood products.
Of course, a shift to local processing of timber will not necessarily conserve resources. On the contrary, without an accompanying decrease in logging, it may well have the opposite effect.\footnote{For example, in Indonesia, prohibitions on raw log exports, combined with incentives to local plywood producers, may have accelerated deforestation, as cuts were increased to feed new, inefficient mills producing cheap plywood for export. \textit{See} Malcolm Gillis, \textit{Indonesia: Public Policies, Resource Management and the Tropical Forest} 43, 71, \textit{in} GILLIS & REPETTO, \textit{supra} note 104.} But simply prohibiting or reducing logging may create such severe social and economic dislocation that it is politically unwise and thus virtually impossible. Moreover, governments may want to allow enough logging to meet domestic construction needs, and simply reducing the permitted cut may result in timber being channelled into the more lucrative export market, creating domestic shortages or unacceptable price hikes. Current GATT rules impose on governments a Hobson's choice of no action or politically infeasible action, and the result will often be the defeat of conservation measures.\footnote{Of course, Article XX(g) should allow countries to override the limits on export restrictions in order to conserve renewable natural resources. But, as discussed above, Article XX has been construed so narrowly as to be nearly useless. ~\textit{Tuna-Dolphin decision, supra} note 49, paras. 5.27, 5.32.}

\section*{B. Import Restrictions and Extraterritoriality}

The tension between creating multilateral solutions to global environmental problems and simultaneously maintaining local regulatory authority is most troublesome in the extraterritorial application of a nation's environmental or conservation laws. As discussed above, the import restrictions allowed by current trade laws are quite limited. For instance, the GATT \textit{Tuna-Dolphin decision} held the Article XX exceptions relate only to resources within the jurisdiction of the regulating state,\footnote{\textit{Tuna-Dolphin decision, supra} note 49, paras. 5.27, 5.32.} although neither the text nor the legislative history of GATT impose any such restriction.\footnote{On the contrary, at the time Article XX of GATT was drafted several treaties and national laws existed protecting resources located outside the regulating state's jurisdiction. The drafters rejected language that would have limited Article XX's extraterritorial application. \textit{See} Charnovitz, \textit{supra} note 83, at 43-46.} Since the U.S. import restrictions on tuna were designed to affect resources outside U.S. jurisdiction, the Panel held they did not fit within the Article XX exception. If states could impose restrictions aimed at protecting resources in other states or in the global commons, the Panel reasoned, "each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights..."
under [GATT]."113

The Panel’s reasoning ignores the connections between most environmental problems, in which measures to protect the oceans, atmosphere, or species outside national jurisdiction are required to protect a country’s own marine, atmospheric, or genetic resources.114 Not only does it jeopardize the trade-related provisions of several international environmental agreements, it also ignores the strength of local preferences, the need for quick action to avoid ecological disaster, and the interplay between national and international decisionmaking.

Several environmental agreements include provisions restricting trade among parties, as well as between parties and nonparties. These agreements include the Montreal Protocol on Depletion of the Ozone Layer,115 the Basel Convention on Trade in Hazardous Wastes,116 and the Convention on International Trade in Endangered Species (CITES),117 all of which concern resources located in whole or in part outside the jurisdiction of the restricting states.118 Under the restrictive jurisdictional

113 Tuna-Dolphin decision, supra note 49, paras. 5.27, 5.32. Similarly, the GATT Secretariat, in its recent Trade and Environment paper, differentiates between environmental problems with "physical" spillover effects and cases with only "psychological" spillovers. According to the Secretariat, the former should be dealt with through multilateral solutions, while the latter, because there is no physical effect in another country, constitute purely domestic problems. These include preservation of endangered species or an end to inhumane or unsound production processes. The Secretariat fears that allowing states to take trade measures to affect these problems will open a "Pandora’s box" of attempts to control other countries' policies through trade, and that national laws restricting trade based on extraterritorial problems must therefore be banned. Trade and the Environment, supra note 1, at 24, 27-31 & n.29.

114 Even the most localized types of pollution have regional or global effects. Burning fossil fuels not only causes localized air pollution and transboundary acid rain problems, but adds to the global warming which affects all countries. See Gary E. Marchant, Freezing Carbon Dioxide Emissions: An Offset Policy for Slowing Global Warming, 22 Envtl. L. 623 (1992). Aquatic runoff from agricultural and industrial activities contains pollutants which accumulate in the oceans and in marine life, and one country’s toxic wastes may well end up embedded in the global food chain. Also, species extinction in one country reduces global biodiversity. Indeed, considering the holistic interactions of the planet’s natural systems, it is difficult to think of instances of purely localized environmental impacts.

116 Basel Convention, supra note 93.
117 CITES, supra note 102.
118 The Montreal Protocol restricts production and trade in chlorofluorocarbons (CFCs) to reduce the current threat to the global ozone layer; the Basel Convention limits waste trade in order to protect the environment of countries outside the waste exporter’s territory; CITES protects endangered species outside an importer’s jurisdiction. Significantly, each of these agreements also conflict with the MFN provisions of Article I of GATT, by differentiating between parties and non-parties. For a full discussion of these conflicts, see Joan E. Donohue, The Trade Provisions of International Environment Agreements: Can They be Reconciled with the GATT?, 86 Proc. Am. Soc. Int’l L. 233 (forthcoming Jan. 1993).
analysis of the *Tuna-Dolphin decision*, a country which is a party to GATT but not to the environmental agreements could challenge these agreements, and the party restricting trade could be found to violate GATT. Nevertheless, because many powerful parties to GATT are also parties to these environmental agreements, pressure is building for either a general or specific waiver of GATT's applicability, or an amendment specifying that international environmental agreements are exempt from GATT.

A more difficult issue is the use of trade measures to affect resources outside the regulating state's jurisdiction in the absence of a multilateral agreement. The *Tuna-Dolphin decision*, the GATT Secretariat, and even the Rio Declaration of the U.N. Conference on Environment and Development have decried the use of unilateral trade measures to protect the global environment, while embracing the idea of multilateral efforts. But framing the issue as impermissible unilateral measures versus permitted multilateral ones ignores the reality of current multilateral rulemaking.

First, although a multilateral approach has clear advantages in building cooperation and ensuring agreed-upon standards, national action may be more effective because it can be implemented more quickly and enforced more easily. Multilateral environmental lawmaking suffers from a host of problems, stemming principally from a need to include a large number of states to make a regime effective, while achieving consensus among these states. To compound the problem, the international environmental lawmaking system is incapable of binding states

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119 Since a challenge would come from countries not party to the environmental agreement, building language into environmental agreements by which parties waive their rights under GATT would be ineffective.


121 The GATT Secretariat's newfound enthusiasm for multilateral measures ignores the Tuna-Dolphin decision's implications for existing multilateral agreements. See *supra* notes 115-120 and accompanying text.

122 There are, of course, regional or species-based problems which can best be resolved by smaller groups of states. But global problems, such as ozone depletion, biodiversity, global warming, and marine pollution, require a large number of parties to effectively attack the problem, to avoid non-parties "free-riding" on the efforts of others, and to provide international legitimacy to protection efforts. See Donohue, *supra* note 118, at 233-380. Suggestions for overcoming the limits of a consensus-based model include a global environmental agency, or a model based on the International Labor Organization, where industry, states, and non-governmental organizations (NGOs) jointly define binding standards and policies. See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 Am. J. Int'l. L. 259 (1992).
that choose not to enter into agreements. Thus, progress to date has been uncertain and slow, and a single recalcitrant state may block advances or pull standards down to a lowest common denominator. Unfortunately, many current environmental problems are too urgent to await the outcome of this cumbersome process.

At the same time, drawing a bright line between unilateral and multilateral efforts to deal with global environmental problems ignores the dynamic between national and international regulation. Often the example and moral pressure of unilateral action or the threat of unilateral sanctions accelerate the process of international lawmaking. A case in point is the Montreal Protocol. When negotiations to cut back levels of CFC production stalled in 1987 due to opposition from industry and the European Community, Senators Chafee of Rhode Island and Baucus of Montana introduced legislation which would have banned the import of products made with or containing CFCs. The Senators, like the U.S. negotiators, understood that the threat of unilateral action would help accelerate conclusion of a treaty. The result was a change in the industry and EC positions, which led to the prompt conclusion of an agreement setting out a timetable for cuts in CFC production. Similarly, the passage of U.S. legislation to protect endangered species probably helped secure the 1973 passage of CITES.

123 Laws based on international custom and usage, which can bind states without written agreement, have seldom been applied in the area of environmental protection, with the possible exception of the general principles of avoidance of harm, compensation, and information sharing. See generally Kiss & Shelton, supra note 32; Palmer, supra note 122. Nor have environmental law principles been considered jus cogens (binding on all states by virtue of their existence as states and therefore superseding any contrary treaty provision). See Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. k (1987) (listing provisions of international law considered jus cogens).


126 Haas, supra note 125, at 208.

127 See Richard B. Bilder, The Role of Unilateral State Action in Preventing International Environmental Injury, 14 Vand. J. Transnat'l L. 51, 82 (1981). Bilder illustrates other unilateral action-forcing advances in multilateral agreements, such as the use of U.S. legislation to impose regulations on the design, construction, and operation of foreign carriers in U.S. waters by 1976 unless international standards were adopted before that date. Id.
Unilateral restrictions can also provide the "teeth" in a weak international regulatory regime. For instance, U.S. threats to use the Pelly and Packwood-Magnuson amendments shored up the weak regulatory regime established by the International Convention for the Regulation of Whaling (ICRW). Finally, national-level restrictions can demonstrate the feasibility of a given regulatory approach, encouraging other states to adopt similar approaches and incorporate them into a multilateral regime. Such restrictions have no direct impact on another country's regulations for its internal market; they apply only to producers seeking access to a regulating state's markets.

Still, employment of unilateral import restrictions has significant drawbacks. Unilateral action may lead to inconsistent requirements by different countries. For example, if producers must meet several sets of environmental or safety rules to operate in several markets, they will more strongly oppose any regulation. Southern countries have been especially vociferous in opposing unilateral restrictions, fearing that their exports will be denied access to Northern markets if they do not comply with strict Northern-imposed conditions. These states have further argued that restrictions too easily serve as a cover for protection of domestic producers. For example, Mexico perceived the dolphin bycatch provisions of the Marine Mammal Protection Act as unfairly protecting the U.S. tuna fleet from Latin American competition, reasoning that if the United States were serious about protecting dolphins it would not allow its own fleets to continue to kill up to 20,500 dolphins per year in purse seine nets.

Several approaches could accommodate both the desire for multilateral solutions and the need to maintain national ability to act if such solutions remain inaccessible or ineffective. One approach is to allow unilateral import restrictions to protect resources outside the regulating state only where a multilateral regime does not exist or is ineffective.

128 Gene S. Martin, Jr. & James W. Brennan, Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments, 17 Den. J. Int'l. L. & Pol'y 293, 297 (1989). The ICRW has been criticized not only because it lacks effective sanction and enforcement powers, but also because parties can object to whaling schedules and thus avoid being bound by them. Accordingly, U.S. laws have been important in achieving the objectives of the Convention. Id. See also David Caron, International Sanctions, Ocean Management, and the Law of the Sea, 16 Ecology L.Q. 311 (1989).

129 In that sense, unilateral measures are not really "extraterritorial" at all; they merely prevent the exporting state's regulation (or lack thereof) from overriding the domestic policy choices of the importing state.

130 See Bilder, supra note 127, at 85-86.

Precaution, Participation, and the “Greening” of International Trade Law

Domestic restrictions would serve as interim measures, providing guidance for establishing new or amended agreements, and exerting political and economic pressure to conclude agreements or to strengthen existing ones to ensure adequate monitoring, compliance, and sanction mechanisms. The difficulty with this approach is determining when a multilateral arrangement in a given area is strong enough to be effective. For example, although the whaling convention is currently in effect, its enforceability has in large measure been due only to the threat of unilateral trade-related actions.

Another important control on the use of unilateral restrictions would be an agreement along the lines of GATT’s national treatment provisions. That is, domestic producers must stop employing practices which foreign producers would be precluded from using. Thus, the U.S. fishing fleet would have to stop using driftnets or purse seine nets in order for the United States to prohibit the entrance of tuna or fish products caught with such methods. Finally, where the problem involves the practices of a Southern country, rules might specify that import restrictions must be combined with technical and financial assistance to assist the exporting country in ceasing the objectionable practice as soon as possible.

These limiting provisions will ensure that national trade restrictions are used judiciously in the service of global environmental protection, without forcing states to renounce useful tools in the name of a purported multilateralism that ignores the real processes of multilateral decisionmaking.

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132 See Bilder, supra note 127, at 91-92.

133 This criterion becomes difficult to apply when there is no domestic production of the products sought to be regulated, as often occurs in the case of tropical timber. A possible solution would be to apply an equivalence test: before a country could apply import restrictions against unsustainably produced tropical timber, it would have to produce its own timber in a sustainable manner.


135 Under GATT, this approach appears feasible. GATT distinguishes among countries by their levels of economic development, allowing countries “the economies of which support low standards of living” and which are “in the early stages of development” to derogate from many of GATT’s provisions. See GATT, supra note 11, art. XVIII & pt. IV (special rules for less-developed contracting parties). A similar differentiation by level of development would be easily implemented in this case. Of course, another way of approaching the extraterritoriality issue is to differentiate imports, whenever possible, by production process and not country of origin. See supra notes 82-90 and accompanying text.
C. Competitiveness, Subsidies, and Countervailing Duties

The competitiveness issue provides a third example of the tension between the need for global standards and the reality of inadequate global institutions. Again, current trade law makes inaction the only alternative to globally enforceable standards.

In the long run, the switch to clean, ecologically sound production methods will benefit producers by lowering costs, while improving the environment and conserving resources. However, in the short term, the switch to clean production methods will require outlays of capital for research and development, higher-priced substitutes for hazardous processing materials, new production technology, and plant construction. These costs will be passed on to consumers in the form of higher prices. Producers may be reluctant to make the switch or may oppose laws forcing such changes, because of worries that they will be undersold by foreign producers who need not implement such changes.

From the GATT perspective, these differences in cost due to varying production methods and regulations merely reflect part of a country's comparative advantage, and should not be compensated. Significantly, this view gives the biggest competitive advantage to the countries with the least regulation. It defeats the key environmental goal of "internalizing" all production costs, such as the costs associated with resource use, pollution control, and clean-up, into product prices to ensure that the "polluter pays." The structure of GATT makes internalizing costs exceedingly difficult. In order to deal with the competitive consequences of differing


137 Trade and the Environment, supra note 1, at 16-24. The traditional view of comparative advantage holds that overall social welfare will increase if countries with differing natural and social endowments specialize in producing those products they can make most profitably, and trade with other countries for the rest of their needs. For a cogent critique of this theory under conditions of capital mobility, see Daly & Cobb, supra note 10, ch. 11. The GATT Secretariat has endorsed the theory of comparative advantage for over twenty years. See GATT, Industrial Pollution Control and International Trade (1971) (arguing against tariffs to cover pollution control costs).

138 The "polluter pays" principle is a theory of cost-allocation first established in 1972 by the OECD and subsequently adopted by the European Community. Sanford E. Gaines, The Polluter-Pays Principle: From Economic Equity to Environmental Ethos, 26 Tex. Int'l L.J. 463, 467 (1991). It holds that the costs of pollution prevention and control should be borne by the polluter and reflected in the costs of goods and services. Id. at 468. As a result, the "polluter pays" principle generally discourages subsidies, although it allows exceptions for technological innovation, transitional periods, and aid to depressed regions. Id. at 476.
Precaution, Participation, and the "Greening" of International Trade Law

levels of national regulation, states can attempt to characterize the lack of regulation abroad as a subsidy, and impose countervailing duties, such as import taxes, equivalent to the amount foreign industry saves by not having to comply with the importing country's stricter requirements. Or states may provide subsidies to domestic industry to make up the difference. Despite the apparent logic of these approaches, both are currently at odds with GATT.

Article I's most-favored-nation principle forbids states from imposing different tariffs on "like" products, even if they are produced with differing environmental costs. Article VI deals with "dumping," or selling products below the selling price in the exporting country. While Article VI allows consideration of "production costs" under certain circumstances in determining whether a product has been dumped, environmental costs are not part of the dumping equation.

Article XVI allows domestic subsidies only if they do not operate directly or indirectly to increase exports or decrease imports. Because subsidies to help domestic industry comply with strict environmental regulation affect trade by changing relative price structures, they are subject to challenge. Thus, impermissible subsidies, along with product dumping, can subject goods to countervailing duties if such practices harm domestic industry. However, a lack of environmental regulation has never been classified as an impermissible subsidy, nor have countervailing duties ever been imposed on products because of "environmental dumping." Moreover, trade challenges must be based on economic injury to a competitive industry, not on injury to larger community interests such as the environment.

Several writers have suggested that trade agreements should allow

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139 See supra notes 79-81 and accompanying text (discussing products and processes under the precautionary principle).

140 GATT, supra note 11, art. VI (1)(b)(ii) allows price constructions based on production costs plus margins for selling costs and profit, in cases where the exported product is not sold in the home market. But the values of environmental services and resources that are not included in the production cost, because of inadequate regulation, are not now considered part of the production cost.

141 Countervailing duty determinations are made by national entities. In the United States, the Secretary of Commerce is responsible for determining if a product has been dumped or a subsidy granted, while the International Trade Commission (ITC) determines whether domestic industry has been injured. 19 U.S.C. § 1671 (1991). In a recent case, the Commerce Department and the ITC determined that Canadian lumber was receiving an export subsidy, in part because Canadian lumber exporters were paying exceedingly low "stumpage" rates to cut trees on national lands. 57 Fed. Reg. 22,570 (1992). Although the determination did not rest on environmental grounds, it could be viewed as an example of the potential for subsidy and countervailing duty determinations to incorporate environmental factors, in this case undervalued resource pricing.
states to impose countervailing duties in cases where a lack of environmental regulation constitutes an indirect subsidy.\textsuperscript{142} A proposal introduced in the U.S. Congress would do just that, in an attempt to eliminate the competitive advantages gained by failures to internalize environmental costs.\textsuperscript{143} The problem, of course, is defining what constitutes "lax" regulation. Ideally, using countervailing duties in such a way requires a "baseline" standard against which to judge a country's performance. Those countries which fail to meet the standard would have their exports penalized to the extent of the relevant cost differences. However, this requires standard-setting on an international level, and again, no international institutional structure exists to undertake this task. Furthermore, while the GATT Secretariat's position, that a state's level of environmental regulation is merely a factor of comparative advantage, is vastly overstated, it is true that some differences in regulation stem from real differences in geography, population, industry density, and level of technological development. A global regulatory body should be able to take these differences into account in tailoring the application of standards.\textsuperscript{144}

The problem then becomes what to do in the absence of such an ideal solution. One proposal is to allow each importing state to compare the exporting state's regulations to its own, and apply duties equal to the extra cost that would have been incurred had the exporter abided by the environmental requirements prevailing in the importing country.\textsuperscript{145} While not forcing a nation to adopt a certain level of environmental protection, this approach would provide an incentive to do so in the form of lower tariff rates. It would eliminate the competitive disadvantage of highly regulated producers and put pressure on states to raise their standards.

Implementing this approach, however, would require changes to the dumping, subsidy, and countervailing duty articles of GATT and to the

\textsuperscript{142} See, e.g., ARDEN-CLARK, supra note 3, at 5; Patterson, supra note 120, at 10,602; Steven Shrybman, Trading Away the Environment, 9 World Pol'y J. 93 (1991).

\textsuperscript{143} See International Pollution Deterrence Act of 1991, S. 984, 102d Cong., 1st Sess. (1991) (setting countervailing duties on goods produced where there is a failure to impose and enforce effective pollution controls equivalent to those imposed on U.S. producers).

\textsuperscript{144} One possibility is a system of minimum international standards which countries could exceed if they wished. A minimum global standard would not eliminate the competitive disadvantage of the most highly regulated states, although it would reduce it. But if global standards are set as \textit{maximums}, the competitive disadvantage issue will be solved at the expense of the environment, by reducing international standards to the least common denominator. This is one flaw in current proposals to harmonize food safety standards. See infra note 176 and accompanying text.

\textsuperscript{145} See Patterson, supra note 120, at 10,602.
concept of "injury."\textsuperscript{146} Under current law, the proceeds of countervailing duty actions are not returned to the affected sector. Thus, a cost-equalizing tariff would not be targeted to improve the environment in either the exporting or importing country. This shortcoming could be remedied by creating a fund with the proceeds of a compensatory tariff, to be used for grants to improve the environment in those countries whose regulation is found lacking. Such a targeted fund would reduce the equity concerns, but the question remains how such a fund would be administered.\textsuperscript{147}

Nonetheless, several drawbacks remain. First, under a countervailing duty scheme based on the importing state's standards, foreign producers will have no incentive to voluntarily exceed national regulatory standards and internalize more of their costs.\textsuperscript{148} Second, the proposal will tend to penalize producers in poorer Southern countries, placing additional obstacles in the way of their access to Northern markets. Third, it directs attention to traditional, easily measurable pollution control equipment, such as scrubbers, filters, and other "end-of-pipe" controls, rather than to the changes in inputs, materials handling, or design that constitute a pollution prevention approach. Moreover, the entities setting the tariffs would have difficulty comparing different methods of achieving the same result in terms of environmental quality, and with measuring key cost variables, such as liability systems.

\textsuperscript{146} As discussed above, parties can now petition the government to initiate dumping or countervailing duty determinations if they can show injury to their ability to compete. The definition of injury would have to be modified to allow public interest groups or other petitioners to allege injury to the environment.

\textsuperscript{147} An international body could be charged with this task, or it could be left to national agencies in the importing country. Recipient countries might of course object that such an approach is paternalistic, and that such funds should be channelled to them directly.

\textsuperscript{148} For example, assume a Spanish manufacturer can make widgets for $.80 each, while it costs a German manufacturer a dollar to make the same widget. If $.10 of the difference is due to stricter pollution laws, and $.10 due to lower wages, current rules allow the Spanish manufacturer to undersell the German, despite the partial subsidy provided by lax environmental regulation. Assuming we can accurately quantify how much of a subsidy is provided by the less strict regulation, suppose Germany imposes a $.10 tariff on Spanish widget imports, which then still undersell German widgets, but by a smaller degree. The Spanish manufacturer has no incentive to push for stricter environmental legislation, because it is still underselling the German widgets, and if the Spanish regulations were tightened, widgets would still cost $.90 rather than $.80 (due to the removal of the partial subsidy or incorporation of the true environmental costs). Rather, the rational reaction would be to shift from exports to domestic production, export to markets where no such scheme existed, or lower wages or other costs to compensate for the tariff. Furthermore, those Spanish manufacturers willing or able to exceed national standards for waste or water discharges would actually have a disincentive to do so, since they would have a tariff imposed on their goods regardless of their actions.
An alternative approach would focus directly on exporters rather than on states, as in the case of damaging production processes. Such an approach would require an exporter to certify that it has taken certain specified steps to internalize environmental costs, equivalent to those domestic producers must take. It would focus not on state regulations but on specific enterprises, perhaps with phase-in periods or exceptions for small businesses. One relatively straightforward method would require transnational corporations to comply with the regulations of either their home country or the host country, whichever were stricter. This approach might be acceptable to many transnational corporations which now assert they meet the standards in the host country. It also removes any incentive for companies to invest in facilities abroad in order to avoid their home country's stricter standards. This approach would be quite effective, but it would also require major changes in GATT rules to allow for such differentiation in imports.

In all three issues—export restrictions, extraterritorial import restrictions, and competitiveness—the underlying problem is how to continue to move towards global institutions, without depriving states of their ability to provide the only level of protection which will be effective while such institutions are aborning. As it stands, GATT makes zero regulation the only alternative to multilateral regulation. If the global community is to be true to a precautionary, preventive ethic, this must change.

IV

DEMOCRACY, TRANSPARENCY, AND PARTICIPATORY MECHANISMS WITHIN GATT

Parts I through III of this article explored how current trade law departs from the precautionary principle, and proposed ways in which GATT can be changed to address these problems. If such changes are to succeed, they must be accompanied by changes in the ways in which trade agreements are negotiated, disputes are settled, and standards are set. This Part elaborates on some of the institutional changes needed to make GATT compatible with principles of effective environmental

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149 See supra notes 82-90 and accompanying text.
150 Gaines, supra note 138, at 489-90.
151 Seventy percent of the world’s trade now involves transnational corporations. Greenpeace, Beyond UNCED 13 (1992). Many of these corporations are already subject to reporting requirements on their operations, for instance, through securities-related filings. A system of self-reporting combined with periodic inspections might suffice to enforce such an approach.
Principles of global environmental law recognize the need for public access to information and debate on activities which affect the environment. For example, the Bergen Declaration emphasizes “the importance of participation by a well-informed and well-educated society so as to allow the public to mobilize itself . . . and to encourage open debate on the environmental implications of national policies.”\(^{152}\) Similarly, the Bangkok Declaration “affirm[s] the right of individuals and non-governmental organizations to be informed of environmental problems relative to them, to have the necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.”\(^{153}\) Such public participation is attainable through equal access and due process in administrative and judicial proceedings,\(^{154}\) and through prior environmental assessment of proposed activities which may significantly affect the environment.\(^{155}\)

In contrast to this emphasis on openness and public participation, current trade rules permit unaccountability, secrecy, and limited access. Trade negotiations are carried out behind closed doors, negotiating documents are restricted,\(^{156}\) and major decisions are often made during informal consultations where votes are not public.\(^{157}\) Although affected industry groups may act as advisors to their countries’ delegations, no provision allows similar input from nongovernmental consumer or other public interest groups.\(^{158}\) Once the negotiations are completed, there is little opportunity for the public or their elected representatives to raise challenges.\(^{159}\)

\(^{152}\) Bergen Declaration, \textit{supra} note 22, paras. 16, 16(e).

\(^{153}\) Bangkok Declaration, \textit{supra} note 23, para. 27.

\(^{154}\) \textit{WORLD COMM'N ON ENV'T AND DEV.}, \textit{supra} note 14, Principle 6.

\(^{155}\) \textit{Id.}, Principle 5; \textit{see also} World Charter for Nature, \textit{supra} note 13, art. 11(c).

\(^{156}\) For example, negotiations for the North American Free Trade Agreement have been carried out in secret. Interested groups, including members of Congress, were forced to rely on a leaked draft, and the full text was not released until weeks after the agreement was completed. Linda Diebel, \textit{Leaked Document Reveals Massive 3-Way Trade Plan, TORONTO STAR}, Mar. 24, 1992, at A1.

\(^{157}\) \textit{See RAGHAVAN, supra} note 31, at 59-65.

\(^{158}\) Although a smattering of labor and environmental advisors were added to a few trade advisory committees in the wake of congressional opposition to fast track authority for NAFTA, these advisory groups remain heavily weighted towards representatives of transnational corporations. Tom Hilliard, Trade Advisory Committees: Privileged Access for Polluters (1991) (unpublished report, Public Citizen, Wash., D.C.).

\(^{159}\) For example, in the United States, Congress considers trade agreements under special “fast track” procedures, which provide for limited debate and no amendments to the agreements. 19 U.S.C. § 2191 (1992). Under fast track, Congress has only 60 to 90 days to consider complex trade agreements submitted by the President. While the purpose of fast track is to make it easier for U.S. negotiators to conclude a deal without
Dispute resolution procedures are also far from transparent. Most disputes between contracting parties are settled through secret, informal consultations, and those that cannot be settled informally are referred to ad hoc dispute resolution panels.\textsuperscript{160} These three-member panels are drawn from lists made up almost entirely of Geneva-based government trade negotiators, and most of the work is done by the lawyers of the GATT Secretariat. The panels' deliberations, the arguments presented, the briefs submitted, and the initial panel report are all secret. Only after a panel report has been approved by the contracting parties does it become public.\textsuperscript{161} Furthermore, interested parties can neither intervene nor act as \textit{amici curiae}, and expert testimony may be used only to the extent the parties agree to it.\textsuperscript{162}

Proposed changes to the dispute resolution process will exacerbate the lack of public input and transparency. The December 1991 draft of the Uruguay Round of GATT (Dunkel text) proposes amending the dispute resolution process to give more teeth to panel decisions. As it now stands, panel reports are binding only when approved unanimously by the parties to GATT, and the loser in a dispute may prevent the panel decision from being adopted. Under the proposed rules, a panel decision would be automatically adopted within sixty days unless GATT parties unanimously oppose it, an unlikely prospect.\textsuperscript{163} To offset this drastic delegation of power, the Dunkel text envisions a standing


\textsuperscript{161} GATT, supra note 11, art. XXIII, merely permits the contracting parties to intervene in disputes between parties. The use of dispute resolution panels to do so was formalized as part of the mid-term review of the Uruguay Round. See \textit{Mid-term Review: Final Agreement at Geneva}, 61 GATT Focus 1, 9-12 (1989).

\textsuperscript{162} For example, the parties in the Thai Cigarette case agreed to allow testimony from the World Health Organization only on the dangers of smoking, an uncontested point, and not on whether Thailand's import restrictions helped reduce smoking risks. See Thai Cigarette Case, supra note 43, paras. 3, 50. Similarly, in the Tuna-Dolphin decision, the panel refused to take testimony from an expert on dolphins. See Tuna-Dolphin decision, supra note 49. Under changes proposed in the Uruguay Round, panels would have the right to seek information and technical expertise, but there is still no provision for outside experts or parties to intervene or to initiate contact with the panel. Dunkel text, supra note 71, at S.11.1.

\textsuperscript{163} Dunkel text, supra note 71, at S.15.
Precaution, Participation, and the "Greening" of International Trade Law

appellate review body overseeing panel decisions and creating a more uniform corpus of law.\textsuperscript{164}

Additionally, under the current system, dispute panels may only recommend changes to a losing party's trade policies. If the loser chooses not to comply, the complainant state's only recourse is to request permission to impose retaliatory sanctions. However, these sanctions have rarely been approved; rather, most trade retaliation takes place through domestic law.\textsuperscript{165} Proposed changes to the dispute resolution process would eliminate the use of domestic laws and channel all dispute resolution through the panel process, or through arbitration if the parties request it. While these changes are intended to rationalize the system and give it greater power, they also perpetuate the lack of public participation and public scrutiny of the existing procedures.

The lack of public access is problematic because the scope of trade law has expanded to cover areas with policy implications far broader than trade alone. The Uruguay Round will further increase the scope of activities under GATT jurisdiction. The inclusion of health, environmental, and similar issues within the purview of GATT dispute resolution raises serious questions of public accountability and institutional competence. These issues, because of the complex interests at stake, are more appropriately decided by elected bodies than by international civil servants insulated from public scrutiny. Moreover, dispute panel members and the legal staff that assist them are experts in trade only, and see their mandate as restricted to trade questions, ignoring the broader implications of their decisions. Thus, the panel in the Tuna-Dolphin decision "wished to underline that its task was limited to the examination of this matter 'in the light of the relevant GATT provisions.'"\textsuperscript{166} Although the panel denied it was passing judgment on U.S. conservation policies, the effect of its decision, if adopted by the GATT Council,\textsuperscript{167} would be to force the United States to choose be-

\textsuperscript{164} Id.


\textsuperscript{166} Tuna-Dolphin decision, supra note 49, para. 6.1. In an earlier case, a dispute resolution panel declined to consider the purpose of a tax destined to fund cleanup of hazardous waste sites. The panel found that "[w]hether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is . . . not relevant . . . ." Re Superfund Taxes, supra note 78, para. 5.2.4.

\textsuperscript{167} The condemnation by environmentalists and others of the Tuna-Dolphin decision led to a request by Mexico to defer consideration of the panel's report by the Council; thus, technically speaking, the decision is not binding. However, its main conclusions have been endorsed by the GATT Secretariat. See Trade & Environment, supra note 1, at 15.
tween amending part of its domestic conservation legislation or facing trade retaliation. Yet the decision was made with no input from environmental lawyers or conservation experts. Despite the proposed addition of an appellate body, under the Dunkel text panels will continue to consist solely of trade experts, rather than reflecting a balance of perspectives.¹⁶⁸

To be brought into line with international law's principles of transparency and accessibility, the current and proposed processes of negotiation, dispute resolution, and standard-setting must be revised. Negotiations can be made more transparent by allowing nongovernmental observers at working group meetings and by requiring notice and comment periods before an agreement is set in stone. Observers and notice and comment procedures must be introduced early enough in the negotiation process to allow potential negative effects to be recognized and prevention or mitigation measures taken.¹⁶⁹ While this may well slow the negotiation process and force parties to reopen settled points, it will be necessary to ensure that such agreements are based on complete information and reflect a broader range of views.

Two possible models exist for reforming the dispute resolution process. One is to continue to increase judicialization, making the panel system more like a true court. The proposed reforms of the Uruguay Round are a step in that direction, but opening the process requires more. Amici and intervenor status should be granted to affected parties who believe they are not well represented by the disputants.¹⁷⁰ Notice of challenges, as well as panel arguments and briefs, should be made public. Panel composition should reflect a range of perspectives, not

¹⁶⁸ The Dunkel text proposes that “[p]anels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a GATT panel, served as a representative to the GATT or in the GATT Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a contracting party.” Dunkel text, supra note 71, at S.7, para 6.1.

¹⁶⁹ The timing of public comments or environmental assessments is critical. If it comes too early, public comment could force parties to commit to negotiating positions which may still be fluid, aggravating the strategic game-playing of negotiations; if such information arises too late, parties might object to revisiting delicate compromises because of unforeseen environmental impacts. In the Uruguay Round, for example, GATT officials have recognized the existence of environmental problems but have argued the negotiations are too far advanced to deal with them in this round.

¹⁷⁰ For example, the U.S. Commerce Department, which was responsible for defending the Marine Mammal Protection Act provisions at issue in the Tuna-Dolphin decision, was successfully sued in U.S. federal court to compel enforcement of those same provisions. See Earth Island Inst. v. Mossbacher, 746 F. Supp. 964 (N.D. Cal. 1990), aff’d, 929 F.2d 1449 (9th Cir. 1991). The U.S. executive’s reluctance to enforce the law raises doubts about its zealousness in defending the same law before a GATT panel.
simply those of trade experts. Alternatively, disputes involving environment, conservation, health, or consumer issues could be referred to non-trade entities, which would participate in the proceedings and sign off on decisions. Appropriate non-trade entities would include the United Nations Environmental Program (UNEP) or other specialized U.N. agencies, or treaty secretariats.\footnote{171}

Another model would expand the consultation procedures of Article XXII.\footnote{172} Rather than a judicialized model, the model is more similar to regulatory negotiation.\footnote{173} Interested or affected parties would be brought into the process of designing a mutually acceptable solution. Notice and comment procedures or use of a convenor or ombudsman would ensure that the views of affected parties were represented. The parties would have a set time in which to resolve the dispute, with recourse to arbitration if they could not. This is a much more radical solution than the judicial model, in that it reduces the state to one actor among many, allowing for representation by affected businesses, non-governmental groups, and even local communities. It reflects the present trend in international law, away from a state-based system towards a pluralistic model in which individuals and groups are subjects and participants.\footnote{174} It also allows for better-tailored solutions to complex

\footnote{171} Mere consultation, however, without an obligation to take the agency's views into account, is inadequate: in the Thai Cigarette case, for example, the panel consulted with the World Health Organization, but then ignored its recommendations. See Thai Cigarette case, supra note 43, and accompanying text.

\footnote{172} "The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter from which it has not been possible to find a satisfactory solution." GATT, supra note 11, art. XXII(2).

\footnote{173} See Phillip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982). Congress recently passed legislation allowing regulatory negotiation ("reg-neg") by U.S. administrative agencies. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at scattered sections of 5 U.S.C.). The statute provides that negotiations are to be encouraged where there are a limited number of identifiable interests that are significantly affected by a rule, there is a reasonable likelihood a committee can be convened with a balanced representation of persons who can adequately represent the interests at stake, and there is a possibility of consensus. Id. § 583. Agencies may use conveners to identify the appropriate interests and persons. Id. The agency must publish a public announcement of the intent to convene a committee, along with the interests and persons involved; additional persons may apply to be on the committee if they feel their interests are not adequately represented. Id. § 584. The maximum size of the committee is 25. Id. § 585. Since its enactment, the law has been widely applied by U.S. agencies, including EPA, the FCC, and the Departments of Energy and Transportation. The reg-neg law provides an excellent model for international trade, as the subject matter of these federal agencies reaches a similarly high level of complexity and technical sophistication.

problems, which are sometimes ill-suited to the binary nature of a judicialized process.\textsuperscript{175} Furthermore, a regulatory negotiation model allows affected communities to be directly involved, rather than participating through the mediation of large NGOs, which are mostly Northern-based, and whose perception of problems and solutions may at times differ from those they purport to represent.

Finally, opening up the trade policy process will require a new mode of standard-setting. To the extent economic and ecological globalization are accompanied by moves towards political globalization, international standards will be required. Standard-setting bodies will need to be transparent and reflect a wide-range of scientific and policy opinion. The Codex Alimentarius Commission, the U.N.-related body charged with setting global food safety and pesticide residue standards, is presently dominated by chemical, food, and pharmaceutical producers, and the standards it has proposed set \textit{ceilings}, rather than minimum limits, on regulation.\textsuperscript{176} Groups like Codex, if they are to be responsible for devising international norms, should be reformed to include a wider range of expert opinion, to make proposed standards subject to both peer review and public comment, and to revisit standards periodically.

\textbf{Conclusion}

International trade rules, as embodied in GATT articles and decisions, depart significantly from the precautionary principle and the principles of participation and access. This article has highlighted some of the areas of departure and suggested solutions. But more than specific amendments or procedures, what is needed is a change in priorities. The free movement of goods and capital is only a means, not an end in itself. Environmental protection, on the other hand, is intrinsic to the continuance of life. It must take precedence if humans, and the species we share the planet with, are to survive.

\textsuperscript{175} See Barry B. Boyer, \textit{Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues}, 71 \textit{Mich. L. Rev.} 111 (1972).

\textsuperscript{176} Most of the U.S. delegation to Codex, for example, consists of scientists tied to the agribusiness or pharmaceutical sectors. Mark Richie, \textit{GATT, Agriculture and the Environment}, 20 \textit{Ecologist} 214, 216 (1990).