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Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes

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INSTITUTIONAL MISFITS: THE GATT, THE ICJ & TRADE-ENVIRONMENT DISPUTES

Jeffrey L. Dunoff*

INTRODUCTION	1044
I. THE TRADE INSTITUTIONS	1047
A. <i>The Ancien Régime: The General Agreement on Tariffs and Trade</i>	1047
1. Institutional History and Mandate: The GATT & the Post-War Quest for Growth	1047
2. GATT Practice: The Subordination of Environmental Interests	1051
3. GATT Dispute Resolution: A Flawed Process	1063
4. The Proposed Cures	1066
B. <i>The Trade Regime II: NAFTA</i>	1072
1. The Substantive Regime	1072
2. Environmental Measures as Impermissible Barriers to Trade	1075
3. Dispute Resolution Provisions	1079
4. The Environmental Side Agreement	1082
5. An Assessment	1085
II. THE ADJUDICATORY INSTITUTIONS	1085
A. <i>International Environmental Adjudication: A Viable Alternative?</i>	1085
B. <i>Adjudication of International Environmental Disputes: Political Impediments</i>	1088
C. <i>Adjudication of International Environmental Disputes: Doctrinal and Procedural Impediments</i>	1093
1. Pervasive Uncertainties in the Substantive Law	1093

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Although research for this Article was completed before the Uruguay Round texts were finalized, I have highlighted some aspects of these texts in footnotes.

2.	Procedural Impediments to International Environmental Adjudication	1097
D.	<i>Adjudication of International Environmental Disputes: Structural Impediments</i>	1100
E.	<i>A New Court for the Environment?</i>	1106
III.	FROM CONFRONTATION TO COOPERATION	1108
A.	<i>An Institutional Mandate that Expressly Incorporates Both Economic Development and Environmental Protection</i>	1111
B.	<i>Access to Impartial Scientific and Technical Expertise</i>	1111
C.	<i>Transparent, Participatory Processes to Enhance Institutional Legitimacy</i>	1113
1.	Broadly Representative Membership and Widespread Participation	1114
2.	Transparency	1117
D.	<i>The Tools Necessary to Create a "Culture of Compliance"</i>	1118
E.	<i>The Protection of Broader International Interests in the Global Environment</i>	1121
CONCLUSION	1128

INTRODUCTION

*The Earth is one but the world is not.*¹

In recent years, the links between international trade, sustainable development, and the planet's environmental health have occupied a prominent spot on the international political agenda. The United Nations' Earth Summit revealed a global consensus that "it is no longer possible to treat ecology and [the] international political economy as separate spheres."² However, this political and ecological truism is not reflected in contemporary international institutions or practice. The fragmented nature of the international system has given rise to acute tensions between the international trade regime, which seeks the general elimination of barriers to trade, and the international environmental regime, which

1. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 27 (1987) [hereinafter WCED].

2. Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 3 (Andrew Hurrell & Benedict Kingsbury eds., 1992) [hereinafter INTERNATIONAL POLITICS].

imposes barriers to trade in environmentally harmful products and products produced in environmentally harmful ways.

These tensions are particularly pronounced when nations restrict trade to protect environmental resources located outside their own borders, and international institutions have increasingly been called upon to resolve disputes arising out of these types of "green" trade measures. Although such disputes are not new,³ the bitter debate over the North American Free Trade Agreement (NAFTA) and the controversial efforts of the General Agreement on Tariffs and Trade (GATT) to resolve trade-environment disputes have catapulted these issues to the forefront of the political debate.

A growing body of literature addresses the substantive issues raised by the competing demands of these two bodies of international law.⁴ However, the *institutional* questions raised by these issues have not attracted sufficient scholarly attention. In particular, what type of organization should consider disputes arising out of the conflicting obligations imposed by the international trade and international environmental regimes? In a world of over 180 equal, sovereign nations, what institution should determine when one country's environmental laws conflict with international trade obligations or when one nation's trade policies threaten to undermine international environmental obligations? The purpose of this article is to offer an analysis that may help to answer these and other institutional questions.

To date, many of the international conflicts between liberalized trade and environmental protection have been considered under the auspices of the GATT. However, this body has no mandate to advance environmental

3. For a brief historical overview of efforts to use trade tools to achieve environmental objectives, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 37, 39-41. For an early example of the international tensions created when nations attempt to protect resources located beyond their borders, see *Behring Sea Fur Seals Arbitration*, 1 MOORE *Int'l Arbitration Awards* 755-61 (1898) (rejecting U.S. claims of a unilateral right to stop pelagic sealing in waters beyond national jurisdiction). For a discussion of this decision, see M.J. Peterson, *International Fisheries Management*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 249, 261-62 (Peter M. Haas et al. eds., 1993) [hereinafter INSTITUTIONS FOR THE EARTH]; PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 493-95 (1992) [hereinafter BIRNIE & BOYLE].

4. See, e.g., Symposium, *Greening the GATT: Resolving Trade & Environment Conflicts*, 27 CORNELL INT'L L.J. 447 (1994); Symposium, *Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?*, 49 WASH. & LEE L. REV. 1219 (1992); Symposium, *Agora: Trade and Environment*, 86 AM. J. INT'L L. 700 (1992); Symposium, *Trade and the Environment*, 23 ENVTL. L. 387 (1993); ENVIRONMENTAL PROTECTION AGENCY, THE GREENING OF WORLD TRADE (1993); *Trade and the Environment*, GATT Doc. GATT/1529 (Feb. 3, 1991) (report of the GATT Secretariat) [hereinafter GATT Secretariat Report].

interests. Where conflict exists, GATT practice invariably subordinates environmental interests to trade interests. Trade-environment disputes will also be considered under the provisions of NAFTA. Innovative provisions in this agreement attempt to address some of the shortcomings of the GATT system but still fail to incorporate adequately notions of sustainable development. In short, both of these bodies seek increased trade and growth without mandating ecologically (or even economically) sustainable development.

Those who seek a more balanced resolution of the competing demands of liberalized trade and global environmental protection have therefore looked for alternative institutions. Many have suggested that the International Court of Justice (ICJ or the Court), or an International Court for the Environment, ought to consider such issues. However, nations have been reluctant to use international tribunals in the past, and the advocates of adjudication offer little reason to think that global environmental disputes will find their way to international courts more frequently in the future. As explained more fully below, there are strong political and policy arguments against submitting such disputes to international adjudication.

The central thesis of this article is that neither trade bodies, like the GATT or NAFTA, nor adjudicatory bodies, like the ICJ or the proposed International Court for the Environment, ought to resolve these issues. Instead, trade-environment conflicts should be heard before an institution that recognizes the interdependent nature of global economic and environmental issues and that has a mandate to advance *both* economic development and environmental protection. This body should have ready access to the scientific and technical expertise that would enable it to resolve trade-environment disputes knowledgeably. It should possess tools to encourage nations to comply with its decisions. Finally, the institution should be able to look beyond the interests of the parties to a particular dispute to protect broader interests in the international economy and the global ecosystem.

This article begins by analyzing the handling of trade-environment conflicts by global and regional trade bodies, such as the GATT and NAFTA. These bodies subordinate environmental interests to economic interests, thereby disabling governments from utilizing many of the most effective tools at their disposal for protecting the global environment. The article discusses adjudicatory institutions, including the ICJ and the proposed International Court for the Environment. Through an exploration of the political, doctrinal, and structural impediments to adjudication of international environmental disputes, this article explains why so few

global environmental disputes are resolved by international adjudicatory bodies.

Finally, an alternative mechanism for the resolution of trade-environment conflicts is proposed. International environmental disputes, including conflicts involving international trade issues, are best resolved in fora that are not adjudicatory. This article outlines several features of the type of institution that is needed and shows how such an institution can play an important role in a global partnership for sustainable development.

I. THE TRADE INSTITUTIONS

A. *The Ancien Régime: The General Agreement on Tariffs and Trade*

The GATT is the primary international institution governing international trade. Although the GATT has also been the leading international institution to address trade-environment disputes, it was never intended to play this role.⁵ When global environmental concerns come before the GATT, they are invariably subordinated to the economic and trade interests that the GATT is designed to serve. As demonstrated below, the privileging of trade over environmental interests is found in the GATT's institutional history and mandate; in the results reached by various GATT dispute resolution proceedings; and in the structure of GATT's dispute resolution process.

1. Institutional History and Mandate:

The GATT & the Post-War Quest for Growth

During the late 1940s, many U.S. and European political leaders believed that the trade wars of the 1920s and 1930s, and the resulting political frictions, contributed to World War II. Toward the end of the war, a series of initiatives was launched to develop global trade and monetary organizations that could help avoid future trade wars.⁶ The 1944

5. "Since 1980, the GATT dispute settlement procedures seem to have been used for the settlement of international disputes over national environmental measures more frequently than the dispute settlement procedures of any other worldwide organization." Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT*, J. WORLD TRADE, Feb. 1993, at 53.

6. Many trace the origins of the GATT to discussions between the United States, the U.K., and Canada in 1942 about provisions of the Lend-Lease program and the postwar economy. See, e.g., ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 7-8 (1975); U.S. DEP'T OF STATE, PUB. NO. 2411, *Proposals for the Expansion of World Trade and*

Bretton Woods Conference, convened by the Western allies, produced draft charters for the World Bank and International Monetary Fund⁷ and a call for an international agreement to "reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations."⁸ Shortly thereafter, a multilateral agreement was reached on a series of tariff reductions. This agreement was memorialized in a General Agreement on Tariffs and Trade (General Agreement), which was intended to be subsumed for a charter for the proposed International Trade Organization (ITO).⁹ The ITO was to be the body that governed the international trading order. However, the diplomats who negotiated the General Agreement were eager to bring it into force as quickly as possible, even though the ITO negotiations had not been completed.¹⁰ The parties to the General Agreement therefore entered into a Protocol of Provisional Application, through which the General Agreement would be applied until the entire ITO Charter came into force.

Employment (1945) (setting out a detailed "Proposal for Consideration by an International Conference on Trade and Employment").

U.S. policy was driven by several concerns. Policymakers were convinced that international efforts to liberalize trade and regulate international monetary flow were essential to promoting international political harmony. As one Presidential message stated:

'The fundamental choice is whether countries will struggle against each other for wealth and power, or work together for security and mutual advantage The experience of cooperation in the task of earning a living promotes both the habit and the techniques of common effort and helps make permanent the mutual confidence on which the peace depends.'

JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMICS* 10 (1989).

Earlier, the U.S. Congress had passed legislation enabling the President to negotiate mutual tariff reductions; however, negotiations of bilateral agreements were lengthy and their efficacy limited. Thus, a multilateral approach was sought. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 294 (2d ed. 1986).

7. A concise survey of the history and evolving objectives of these institutions can be found in *The IMF and the World Bank*, *THE ECONOMIST*, Oct. 12, 1991 (special survey section).

8. Quoted in JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 40 (1969); see also John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 *BROOK. J. INT'L L.* 15 (1992). Trade was not directly addressed at Bretton Woods, because the Conference was held under the jurisdiction of the ministries of finance, which were not responsible for international trade. *Id.* at 16.

9. In the text that follows, the term "General Agreement" refers to the text of the General Agreement itself (including subsequent changes). General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 (entered into force Jan. 12, 1948) [hereinafter GATT]. The term "GATT" refers to the GATT trading system as an institution and as a regime including the General Agreement and subsequent side agreements. The "contracting parties" are the signatory members of the General Agreement.

10. The tariff concessions could not remain secret for very long. A prolonged wait before these concessions came into force would have seriously disrupted international trade patterns. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 13 (1990).

However, the ITO Charter never entered into force, leaving a major gap in the institutional framework designed to govern international economic affairs.¹¹ By default, the GATT became the principal mechanism governing international trade.¹² Today, over 100 nations are GATT members, and approximately twenty-eight apply the GATT on a de facto basis.¹³

The General Agreement imposes four principal substantive obligations on its contracting parties. First, each party may levy no more than a stated tariff on particular products imported from other GATT contracting parties. As a result of several "rounds" of negotiations held under GATT auspices, the average tariff on industrial goods has declined by ninety percent in the last forty years.¹⁴

Second, each contracting party is required to grant to every other contracting party treatment at least as favorable as it grants any other nation with respect to the import or export of like products. This "most-favored-nation principle" has long been a cornerstone of international trade law.¹⁵ Under this principle, a GATT party is precluded from granting special

11. By the time the ITO draft charter was completed in early 1948, "the aura of international cooperation that prevailed immediately after World War II had faded, and the composition of [the U.S.] Congress had shifted to a stance less liberal on trade matters and less internationally oriented." JACKSON & DAVEY, *supra* note 6, at 295. When the United States refused to join the ITO, it became clear that the ITO would never come into being. *Id.*

The ITO Charter is described in detail in CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* (1949); George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089 (1949).

12. See generally John. H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967).

13. INTERNATIONAL MONETARY FUND, *ISSUES AND DEVELOPMENTS IN INTERNATIONAL TRADE POLICY* 69 (1992). At present, requests for admission have been received from Albania, Algeria, Armenia, Belarus, Bulgaria, China, Croatia, Ecuador, Honduras, Latvia, Moldova, Mongolia, Nepal, Panama, Russia, Saudi Arabia, Slovakia, Taiwan, and Ukraine. *GATT Receives Membership Applications From Armenia, Latvia, Moldova, Ukraine*, Int'l Trade Daily (BNA) (Dec. 20, 1993).

Approximately ninety percent of world trade is conducted pursuant to the rules of the GATT. See INTERNATIONAL MONETARY FUND, *supra*; *A Note on the GATT*, in *TRADE POLICIES FOR A BETTER FUTURE: THE "LEUTWEILER REPORT," THE GATT AND THE URUGUAY ROUND* 67 (Peter Erenhaft ed., 1987).

14. Susan F. Rasky, *Groping for a New Order on Trade*, N.Y. TIMES, Aug. 30, 1987, § 3, at 1. The negotiating rounds included the original drafting session in Geneva, Switzerland; a 1949 round in Annecy, France; a 1950 round in Torquay, England; a 1956 round in Geneva; a 1960-61 round in Geneva (the Dillon Round); a 1963-67 round in Geneva (the Kennedy Round); a 1973-79 round in Geneva (the Tokyo Round); and the recently concluded Uruguay Round. A history of the first five rounds is found in GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLITICS AND TECHNIQUES* (1965).

15. The most-favored-nation clause in trade agreements dates back to the twelfth century. See STAFF OF SENATE COMM. ON FINANCE, 93RD CONG., 2D SESS., *THE MOST-FAVORED-NATION CLAUSE PROVISION*, EXECUTIVE BRANCH GATT STUDY NO. 9 (Comm. Print 1974).

trading advantages to particular nations and from discriminating among trading partners.

Third, GATT signatories are to extend "national treatment" to like products from other contracting parties, meaning that "imported goods will be accorded the same treatment as goods of local origin with respect to matters under government control, such as taxation and regulation."¹⁶ The purpose of this provision is to preclude discrimination between products that are domestically produced and similar products produced in other nations.

Finally, the General Agreement generally prohibits the use of non-pecuniary restrictions on imports or exports.¹⁷ Under this provision, nations are not to maintain quotas, embargoes, or other "quantitative" restrictions on goods from other contracting parties. These substantive obligations further the GATT's principal purpose: "the substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international commerce."¹⁸

Review of the preparatory conferences and drafting history reveals little concern over the relationship between international trade and global ecology. There is likewise little evidence that any of the GATT's provisions were drafted to advance global environmental interests. This is not surprising, since at the time there was little governmental knowledge of, or interest in, domestic or international environmental issues.¹⁹ There were relatively few domestic environmental laws or agencies and even fewer organizations concerned with global environmental issues. Many of the concerns that animate contemporary international environmental law

16. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 8, at 273.

17. The General Agreement provides that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas . . . or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party." GATT, *supra* note 9, at art. XI, § 1. There are several exceptions to this general prohibition. The most important exceptions concern agricultural products, *id.*, at art. XII, § 2(c); measures to safeguard a nation's balance of payments, *id.*, at arts. XII, XVII, § 4(a); and certain exceptions available to developing nations. *Id.*, at art. 18, § 4(a).

18. *Id.*, at pmb1.

19. See STEPHAN SCHMIDHEINY, *CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT* 74 (1992) ("It is hardly surprising that GATT does not deal effectively with environment or sustainable development issues, as neither was an international concern when it was set up."); Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728, 728 (1992) ("In the immediate postwar period, countries were not concerned with the environment, because they had not yet recognized their capacity to degrade it irreversibly. . . ."). *But see* Charnovitz, *supra* note 3 (explaining that there were discussions regarding international fishery and wildlife agreements during negotiations over the ITO chapter on Intergovernmental Commodity Arrangements).

either did not exist or were not perceived to be major issues. As a result, the GATT lacks any institutional mandate to advance global environmental interests.

2. GATT Practice: The Subordination of Environmental Interests

Over the years, several GATT dispute resolution panels have considered whether trade restrictions designed to further environmental ends conflict with the obligations set out in the General Agreement. As a general rule, the central question presented in these cases is whether the trade restriction falls within the scope of GATT Article XX.²⁰ This article permits trade restrictions that are "necessary to protect human, animal or plant life or health," or "relat[e] to the conservation of exhaustible natural resources."²¹ A "the original drafters in 1947 did not intend the Article to cover environmental protection which was not then an issue . . . [the] strained arguments . . . made to include particular environmental policy measures under the exceptions" have generally been unsuccessful.²²

20. Although the Agreement on Technical Barriers to Trade was designed to minimize the trade distortions caused by divergent national standards for agricultural and industrial products, and includes dispute resolution procedures, to date there has been no formal resolution of a dispute under this Agreement. Agreement on Technical Barriers to Trade. Apr. 12, 1979, 31 U.S.T. 405, 1186 U.N.T.S. 276.

21. This article provides, in relevant part:

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

I . . .

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

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

GATT, *supra* note 9, at art. XX.

22. Eliza Patterson, *GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects*, J. WORLD TRADE, June 1992, at 99, 107.

See, e.g., GATT, *United States—Restrictions on Imports of Tuna* (Aug. 16, 1991), 30 I.L.M. 1594 (1991) [hereinafter *Tuna-Dolphin Panel Report*]; GATT, *Thailand—Restrictions on Importation and Internal Taxes on Cigarettes*, BASIC INSTRUMENTS SELECTED DOCUMENTS [hereinafter *B.I.S.D.*] 200 (37th Supp. 1990) (cigarette import restrictions designed to protect human health impermissibly discriminate between domestic and imported products) [hereinafter *Thai Cigarette Case*]; GATT, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, B.I.S.D. 98 (35th Supp. 1989) (natural resources export restrictions are not primarily aimed at conservation and impermissibly discriminate against foreign markets); GATT, *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, B.I.S.D. 91 (29th Supp. 1983) (import restrictions on fish violate GATT in light of disparate treatment of domestic production and consumption).

Indeed, as explained more fully below, successive GATT dispute resolution panels have developed an increasingly restrictive interpretation of the Article XX exception.²³ Under this narrow interpretation, the GATT generally does not permit the use of trade measures to protect global commons resources. The GATT likewise does not permit nations to restrict trade in goods produced in environmentally destructive ways. In addition, the use of unfair trade statutes to counter lax environmental regulations in other nations appears to be inconsistent with the GATT. Finally, under GATT practice, even where trade measures are not prohibited, their use is seriously constrained.²⁴

a. The GATT Severely Restricts the Use of Trade Measures
Designed to Protect the Global Commons

Collective action to protect global commons resources is one of the most prominent trends in international environmental law.²⁵ The global community has engaged in extensive efforts to protect the atmosphere,²⁶ the high seas,²⁷ Antarctica,²⁸ and other areas or resources that are outside

Similar results have been reached under the United States-Canada Free Trade Agreement. See United States-Canada Binational Panel, *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Panel No. CDA 89-1807-01 (Oct. 16, 1989) (requirement that fish caught in Canadian waters be "landed" in Canada is impermissible in light of less restrictive alternatives).

23. Although the GATT system does not have a doctrine of legally binding precedents, as a general matter dispute resolution panels cite to, and reason by analogy from, past panel reports. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1273 (1992).

24. For a useful description of the different types of environmental trade measures nations might use, see Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1 (1993).

25. This author has argued elsewhere that customary international environmental law contains a duty not to harm the global commons. Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1433-38 (1992).

26. Framework Convention on Climate Change, May 9, 1992, at art. 9, *reprinted in* 31 I.L.M. 849 [hereinafter Climate Change Convention]; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, S. TREATY DOC. NO. 9, 99th Cong., 1st Sess. (1985), *reprinted in* 26 I.L.M. 1529 [hereinafter Vienna Convention]; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 100th Cong., 1st Sess. (1987), *reprinted in* 26 I.L.M. 1550 [hereinafter Montreal Protocol]; Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 [hereinafter London Amendments].

27. See, e.g., International Convention on Oil Pollution Preparedness, Response and Cooperation, Nov. 30, 1990, 30 I.L.M. 733 (1991); United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) (not in force); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 (1987).

28. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455.

the jurisdiction of any nation or group of nations. Approximately seventy percent of the earth's surface is either commons or not yet subject to undisputed sovereign control.²⁹

A recent GATT dispute resolution panel report concluded that the GATT severely restricts the use of environmental trade measures to protect global commons resources.³⁰ This report arose out of a Mexican challenge to certain provisions of the U.S. Marine Mammal Protection Act (MMPA). The MMPA prohibits the importation of fish caught in a manner that incidentally kills marine mammals in excess of U.S. standards.³¹ The United States had imposed an embargo on yellowfin tuna and tuna products caught by Mexican vessels. The United States argued to a GATT dispute resolution panel that this ban fell within the scope of Article XX(b)'s exception for trade restrictions "necessary . . . to protect animal life, safety or health." This argument was rejected for several independent reasons. First, the Panel's cursory review of Article XX's drafting history led it to the conclusion that "the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."³² Thus, the Panel determined that Article XX(b) can only be invoked for trade measures that protect resources located within the jurisdiction of the sanctioning nation. Second, the Panel concluded that the U.S. measure was not "necessary" to protect animal life, safety, or health.³³

29. CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* 35 (1993).

30. Since the Tuna-Dolphin Panel Report was issued when environmental concerns were threatening Congressional ratification of NAFTA, Mexico never requested that the report be considered by the full GATT Council. Thus, the report has not been formally adopted by the Council and technically has no precedential value. However, the Tuna-Dolphin Panel Report has set the framework for much of the scholarly and political debates over trade-environment issues.

31. Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2) (1988) [hereinafter MMPA]. The provision states, in relevant part, that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." *Id.*

32. Tuna-Dolphin Panel Report, *supra* note 22, at para. 5.26 (emphasis added). An earlier draft of this clause permitted trade restrictions "[f]or the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country." *Id.* (emphasis added). According to the Panel, this highlighted clause addressed concerns that importing nations might abuse sanitary regulations for protectionist purposes. The clause was later dropped as unnecessary. From this scant history, the Panel concluded that the drafters were concerned about the use of sanitary measures to safeguard resources inside the importing country. *Id.*

33. The Panel reached this conclusion for two independent reasons. First, according to the Panel, the United States had not demonstrated that it had attempted to negotiate an international agreement to protect dolphins. *Id.*, at para. 5.28. However, this reasoning is suspect; nothing in Article XX requires a nation to pursue international negotiations before enacting domestic legislation. Moreover, as a factual matter, the Panel's assertion that the United States had not

Finally, the Panel reasoned that if this environmental trade measure were permitted, "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement." The Panel evidently believed that such a "broad" interpretation would permit (or, perhaps, invite) any number of environmental trade measures and thereby undermine the liberalized trade regime that the GATT created. Eager to avoid such a result, the Panel concluded that Article XX(b) does not permit nations to restrict trade to protect global commons resources.³⁴

This rationale endangers critical provisions of treaties and laws³⁵ designed to protect the earth's atmosphere, wildlife, and other global commons resources.³⁶ As global commons resources belong to no single nation, each country has little incentive to restrict its use of such resources.³⁷ Thus, overexploitation of these resources can typically only

engaged in multilateral efforts to address the Tuna-Dolphin problem is simply incorrect. Through the Inter-American Tropical Tuna Commission (IATTC), the United States has been involved in ongoing attempts to address this issue. For example, in 1990, the United States proposed that the IATTC adopt international marine mammal quotas that would be progressively reduced to levels approaching zero.

The Panel also concluded that the MMPA was written in such a way that "the Mexican authorities could not know whether, at a given point in time, their policies conformed to the United States' dolphin protection standards" and could not adjust their conduct accordingly. *Id.* The Panel asserted that a restriction "based on such unpredictable conditions" was not "necessary" for purposes of Article XX(b). *Id.* Again, the Panel's rationale is not persuasive. Whether the permissible taking rate for foreign fleets is "unpredictable" does not answer the question of whether it is "necessary." Significantly, neither Mexico nor the Panel suggested an alternative measure reasonably available to the United States that would effectively serve the MMPA's conservationist purposes.

34. *Id.* at 5.27. The United States also argued that the tuna ban fell within the scope of Article XX(g). Relying on similar "unpredictability" and "slippery slope" arguments, the Panel limited the reach of this provision to trade measures designed to protect environmental interests within the jurisdiction of the sanctioning state. *Id.*, at paras. 5.30-5.34.

35. In addition to the MMPA, the rationale employed by the Tuna-Dolphin Panel Report threatens provisions of the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2) (1988) (trade sanctions against nations that diminish the effectiveness of the Whaling Convention); the Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978 (1988) (trade sanctions against nations that diminish the effectiveness of international fishery conservation programs); the African Elephant Conservation Act, 16 U.S.C. § 4201 *et. seq.* (1988) (prohibiting ivory imports from nations with inadequate elephant protection programs); and the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.*, § 1538 (1973) (prohibiting trade in endangered species).

36. It also threatens to eliminate one of the few available policy tools that can effectively protect global commons resources. Less coercive diplomatic measures are often insufficient to persuade nations to change their environmental practices. Conversely, nations are reluctant to employ more coercive measures, such as the threat or use of force, against another nation in response to improper trade in an endangered plant or excessive use of an ozone depleting chemical.

37. This is an international example of the "tragedy of the commons." See Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243 (1968).

be prevented by multilateral action. However, multilateral efforts give rise to a series of familiar "collective action" problems.³⁸ Trade measures are used to address many of these collective action problems.

For example, nations that act to preserve global commons resources pursuant to international agreement create a "public good" from which they cannot exclude other nations. Imposing trade restraints against "free riders," nations that are not part of the agreement, is one way of minimizing or eliminating the benefits enjoyed by nonparties, thereby encouraging the nonparties to participate in international environmental efforts.³⁹

In addition, in many circumstances, collective action by a group of states may be rendered ineffective if other nations do not cooperate. For example, the efforts of a nation or group of nations to reduce the use of ozone depleting substances can be rendered ineffective if these reductions are in effect replaced by increased use of these substances by other nations.⁴⁰ Trade measures can encourage reluctant states to join international environmental efforts and thus increase the possibility that these efforts will be successful.⁴¹

Trade measures also address competitiveness concerns that may arise from the imposition of environmental obligations. Industries often urge governments not to sign treaties or enact legislation that imposes environmental costs on the grounds that they will be placed at a competitive disadvantage vis-à-vis their competitors in other nations that have not assumed the same obligations.⁴² Trade measures against nations that are

38. Collective action problems arise when individual parties can, without taking any action, enjoy the benefits created by the collective efforts of other parties. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2d ed. 1971); RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

39. See generally Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 *WORLD POL.* 1 (1985) (sanctions against nonmembers or violators is essential to deter free riders and maintain a regime). A good example of this phenomena is the case of South Korea which acceded to the Montreal Protocol the day before trade sanctions were to be imposed. See Sang Don Lee, *The Effect of Environmental Regulations on Trade: Cases of Korea's New Environmental Laws*, 5 *GEO. INT'L ENVTL. L. REV.* 651, 657 (1993).

40. See, e.g., *Three Year, \$510 Million Budget Approved At Montreal Protocol Meeting*, *Daily Envtl. Rep. (BNA)* (Nov. 18, 1993) (in 1991, industrialized nations decreased their consumption of ozone depleting substances by an average of 45% but developing nations increased their consumption by 54%).

41. Again, the South Korean example is instructive. South Korea decided to honor the International Whaling Commission's moratorium on whaling in response to a U.S. threat to prohibit South Korean fishing operations in the U.S. exclusive economic zone and to ban imports of South Korean fish products. See Lee, *supra* note 39, at 659.

42. On the other hand, industries operating under strict domestic regulation may urge their governments to enter into international agreements. For example, in the ozone depletion context, at one time U.S. industry was subject to certain restraints that their competitors in the European Community (EC) did not face. The U.S. industry's demand for a "level playing field" vis-à-vis their EC competitors strongly influenced this nation's international negotiating

not undertaking environmental efforts can eliminate any comparative advantage and encourage recalcitrant states to enact heightened environmental standards.

Finally, a nation may properly decide that it does not wish to aid and abet the harmful environmental practices of other nations. The Tuna-Dolphin Panel Report rationale would obligate nations to provide markets for products that contribute to the destruction of global commons resources, arguably forcing states to violate their responsibility under international environmental law to ensure that "activities within their jurisdiction or control do not cause damage to the environment . . . beyond the limits of national jurisdiction."⁴³ For all these reasons, the GATT's restriction on trade measures designed to protect global commons resources presents an

position. See, e.g., RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 30-34 (1991).

Whether environmental regulations in fact create such competitive disadvantages is hotly debated. See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, *INDUSTRY, TECHNOLOGY, AND THE ENVIRONMENT: COMPETITIVE CHALLENGES AND BUSINESS OPPORTUNITIES* (1994); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 *YALE L.J.* 2039 (1993) (reviewing empirical studies of the relationships between environmental measures and international competitiveness); Joseph R. Biden, Jr., *The Environment and World Trade*, 23 *ENVTL. L.* 687 (1993) (U.S. leadership in environmental regulations can promote, rather than restrict, U.S. international competitiveness).

43. Rio Declaration on Environment and Development, Prin. 2, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1, reprinted in 31 *I.L.M.* 874, 876 [hereinafter Rio Declaration]; Declaration of the United Nations Conference on the Human Environment, Prin. 21, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1, reprinted in 11 *I.L.M.* 1416, 1420 [hereinafter Stockholm Declaration].

Just prior to publication, a GATT dispute resolution panel released a report on an EC challenge to a tuna embargo imposed by the United States under the MMPA. *United States—Restrictions on Import of Tuna: Report of the Panel*, DS29/R, Limited Distribution, June 1994 [hereinafter Tuna-Dolphin Panel Report II]. Again, the Panel found that the U.S. tuna embargo was not justified under any Article XX exceptions. However, in a potentially significant departure from the first Tuna-Dolphin Panel Report, Tuna Dolphin Panel Report II adopted a broader reading of Article XX. In particular, the Panel found that Article XX exceptions are not limited to trade measures designed to protect resources located within the nation relying on Article XX. *Id.*, at paras. 5.20, 5.33.

Nevertheless, the U.S. tuna embargo was deemed GATT inconsistent, because it was designed to pressure other nations to change their fishing practices. The Panel stated that if "Article XX were to be interpreted to permit [nations] to take trade measures so far as to force other contracting parties to change their [environmental] policies . . . the General Agreement could no longer serve as a multilateral framework for trade among [nations]." *Id.*, at para. 5.26. See also Dunoff, *supra* note 25, at 1420-21 (criticizing similar "slippery slope" arguments in the first Tuna-Dolphin Panel Report). Apparently the Panel was concerned that each sovereign nation have the right to set its own environmental policies. Tuna-Dolphin Panel Report II, *supra*, at paras. 5.26, 5.38.

The GATT's commitment to this version of state sovereignty renders it unable to evaluate appropriately trade measures designed to protect the global commons resources. See Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 *CORNELL J. INT'L L.* (forthcoming 1994). The Tuna-Dolphin Panel Report II's commitment to state sovereignty largely eviscerates the potential benefits that could have flowed from its expansive reading of Article XX. Since a significant number of environmental trade measures are designed, at least in part, to encourage other nations to change their practices, these measures, under the Panel's reasoning, would not fall within the scope of Article XX exceptions.

extremely serious handicap to the international community's efforts to protect these resources.

b. The GATT Does Not Permit Trade Restrictions on Products Produced in an Environmentally Destructive Manner

An increasing number of environmental regulations are aimed not at regulating products as such, but rather the *process* by which products are produced.⁴⁴ The regulation at issue in the Tuna-Dolphin Panel Report is an example of a process-based standard. The U.S. import ban was not directed at tuna *qua* tuna, but rather at the method by which the tuna were caught. Process-based trade restrictions are increasingly designed to protect resources located beyond national borders. For example, Austria is considering a ban on the import of tropical timber harvested in an unsustainable manner.⁴⁵ Similarly, a number of nations ban the importation of fish caught in the high seas by use of driftnets.⁴⁶

Under the GATT, importing nations cannot discriminate between "like" domestic and foreign products or between "like" products from different trading partners. According to the Tuna-Dolphin Panel Report, any differential treatment must be based on measures "affecting *products as such*."⁴⁷ Under this rationale, goods produced using "clean" production technologies are "like" goods produced using "dirty" technologies.⁴⁸ Thus, "it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of

44. See, e.g., Charnovitz, *supra* note 24, at 13-15; William J. Snape & Naomi Lefkovitz, *Searching for the GATT's Environmental Miranda: Are "Process Standards" Getting Due Process*, 27 CORNELL INT'L L.J. (forthcoming 1994). The use of process based standards is not an entirely new phenomena. For example, at the turn of the century, the United States prohibited the importation of sponges taken by means of diving or diving apparatus. Act of June 20, 1906, ch. 3442, 34 Stat. 313 (regulating sale of sponges).

45. Earlier legislation increased the import tax on products containing tropical wood and required that all tropical timber and products containing tropical timber be labelled as such to distinguish them from a quality mark related to sustainable forest management. FEDERAL GAZETTE (Rep. of Austria), 184th ed., Aug. 31, 1992. In response, Malaysia submitted a protest to the GATT Council on behalf of the ASEAN nations.

46. See *Large Scale Pelagic Drift-net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas*, G.A. Res. 215, U.N. GAOR, 46th Sess., U.N. Doc. A/Res/46/215 (1992); Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, 29 I.L.M. 1449; High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1371(a)(2)(E) (Supp. 1992) (requiring Secretary of Treasury to impose trade sanctions on nations that engage in driftnet fishing).

47. Tuna-Dolphin Panel Report, *supra* note 22, at para. 5.11 (emphasis added).

48. Applying this principle, the Tuna-Dolphin Panel Report stated that the MMPA import ban did not affect tuna as a product since there was no difference between the product (yellowfin tuna) caught by Mexican and U.S. vessels. *Id.*, at para. 5.14. The Panel's reasoning on this point is examined more fully in Dunoff, *supra* note 25, at 1413-15.

the exporting country.”⁴⁹ A nation may not restrict imports of a product because the product was produced in an environmentally harmful manner.⁵⁰

Permitting the regulation of *products* but prohibiting the regulation of *processes* makes little environmental sense. “[F]rom the viewpoint of environmentally sustainable development, the process by which products are made is as important as the product.”⁵¹ The use, for example, of ozone depleting chemicals in the manufacturing process for electronic circuits can be as harmful to the earth’s atmosphere as the use of an identical amount of such chemicals in a cooling unit. To limit the ability to restrict trade in products produced by environmentally destructive practices is to eliminate an essential measure for achieving sustainable development.⁵²

c. The GATT Forbids the Use of Unfair Trade Statutes to Address International Environmental Issues

The next generation of conflicts between the trade and environmental regimes will arise when nations attempt to utilize their “unfair trade” laws to address the allegedly inadequate environmental practices of other nations.⁵³ Unfair trade laws typically come in two varieties: subsidies and antidumping statutes. Both are subject to GATT disciplines.

Subsidies are grants or bounties that governments bestow, directly or indirectly, upon the manufacture, production or export of any merchandise. Some environmentalists argue that a government’s failure to impose sufficiently strong environmental regulations on a particular industry constitutes a government subsidy to that industry. In effect, the

49. GATT Secretariat Report, *supra* note 4, at 10.

50. Tuna-Dolphin Panel Report, *supra* note 22, at paras. 5.14–5.15; GATT Secretariat Report, *supra* note 4, at 7; Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT’L LAW. 751, 756 (1993).

51. Weiss, *supra* note 19, at 730.

52. *Id.* See also Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1386–87 (1992) (arguing that “countries must be allowed to ensure that the full life cycle of imported products (from cradle to grave) meets the standards applicable to similar domestic goods”).

The product/process distinction can also be criticized on economic grounds. As Steve Charnovitz has noted, this rule discourages a more efficient economic tool, a direct tax on the environmental externality (i.e., the amount of pollutant emitted during the production process), in favor of an indirect and therefore less efficient tax on the product itself. Steve Charnovitz, *Achieving Environmental Goals Under International Rules*, 2 REV. EUR. COMM. & INT’L ENVTL. L. 45, 46 (1993).

53. See Jackson, *supra* note 23, at 1246 (“[T]he subsidies question in relation to environmental policies may be one of the most intricate and difficult issues facing the world trading system during the next decade.”).

unregulated or loosely regulated use of clean air, water, or other natural resources can “improperly” become a basis for a particular product’s comparative advantage to the detriment of competitors in other nations and the “subsidized” environmental resource. Some argue that this externalization of pollution costs distorts a producer’s true costs and that countervailing duties ought to be utilized in such situations.⁵⁴

Adopting this general argument, several legislative proposals have been introduced in this nation that would treat another nation’s failure to adopt or enforce environmental standards comparable to U.S. standards as a countervailable subsidy.⁵⁵ For example, the proposed International Pollution Deterrence Act⁵⁶ would treat other nations’ inadequate pollution controls and environmental safeguards as a government subsidy. The bill would authorize the imposition of countervailing duties in an amount equivalent to the cost the foreign firm would have to undertake to comply with relevant U.S. standards.⁵⁷

The use of countervailing duties in response to another nation’s allegedly lax environmental practices would most likely violate the GATT.⁵⁸ A duty levied on the basis of a product’s country of origin would violate the GATT’s most-favored-nation clause which requires

54. See, e.g., AL GORE, *EARTH IN THE BALANCE* 343 (1992); Robert F. Housman & Durwood Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 550–61 (1993); Thomas K. Plofchan, Jr., *Recognizing and Countervailing Environmental Subsidies*, 26 INT’L LAW. 763 (1992); John A. Ragosta, *Natural Resource Subsidies and the Free Trade Agreement: Economic Justice and the Need for Subsidy Discipline*, 24 GEO. WASH. J. INT’L L. & ECON. 255 (1990); Kenneth S. Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 HOUS. J. INT’L L. 189 (1988); Michael Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. INT’L L.J. 85 (1987).

55. A variant on this idea is to impose trade sanctions when a nation fails to enforce its own environmental laws. See *Gephardt Plans Bill to Allow Sanctions for Failure to Enforce Environmental Laws*, Daily Envtl. Rep. (BNA) (Mar. 25, 1994) (House Majority Leader announces plans to introduce a “Green 301”).

56. S. 984, 102d Cong., 1st Sess. (1991).

57. Half of the funds collected under this bill would be earmarked for use by the Agency for International Development to assist buyers from developing nation with the purchase of U.S. pollution control equipment.

Similarly, the proposed Global Clean Water Incentives Act would require the imposition of fees on foreign products manufactured by processes that fail to meet U.S. Clean Water Act standards. S. 1965, 102d Cong., 1st Sess. (1991). Funds raised under this bill would be used to assist the export of U.S. products bearing higher prices as a result of the manufacturer’s compliance with the Clean Water Act.

58. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT’L L. 700 (1992); OFFICE OF TECHNOLOGY ASSESSMENT, *TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES* 66 (1992), Housman & Zaelke, *supra* note 54, at 560–61; Frederick L. Kirgis, Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 859, 895 n.91 (1972); *EC Commissioner Urges Trade Policy to Promote Sustainable Development*, Daily Envtl. Rep. (BNA) (Nov. 15, 1993).

uniform treatment of "like products" imported from all GATT contracting parties.⁵⁹

From the GATT perspective, there are additional difficulties with this proposal. GATT subsidies rules focus on government *action* — the giving of funds or other grants to particular industries. It would thus take a significant conceptual leap to define government *inaction* as constituting a subsidy.⁶⁰ Indeed, such a conclusion might imply that nations are subject to an *affirmative* duty to protect the environment.⁶¹ While many nations may well acknowledge the existence of such a duty, no consensus exists on the nature and scope of this duty.⁶²

Moreover, there are important practical difficulties with such a proposal. How can the importing nation identify the "proper" level of environmental protection that the exporting nation should have adopted⁶³ or quantify the alleged benefit bestowed by government inaction?⁶⁴

A recent GATT Secretariat report argues strongly against the use of environmental countervailing duties. The report states that:

in principle there is no difference between the competitive implications of the type raised by different environmental standards and the competitive consequences of many other policy differences between countries. Differences between countries in tax and other policies toward savings and investment affect the capital stock, which means that countries encouraging capital formation may be enhancing their competitive advantage in capital-intensive industries. Large expenditures on education and immigration policies which selectively encourage the immigration of skilled labour, will

59. This also follows from the Tuna-Dolphin Panel Report's dicta that differences in the environmental laws of exporting nations cannot be the basis for differential treatment if there are no resulting differences in the imported products themselves. Tuna-Dolphin Panel Report, *supra* note 22, paras. 5.14-5.15; Kirgis, *supra* note 58, at 891 ("[a]ny argument to the effect that pollution-engendering and pollution-free imports are not 'like products' for most-favored-nation purposes is unpersuasive").

60. See Housman & Zaelke, *supra* note 54, at 556; Komoroski, *supra* note 54, at 209.

61. Janet MacDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 429 (1993).

62. *Id.*

63. As Richard Stewart recently noted, there are a number of reasons why nations might have different environmental standards including differing assimilative capacities. Stewart, *supra* note 42, at 2052-56.

64. Countervailing "environmental subsidies" present other difficulties as well. For example, it is not clear whether the harm caused by lax environmental standards constitutes the requisite "injury" for GATT purposes. Housman & Zaelke, *supra* note 54, at 556. The Subsidies Code defines "injury" in terms of material economic injury to particular domestic industries. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, art. 2(1) & n.6, Apr. 12, 1979, 31 U.S.T. 513, 519; art. 2(1) & n.††, 1186 U.N.T.S. 204, 206.

encourage competitive advantage in skill-intensive industries. . . . The extent of government support for science education can influence competitive advantage in high-tech industries.

The list is almost endless. Where is the line to be drawn if the competitive implications of differences in so many government policies are to become a source of demands for the neutralization of the consequences for trade?⁶⁵

Given all of these reasons, it is extremely unlikely that the GATT would endorse the use of countervailing duties to address the environmental practices in other nations.

For many of the same reasons, the use of environmental antidumping duties would likely violate the GATT. Dumping occurs when products from one nation are sold in another nation at less than fair market value.⁶⁶ If this practice causes or threatens material harm to a domestic industry or retards the establishment of a domestic industry, then the importing nation may impose antidumping duties on the imported product.

A state with lax environmental standards can export goods at a price that does not reflect the product's full social cost. The good can then be sold at less than fair market value.⁶⁷ Some environmentalists argue that this should be considered "ecodumping" and that these goods should be subject to duties.⁶⁸

From the GATT perspective, the notion of ecodumping raises many of the same conceptual and definitional problems as does the concept of government inaction as an environmental subsidy. In addition, antidumping statutes typically focus on the conduct of *private* actors; in

65. GATT Secretariat Report, *supra* note 4, at 20. A GATT study conducted in 1971 similarly concluded that lower product prices resulting from the absence of environmental regulations is a form of competitive advantage and is not an "unfair" trade practice. *International Pollution Control and International Trade*, GATT STUDIES IN INTERNATIONAL TRADE No. 1, at 23 (1971).

Of course, unlike the other policies mentioned by the Secretariat, the lack of environmental regulations can have serious adverse spillover effects, such as when loosely regulated industrial processes produce transborder or global environmental degradation.

66. The classic discussion of dumping is found in JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923).

67. The concept of ecodumping is explained in more detail in Stewart, *supra* note 42, at 2049 n.48. See also Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 217 (1994).

68. The use of unfair trade statutes in this manner is not purely theoretical. For example, a German firm that produced asbestos in compliance with relatively costly German standards sued an importer of asbestos from a developing nation with a much lower safety standard under the German Unfair Competition Law. Ignaz Seidl-Hohenveldern, *International Economic Law*, 198 RECUEIL DES COURS 21, 137 (1986).

contrast, the problem in the ecodumping context is that the *State* fails to enact or enforce adequate environmental regulations. It is unlikely that duties designed to counter ecodumping would be found to be consistent with the GATT.

d. The GATT Severely Constrains a Nation's Ability to Utilize Trade Policy as a Tool for Environmental Protection

In addition to forbidding outright many types of environmental trade measures, the GATT severely restricts the use of even those measures that are permitted. This result is achieved through a very narrow interpretation of the Article XX requirement that trade restrictions be "necessary" for the protection of human, animal, or plant life or health.

The meaning of this term was at issue in a GATT challenge by the United States to Thailand's restrictions on imported cigarettes.⁶⁹ Although the law at issue had strong protectionist elements, the reasoning used by the Thai Cigarette Panel may threaten measures not designed to protect domestic industries. Transplanting a definition from a different GATT provision, the Panel declared that a measure is "necessary" only "if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."⁷⁰ Applying this test, the Panel concluded that Thailand's restrictions on imported cigarettes did not fall within the scope of the Article XX exception. The Panel reasoned that, although cigarette smoking produced adverse health effects,⁷¹ Thailand's restrictions on imported cigarettes were not necessary because the government could protect its citizens by other, less trade restrictive measures.⁷² Thus, the Panel suggested, Thailand could safeguard the health of its citizens through the use of labeling requirements⁷³ and reducing the demand for cigarettes by banning cigarette advertisements.⁷⁴

69. *Thai Cigarette Case*, *supra* note 22, *passim*. For an interesting background on this dispute, and on U.S. efforts to open Asian markets to cigarette exports generally, see Stan Sesser, *Opium War Redux*, *THE NEW YORKER*, Sept. 13, 1993, at 78, 85.

70. *Thai Cigarette Case*, *supra* note 22, para. 74 (quoting Report of the Panel on "United States—Section 337 of the Tariff Act of 1930" (LJ6439, para. 5.26, adopted on 7 Nov. 1989)).

71. *Id.*, para. 73. Pursuant to a Memorandum of Understanding between the parties and a petition by Thailand, the Panel requested information from the World Health Organization (WHO) regarding the health effects of cigarette use and consumption. The WHO submission outlined many of the health problems associated with smoking; the U.S. did not "take issue with [the WHO's] statements regarding the effect of cigarette use and consumption." *Id.*, paras. 3, 5, 50–57.

72. *Id.*, paras. 77–79.

73. *Id.*, para. 77.

74. *Id.*, para. 78. After the decision, Thailand removed its import ban but retained its

As the Thai Cigarette and Tuna-Dolphin cases demonstrate, in practice it is almost impossible to meet the requirement that a trade measure be the least GATT inconsistent remedy reasonably available.⁷⁵ Astonishingly, no GATT Panel has required that the proposed alternative measure be as effective as the measure actually employed. Creative counsel challenging trade measures should always be able to posit an *ex post facto* measure that is less restrictive on trade.

Labeling requirements appear to be one of the few types of environmental trade measures that GATT panels will deem "necessary."⁷⁶ There is a certain logic to this result from the trade perspective: "green" trade bans, taxes, quotas, and the like are government actions that "distort" trade, while labeling schemes permit the market and individual consumers rather than government bureaucrats to decide whether trade in environmentally harmful products will occur. Of course, this rationale ignores the fact that one or more nations may legitimately reach a *political* decision that certain markets should not exist. The narrow reading of Article XX's "necessary" requirement limits significantly the ability of the community of nations to make such political decisions.

3. GATT Dispute Resolution: A Flawed Process

The GATT's dispute resolution processes reinforce the tendency to subordinate environmental considerations to trade interests. Since the GATT was never intended to be the primary international institution with respect to world trade,⁷⁷ the GATT itself lacks a well-developed mechanism for resolving disputes between the Contracting Parties.⁷⁸ In

health warnings and its ban on advertising and promotional activities. Pornpimol Kanchanalak, *GATT Rules Against Thai Ban on Foreign Cigarettes*, BANGKOK POST, Oct. 1, 1990, at 1; Peter Mytri Ungphakorn, *U.S. Won't Object to Cigarette Ban*, BANGKOK POST, Oct. 11, 1990, at 1.

75. The current EC challenge to U.S. fuel economy standards may turn, as well, on the argument that the United States could have used a less restrictive trade measure. See *European Challenge to U.S. Gas Guzzler Tax Could Set Precedent Against Product Bans*, Int'l Envtl. Rep. (BNA) (Dec. 10, 1993) [hereinafter *European Challenge*].

76. In addition to the suggestion that Thailand should have used a labeling scheme, the Tuna-Dolphin Panel Report upheld the Dolphin Conservation & Protection Act, 16 U.S.C. § 1385 (1990), which regulates the use of the term "dolphin safe" and prohibits the use of this term on cans of tuna harvested in certain manners. Tuna-Dolphin Panel Report, *supra* note 22, paras. 5.41-5.44.

77. The GATT, therefore, lacks several of the features typically associated with an international organization. See, e.g., JACKSON, *supra* note 6, at 5; JACKSON & DAVEY, *supra* note 6, at 1166. Many of these institutional shortcomings will be addressed by the formation of the World Trade Organization. See GATT, *Agreement Establishing the Multilateral Trade Organization [World Trade Organization]*, Doc. MTN/FA, pt. II (Dec. 15, 1993), 33 I.L.M. 13 (1994) [hereinafter *WTO Agreement*].

78. Very early in the GATT negotiations, there was a proposal to include a provision accepting the jurisdiction of the ICJ, U.N. Doc. E/PC/T/C.6/65/Rev.2, at 5 (memorandum from the Secretariat, Feb. 12, 1947); however, this provision was promptly rejected. U.N. Doc. E/PC/T/C.6/87, at 3 (meeting Feb. 14, 1947).

fact, "[t]here exists no official definition of a 'GATT dispute' or a 'GATT dispute settlement' procedure."⁷⁹

The contracting parties have built upon language in Article XXIII, which provides a mechanism in the event that consultations between the disputing nations are unsuccessful.⁸⁰ Over time, the contracting parties have institutionalized a practice whereby they appoint a panel of individuals to consider a dispute.⁸¹ The panels receive submissions from the contending parties and may receive submissions from other interested nations. The panels then issue proposed reports to the contending parties for their review and comments. Following consideration of the comments, the panel submits its report on the dispute to the GATT Council.⁸² A report is of no force until it is adopted by the Council. Typically, the Council will not adopt a report absent consensus.⁸³

In trade-environment conflicts, this dispute resolution process is skewed against environmental interests in several important respects. For example, GATT panels have placed the burden of proof on the party relying upon the Article XX exception.⁸⁴ Given the substantial scientific

79. Ernst-Ulrich Petersmann, *Proposals for Improvement in the GATT Dispute Settlement System: A Survey and Comparative Analysis*, in FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 340, 341 (Detu Chr. Dikce et al. eds., 1988).

80. Under Article XXIII, the aggrieved party can refer the matter to the contracting parties. The contracting parties, acting as a group, are then to investigate the matter and make appropriate recommendations or rulings. If necessary, the group may authorize the complaining party to take retaliatory action against the respondent to compensate for damages suffered by the complainant. GATT, *supra* note 9, art. XXIII. Such a retaliation has only been authorized once under Article XXIII. GATT, *Netherlands—Measures of Suspension of Obligations to the United States*, BISD 32 (1st Supp. 1953).

Article XXIII, however, simply provides an outline of the various stages to be followed as a dispute advances through the GATT system. It does not establish any formal rules or procedures for handling or resolving such disputes.

81. GATT, *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD 210 (26th Supp. 1979) [hereinafter GATT Understanding]; GATT, *Ministerial Declaration on Dispute Settlement Procedures*, BISD 13 (29th Supp. 1982) [hereinafter Ministerial Declaration]; GATT, *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, BISD 61 (36th Supp. 1990). For a history of the early use of dispute resolution panels, see HUDEC, *supra* note 6, at 74–83.

82. The GATT Council meets between the yearly meetings of the contracting parties. Council membership is open to all contracting parties willing to participate. JACKSON & DAVEY *supra* note 6, at 318–320.

83. Ministerial Declaration, *supra* note 81. See also Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 37 (1994) (GATT practice of decisionmaking by consensus dates back to 1959). The Uruguay Round agreements will change this practice. Under the new WTO, panel reports will be adopted unless there is a consensus not to adopt the report. GATT, *Multilateral Trade Negotiations (the Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes*, para. 16.4 (Dec. 15, 1993) 33 I.L.M. 112, 123 (1994) [hereinafter GATT, *Multilateral Trade Negotiations*].

84. Tuna-Dolphin Panel Report, *supra* note 22, para. 5.22.

uncertainty that marks much regulation in the international environmental arena, this risk of nonpersuasion may often be outcome determinative.

In addition, panel members are chosen for their expertise in "trade relations, economic development and other matters covered by the General Agreement."⁸⁵ Panel members are often well-schooled in, and supportive of, the GATT system.⁸⁶ There is no requirement that panel members have any environmental expertise. "The natural effect of the appointment process is an implicit and unavoidable bias in favor of trade rules."⁸⁷ In addition, the GATT panelists typically do not apply international law other than GATT law in any dispute.⁸⁸ Thus, they generally do not consider more recent international environmental treaties that may be relevant to a particular dispute.

No formal mechanism ensures that the panel will have access to environmental expertise. The GATT's procedures do not permit participation by nongovernmental organizations. Although panels are free to request scientific or technical assistance,⁸⁹ calling outside experts is a rarity. Thus, for example, the Tuna-Dolphin Panel Report did not hear a scientific or ecological defense of the U.S. ban on Mexican tuna from any environmental experts.⁹⁰

Finally, GATT dispute resolution is largely a closed process. The parties' submissions, the oral arguments, and the transcripts of the panel's proceedings are all confidential.⁹¹ Even the final panel reports, until

85. The GATT Director General maintains a list of such persons from which panelists are selected. GATT Understanding, *supra* note 81, at 212.

86. Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH & LEE L. REV. 1279, 1286 (1992); Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 65-72 (1987).

87. Housman & Zaelke, *supra* note 54, at 568.

88. Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, 36 ENVTL. L. 14, 16 (1994).

89. As noted above, the panel considering the U.S. challenge to Thailand's ban on foreign cigarettes heard testimony from the WHO regarding the health basis for cigarette regulation. *See Thai Cigarette Case*, *supra* note 22, paras. 3, 5, 50-57.

90. Indeed, the Panel declined the opportunity to hear such arguments. Goldman, *supra* note 86, at 1286 n.33.

91. This secrecy has been the subject of sharp criticism. Senator Max Baucus, Chair of the Senate Subcommittee on International Trade, recently called for transparency in GATT dispute resolution procedures. He noted that "[o]nly opening up the process will lift the cloud of mistrust that permeates the [trade-environment] debate. The public is most likely to fear secrecy, and must be assured that environmental concerns are receiving appropriate weight in trade decisions." *Sen. Baucus Calls on GATT Negotiators To Take Account of Environmental Issues*, Daily Envtl. Rep. (BNA) (Dec. 10, 1993).

The near-total secrecy cloaking GATT dispute resolution procedures conflicts with U.S. law. A federal district court recently ruled that U.S. submissions to GATT panels and unadapted GATT panel reports must be released to the public after a request under the Freedom of Information Act. *Public Citizen v. Office of United States Trade Representative*, 804 F. Supp. 385 (D.D.C. 1992).

adopted, are not public documents. Thus, no opportunity exists for nongovernmental organizations to participate in trade-environment disputes.⁹² This closed process is inimical to sound environmental decisionmaking, which is premised upon public participation and open decisionmaking.⁹³

4. The Proposed Cures

*No answer is what the wrong question begets*⁹⁴

The GATT as a forum for the resolution of trade-environment issues has generated widespread international dissatisfaction. The Tuna-Dolphin Panel Report, in particular, has sparked a storm of protest.⁹⁵ For example, following release of this report, the European Community Parliament called for a two-year moratorium on all GATT panel reports on environmental issues.⁹⁶

In light of this dissatisfaction, a number of institutional "cures" have been proposed. However, as demonstrated more fully below, each of these proposals has serious legal and political drawbacks. More fundamentally, none of these proposed cures will work, because none address the core problems: the GATT's institutional mission to eliminate barriers to trade, the lack of an institutional mandate to advance global environmental interests, and the institutional inability to identify and value adequately environmental interests in the context of trade-environment conflicts.

92. The GATT could have been drafted to allow nongovernmental organizations to participate. The draft ITO Charter provided for "suitable arrangements for consultation and cooperation with nongovernmental organizations concerned with matters within the scope of this Charter." Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 511 n.164 (1993) (quoting the ITO Charter, art. 87, para. 2).

93. See, e.g., Rio Declaration, *supra* note 43, princ. 10 (environmental issues "are best handled with the participation of all concerned citizens, at the relevant level"); Agenda 21, U.N. Doc. A/CONF.15.1/4, paras. 8.4, 8.11 (1992), reprinted in 2 AGENDA 21 & THE UNCED PROCEEDINGS 47-1,057 (Nicholas A. Robinson ed., 1992) (need to ensure access by public to relevant information and allow effective participation on national level and to promote public awareness and exchange of information) [hereinafter 2 AGENDA 21].

94. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (1962).

95. See, e.g., *Environmental Group Says GATT Tuna Report Could Have Disastrous Conservation Impact*, 8 Int'l Trade Rep. (BNA) 1325 (Sept. 11, 1991).

96. EUR. PARL. RES. A3-0329/92 (Jan. 22, 1993). See also *EC Parliament Adopts Two-Year Moratorium on GATT Panel Environmental Decisions*, 10 Int'l Trade Rep. (BNA) 136 (Jan. 26, 1993). As Steve Charnovitz has noted, this call has not dissuaded the EC from pressing its own GATT complaint over the MMPA provisions at issue in the U.S.-Mexico Tuna-Dolphin Panel Report. Charnovitz, *supra* note 52, at 46. See also Tuna-Dolphin Panel Report II, *supra* note 43.

a. Amend the GATT

The shortcomings identified above could, in theory, be addressed through one or more amendments to the GATT. The Tuna-Dolphin Panel Report strongly suggested that adequate resolution of the conflicts between international environmental measures and international trade law might require a GATT amendment.⁹⁷ A number of commentators have suggested that Article XX be either amended or expanded to ensure that trade measures do not run afoul of the GATT.⁹⁸

However, these proposals seem to ignore GATT institutional and political realities. The General Agreement provides for amendment "upon acceptance by two-thirds of the contracting parties."⁹⁹ As a political matter, it would appear to be virtually impossible to obtain the necessary political support to amend Article XX in the manner suggested above. Indeed, in 1991, the Negotiating Group on GATT Articles rejected a suggestion that would have added the phrase "the environment" to Article XX(b).¹⁰⁰ Similarly, the reaction of GATT contracting parties to the U.S. embargo of Mexican tuna may be a rough indication of the enthusiasm that would meet any effort to amend the GATT to permit environmental trade measures.¹⁰¹

The combination of widely divergent interests among the large GATT membership and the fairly stringent voting and procedural requirements produces the political reality that, even on issues less controversial than

97. Tuna-Dolphin Panel Report, *supra* note 22, para. 6.3 (if the GATT contracting parties want to permit trade measures like the U.S. tuna embargo, they should "do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement").

98. One suggestion is that a new provision be added to permit trade measures "imposed for the protection of the environment, ecological or biological resources, . . . whether within or outside the jurisdiction of the Contracting Party enacting the measure." 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 U. MIAMI INTER-AM. L. REV. 569, 608-09 (1991-92).

Others call for amendments to permit measures relating to the protection of the environment, Patterson, *supra* note 22, *passim*, or measures "designed . . . to encourage or ensure protection of [the] environment and promote sustainable development." CHARLES ARDEN-CLARKE, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT* 7 (1991). Proposals to amend the GATT have found some support in the political community. The U.S. Congress has urged the President to initiate negotiations to amend Article XX to provide exceptions for trade measures intended to protect the environment. See H.R. Con. Res. 247, 102d Cong., 1st Sess. (1991).

99. GATT, *supra* note 9, art. XXX. As a practical matter, however, most GATT decisions are made by consensus rather than by vote. See, e.g., Schoenbaum, *supra* note 58, at 705.

100. Friedl Weiss, *International Organizations and Bodies: GATT*, 2 Y.B. INT'L ENVTL. L. 346, 350 (1992).

101. Australia, Canada, the European Community, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela all filed submissions opposing the MMPA ban.

this, “[a]mendment of the GATT is no longer a feasible option.”¹⁰² For these reasons, the GATT amendment procedures simply do not provide a politically viable mechanism for addressing the GATT’s subordination of environmental considerations to trade interests.

b. Utilize the GATT Waiver Provision

Perhaps implicitly acknowledging that an amendment to permit greater use of environmental trade measures is unlikely, some have urged that the international community employ the GATT waiver provision. These proposals are based on Article XXV(5) of the GATT, which authorizes the contracting parties, in “exceptional circumstances,” to “waive an obligation imposed upon a Contracting Party by this agreement.” Such a waiver requires a “two-thirds majority of the votes cast” provided that this majority comprises more than half of the contracting parties.¹⁰³ The waiver power extends to all GATT obligations.¹⁰⁴ Citing this provision, Professor John Jackson has suggested the possibility of “a five year waiver . . . that would specifically refer to certain listed multi-lateral environmental agreement[sic] . . . and provide that actions under them would not be deemed inconsistent with other GATT rules.”¹⁰⁵

The use of the waiver provision, however, is both undesirable and unlikely. Adopting a waiver for trade measures implementing the obligations embodied in certain enumerated environmental treaties would effectively “freeze” the universe of such permissible trade measures, an undesirable

102. Spencer Weber Waller, *Symposium: The Uruguay Round and the Future of World Trade: Introduction*, 18 *BROOK. J. INT’L L.* 1, 2 (1992); JACKSON & DAVEY, *supra* note 6, at 310–11 (“[i]t is generally considered today almost impossible to amend the GATT”). In fact, there have been no successful attempts to amend the GATT since 1965. Charnovitz, *supra* note 92, at 515 n.180. Moreover, even if an amendment garners the requisite majority, the General Agreement provides that those countries that do not accept the amendment are not bound by it. GATT, *supra* note 9, art. XXX.

The new WTO will likewise require a supermajority vote for most amendments. See WTO Agreement, *supra* note 77, art. X, 20–21.

103. Article XXV(5)(a) reads, in relevant part:

In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.

GATT, *supra* note 9, art. XXV(5)(a).

The waiver provision will be changed somewhat by the Uruguay Round agreements which provide for waivers upon approval of three-fourths of the Members. WTO Agreement, *supra* note 77, art. IX(3).

104. See GATT Doc. L/403 (Sept. 7, 1955), *quoted in* JACKSON & DAVEY, *supra* note 6, at 313 [hereinafter GATT Doc. L/403]; GATT, *ANALYTICAL INDEX* 147 (1973) (quoting report of the London preparatory meeting for the Havana Conference, GATT, *Waiver Granted in Connection with the European Coal and Steel Community*, BISD 17 (1st Supp. 1953)).

105. Jackson, *supra* note 23, at 1271.

result given the rapid pace at which international environmental law is developing.¹⁰⁶ Under this scenario, no new measure, whether multilateral or unilateral, could be assured of GATT consistency unless a supermajority of the contracting parties agrees to the new waiver.

More importantly, the use of an Article XXV waiver in this manner sends the wrong signal with respect to the relationship between international environmental law and international trade law. Reliance on a waiver suggests that international environmental policies are subordinate to international trade policies — that only those environmental trade measures that have been singled out and identified by the GATT contracting parties are legitimate international policy tools. To use the waiver provision to “resolve” trade-environment conflicts is to give the GATT an effective veto over the use of environmental trade measures.

Such a privileging of trade interests over ecological interests is inappropriate. Certain trade measures can serve paramount environmental interests at little cost to the trade regime. Therefore, it makes little sense to elevate *a priori* one set of interests above the other.¹⁰⁷

In addition, formidable political¹⁰⁸ and technical¹⁰⁹ difficulties would

106. See, e.g., U.S. INT'L TRADE COMMISSION, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE vii, USITC Pub. No. 2351 (1991) (identifying 170 international environmental conventions and noting that approximately two-thirds of them have been signed in the past two decades).

107. See Dunoff, *supra* note 25, at 1449–50.

108. As in the amendment context, it would be extremely difficult to obtain a supermajority of states voting for such a waiver. The reality is that “international environmental agreements often go into force with a small nucleus of countries that may fall far short of two-thirds of the GATT.” Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 217 (1992). For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter C.I.T.E.S.], which now has 115 signatories, went into force with just ten countries. Trade measures enacted pursuant to “regional [environmental] agreements might also have a difficult time gaining a GATT supermajority.” Charnovitz, *supra*, at 217.

109. It is extremely unlikely that an environmental waiver satisfies the “exceptional circumstances” necessary to invoke an Article XXV waiver. Although the General Agreement does not define this term, the GATT Executive Secretary has stated that this term is “clearly designed to limit the use of the waiver provision to individual problems to which the agreement as written does not provide an adequate solution and where an amendment would result in a modification both broader in its application and more permanent than is required.” GATT Doc. L/403, *supra* note 104, at 314. Given the recent explosion in the number of environmental treaties, see U.S. INT'L TRADE COMMISSION, *supra* note 106, such agreements are “increasingly unexceptional.” Charnovitz, *supra* note 108, at 217.

In addition, Article XXV's drafting history suggests that the waiver provision is intended to be used “only in cases . . . involving hardship to a particular member . . .” GATT Doc. L/403, *supra* note 104, at 315. As environmental trade measures generally affect a great number of nations, it is unlikely that they will raise issues involving a hardship only to “a particular member” of the GATT system.

The waiver procedures have been used in the past in circumstances that appear to be outside Article XXV's intended scope. For example, in 1971, the contracting parties voted a waiver authorizing developed nations to depart from MFN to the extent necessary to grant tariff preferences to developing nations. *Generalized System of Preferences*, GATT Doc. L/3545, BISD 24 (18th Supp. 1972). See also *Differential and More Favorable Treatment: Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Dec. 3, 1979) (decision

accompany any effort to use the waiver process. For all of these reasons, the problems posed by trade-environment conflicts are unlikely to be solved through the use of the GATT waiver provisions.

c. Negotiate a Separate "Environmental Code"

Given the difficulties of negotiating GATT amendments and waivers, the contracting parties have from time to time entered into "side agreements" or "side codes." These agreements are often negotiated and administered in the GATT context but are not part of the General Agreement. Since the release of the Tuna-Dolphin Panel Report, there have been calls for the negotiation of a GATT "Environmental Code" in a "Green Round" of negotiations.¹¹⁰

Waiting for a currently unscheduled Green Round of GATT negotiations to address trade-environment conflicts is the legal equivalent of waiting for Godot. The recently concluded Uruguay Round of negotiations dragged on for seven years and missed a series of deadlines. The GATT's Director of the Trade and Environment Division has declared that a Green Round "is unlikely to begin within ten years given the

of the contracting parties to continue the GSP program). It has been argued that this waiver is inconsistent with the limitations imposed by Article XXV. See, e.g., Hector Gros Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341 (1974). In this instance, the contracting parties considered an amendment but rejected this option because of the difficulties associated with the amendment process. JACKSON & DAVEY, *supra* note 6, at 318.

Notwithstanding the technical difficulties, the GSP waiver was possible because an overwhelming majority of nations was strongly in favor of the GSP program. See Gerald M. Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 CORNELL INT'L L.J. 239 (1980). In contrast, there is little consensus in the GATT context regarding the nature or scope of an environmental waiver.

110. See, e.g., Charnovitz, *supra* note 92, at 510-11; *Split Among Environmentalists on NAFTA Healed in United Support of GATT Reforms*, Daily Envtl. Rep. (BNA) (Dec. 6, 1993) (coalition of environmental organizations call for formation of Green Round of GATT negotiations); *GATT Green Round Said Likely to Pit Environmentalists Against Third World*, Daily Envtl. Rep. (BNA) (Dec. 7, 1993) (predicting that a Green Round of negotiations would pit environmentalists against developing nations). See also *Environmental Code Should Be Condition for Ratification of GATT, Dutch Official Told*, 17 Int'l Envtl. Rep. (BNA) 259 (Mar. 23, 1994) (Dutch environmental nongovernmental organization calls for E.U. to "suspend their ratification" of the GATT pending establishment of a comprehensive "Environmental Code").

There have been different proposals for the content of the Environmental Code. For example, the Chairman of the Senate Subcommittee on International Trade has proposed a GATT Environmental Code that would permit the imposition of countervailing duties on imports from countries whose environmental standards are lower than those in the importing nation. 137 CONG. REC. S13,169 (daily ed. Sept. 17, 1991) (statement of Sen. Baucus). See also Schoenbaum, *supra* note 58, at 723 (discussing similar proposals); Patterson, *supra* note 22, at 105-06. Another idea is for the proposed Code to "set out minimum levels of pollution control and environmental quality with respect to certain key economic sectors, such as import-sensitive industries." Schoenbaum, *supra* note 58, at 723.

schedules foreseen for implementing the results of the Uruguay Round."¹¹¹ However, as even GATT officials concede, "[a]ddressing the trade and environment interface cannot wait that long."¹¹² The urgency of global environmental problems mandates that these issues not be relegated to an unscheduled round of GATT negotiations.

Moreover, a negotiating round devoted to environmental issues would be extremely unlikely to promote significant environmental reform of the GATT. Negotiators of the ambitious Uruguay Round texts were able to reach agreement, in part, because of the wide range of issues on the table which permitted nations to engage in a variety of trade-offs across issues. As a result, virtually every participating nation achieved at least some of its negotiating objectives and had a stake in a successful conclusion of the round. A round that focuses on a single set of issues cannot generate the possibility of such trade-offs. The nations seeking to "Green the GATT" through such a round will not have inducements to encourage the cooperation of nations resistant to environmental reform of this trade body.¹¹³

As demonstrated above, none of the frequently proposed cures are satisfactory. With respect to the search for a reformation of the GATT to incorporate a commitment to sustainable development, "[n]o answer is what the wrong question begets, for the excellent reason that the [GATT] was not framed to be a catalogue of answers to such questions. And, indeed, how could it have been, consistently with the intention to write a charter for [the international trade regime]?"¹¹⁴

As presently constituted, the GATT is fundamentally incapable of addressing today's pressing global environmental issues. The GATT lacks the institutional mandate to advance global environmental interests. It possesses neither the competence nor the expertise to evaluate environmental threats. It systematically subordinates environmental interests to trade interests where the two are in conflict. Those interested in a more balanced approach to trade-environment issues need to look elsewhere for an appropriate institution to consider these issues.

111. Richard Eglin, *Enlisting the Support of Liberal Trade for Environmental Protection and Sustainable Development*, 23 ENVTL. L. 697, 700 (1993). See also Keith Bradsher, *U.S. Politicians Turn Into Lobbyists Over GATT*, N.Y. TIMES, Dec. 11, 1993, at A39 (U.S. Trade Representative Mickey Kantor states that environmental issues would have to wait for next round of international trade talks which convene, on average, once a decade).

112. Eglin, *supra* note 111, at 700.

113. Robert Housman and David Wirth have made this point. Robert Housman, Testimony before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce, Science, and Transportation, FED. DOC. CLEARING HOUSE CONG. TESTIMONY (Feb. 3, 1994); Telephone conversation with David Wirth, Mar. 25, 1994.

114. BICKEL, *supra* note 94, at 103.

B. *The Trade Regime II: NAFTA*

Conflicts between trade-environment interests will be considered under the auspices of NAFTA.¹¹⁵ While NAFTA reproduces much of the form and substance of the GATT approach to these issues, NAFTA does include some significant departures from the GATT framework. Ultimately, however, like the GATT, NAFTA is primarily designed to reduce barriers to trade. Moreover, like the GATT, the treaty does not give sufficient priority to international environmental interests.

1. The Substantive Regime

NAFTA creates a free-trade area comprised of Mexico, Canada, and the United States. This treaty incorporates a schedule of staged tariff reductions on qualifying goods from each NAFTA signatory, leading to the progressive elimination of all tariffs on trade between the United States, Canada, and Mexico.¹¹⁶ The agreement creates the world's largest free-trade zone, stretching from the Yukon to the Yucatan, with a combined gross national product of approximately \$6 trillion.¹¹⁷

The treaty also includes provisions similar to those found in the GATT regarding most-favored-nation treatment, national treatment, rules of origin, and customs procedures. Under the agreement, the three countries are to eliminate prohibitions and quantitative restrictions applied at the border, such as quotas and import licenses. In addition, NAFTA includes provisions designed to reduce barriers to trade in services.¹¹⁸

115. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S. [hereinafter NAFTA].

The environmental implications of the NAFTA have been ably discussed by a number of other commentators. See, e.g., Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993); Steve Charnovitz, *NAFTA: An Analysis of its Environmental Provisions*, 23 ENVTL. L. REP. 10,068 (1993) [hereinafter Charnovitz, *NAFTA*]; Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin* (unpublished manuscript, on file with MICH. J. INT'L L.) [hereinafter Charnovitz, *Green Spin*]; Stewart, *supra* note 50, at 751; SIERRA CLUB, ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (1993). Rather than reproduce this analysis, this section is limited to a discussion of the subordination of environmental interests by this trade regime.

116. The treaty builds upon the existing Canada-U.S. Free Trade Agreement, Dec. 22-23, 1987 & Jan. 2, 1988, Can.-U.S., (entered into force Jan. 1, 1989), *reprinted in* 37 I.L.M. 781 [hereinafter Can.-U.S. FTA], and includes that agreement's exemptions for Canadian cultural industries and certain agricultural commodities.

117. See White House Fact Sheet: The North American Free Trade Agreement, 28 *Wkly. Compil. Pres. Doc.* 1424 (Aug. 12, 1992) [hereinafter White House Fact Sheet].

118. NAFTA, *supra* note 115, chs. 12-14 (Cross-Border Trade in Services, Telecommunications, and Financial Services respectively).

NAFTA also includes provisions that remove significant investment barriers, ensure basic protections for NAFTA investors, and provide a mechanism to resolve disputes between investors and NAFTA countries.¹¹⁹ Finally, NAFTA sets out certain basic protections for intellectual property rights.¹²⁰

NAFTA supporters have often proclaimed the treaty's environmental virtues.¹²¹ Close examination reveals, however, that even the treaty's "green provisions" subordinate environmental interests to economic ones. A good example is NAFTA's treatment of trade obligations imposed by international environmental agreements. A number of environmental treaties require nations to restrict or prohibit trade in harmful goods. NAFTA provides that trade obligations set out in certain enumerated international environmental treaties "shall prevail" over any inconsistencies in NAFTA.¹²²

Although NAFTA backers claim that this provision is an unprecedented clause affirming the supremacy of international environmental agreements,¹²³ not all measures taken pursuant to international environmental obligations "shall prevail" over NAFTA obligations. Rather, such measures will survive NAFTA scrutiny only "provided that where a party

119. *Id.*, ch. 11.

120. *Id.*, ch. 17.

121. See, e.g., *The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the House Committee on Science, Space, and Technology*, 102d Cong., 2d Sess. 77 (Sept. 30, 1992) (testimony of Charles Roh, Assistant U.S. Trade Representative for North American Affairs) ("this agreement does more to improve the environment than any other agreement in history"); *News Conference with William Reilly, EPA Administrator*, Fed. News Serv., Aug. 13, 1992, available in LEXIS, News Library, FEDNEW File (NAFTA is the "greenest free trade agreement ever").

122. NAFTA, *supra* note 115, art. 104. This provision applies to C.I.T.E.S., *supra* note 108; the Montreal Protocol, *supra* note 26; and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, reprinted in 28 I.L.M. 649.

Two additional bilateral agreements are subject to Article 104. See NAFTA Annex 104.1 (listing the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, Mex.-U.S., T.I.A.S. No. 10,827, as well as the annexes to this agreement, and the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, Oct. 26, 1986, Can.-U.S., T.I.A.S. No. 11,099, as subject to Article 104). Interior Secretary Bruce Babbitt has stated that a "verbal agreement" has been reached by the three NAFTA nations "to add the Migratory Bird Treaties to [Article 104]." *Key Officials Address House Committee on Environmental Benefits of Agreement*, Int'l Trade Daily (BNA) (Nov. 15, 1993).

123. See, e.g., *USTR Letter on NAFTA Environmental Standards*, INSIDE U.S. TRADE, Sept. 17, 1993, at 4.

As a historical matter, it is far from clear that such a clause is, in fact, unprecedented. It appears that, at one time, it was rather common for commercial treaties to expressly yield to provisions of preexisting treaties relating to health or conservation. See, e.g., Charnovitz, *Green Spin*, *supra* note 115 (citing Treaty of Commerce and Navigation between Great Britain and Germany, Dec. 2, 1924, G.B.-Ger., art. 10, 43 L.N.T.S. 89; Convention between France and Greece, Mar. 11, 1929, Fra.-Greece, art. 9, 95 L.N.T.S. 403).

has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement."¹²⁴ This language appears to follow closely the "least trade restrictive" interpretation given to the term "necessary" found in the Article XX exception of the GATT.¹²⁵ This provision also imposes new requirements and new trade disciplines on parties to these international environmental agreements.¹²⁶ Finally, this provision contrasts sharply with NAFTA's treatment of preexisting tax conventions, the provisions of which expressly and unconditionally take precedence over any inconsistent NAFTA provisions.¹²⁷

NAFTA also addresses the "pollution haven" concern, an issue not typically addressed by trade agreements. In response to concerns that a NAFTA party might lower its environmental standards to attract scarce investment capital, NAFTA provides that "a Party should not waive or otherwise derogate" from domestic environmental measures to encourage foreign investment.¹²⁸ Significantly, when negotiating this provision, the Parties considered, but ultimately could not agree on stronger language. Although the Canadian government had urged use of the mandatory verb "shall" rather than the hortatory "should," this suggestion was rejected by the Bush Administration.¹²⁹

Moreover, a nation that believes another party is lowering its environmental standards to encourage foreign investment and thereby failing to honor the NAFTA provision quoted above cannot utilize the formal NAFTA dispute settlement processes to resolve this issue. Rather, the nation can only "request consultations" with the allegedly offending nation "with a view to avoiding" any encouragement of foreign investment through relaxation of environmental measures.¹³⁰ This procedure for resolving this type of dispute stands in stark contrast to the procedures for

124. NAFTA, *supra* note 115, at art. 104(1).

125. See *supra* text accompanying notes 17-76.

126. Housman & Orbuch, *supra* note 115, at 754-55 & n.175.

127. NAFTA, *supra* note 115, art. 2103.

128. *Id.* art. 1114(2) (emphasis added).

129. Charnovitz, *NAFTA*, *supra* note 115, at 10,072. See also *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, Int'l Trade Daily (BNA) (Sept. 10, 1992); *Hills Says Rejection of Canadian Green Language in NAFTA Helped Environment*, INSIDE U.S. TRADE, Aug. 28, 1992, at 8; Norma Greenaway, *U.S. Set to Unveil Trade Deal with Canada & Mexico*, MONTREAL GAZETTE, Aug. 12, 1992, at A10. The actual treaty language thus contradicts a 1992 Presidential statement that NAFTA "prohibits the lowering of standards to attract investment." White House Fact Sheet, *supra* note 117, at 1426.

130. NAFTA, *supra* note 115, art. 1114(2).

resolving other types of investment disputes, which are subject to a complex, detailed, and binding arbitral regime.¹³¹

2. Environmental Measures as Impermissible Barriers to Trade

Environmental measures that affect trade are subject to challenge as impermissible non-tariff barriers under the chapters on Sanitary and Phytosanitary (S&P) Measures and on Standards-Related Measures (Standards Chapter). To avoid or prevail in such challenges, NAFTA strongly encourages each nation to utilize relevant internationally agreed-upon standards. The treaty provides that environmental measures restricting trade that conform to international standards are presumptively valid.¹³²

However, NAFTA parties are not required to use international standards. NAFTA affirms the "right" of each nation to set an "appropriate level of protection" for human, animal, or plant life or health and to implement measures more stringent than international standards.¹³³ However, such measures are subject to several disciplines.

First, NAFTA disciplines the ability of parties to choose its "appropriate level of protection" in different contexts. Parties are directed to achieve consistency in the level of protection afforded by different standards. A party is to "avoid arbitrary or unjustifiable distinctions in such levels [of protection] in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another party or constitute a disguised restriction on trade between the Parties."¹³⁴ Some commentators fear that this clause may preclude the United States from using regulations designed to achieve different levels of risk in unrelated areas of conduct.¹³⁵ For example, permitting certain levels of salmonella in chicken while imposing a zero tolerance for carcinogenic food additives may invite a NAFTA challenge.¹³⁶

In addition, NAFTA imposes a series of scientific disciplines on the use of health and safety standards.¹³⁷ NAFTA requires that S&P measures

131. *Id.* arts. 1115–1138(2).

132. *Id.* arts. 713, 905.

133. *Id.* arts. 712(1), 904(2).

134. *Id.* art. 715(3)(b). For similar, precatory language on standards, see *id.* art. 907(2).

135. Housman & Orbuch, *supra* note 115, at 739; Charnovitz, *Green Spin*, *supra* note 115.

136. Housman & Orbuch, *supra* note 115, at 739.

137. The Uruguay Round agreements contain similar scientific disciplines on domestic sanitary and phytosanitary measures. See Agreement on the Application of Sanitary and Phytosanitary Measures, GATT Doc. MTN/FA.II.A1A.4 (Dec. 15, 1993). For a thoughtful discussion of the issues raised by the use of science-based disciplines on environmental measures in trade agreements, see David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L. J. (forthcoming 1994).

be “based on scientific principles, taking into account relevant factors” and “not maintained where there is no longer a scientific basis for it.”¹³⁸ Similarly, when setting national regulatory standards other than S&P measures that are more stringent than international standards, a party “may . . . conduct an assessment of risk . . . tak[ing] into account . . . available scientific evidence or technical information.”¹³⁹ However, the treaty itself fails to define meaningfully the key terms in these provisions.¹⁴⁰ This lack of definition may lead NAFTA dispute resolution panels to “second-guess” the science that a legislature relied upon when enacting a standard.¹⁴¹ It also gives panels wide latitude to determine whether any particular standard satisfies these provisions or is an unjustified trade barrier.¹⁴²

The treaty also requires that the S&P measure be “based on a risk assessment, as appropriate to the circumstances.”¹⁴³ This risk assessment must take into account international risk assessment methodologies and “relevant scientific evidence.”¹⁴⁴ Several U.S. health and safety standards may be vulnerable to challenge under this provision. For example, the Delaney Clauses¹⁴⁵ ban any amount of carcinogenic pesticide residue in

138. NAFTA, *supra* note 115, art. 712(3).

139. *Id.* art. 907(1)(a). An “assessment of risk” is an “evaluation of the potential for side effects.” *Id.* art. 915.

140. For example, a “scientific basis” is defined as “a reason based on data or information derived using scientific methods.” *Id.* art. 724.

141. This concern is not unfounded. A panel operating under the Can.-U.S. FTA, *supra* note 116, rejected Canada’s assertion that it needed to inspect all of the commercially-taken herring and salmon to assure high quality biological data regarding the harvesting and stocks of these species. In the Matter of Canada’s Landing Requirement for Pacific Coast Salmon and Herring, Panel No. CDA-89-1807-01 (Oct. 16, 1989), available in LEXIS, INTLAW Library, USCFTA File [hereinafter *Canadian Salmon Case*]. The panel determined that “reliable sampling data can be obtained without requiring access to 100% of the catch.” *Id.* See also Brief Amicus Curiae of the Government of Canada, at 16–19, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (arguing that the EPA imposed ban on the importation of asbestos is not supported by adequate scientific evidence, therefore, the ban violates international trade law); In the Matter of Puerto Rico’s Regulations on the Import, Distribution, and Sale of U.H.T. Milk from Quebec, Panel No. USA-93-1807-01 (June 3, 1993), available in LEXIS, INTLAW Library, USCFTA File (rejecting Canada’s challenge to the ban on certain types of milk).

The U.S. Trade Representative has stated that the scientific disciplines “do not involve a situation where a dispute settlement panel may substitute its scientific judgment for that of the government maintaining the [sanitary or phytosanitary] measure.” Letter from Michael Kantor, U.S. Trade Representative, to John Adams, Executive Director, Natural Resources Defense Council (Sept. 13, 1993), reprinted in *INSIDE U.S. TRADE*, Sept. 17, 1993, at 5. Of course, this unilateral interpretation, offered after the conclusion of the NAFTA negotiations, is not binding on a NAFTA panel.

142. Housman & Orbuch, *supra* note 115, at 747–48.

143. NAFTA, *supra* note 115, art. 712(3)(c).

144. *Id.* art. 715(1)(a) & (1)(b).

145. 21 U.S.C. §§ 348(c)(3)(A), 360b(d)(1)(H), & 376(d)(5)(B) (1992).

processed foods sold in the United States. This standard rests on the political — rather than scientific — judgment that no risk posed by carcinogens in the food supply is acceptable.¹⁴⁶ Observers fear that standards like this would not survive challenge under NAFTA.¹⁴⁷

In addition, NAFTA disciplines are expressly applicable to state and local measures, as well as federal provisions. Thus, NAFTA provides that “[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”¹⁴⁸ Under this language, a state that prohibits a pesticide permitted to be used under federal law¹⁴⁹ or enacts a food safety regulation more stringent than the federal standard¹⁵⁰ faces a possible challenge from Canada or Mexico that such measures are impermissible barriers to trade.¹⁵¹

In addition, NAFTA’s S&P and Standards chapters impose many of the disciplines found in the GATT and thus incorporate many of the shortcomings in the GATT system outlined above. For example, the S&P chapter reproduces the GATT distinction between standards regulating a product and standards regulating the process by which a product is

146. This “zero risk” requirement has been upheld in U.S. courts. *Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987); *Cosmetic Toiletry and Fragrance Assoc. v. Public Citizen*, 485 U.S. 1006 (1988).

147. See Housman & Orbuch, *supra* note 115, at 739–49. See also *The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the Committee on Science, Space, and Technology*, 102d Cong., 2d Sess. 77 (Sept. 30, 1992) (Testimony of Professor David Wirth) [hereinafter Wirth Testimony].

148. NAFTA, *supra* note 115, art. 105. See also *id.* arts. 709, 711 (requiring Party to ensure that any nongovernmental entity upon which it relies in applying a S&P measure complies with the treaty’s S&P provisions); *id.* art. 902 (requiring a Party to ensure that state and local standardizing bodies comply with the treaty’s substantive obligations regarding standards and related measures).

The GATT, in contrast, requires each contracting party to “take such reasonable measures as may be available to it to ensure observance” by state and local governments. GATT, *supra* note 9, art. XXIV(12). *But see* GATT, *United States—Measures Affecting Alcoholic and Malt Beverages*, Panel report DS/23R, para. 5.48 (Feb. 7, 1992) (“GATT law is part of federal law in the United States and as such is superior to inconsistent state law”); Jackson, *supra* note 6, at 116 (GATT obligates a contracting party’s executive to prevent local laws or actions that violate GATT).

149. States possess such authority, 7 U.S.C. § 136v(a) (1992), and have exercised it. See, e.g., IOWA CODE § 2-6.32 (1989) (prohibiting sale and use of chlordane); MD. CODE ANN., AGRIC. § 5-210.5 (1991) (restricting use of chlordane and other chemicals).

150. California Proposition 65 imposes certain requirements on the sale of foods, drugs, and cosmetics. California Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (Deering 1986).

151. See Charnovitz, *NAFTA*, *supra* note 115, at 10,069–70; Housman & Orbuch, *supra* note 115, at 737; Patti A. Goldman, *The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulations*, 7 J. ENVTL. L. & LITIG. 11 (1992).

produced.¹⁵² In addition, although the parties have discretion in setting standards, the S&P chapter limits the permissible trade measures that can be used to achieve such protection. Thus, any trade measure may be applied only to the extent "necessary" to achieve the nation's chosen level of protection.¹⁵³ As NAFTA incorporates GATT's obligations by reference,¹⁵⁴ it is quite possible that the term "necessary" will be interpreted as narrowly in the NAFTA context as it has been by successive GATT dispute resolution panels.¹⁵⁵

NAFTA's substantive regime reflects GATT jurisprudence in another important respect. NAFTA Article 2101 provides that

GATT Article XX and its interpretative notes . . . are incorporated into and made a part of this Agreement. The parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

Assuming that the provisions of GATT Article XX would be interpreted by NAFTA dispute resolution panels as they have been interpreted by GATT dispute resolution panels,¹⁵⁶ NAFTA would thus restrict the use of trade measures to protect global commons resources. In addition, as NAFTA requires that environmental trade measures be "necessary," Parties will likely need to employ trade measures that are the "least trade restrictive," even if such measures are not the most effective policy tool.

Although there have been no such challenges to date, it is significant that even before it came into force, NAFTA led to the amendment of several U.S. health and safety laws. The legislation implementing NAFTA amended five federal health-related import bans.¹⁵⁷ Four of these

152. Housman & Orbuch, *supra* note 115, at 738-39 (NAFTA's failure to eliminate the distinction between standards regulating the product and standards regulating the production process restricts the ability of the United States to exclude products produced in an environmentally damaging manner); Stewart, *supra* note 50, at 761 (NAFTA provisions relating to S&P and other product standards do not authorize trade restrictions against products because of the adverse environmental effect of their production processes).

153. NAFTA, *supra* note 115, arts. 709, 712(1) & 712(5).

154. *Id.* art. 103(1).

155. See Wirth Testimony, *supra* note 147; Charnovitz, *NAFTA*, *supra* note 115. For an analysis of the interpretation of the term "necessary" in the GATT context, see *supra* text accompanying notes 69-77.

156. Identical language in the Can.-U.S. FTA has been interpreted in the same manner as GATT dispute resolution panels. See, e.g., *Canadian Salmon Case*, *supra* note 141.

157. For more on these amendments, see Steve Charnovitz, *No Time for NEPA: Trade Agreements and the Fast Track*, 3 MINN. J. GLOBAL TRADE 195 (1994).

amendments weakened food safety and agricultural laws only for imports from Canada and/or Mexico.

3. Dispute Resolution Provisions

Unlike the original General Agreement on Tariffs and Trade, which was not intended to be an international institution and did not have detailed provisions on dispute resolution, the NAFTA negotiators gave careful attention to the resolution of disputes among the Parties.¹⁵⁸ Several of the provisions on dispute settlement are significant with respect to trade-environment issues.

First, NAFTA contains a provision regarding forum selection when environmental measures allegedly conflict with trade rules. In general, if a dispute arises under both NAFTA and the GATT, the parties may use the dispute resolution procedures available under either treaty.¹⁵⁹ However, NAFTA provides that a party defending a S&P Standard or a Standard-Related Measure can choose to defend its regulation before a NAFTA panel.¹⁶⁰ This forum selection provision also applies to challenges to standards implementing specified international environmental treaties.¹⁶¹ However, the responding party's ability to select the forum is not unlimited. The treaty permits the responding party to force the dispute to its choice of forum only if the standard affects the party's domestic environment.¹⁶² This suggests that the responding party does not have the ability to select the forum if its standard protects the "global commons."¹⁶³

Another important NAFTA provision relates to the burden of proof in challenges to environmental measures. The S&P chapter provides that "a Party asserting that a sanitary or phytosanitary measure of another Party is inconsistent with this section shall have the burden of

158. NAFTA creates a three-tiered dispute resolution process. The first tier consists of formal consultation between the disputing parties. NAFTA, *supra* note 115, art. 2006(1). If consultation fails to resolve the matter within forty-five days, any Party has the right to call a meeting of the NAFTA Free Trade Commission to consider the matter. *Id.* art. 2007. In the event that the Commission is unable to arrange a mutually satisfactory resolution of the matter, any Party involved in the dispute may request the formation of a dispute resolution panel. *Id.* art. 2008(1). The analysis in this article focuses primarily on the provisions regarding dispute resolution panels.

159. *Id.* art. 2005(1).

160. *Id.* art. 2005(4).

161. *Id.* art. 2005(3).

162. *Id.* art. 2005(4)(a).

163. See Charnovitz, *NAFTA*, *supra* note 115, at 10,070. As explained, trade measures designed to protect the global commons will not fall within the scope of GATT's Article XX(b) exception for trade measures necessary to protect plant, animal, or human life or health. See *supra* text accompanying notes 25-43.

establishing the inconsistency,"¹⁶⁴ and the Standards chapter has similar language.¹⁶⁵ As the Canadian government stated, "in the event of a dispute, the environment would be given the benefit of the doubt."¹⁶⁶ This would appear to be a significant departure from practice under the GATT, where the party arguing that a trade measure is justified under an Article XX exception has the burden of proof.¹⁶⁷

However, a number of commentators have questioned the meaning and significance of this provision. There is some question as to whether this clause imposes only a prima facie burden on the challenging party, with the actual burden of proof shifted to the defending party once the prima facie case is made.¹⁶⁸ The burden of proof issue is unlikely to be clarified until an actual dispute between the parties is adjudicated.¹⁶⁹

Moreover, in a number of contexts, the burden of proof will be on the party defending the trade measure. For example, if a complaining nation establishes that a trade measure violates a NAFTA provision, the respondent nation may attempt to rely on the "exceptions" provisions in NAFTA Chapter 21. These provisions expressly incorporate GATT Article XX. Under this provision, the burden will be on the responding party. Similarly, a nation attempting to defend a trade measure under an international treaty other than a treaty listed in Article 104 will likely have the burden of proof in defending its measure under NAFTA Article 2101.¹⁷⁰

Other NAFTA provisions reproduce many of the shortcomings found in the GATT dispute settlement system. For example, NAFTA lacks any

164. NAFTA, *supra* note 115, art. 723(6).

165. *Id.* art. 914(4).

166. Government of Canada, *North American Free Trade Agreement*, CAN. ENVTL. REV., Oct. 1992, at 70. See also U.S. ENVIRONMENTAL PROTECTION AGENCY, *NAFTA AND THE ENVIRONMENT 2* (1992) (burden of proof standard will enhance environmental protection by ensuring that stringent regulatory standards remain viable).

167. Although the General Agreement does not explicitly discuss which party has the burden of proof, successive panel reports have placed this burden on the party attempting to defend its trade measure. See, e.g., Tuna-Dolphin Panel Report, *supra* note 22, para. 5.22 & n.39.

168. See Industry Policy Advisory Committee for Trade and Policy Matters, *Report on the North American Free Trade Agreement*, Sept. 14, 1992, at 14 (S&P chapter imposes a prima facie burden of proof on complaining party), cited in Housman & Orbuch, *supra* note 115, at 744 n.120. See also James E. Bailey, *Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable*, 8 AM. U. J. INT'L L. & POL'Y 839, 853 (1993) (arguing that Article 723(6) creates a shifting burden of proof).

169. See *Possibility of Amending GATT Sanitary Provisions Discussed*, PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 18, 1992, at 28 (EPA Deputy Director, Policy and International Affairs Division, states that burden of proof "could be the preponderance of the evidence" standard but that "until an adjudication we don't know.").

170. See, e.g., Charnovitz, *Green Spin*, *supra* note 115.

requirement that panels considering environmental cases include any panelists with environmental expertise. Rather, the treaty requires only that panelists "have expertise or experience in law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements" ¹⁷¹ This omission is especially troubling given that NAFTA panels will have five members, while GATT panels generally consist of three members. ¹⁷²

Another area where significant improvement over the GATT system should have been made concerns the ability of a panel to obtain scientific or technical advice. Astonishingly, there is no guarantee that a NAFTA dispute resolution panel considering a trade-environment conflict will receive scientific or technical information regarding the challenged environmental measure. Rather, NAFTA provides that at the request of a disputing party, or on its own initiative, "the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree" ¹⁷³ Dispute resolution panels may also request written reports from special "scientific review boards" formed under the treaty "on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding" ¹⁷⁴ Again, however, the Panels need the consent of the parties. ¹⁷⁵

Serious drawbacks are created by conditioning the use of technical and scientific information on the consent of the parties. "Because a disputing party is unlikely to agree to the use of a scientific review board's report which would prejudice its position, NAFTA cannot guarantee that a scientific review board will be established." ¹⁷⁶ In addition, the scope of expert information provided to the dispute resolution panels is limited by conditions set by the disputing parties and by the treaty, which permits a report on "factual issue[s]" only. ¹⁷⁷ So limiting the input of a scientific review board may preclude a panel from taking full advantage of environmental expertise when considering environmental issues. ¹⁷⁸

171. NAFTA, *supra* note 115, art. 2009(2)(a).

172. Charnovitz, NAFTA, *supra* note 115, at 10,071.

173. NAFTA, *supra* note 115, art. 2014.

174. *Id.* art. 2015(1).

175. *Id.*

176. Housman & Orbuch, *supra* note 115, at 748.

177. NAFTA, *supra* note 115, art. 2015.

178. Housman & Orbuch, *supra* note 115, at 748.

Finally, NAFTA, like the GATT, takes affirmative steps to eliminate public access to and participation in dispute resolution procedures. Under NAFTA, a dispute resolution “panel’s hearings, deliberations and initial report, and all written submissions to and communications with the panel, shall be confidential.”¹⁷⁹ Even the final report may be kept confidential, if the Commission so decides.¹⁸⁰ Although the rules of procedure have not yet been promulgated, nothing in the treaty requires or invites public participation in the dispute resolution process.¹⁸¹ In this sense, the NAFTA dispute resolution process differs little from the widely criticized GATT process.¹⁸²

4. The Environmental Side Agreement

In response to criticisms of NAFTA’s provisions regarding environmental issues, the NAFTA parties negotiated a side agreement called the North American Agreement on Environmental Cooperation (“NAAEC”).¹⁸³ This agreement establishes a Commission for Environmental Cooperation (“CEC”) comprising a Council, a Secretariat, and a Joint Public Advisory Committee.¹⁸⁴

The Council consists of cabinet-level representatives of the Parties.¹⁸⁵ It is designed to provide a forum for the discussion of environmental issues affecting the three nations and to develop nonbinding recommendations on a variety of environmental issues.¹⁸⁶ The Council will cooperate with the NAFTA Free Trade Commission by “contributing to the prevention or resolution of environment-related trade disputes.”¹⁸⁷ The Council is to accomplish this by addressing disputes and by identifying experts able to provide information or technical advice to other NAFTA bodies.¹⁸⁸

179. NAFTA, *supra* note 115, art. 2012(1). The selection of a scientific board is likewise confidential. *Id.* art. 2015(2).

180. *Id.* art. 2017(4).

181. *See, e.g., id.* arts. 2004, 2013 (discussing the roles of the parties in the dispute resolution process).

182. *See, e.g., Environmental Safeguards for the North American Free Trade Agreement*, June 1992, at 8 (joint statement of 13 environmental groups urging public participation in dispute resolution process).

183. North American Agreement on Environmental Cooperation, *reprinted in* 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

184. *Id.* art. 8.

185. *Id.* art. 9.

186. *Id.* art. 10(1)(a), 10(2).

187. *Id.* art. 10(6).

188. *Id.*

The Secretariat will be headed by an Executive Director, appointed by the Council for a three-year term and removable only for cause.¹⁸⁹ The Executive Director and her staff will be independent: "the Executive Director and the staff shall not seek or receive instructions from any government. Each party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities."¹⁹⁰ The Secretariat is to provide "technical, administrative and operational support to the Council."¹⁹¹ It is also to prepare an annual report on the state of the environment in the territories of the NAFTA parties and a variety of other environmental issues. However, in preparing these reports, the Secretariat has few independent investigative powers and must rely on publicly available information.

The Public Advisory Committee consists of individuals appointed by the NAFTA parties. Its principal role is to make nonbinding recommendations to the Council. It can also comment on Secretariat reports at the time they are submitted to the Council and before their release to the general public.

Most notably, the NAAEC provides that "each Party shall effectively enforce its environmental laws and regulations."¹⁹² A resident of any party may complain to the Secretariat that a country is not enforcing its environmental laws.¹⁹³ If the complaint meets certain criteria, the Secretariat will request a response from the Party and may create a factual record on the issue.¹⁹⁴ This factual record will be based on information developed by the Secretariat and the possible use of outside experts.¹⁹⁵ The Council may decide, by a two-thirds vote, to release this factual record to the public.

The NAAEC also creates a formal mechanism for "consultation and resolution of disputes" if there is a "persistent pattern" of failure "to effectively enforce" domestic environmental laws.¹⁹⁶ However, this mechanism is limited to pollution control, hazardous waste laws, and laws

189. *Id.* art. 11(1).

190. *Id.* art. 11(4).

191. *Id.* art. 11(5).

192. *Id.* art. 5.

193. *Id.* art. 14.

194. *Id.* arts. 14, 15.

195. *Id.* art. 15(2), 15(7).

196. *Id.* art. 22(1).

concerning wild flora and fauna.¹⁹⁷ The dispute resolution process is triggered only by a two-thirds vote of the Council.

This dispute resolution mechanism consists of several stages. First, the Parties are to engage in consultations in an attempt to arrive at a mutually satisfactory resolution of the matter.¹⁹⁸ In the event consultations are unsuccessful, the matter may be referred to a special session of the Council.¹⁹⁹ If the matter is still unresolved, the Council may, upon a two-thirds vote, convene an arbitral panel to consider the allegation of a persistent pattern of failure to enforce environmental laws.²⁰⁰ The five person panel shall receive written submissions, hold at least one hearing,²⁰¹ and then issue an initial report to the parties.²⁰² Following the receipt of comments by any disputing party, the panel will issue a final report.²⁰³

If the panel finds that a Party has engaged in a persistent pattern of failure to enforce effectively its environmental laws, the disputing parties are to agree on a mutually satisfactory plan of action.²⁰⁴ If they are unable to do so, or if there is a dispute regarding the implementation of an action plan, a disputing party may request that the arbitral panel be reconvened.²⁰⁵ If the reconvened panel finds that a Party is not fully implementing an action plan, it may impose a monetary enforcement assessment²⁰⁶ of up to U.S. \$20 million.²⁰⁷ The assessment is to be paid into a NAAEC fund and used to improve or enhance the environment or environmental law enforcement of the offending Party.²⁰⁸ Ultimately, this sanction can be enforced against the United States and Mexico by trade sanctions and against Canada by enforcement in Canadian domestic courts.²⁰⁹

197. Thus, laws governing the exploitation of natural resources and the conservation of forest, soils, minerals, water, and land are exempt from this process. *Id.* art. 45(2). Laws governing worker health and safety are likewise exempt. *Id.*

198. *Id.* art. 22.

199. *Id.* art. 23.

200. *Id.* art. 24.

201. *Id.* art. 28.

202. *Id.* art. 31.

203. *Id.* arts. 31(5), 32.

204. *Id.* art. 33.

205. *Id.* art. 34(1).

206. *Id.* art. 34(5).

207. *Id.* annex 34 (providing that maximum assessment shall be no greater than \$20 million for the first year after the date of entry into force of the NAAEC, and no greater than .007 percent of total trade between the Parties thereafter).

208. *Id.*

209. *Id.* annex 36(a).

While this is the first time that an international agreement provides sanctions for the failure of one country to enforce its own environmental laws, it is unlikely that sanctions will ever be imposed. The complex procedural framework to be followed before sanctions can be imposed can last for close to three years if a nation attempts to drag out the process.²¹⁰ As Mexico's NAFTA negotiator candidly conceded, "[t]he time frame of the process makes it very improbable that the stage of sanctions could be reached."²¹¹

More significantly, the NAAEC dispute resolution process is largely closed to the public.²¹² For example, the side agreement does not allow nongovernmental organizations or the public to submit amicus briefs. Similarly, the treaty does not require that dispute resolution proceedings, including hearings, be open to the public. Finally, the NAAEC precludes any Party from providing a right of action under its law against any other Party on the ground that it has acted in a manner inconsistent with the agreement.²¹³

5. An Assessment

Although NAFTA has been billed as the "greenest trade agreement ever," it fails to account adequately for international environmental interests. Significantly, the agreement imposes several new disciplines on the ability of parties to employ measures that restrict international trade, even if those measures are pursuant to an international environmental treaty. The environmental side agreement does not address this problem. Rather, the side agreement creates a system for encouraging the enforcement by each party of its domestic environmental laws. This is an important goal, but the side agreement does little to address the issues raised by the trade-environment conflicts that will arise under this treaty.

II. THE ADJUDICATORY INSTITUTIONS

A. *International Environmental Adjudication: A Viable Alternative?*

International adjudication involves the submission of a dispute to either a permanent judicial body or an arbitral tribunal for binding

210. Magraw, *supra* note 88, at 41.

211. Ingrid Negrete, *Mexico Official Defends NAFTA Dispute Process*, J. OF COM., Aug. 20, 1993, at A3.

212. SIERRA CLUB, *supra* note 115, at 23.

213. NAAEC, *supra* note 183, art. 38.

decision, typically on the basis of international law.²¹⁴ The primary judicial forum for resolving international legal disputes is the ICJ. The Court is "the principal judicial organ of the United Nations," and all members of the United Nations are parties to the ICJ Statute.²¹⁵ The ICJ is competent to decide environmental disputes,²¹⁶ and commentators have repeatedly called for greater use of the Court to resolve international environmental disputes.²¹⁷ In addition, at the United Nations Earth Summit, nations as diverse as New Zealand, Colombia, and Mexico called for a strengthening of the ICJ's role in the "settlement of disputes relating to the environment, and urged States to recognize the compulsory

214. Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 155 (Lori F. Damrosch ed., 1987) [hereinafter *ICJ CROSSROADS*]. "The only difference between arbitration and *judicial settlement* lies in the method of selecting the members of these judicial organs. While in the arbitration proceedings, this is done by agreement between the parties, judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept." GEORGE SCHWARZENBERGER & E. BROWN, *MANUAL OF INTERNATIONAL LAW* 195 (6th ed. 1976).

Although this article does not discuss international arbitration in any detail, many of the disadvantages of litigation may be applied to arbitration. JON MARTIN TROLLDALEN, *INTERNATIONAL ENVIRONMENTAL DISPUTE RESOLUTION* 20 (1993). Neither the Permanent Court of Arbitration nor any other arbitral body has been proposed as a forum for the resolution of trade-environment conflicts.

215. U.N. CHARTER, arts. 92, 93; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, (1945) [hereinafter *ICJ STATUTE*]. For an overview of the history and workings of the Court, see SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* (1973).

The Court has, in addition to the power to decide contentious cases between states, the authority to render advisory opinions. *ICJ STATUTE*, *supra*, art. 65. The United Nations Security Council and the General Assembly are authorized to request such opinions. U.N. CHARTER, art. 96. The General Assembly can also authorize other organs of the U.N. and specialized agencies to request advisory opinions. *Id.* Many of the impediments to the adjudication of international environmental disputes outlined below apply with equal force to requests for advisory opinions.

216. As a Judge and the President of the ICJ told the UNCED Conference, "there is no legal question or problem concerning the environment over which the ICJ does not have full jurisdiction and competence *ratione materiae*." Sir Robert Jennings, *The Role of the ICJ in the Development of International Environment Protection Law*, reprinted in 22 *ENVTL. POL. & L.* 312, 313 (1992).

217. See, e.g., EXPERT'S GROUP ON ENVIRONMENTAL LAW, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 17 (1986); WCED, *supra* note 1, at 334; Lawrence Susskind & Connie Ozawa, *Negotiating More Effective International Environmental Agreements*, in *INTERNATIONAL POLITICS*, *supra* note 2, at 165; Catherine Tinker, "Environmental Security" in the United Nations: Not A Matter for the Security Council, 59 *TENN. L. REV.* 787, 801 (1992) (International community "would be better served by urging nations . . . to take complaints to the ICJ when legal duties are breached or treaty obligations broken."); UNA/SIERRA CLUB, *UNITING NATIONS FOR THE EARTH* 16-17 (1990); James Cameron & Durwood Zaelke, *Global Warming and Climate Change—An Overview of the International Legal Process*, 5 *AM. U. J. INT'L L. & POL'Y* 249, 261-71 (1990).

jurisdiction of the Court in these matters.”²¹⁸ The Court has repeatedly “declared its willingness and readiness to deal with such cases fully and promptly.”²¹⁹ Indeed, to “be prepared to the fullest extent to deal with any environmental cases falling within its jurisdiction,” the Court recently formed a special seven-member Chamber for Environmental Matters.²²⁰

Although the Court can play a useful role in the adjudication of transboundary pollution cases, in disputes involving the interpretation of an environmental treaty, and in various bilateral environmental disputes,²²¹

218. Report by the Secretary-General of the United Nation Conference on Environment and Development, para. 152, *reprinted in* 2 AGENDA 21, *supra* note 93, at 733–34.

219. WCED, *supra* note 1, at 334.

220. The Court’s statute provides that “[t]he Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.” ICJ STATUTE, *supra* note 215, art. 26, para. 1. The Chamber for Environmental Matters is composed of Judges Schwebel, Bejdaoui, Evensen, Shahabuddeen, Weeramantry, Ranjeva, and Herczegh, who were elected by secret ballot. *World Court Sets-Up Special Environmental Chamber*, Reuter Lib. Rep., July 26, 1993, available in LEXIS, News Library, CURNWS File. The formation of such an Environmental Chamber had long been urged. See, e.g., P.C. Jessup, *Do New Problems Need New Courts?*, 65 PROCEEDINGS OF THE ASIL 261–68 (1971); Manfred Lachs, *The Revised Procedure of the International Court of Justice*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER, at 21, 43 (Kalshoven ed., 1980); Manfred Lachs, *Some Reflections on the Settlement of International Disputes*, 68 PROCEEDINGS OF THE ASIL 323–30 (1974). To date, this new Chamber has not been used.

The Court’s statute also provides that “[t]he Court may at any time form a chamber dealing with a particular case.” ICJ STATUTE, *supra* note 215, art. 26, para. 2. See generally EDWARD MCWHINNEY, *JUDICIAL SETTLEMENT OF DISPUTES*, 221 RECUEIL DES COURS 9, 106–22 (1990); Steven Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT’L L. 831 (1987); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (1965).

Unlike the specialized Environmental Chamber, ad hoc chambers have been used on a number of occasions. See, e.g., *Electronica Sicula S.P.A. (U.S. v. Italy)*, 1989 I.C.J. 15 (July 15); *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1988 I.C.J. 66 (Oct. 14); *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554 (Dec. 22). Presumably, an environmental dispute could be submitted to an ad hoc chamber of the Court.

221. The Court is seized of a dispute between Hungary and Slovakia regarding the construction of the Gabčíkovo dam and the diversion of the Danube River. In 1977, Hungary and Czechoslovakia entered into a treaty providing for the construction and joint operation of the Gabčíkovo-Nagymaros Barrage System. Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, Sept. 16, 1977, Czech.-Hung., 1109 U.N.T.S. 235, *reprinted in* 32 I.L.M. 1247 (1993). Under this agreement, the nations were to build a dam, a reservoir, a barrage system, two hydroelectric stations, and a twenty-five kilometer bypass canal to divert the Danube through a system of locks. *Id.*

In 1989, in response to public pressure, Hungary suspended construction on the project. Shortly thereafter, Hungary terminated the treaty. Hungarian Declaration on the Termination of the Treaty on the Construction and Joint Operation of the Gabčíkovo-Nagymaros Barrage System, 32 I.L.M. 1259 (1993). Czechoslovakia then pursued a “provisional solution” involving the unilateral diversion of the Danube that allegedly caused environmental harm to Hungary. After extensive negotiations, the parties agreed to submit this dispute to the ICJ. Special Agreement for the Submission to the International Court of Justice of the Differences Between Czechoslovakia and Hungary Concerning the Gabčíkovo-Nagymaros Project, April 7, 1993, Czech.-Hung., 32 I.L.M. 1293 (1993). For more on this action, see Philippe J. Sands, *Reports from International Courts and Tribunals*, 3 Y.B. INT’L ENVTL. L. 495, 498 (1992); Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and*

a marked increase in the use of the ICJ to resolve global environmental conflicts is unlikely. As explained more fully below, there are substantial political, doctrinal, and structural impediments to international environmental adjudication. These impediments suggest that adjudication will not and should not be the international community's primary means of resolving trade-environment conflicts.²²²

B. Adjudication of International Environmental Disputes: Political Impediments

International law imposes no obligation on a state to submit a dispute with another state to international adjudication.²²³ Thus, unlike domestic tribunals, international courts do not possess compulsory jurisdiction. Rather, jurisdiction exists only by consent of the disputing parties.²²⁴ As

Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams, 19 COLUM. J. ENVTL. L. 1 (1994).

In addition, the Court recently received a request for an advisory opinion from the WHO that stated "[i]n view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1993 I.C.J. 93 (Sept. 13).

Opinions addressing the merits in either of these proceedings could greatly advance the development of international environmental law. Thus, the argument to follow does not deny the ICJ's ability to develop and clarify the rules of international environmental law. *See, e.g.*, SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 4-5 (1958) (suggesting that the ICJ's primary utility is in its capacity to develop international law, rather than in its role as a dispute settlement body). Rather, this argument suggests that the ICJ is unlikely to play a role in the resolution of a significant number of the myriad trade-environment disputes that the international community will face.

222. For more on the resolution of international environmental disputes generally, see Richard Bilder, *The Settlement of Disputes in the Field of International Law of the Environment*, in 144 *RECUEIL DES COURS* 139 (1975) [hereinafter Bilder, *Settlement of Disputes*]. The analysis below is influenced by this seminal work, as well as Professor Bilder's other writings on uses and limits of adjudication in international dispute resolution. *See, e.g.*, Richard Bilder, *International Third Party Dispute Settlement*, 17 *DENV. J. INT'L L. & POL'Y* 471 (1989); Richard Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 *EMORY J. INT'L DISP. RESOL.* 131 (1987); Bilder, *ICJ CROSSROADS*, *supra* note 214, at 158. *See also* David A. Wirth, Book Review, 2 *Y.B. INT'L ENVTL. L.* 479 (outlining certain shortcomings of international environmental adjudication); *Developments in the Law—International Environmental Law*, 104 *HARV. L. REV.* 1484, 1550 (1991) [hereinafter *Developments: International Environmental Law*].

223. "There exists an uncontroverted principle of general international law according to which no State is obliged to submit a dispute with another State to an international tribunal. Such submission requires agreement of the parties to the dispute." ROSENNE, *supra* note 215, at 313.

224. Nations may consent to ICJ jurisdiction in three different ways: through a special agreement to submit a particular dispute to the Court; through a jurisdictional clause in an international treaty to which the nation is party; or through a more general declaration accepting the compulsory jurisdiction of the Court. ICJ STATUTE, *supra* note 215, art. 36.

Interestingly enough, at the San Francisco conference to consider and approve the U.N. Charter and ICJ Statute, a majority of states favored a grant of automatic compulsory jurisdiction to the ICJ. U.S. DEP'T OF STATE, PUB. NO. 2491, *THE INTERNATIONAL COURT OF*

a historical matter, nations rarely consent to third party adjudication and have tended to use the ICJ relatively infrequently.²²⁵

A number of reasons explain the failure of many nations to use the Court more frequently.²²⁶ Most importantly, “[t]he vast majority of nations, especially the major world powers, have been and continue to be unwilling to limit their sovereignty by submitting to the Court’s compulsory jurisdiction.”²²⁷ Several factors contribute to this reluctance. For example, national officials are hesitant to permit third parties to make final, binding determinations of their nation’s interests in an international dispute.²²⁸ “[N]ations will not adjudicate matters which, they feel, they could not afford to lose or where, if they lost, they could not afford to obey the judgment.”²²⁹ This tendency is exacerbated in issues deemed to be of “vital importance.” As the U.S. government has declared, “[c]ases

JUSTICE: SELECTED DOCUMENTS RELATING TO THE DRAFTING OF THE STATUTE 33-45 (1946). However, the United States and the Soviet Union adamantly opposed compulsory jurisdiction, and this view ultimately prevailed. *Summary Report of the Fourteenth Meeting of Committee*, 13 U.N.C.I.O. Doc. 226 (1945), IC/1, Doc. 661.

225. From 1946-1985, the ICJ rendered forty-six judgments, fifty substantive orders, and eighteen advisory opinions, an average of approximately two or three decisions per year. 1984-1985 I.C.J.Y.B. 194-200. Over the decades, the case load has tended to ebb and flow. For example, from the delivery of the 1975 Advisory Opinion in the Case of the Western Sahara, 1975 I.C.J. 12 (Oct. 16), until the 1976 filing of the Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3 (Sept. 11), there was a 10 month period when there were no cases on the Court’s docket. There were also no cases pending for nearly 6 months in 1970. Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 831 n.23 (1991).

In the last few years, the size of the Court’s docket has increased, although in absolute numbers its caseload is still small. See, e.g., Keith Highet, *The Peace Palace Heats Up: The World Court in Business Again*, 85 AM. J. INT’L L. 646 (1991).

226. There is extensive literature on the causes of and suggested cures for the Court’s disuse. See, e.g., INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY (Mark W. Janis ed., 1992); THOMAS FRANCK, JUDGING THE WORLD COURT (1986); Bilder, ICJ CROSSROADS, *supra* note 214; RICHARD FALK, REVIVING THE WORLD COURT (1986); JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (H. Mosler & R. Bernhardt eds., 1974); Morrison, *supra* note 225; J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT’L L. 129, 142-56 (1989); Hardy Dillard, *The World Court: Reflections of a Professor Turned Judge*, 27 AM. U. L. REV. 205 (1978); Cornelius F. Murphy, Jr., *The World Court and the Peaceful Settlement of Disputes*, 7 GA. J. INT’L & COMP. L. 551 (1977).

227. J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 YALE J. INT’L L. 342, 365 (1987).

228. As Senator Huey Long stated during the debate on whether this nation should join the World Court, “[W]e are being rushed in pell-mell to get into this World Court so that Señor Ab Jap or some other something from Japan can pass upon our controversies.” 79 CONG. REC. 1132 (1935).

229. LOUIS HENKIN, HOW NATIONS BEHAVE 187 (1979). As then Secretary of State William P. Rodgers explained, “States have not been willing to accept the idea of going to the Court on a regular basis, expecting to win some cases and lose others. If the legal adviser of the foreign ministry is not confident of victory, he recommends against litigation.” Address by William P. Rodgers, American Society of International Law Annual Dinner, Apr. 25, 1970, reprinted in 62 U.S. DEP’T ST. BULL. 623, 623-24 (1970).

of secondary importance to the vital interests of States are often considered not worth the expenditure of time and money [to litigate], and cases which do affect those vital interests are regarded as too important to entrust to any third party."²³⁰

A related drawback is that adjudication is a zero-sum process.²³¹ Litigation, including interstate litigation, typically produces a clear "winner" and "loser."²³² Litigation is not designed or intended to produce mutually acceptable solutions to disputes. For this reason, nations commonly prefer diplomatic mechanisms such as negotiation and compromise; these are more flexible and often generate a larger universe of alternative resolutions. As many international disputes have significant political components, national leaders often prefer a face-saving compromise over the risk of legal defeat.

The Court has also been hampered by "a perceived lack of bite."²³³ Under the U.N. Charter, a nation "undertakes to comply with the decision" of the Court if "it is a party" to the case.²³⁴ However, on several occasions, nations have refused to comply with Court directives. For example, in the *Anglo-Iranian Oil Co. Case*,²³⁵ Iran refused to obey the ICJ's order forbidding the nationalization of a British corporation until the Court's final judgment. Similarly, in the *Fisheries Jurisdiction Case*,²³⁶ Iceland disregarded the Court's order not to enforce a fifty mile fishing zone pending the Court's disposition of actions filed by the U.K. and West Germany. More recently, in the *United States Diplomatic and Consular Staff in Teheran Case*,²³⁷ Iran refused to comply with the Court's Interim Order and Final Judgment to release U.S. citizens taken hostage at the U.S. Embassy in Teheran, Iran. Although the U.N. Security Council has authority to "decide upon measures to be taken to give effect

230. *Review of the Role of the International Court of Justice: Report of the Secretary-General*, U.N. GAOR, 26th Sess., Prov. Agenda Item 97, para. 46, at 20, U.N. Doc. A/8382 (1971). Professor Richard Baxter, before elevation to the bench of the ICJ, voiced a similar opinion. Richard R. Baxter, *Symposium: The International Court of Justice: Introduction*, 11 VA. J. INT'L L. 291, 291-94 (1971).

231. Bilder, ICJ CROSSROADS, *supra* note 214, at 170.

232. *Id.*

233. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 540 (1993).

234. U.N. CHARTER, art. 94, § 1.

235. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1951 I.C.J. 89 (Interim Protection Order, July 5).

236. *Fisheries Jurisdiction Case (U.K. & N. Ireland v. Iceland; F.R.G. v. Iceland)*, 1972 I.C.J. 30 (Aug. 17).

237. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7 (Interim Order, Dec. 15), 1980 I.C.J. 3 (Final Judgment on the Merits, May 24).

to the [Court's] judgment,"²³⁸ the Council has yet to decide upon any enforcement measures in such situations.²³⁹

In addition, a party that wants a dispute resolved quickly will find the Court's procedures "uninviting."²⁴⁰ The Court is not particularly "well adapted for fact-finding, and a long time passes before the Court renders a decision, even with its light caseload."²⁴¹ For example, the Court took eight years to reach a decision in the *Barcelona Traction Case*²⁴² and six years in the *South West Africa*²⁴³ Cases.²⁴⁴

Finally, other reasons that contribute to the infrequent use of the Court include:

a sense of ignorance and unfamiliarity about the world of law and adjudication; . . . the weakness — in many countries — of the habit of adjudication; a lack of confidence in "foreign judges" and fear that a court might extend its authority and the scope of law to "strictly internal" matters; the feeling that a lawsuit is an unfriendly act that might exacerbate relations; and that loss of a case would be a blow to national prestige The issues of particular cases, moreover, will often discourage its adjudication. A nation will not normally come to court where its case is weak and its chance of winning slim.²⁴⁵

This general reluctance to adjudicate extends to international environmental issues. For example, although several nations were affected by radioactive debris, no state brought suit against the Soviet Union after the

238. U.N. CHARTER, art. 94, § 2.

239. Barton & Carter, *supra* note 233, at 541. The only occasion on which the Security Council's power has been invoked was when the U.K. unsuccessfully sought the Council's support for the Court's Interim Order of protection against Iran in 1951. See D.W. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, 180 RECUEIL DES COURS 169, 212 (1983). The President Judge of the Court has suggested that "an environmental issue could well be a situation where [this power] could come into its own." Jennings, *supra* note 216, at 314.

240. Barton & Carter, *supra* note 233, at 542.

241. *Id.*

242. Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Sp.), 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction Case*].

243. *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

244. The ICJ did not render a final judgment on the merits in either case. A factor related to this delay is expense. Litigation before the ICJ is extremely expensive. For example, litigation of the *Gulf of Maine Case* before a Chamber of the Court is estimated to have cost the United States \$7 million. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.), 1982 I.C.J. 3 (Order for Constitution of Chamber Jan. 20), 1984 I.C.J. 246 (Judgment Oct. 12). See also D.R. Robinson et al., *Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, 79 AM. J. INT'L L. 578, 588 (1985).

245. HENKIN, *supra* note 229, at 187. See also, Oscar Schachter, *General Course in Public International Law*, in 178 RECUEIL DES COURS 9, 208 (1982).

1985 Chernobyl accident.²⁴⁶ Similarly, no international legal claims were filed against Switzerland for damages caused by the 1986 Sandoz spill of toxic chemicals into the Rhine river, despite possible Swiss violations of a treaty providing for adjudication of all disputes.²⁴⁷ Although many regional and global environmental agreements contain provisions for arbitration or judicial settlement of disputes on an optional basis, to date "there are no known cases in which any of these provisions were invoked or used."²⁴⁸

This reluctance to adjudicate environmental issues stems, in part, from political considerations. At times, nations are simply unwilling to cede decision-making authority over environmental issues to adjudicatory bodies. Thus, for example, in 1970 Canada enacted the Arctic Waters Pollution Prevention Act. This law raised a number of important and complex questions regarding then unsettled doctrines of the international law of the sea.²⁴⁹ However, the Canadian government excluded international legal disputes arising out of the operation of the Act from the Court's compulsory jurisdiction.²⁵⁰ Similar unilateral actions continue. For example, Poland's recent acceptance of the Court's compulsory jurisdiction expressly excludes cases involving "disputes with regard to pollution of the environment"²⁵¹

Even if jurisdiction exists, strategic calculations may dissuade a state from pursuing adjudication of an environmental claim. In addition to the

246. See, e.g., PHILIPPE J. SANDS, *CHERNOBYL: INTERNATIONAL LAW AND COMMUNICATION* 26-30 (1988).

247. See *Developments: International Environmental Law*, *supra* note 222, at 1499. Although no legal claims arising out of the Persian Gulf War have been filed with the Court, both Kuwait and Iraq have submitted claims for compensation due to environmental damage to the U.N. Compensation Commission. See *Kuwait, Iraq Submit Rival Claims for Compensation from Gulf War Damage*, 16 Int'l Env'tl. Rep. (BNA) 593 (Aug. 11, 1993).

248. 2 AGENDA 21, *supra* note 93, at 754.

249. Significant legal issues raised by this Act included questions regarding "the legal regime of Arctic waters, the concept of contiguous zones, the status of waters within archipelagoes, and the doctrines of innocent passage and international straits." Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 2 (1970).

250. Canada withdrew jurisdiction over "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, Apr. 7, 1970, 9 I.L.M. 598, 599. This declaration was later withdrawn. Canada: Acceptance of I.C.J. Compulsory Jurisdiction with Regard to Disputes Arising out of Jurisdictional Claims, Sept. 10, 1985, 24 I.L.M. 1729.

251. ". . . unless the jurisdiction of the International Court of Justice results from treaty obligations of the Republic of Poland." Renata Szafarz, *Poland Accepts the Optional Clause of the ICJ Statute*, 85 AM. J. INT'L L. 374 (1991).

foreign policy risks associated with any international litigation,²⁵² a nation that is a pollution victim may forego bringing suit because, on other occasions, that nation may be a source of pollution. Thus, West Germany may have refrained from pursuing international legal remedies against Switzerland after the Sandoz spill because Germany "has been responsible for at least as many toxic spills as Switzerland."²⁵³ Similarly, the U.K. may have been dissuaded from filing claims against the Soviet Union following the Chernobyl accident because of "outstanding disputes regarding acid rain in Scandinavia, contamination of the Irish Sea by nuclear waste from the Windscale/Sellafield nuclear plant, and alleged damage to Australian territory from nuclear tests carried out by the United Kingdom in the 1950's."²⁵⁴

C. Adjudication of International Environmental Disputes: Doctrinal and Procedural Impediments

Even if the political impediments outlined above are overcome, a variety of doctrinal and procedural impediments remain to the adjudication of international environmental disputes. Most importantly, the adjudication of such disputes is significantly hampered by the relatively undeveloped state of international environmental law and by the Court's restrictive procedural requirements.

1. Pervasive Uncertainties in the Substantive Law

"[C]ustomary international environmental law is in an embryonic state of development, and although treaties are numerous, they provide only islands of rules in a sea of vague general principles and custom."²⁵⁵ As a result, parties are unable to predict, with any degree of certainty, the substantive law that would be applied to, or the outcome of, a potential international environmental adjudication.

For example, the general principle governing international environmental responsibility is relatively clear: "States have . . . the responsibility to ensure that activities within their jurisdictions or control do not

252. See e.g., Steven C. McCaffrey, *Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Study*, 19 U.W. ONT. L. REV. 35 (1981).

253. Aaron Schwabach, Note, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 ECOLOGY L.Q. 443, 470 (1989).

254. Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 406 (1989).

255. Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L L. 247, 252 (1986).

cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."²⁵⁶ However, the scope of this responsibility is ill-defined. The principal problem arises from the juxtaposition of this responsibility and the apparently contradictory "sovereign right" of nations "to exploit their own resources pursuant to their own environmental policies."²⁵⁷ Harmonizing these two principles legally has proven to be frustratingly elusive. As a group of legal experts convened by the U.N. Environment Programme (UNEP) concluded, "an obligation to protect the environment exist[s] in international law, but . . . its content [is] not established."²⁵⁸

Moreover, a number of important subsidiary questions remain unanswered. Most significantly, substantial debate continues as to whether this principle imposes a strict liability or a fault based standard on States.²⁵⁹ Although a handful of international environmental treaties expressly address liability issues,²⁶⁰ this topic is so contentious that several international environmental treaties simply avoid any determination of whether a breach of the treaty entails liability.²⁶¹ A great many other treaties neatly sidestep the question of liability by providing that the

256. Stockholm Declaration, *supra* note 43, prin. 21.

257. *Id.* This sovereign right "is understood in the context as a code for each nation's right to do with its environment whatever it wishes, without having to answer for its internal effects internationally." STONE, *supra* note 29, at 35.

258. *Report of the Group of Experts on Liability for Pollution and Other Environmental Damage and Compensation for Such Damage*, U.N. Doc. UNEP/WG.818, at 4 (1977).

259. *See, e.g.*, Thomas Gehring & Markus Jachtenfuchs, *Liability for Transboundary Environmental Damage: Towards A General Liability Regime?*, 4 EUR. J. INT'L L. 92 (1993); Sanford E. Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?*, 30 HARV. INT'L L.J. 311 (1989); ALLEN SPRINGER, *THE INTERNATIONAL LAW OF POLLUTION* 130-34 (1983); BIRNIE & BOYLE, *supra* note 3, at 139-49. Some argue that a strict liability standard is simply impractical given the widespread nature of transborder pollution, and that adoption of this standard would have "to be offset by raising the threshold of what constitutes a legally actionable level of 'damage' or by putting the complainant under a stronger burden to prove that the defendant's activities were the cause of its injuries." STONE, *supra* note 29, at 63.

260. For example, the International Convention on Civil Liability for Oil Pollution Damage, *opened for signature* Nov. 29, 1969, 9 I.L.M. 45, provides for the establishment of an oil pollution compensation fund, and for limited liability of shipowners without a showing of fault; however, as a result of this provision, not a single nation has ratified this treaty. 3 AGENDA 21 & THE UNCED PROCEEDINGS 1503 (Nicholas A. Robinson ed., 1992).

Nations have accepted the principle of strict liability in the context of damage caused by space objects. Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 188. A strict liability provision is also found in the treaty between Argentina and Uruguay regarding the La Plata River. Treaty Concerning La Plata River and its Maritime Limits, Nov. 19, 1973, *reprinted* in 13 I.L.M. 251 (1975).

261. *See, e.g.*, Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, *opened for signature* Sept. 26, 1986, *reprinted* in 25 I.L.M. 1377; Convention on Long Range Transboundary Air Pollution, *opened for signature* Nov. 13, 1979, *reprinted* in 18 I.L.M. 1442; C.I.T.E.S., *supra* note 108.

parties will cooperate in the future to establish rules and procedures on liability and damages.²⁶² Similarly, UNEP's efforts to develop rules "concerning the responsibility of states and indemnification of victims of transfrontier pollution . . . [have been] unsuccessful."²⁶³ Most recently, at the Earth Summit, it was impossible to reach consensus on liability rules; the international community could do no more than call upon states to "cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage . . . to areas beyond their jurisdiction."²⁶⁴

Likewise, it is unresolved whether transboundary environmental damage must reach a certain level of gravity before it becomes impermissible under international law. The Restatement (Third) of the Foreign Relations Law provides that nations are responsible "for any significant injury" to areas beyond national jurisdiction resulting from activities within its jurisdiction or control.²⁶⁵ Other legal instruments have required

262. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 17, 1992, art. 7, *reprinted in* 3 Y.B. INT'L ENVTL. L. 703, 708 ("[t]he Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability"); Convention on Control of Hazardous Waste, *supra* note 122, art. 12; Convention for the Protection of the Natural Resources of the Environment of the South Pacific, *opened for signature* Nov. 25, 1986, art. 20, *reprinted in* 26 I.L.M. 41, 49 (parties to cooperate in future to formulate liability rules); Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, *opened for signature* Mar. 24, 1983, art. 14, *reprinted in* 22 I.L.M. 227, 231; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 13, 1972, art. 10, *reprinted in* 11 I.L.M. 1294, 1302 (parties "undertake to develop procedures for assessment of liability"). *See also* Convention on the Transboundary Effects of Industrial Accidents, *opened for signature* Mar. 17, 1992, art. 13, *reprinted in* 3 Y.B. INT'L ENVTL. L. 722, 729 (1992); Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 28, at 1451 ("the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol"); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa, *opened for signature* Jan. 29, 1991, art. 12, *reprinted in* 30 I.L.M. 775, 790 ("Conference of the Parties shall set up an ad hoc expert organ to prepare a draft Protocol setting out appropriate rules and procedures in the field of liabilities and compensation for damage resulting from the transboundary movement of hazardous waste").

263. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 62 (1991).

264. Rio Declaration, *supra* note 43, prin. 13. Even where clear liability rules have been articulated, they generally have not served to eliminate the underlying environmental problem. *See, e.g.,* Alexandre Kiss, *The Protection of the Rhine Against Pollution*, 25 NAT. RES. J. 613 (1985) (arguing that liability rules cannot prevent pollution and outlining reasons why such rules would not work at an interstate level).

265. The Restatement provides that:

[a] state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

that the injury be "substantial" or "serious."²⁶⁶ In addition to this question of the relevant standard, substantial questions exist regarding the type of interests that are protected. Does international environmental law concern itself only with the "physical consequences" of transborder environmental damage or with economic and social effects as well?²⁶⁷ What of damage to the environment itself that does not constitute a loss of property?²⁶⁸ Finally, to whom should compensation be given when the injury is to global commons resources?

The law on state attribution is likewise unfixed.²⁶⁹ Although nations may be held responsible for the acts or omissions of state organs and agencies, international pollution is often generated by private entities. There is substantial uncertainty regarding the responsibility of nations to regulate the environmental consequences resulting from the conduct of private citizens, domestic corporations, and multinational corporations.²⁷⁰ Given the paucity of cases, the circumstances under which an international tribunal would attribute the acts of such parties to the state is an open question.²⁷¹

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 601(1)(b) (1987). The Restatement further provides that a state that is "responsible to another state for violation [of the above-quoted provision] is subject to general interstate remedies . . . to prevent, reduce, or terminate the activity threatening or causing the violation, and to pay reparation for injury caused." *Id.*, § 602.

266. See *id.*, § 601, n.3.

267. See, e.g., BIRNIE & BOYLE, *supra* note 3, at 100. Recent International Law Commission drafts examining "international liability for injurious consequences arising from acts which are not prohibited under international law" focus on "physical consequences" only. *Report of the International Law Commission on the Work of its Fortieth Session*, U.N. GAOR, 40th Sess., Supp. No. 10, at 11, 25. See also Stephen C. McCaffrey, *Current Development: The Fortieth Session of the International Law Commission*, 83 AM. J. INT'L L. 153 (1989).

268. See Sands, *supra* note 254, at 407; SPRINGER, *supra* note 259, at 136-37. There is significant debate concerning the effect of the *Trail Smelter* arbitration award on this issue. *Trail Smelter Arbitration* (Can. v. U.S.), 13 R.I.A.A. 1938 (1949). Compare Alfred Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 273 (1971) (*Trail Smelter* precludes "international responsibility . . . for acts of pollution not giving rise to tangible monetary injury") with Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 62-63 (1975) (arguing for broader set of compensable interests).

Developments in the aftermath of the Persian Gulf war may shed light on this issue. U.N. Security Council Resolution 687, establishing the cease fire, permits claims for injuries to the environment arising out of Iraq's invasion and occupation of Kuwait. U.N. Sec. Coun. Res. 687, adopted April 3, 1991, *reprinted in* 30 I.L.M. 847. ("Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources . . .").

269. See, e.g., SPRINGER, *supra* note 259, at 128-29.

270. See, e.g., McCaffrey, *supra* note 267.

271. See, e.g., BRIAN D. SMITH, *STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT* 30 (1988) (urging attribution where state acts in "central role" in a commercial enterprise).

Finally, a successful litigant will likely receive inadequate relief. International tribunals rarely grant injunctive relief or punitive damages.²⁷² Likewise, compensation may not be awarded for environmental damage that does not constitute a loss of property.²⁷³

There is little doubt that the lack of well-defined legal standards and the inadequacy and uncertainty of relief act as substantial bars to adjudication of international environmental issues. "In a subject where legal rules are still developing, and underlying consensus not yet fully established, the role of adjudication is likely to be limited."²⁷⁴ The substantial uncertainty regarding the relevant legal norms is, to a certain extent, self-perpetuating. Just as the numerous unanswered legal questions contribute to the reluctance to bring such cases to the Court, the lack of environmental cases affords the Court little opportunity to clarify the law in this area.²⁷⁵ These doctrinal impediments make it unlikely that adjudication will become the international community's preferred mechanism for the resolution of trade-environment conflicts.

2. Procedural Impediments to International Environmental Adjudication

Environmental adjudication in the ICJ has likewise been hampered by certain procedural doctrines. The most significant of these is the Court's stringent standing requirements.

Many contemporary international environmental issues — including many trade-environment conflicts — involve harm to shared or global commons resources. This phenomenon raises the legal issue of whether any particular nation has standing to complain of such harm. Cases involving harm to global commons resources arguably involve a breach of international obligations *erga omnes* which "[b]y their very nature . . . are the concern of all States."²⁷⁶ The ICJ has indicated that, with respect

272. See, e.g., *Lusitania Case (U.S. v. Ger.)*, 7 R.I.A.A. 32, 40 (1926) ("[C]ounsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another."); BIRNIE & BOYLE, *supra* note 3, at 150-51 (suggesting that the ICJ "cannot grant injunctions or prohibitory orders restraining violations of international law"); CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 69-74 (1987) (punitive damages generally not awarded). *But see I'm Alone Case (Can. v. U.S.)*, 3 R.I.A.A. 1609, 1618 (1933, 1935) (awarding \$25,000 as "material amend in respect of the wrong" suffered by Canada).

273. STONE, *supra* note 29, at 63.

274. BIRNIE & BOYLE, *supra* note 3, at 184.

275. Leo Gross, *Conclusions*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 727, 746 (Leo Gross ed., 1976). See also RICHARD BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* (1981).

276. *Barcelona Traction Case*, *supra* note 242, at 32.

to obligations *erga omnes*, "all states can be held to have a legal interest in their protection."²⁷⁷ Nevertheless, the Court has yet to grant standing on this basis,²⁷⁸ rather, the Court has strictly limited standing to states that are directly injured by the acts at issue. Thus, absent a substantial change in the Court's jurisprudence, it appears that no individual state possesses standing to sue when environmental harm is inflicted upon a global commons resource.²⁷⁹ For similar reasons, no state will have standing to protect the interests of future generations²⁸⁰ or nonhuman species that may be harmed by environmentally destructive practices.²⁸¹

Moreover, the Court's statute provides that "[o]nly states may be parties in cases before the Court."²⁸² Nongovernmental organizations (NGOs), often the most zealous advocates of international environmental interests, have no direct access to the Court. Entities that will be directly affected by new environmental standards, such as private individuals and multinational corporations, likewise have no direct access to the Court.²⁸³

277. *Id.* The Court has discussed the principle of obligations *erga omnes* in different contexts. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (Advisory Opinion May 28) (human rights); *Nuclear Tests Cases (Austl. v. Fr.; N.Z. v. Fr.)*, 1974 I.C.J. 253, 269; 457, 474 (Judgment Dec. 20) (unilateral undertaking addressed to entire international community).

278. A similar issue was raised in the controversial *South West Africa Cases*. *South West Africa Cases*, *supra* note 243. In this consolidated action, Ethiopia and Liberia had filed suit alleging that, in its administration of South West Africa, South Africa had violated obligations due to the international community as expressed in the Covenant of the League of Nations and the Mandate Agreement. Both Ethiopia and Liberia had been members of the League of Nations. Nevertheless, over strong dissents by Judge Jessup and Judge Tanaka, the Court concluded that these nations lacked standing to raise these issues because neither their own interests, nor those of their nationals, were affected. *Id.* at 388 (dissenting opinion of Judge Jessup); *id.*, at 252 (dissenting opinion of Judge Tanaka).

For a further discussion of the concept of *erga omnes* obligations, see Schachter, *supra* note 245, at 195-202. See also EDWARD McWHINNEY, *THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS* 17 (1979); Fredrick Kirgis, *Standing to Challenge Human Endeavors that Could Change the Climate*, 84 AM. J. INT'L L. 525 (1990).

279. *But see* Jonathan I. Charney, *Third State Remedies for Environmental Damage to the World's Common Spaces*, in *INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM* 149 (Francesco Francioni & Tullio Scovazzi eds., 1991) (arguing international law provides limited remedies to nations when environmental harm occurs in global common areas).

280. See, e.g., EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY & INTERGENERATIONAL EQUITY* (1989).

281. The seminal discussion of issues raised by the question of standing for non-human species is in CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING: TOWARDS LEGAL RIGHTS FOR NATURAL OBJECTS* (1984). An interesting, recent application of Stone's arguments is found in Sudhir Chopra & Anthony D'Amato, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1992).

282. ICJ STATUTE, *supra* note 25, art. 34. This limitation also applies to cases heard before Chambers of the Court.

283. See generally Kiss & Shelton, *supra* note 263, at 40, 49; PAUL GROMLEY, *HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION* 48-50 (1976); David Scott Rubinton, *Toward a Recognition of the Rights of Non-States in International*

Many have argued that environmental NGOs, in particular, should be permitted to appear before the Court.²⁸⁴ These organizations "have the resources, the energy and the interest to participate in the international legal process, and unlike governments are not hindered by often extraneous politically self-interested considerations in determining whether to invoke the law."²⁸⁵ Even Judge Jessup, a strong advocate of international environmental adjudication before the Court, recognized the "folly" of hearing such disputes without input from "those entities which will be as much concerned with enforcement of the new [environmental] standards as will governments of States."²⁸⁶

However, giving NGOs the right to appear as parties before the Court would require a significant, and unlikely, revision of the ICJ Statute. Given the significant diversity in the international environmental NGO community,²⁸⁷ it would also raise the possibility of multiple environmental parties and intervenors advocating conflicting positions.²⁸⁸ "[P]ermitting multiple claimants may render settlement of a dispute more difficult or lead to measures disproportionate to the violation or injury."²⁸⁹

In addition to standing, other procedural doctrines can hinder adjudication of international environmental issues. The *Nuclear Tests Cases* illustrate how this can occur. In this consolidated action, Australia and New Zealand claimed that they were suffering the effects of radioactive fallout resulting from France's nuclear testing in the atmosphere over the Pacific.²⁹⁰ Plaintiffs also argued that the tests violated international law

Environmental Law, 9 PACE ENVTL. L. REV. 475 (1992). In contrast, domestic environmental law often provides access to interested individuals and groups. See JEFFREY G. MILLER & ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1987), and other international tribunals permit NGOs to file actions. BIODIVERSITY AND INTERNATIONAL LAW 142, 160-61 (Simone Bilderbeck ed., 1992) (International Water Tribunal permits NGOs to bring cases against States).

NGOs and private citizens likewise have no means of ensuring indirect access to the Court, as States are under no international legal obligation to press their citizens' claims before an international tribunal.

284. Sands, *supra* note 254, at 412; Comment, *Resolving International Environmental Disputes Between Private Parties and States*, 1 EMORY J. INT'L DISP. RESOL. 81, 96 (1986). See also Kirgis, *supra* note 278, at 25; John T. Miller, Jr., *Intervention in Proceedings Before the International Court of Justice*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 275, at 550.

285. Sands, *supra* note 254, at 411-12.

286. Jessup, *supra* note 220, at 210.

287. The recent NAFTA debate provides a well-publicized example of the divergent NGO views on trade-environment issues. See, e.g., *Environmental Groups Line Up to Oppose, Support Trade Pact*, Int'l Env'tl. Daily (BNA) (Sept. 16, 1993).

288. BIRNIE & BOYLE, *supra* note 3, at 157.

289. *Id.*

290. *Nuclear Tests Cases*, *supra* note 277, at 253, 257. For a critique of the Court's

because they caused pollution of the South Pacific, a global commons area.²⁹¹ The cases posed important questions regarding state responsibility for transborder pollution.

However, France refused to litigate this issue. The French argued that the Court lacked jurisdiction over the matter. After these jurisdictional objections were rejected, France refused to appear before the Court.²⁹² The Court issued an Interim Order of protection, which France ignored.²⁹³ Thereafter, France announced that it would halt its atmospheric testing of nuclear weapons. Relying on these unilateral declarations, the Court declared the case moot.²⁹⁴ The Court thus never reached the merits of plaintiffs' claims.²⁹⁵

In short, the substantial limitations on the ability to pursue claims based on damage to community interests create serious impediments to the adjudication of international environmental conflicts.

D. Adjudication of International Environmental Disputes: Structural Impediments

Although it might be possible to overcome the political and doctrinal impediments to the adjudication of international environmental disputes, there are a series of deeper and more significant impediments. These impediments, which result from the particular nature of international environmental issues, render such issues peculiarly unamenable to judicial resolution.

handling of this action, see TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 100-18 (1983); Alfred Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977).

291. Nuclear Tests Cases, *supra* note 277, at 103-04.

292. See Notification Received Jan. 10, 1974, 907 U.N.T.S. 129.

293. See Jerome B. Elkind, *French Nuclear Testing and Article 41—Another Blow to the Authority of the Court?*, 8 VAND. J. TRANSNAT'L L. 39, 40-41 (1974); W.K. Ris, Jr., Comment, *French Nuclear Testing: A Crisis for International Law*, 4 DENV. J. INT'L L. & POL'Y 111, 111-12 (France began new series of atmospheric tests barely one month after the ICJ judgment).

294. Nuclear Tests Cases, *supra* note 277, at 472-78. For more on the holding that a state's unilateral declarations may be binding, compare Thomas Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Tests Cases*, 69 AM. J. INT'L L. 612 (1975) with Rubin, *supra* note 290.

295. In dissent, Judge de Castro addressed the argument that nuclear testing violated a state's obligation not to use its territory for acts contrary to the rights of other states. Nuclear Tests Cases, *supra* note 277, at 389. For a criticism of the Court's failure to address the substantive issues presented in its cases, see John Dugard, *The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision*, 16 VA. J. INT'L L. 463 (1976).

First, international environmental issues often do not present the sort of "bilateral" dispute that is well-suited for adjudication. The "polluters" in the case of climate change or ozone depletion for example, include all the nations of the earth. All nations would likewise be potential plaintiffs, because all are affected. It would be impossible to prove the harms caused by any particular state and nearly as difficult to collect awards from over 170 nations. Traditional litigation simply does not lend itself to the resolution of this type of dispute.²⁹⁶

However, the problem involves more than simply the number of parties involved. The core structural impediment to adjudication is that most global environmental issues are "polycentric" or "many centered."²⁹⁷

296. This is *not* an argument that the Court should avoid or is incapable of resolving disputes that have large political components. See Notification of U.S. Withdrawal, reprinted in Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 79 AM. J. INT'L L. 431, 439-41 (1985) (U.S. argument that exercise of jurisdiction in Nicaragua case represents "an overreaching of the Court's limits . . . and a risky venture into treacherous political waters"). Disputes between nations will invariably have a political dimension. However, the Court should not decline to exercise jurisdiction over the *legal* aspects of an international dispute simply because the dispute in question has other aspects. "[L]egal disputes between sovereign States by their very nature are likely to occur in political contexts and often form only one element in a wider and longstanding political dispute between the States concerned [To refuse to adjudicate such disputes] would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." United States Diplomatic and Consular Staff in Tehran, *supra* note 237, 1980 I.C.J., at 20.

Rather than focus on the political aspect of disputes, the argument is that adjudication is not an apt method for the resolution of conflicts that involve a large number of highly interrelated and interdependent technical and distributional issues.

297. As Lon Fuller explained:

We may visualize [a polycentric] situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation . . . each crossing of strands is a distinct center for distributing tensions.

Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1979) [hereinafter Fuller, *Forms and Limits*]. See also Lon Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L L. 1 [hereinafter Fuller, *Adjudication*]; Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3 (1963) [hereinafter Fuller, *Collective Bargaining*].

Fuller borrowed this term from Michael Polyani. See Fuller, *Adjudication*, *supra*, at 3; Fuller, *Collective Bargaining*, *supra*, at 33 n.26. See also MICHAEL POLYANI, *THE LOGIC OF LIBERTY* 170-84 (1951). The term "polycentric" is also associated with a historical narrative technique used by Thomas Carlyle to address the fact that whereas "all Narrative is, by its nature, of only one dimension," in actual history "every single event is the offspring not of one, but of all other events, prior or contemporaneous, and will in its turn combine with all others to give rise to new." Thomas Carlyle, *On History*, in COMPLETE WORKS, at 88-89 (H.D. Trail ed., vol. 27 1901); PHILIP ROSENBERG, *THE SEVENTH HERO* 76 (1974); JOHN ROSENBERG, *CARLYLE AND THE BURDEN OF HISTORY* 44 (1985).

In addition to a multiplicity of actors, these issues generally present a number of complex, interrelated problems. A complex interrelationship is created between "the processes involved and the resultant impacts, the often multiple-source and cumulative causes, and the effective solutions."²⁹⁸ As a result, the resolution of any one particular issue often has vast spillover effects.

In addition, international environmental issues typically involve complicated questions at the edges of our scientific knowledge and technological capabilities. Uncertainty about central underlying facts may hinder the principled adjudication of particular conflicts in several ways. For example, states may recognize a shared level of risk but lack sufficient information to quantify the precise level of risk they face, as in the climate change context. Alternatively, limited factual knowledge can lead to substantial uncertainty over the most effective policy response to a recognized threat. Thus, nations may recognize that overfishing may endanger a marine fishery but be unable to quantify or allocate the maximum level of sustainable catch. Finally, new technologies, such as auto emission systems or fishing nets, can significantly alter the environmental impact of a particular activity.

In short, rapidly changing scientific knowledge often suggests new understandings of and technological approaches to global ecological problems. Developing technological capacities in turn strongly affect our ability to engage in environmental destruction and environmental protection. Courts are ill-equipped to choose from among a number of conflicting scientific explanations of a particular global environmental phenomenon. This significant scientific uncertainty often invites conflicting interpretations and enlarges the policy component of any particular dispute.²⁹⁹ Courts often lack both the fact-finding abilities and specialized expertise necessary to resolve disputes in subject areas marked by rapidly developing science and technological change.³⁰⁰

298. Cooper, *supra* note 255, at 251.

299. *Id.*

300. Questions regarding the Court's ability to handle complex scientific and environmental issues are not wholly speculative. One of the U.S.'s legal advisers in the *Gulf of Maine Case* complained that "the marine environment is . . . too complex for international courts to come to grips with." *Id.* at 263 (quoting David Colson, Assistant Legal Adviser, Department of State).

The Court can seek outside assistance with scientific or technical issues. The Court can request that "an individual, body . . . or other organization" carry out an inquiry or render an expert opinion. ICJ STATUTE, *supra* note 25, art. 50. Unfortunately, this power has rarely been exercised. J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 132 (2d ed. 1991). For example, in the *Gulf of Maine Case*, a Chamber of the Court did engage a technical expert. The expert's report did not assist the Chamber in reaching its decision; rather, the Chamber implemented the decision by means of a technical description. Cooper, *supra* note 255, at 260.

In addition, global environmental issues typically present acute and contentious distributional issues. As the negotiations over, for example, ozone depletion, climate change, and biodiversity illustrate, global environmental issues turn, in large part, on disputes regarding who should pay for what. Given the lack of controlling legal principles in this area, courts would have difficulty generating principled responses to these distributional issues.

The difficulties associated with adjudication of polycentric disputes are particularly salient in trade-environment conflicts. Given the interdependence of the global economy and the global ecosystem, trade-environment issues are irreducibly polycentric. The use or discontinuance of trade measures have economic, social, and ecological spillover effects that courts cannot easily determine. They also involve issues on the frontiers of science. Finally, they have strong distributional elements; a decision to uphold or strike an environmental trade measure, such as the U.S. ban on Mexican tuna, is in large part a decision over who will bear the costs of environmental protection (or degradation).³⁰¹ These features combine to make trade-environment conflicts uniquely unsuited for adjudication.³⁰²

The conclusions of a U.N. study of international environmental issues can be easily applied to trade-environment conflicts:

[Environmental] problems frequently resemble traffic jams more than automobile accidents: there are many participants rather than just one or two; the cause of the problem lies in the individual decisions of these many to do what, except for the existence of so many others, might be acceptable rather than in a single error or unlawful act; and there often exist thresholds below which no problem would exist. Traffic lights, rules of the road, tolls and many other means of control that do not require the assignment of responsibilities may not work well, but they are surely more useful in controlling traffic than the imposition of liability on each driver for lost time and frayed nerves caused to others.³⁰³

Under Article 30, the Court can also appoint "assessors," presumably individuals with specialized technical competence, to participate in the Court's deliberations. ICJ STATUTE, *supra* note 215, art. 30. However, this authority has never been invoked.

301. As a general principle, a nation should not be permitted to transfer the costs of its pollution to other nations. *See, e.g.*, Stockholm Declaration, *supra* note 43, prin. 21. Trade-environment conflicts raise, in part, the issue of whether a nation can transfer the costs of its environmental protection policies to other nations. *See, e.g.*, Dunoff, *supra* note 25, at 1406-07.

302. Fuller, *Forms and Limits*, *supra* note 297, at 400.

303. UNITAR, *International Co-operation for Pollution Control*, RESEARCH REPORTS 9 1972, at 25, U.N. Sales No. E.75.XV.RR/9, *quoted in* AIDA LUISA LEVIN, *PROTECTING THE HUMAN ENVIRONMENT* 29 (1977).

Some may argue that this article has overstated the "polycentric" elements of trade-environment disputes or the relative polycentricity of such disputes when compared with other international disputes. In essence, the argument is that since other types of international disputes, such as investment disputes or boundary disputes that have polycentric elements, are amenable to adjudication, trade-environment disputes should be as well.

International environmental issues differ in significant ways from other international issues, which are often defined and limited by notions of state sovereignty.³⁰⁴ This concept, which is one of the cornerstones of international law, is particularly inappropriate in the international environmental area; natural ecosystems and pollution alike do not respect national boundaries or the commands of sovereigns.³⁰⁵ The trade-environment complex of issues *is* unlike other environmental issues. While other international environmental issues, such as climate change, biodiversity loss, and deforestation, are surely complex and difficult at least the issues are clearly defined.

Trade on the other hand, cuts across *all* th[ese] problems: it plays a central role in deforesting Malaysia and accelerating extinctions of plants and animals in Costa Rica. It exacerbates climate change by increasing the energy requirements of goods transported over long distances. . . . [Trade-environment issues are] a political minefield that reaches into virtually every country, industry and ecosystem.³⁰⁶

The claim that trade-environment disputes are polycentric is *not* equivalent to a claim that courts are absolutely incapable of addressing them. Rather, it supports an argument that they are ill-suited to doing so. To borrow Fuller's example, a sledgehammer is well suited to driving stakes and will serve in a pinch for cracking nuts, but can be considered useless when it comes to opening cans.³⁰⁷ However, if the need is great enough, where any solution is preferable to no solution at all, a sledge-

304. Sovereignty refers to the basic legal status of a nation that is not subject, within its territorial jurisdiction, to the governmental or judicial jurisdiction of a foreign nation or to foreign law other than public international law. Helmut Steinberger, *Sovereignty*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 408 (Rudolph Bernhardt ed., 1987).

305. For more on the relationship between international environmental issues and state sovereignty, see Dunoff, *Resolving Trade-Environment Conflicts*, *supra* note 43.

306. HILARY F. FRENCH, *COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT* 5 (1993).

307. Fuller, *Adjudication*, *supra* note 297, at 1.

hammer can be used to open cans. However, the result may be exceedingly messy.³⁰⁸

Adjudication can likewise be used to provide some kinds of responses to even the most polycentric problems. The point is that courts, like sledgehammers, can effectively solve a limited set of problems. A rough proportionality principle is at work here; the more polycentric the dispute, the less equipped the courts are to resolve it.³⁰⁹

Polycentric elements are, no doubt, present in almost all problems resolved by adjudication. The issue is one of degree; "it is a question of knowing when the polycentric elements have become so significant that the proper limits of adjudication have been exceeded."³¹⁰ For the reasons set out above, this article argues that trade-environment disputes stretch these limits beyond their breaking points.³¹¹

But even apart from their polycentric aspects, international environmental disputes are generally ill-suited for adjudication. As a result of changing conditions, global environmental issues often require continuous monitoring, ongoing management, and periodic recalibration of policies and responses. This presents a mismatch between the nature of the issues and the nature of adjudication. International tribunals typically do not engage in the sort of ongoing monitoring and management that global environmental issues require, and these issues typically do not lend themselves to the "all or nothing" solution that adjudication can provide.³¹²

There are other shortcomings to international litigation. Much litigation, including international litigation, is eventually settled out of court.³¹³

308. *Id.*; James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1539 (1973).

309. Henderson, *supra* note 308, at 1539. Conversely, as Professor Henderson noted, requiring courts to address polycentric disputes poses threats to the integrity of the adjudicative process. *Id.* (sensible resolutions of polycentric disputes bear little, if any, relation to the legal issues presented).

310. Fuller, *Form and Limits*, *supra* note 297, at 398.

311. To say that a dispute is polycentric, and therefore not easily amenable to adjudication, is not to say that it defies rational solution. *Id.* at 388-89. Adjudication is, of course, simply one type of dispute resolution process. Other processes are well suited to solving polycentric problems. Diplomacy and negotiations, as urged below, are among the most frequently used techniques for resolving polycentric problems of resource allocation. *Id.* at 399-400.

312. Cooper, *supra* note 255, at 262.

313. *See, e.g.*, *Passage through the Green Belt (Fin. v. Den.)* 1992 I.C.J. 348 (Sept. 10) (discontinuation of case following settlement by the parties). This is true for environmental disputes as well. For example, after the Court determined the admissibility of the complaint in *Certain Phosphate Lands in Nauru (Nauru v. Austl.)* 1992 I.C.J. 240 (Preliminary Objections, Judgment June 26), the parties reached an out-of-court settlement. For more on Nauru's claims, see Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993).

In a world of bilateral litigation, "one nation's pollution complaint is likely to be settled by reference to its neighbor's own pollution complaint — plus a few items of contention the diplomats regard as more pressing: trade, currency, and military assistance."³¹⁴ However, the settlement any two states may reach regarding a particular international environmental problem may be wholly inadequate from the perspective of other nations who are not parties to the litigation but who are affected by the activities of the litigants.³¹⁵ Thus, if two nations resolve a transfrontier pollution problem by mutually agreeing to dump their wastes in the high seas, the dispute may be settled but hardly in a manner that advances the interests of the international community.³¹⁶

Finally, the adversarial nature of international adjudication is most successful when addressing situations where an alleged violation of international law has already taken place and environmental injury has resulted. However, international environmental law has focused less on compensating for past wrongs than on preventive and protective mechanisms. As this area of the law strives to prevent the environmental harm in the first place, the proper focus ought to be on dispute avoidance rather than dispute settlement.

E. A New Court for the Environment?

The combined force of the factors outlined above has produced an almost barren history of international environmental adjudication, with little prospect for dramatic change. Implicitly acknowledging this reality, a number of scholars and politicians have called for new adjudicatory institutions and, in particular, for a new International Court for the Environment.³¹⁷

Perhaps the most detailed and influential of these proposals was made at the International Congress convened at the National Academy of Lincei

314. STONE, *supra* note 29, at 64.

315. *Id.*

316. Bilder, *Settlement of Disputes*, *supra* note 222, at 163.

317. See, e.g., TROLLDALEN, *supra* note 214, at 20; *Mercosur Presidents Discuss Common Position for June's Earth Summit*, Latin Amer. Reg. Rpts., Mar. 12, 1992 available in LEXIS, NSAMER Library, LAN File (Argentina's President supports proposal by Uruguay's President for "an international court to deal exclusively with environmental issues"); *Meeting in Mexico Produces Call for World Environmental Court*, Global Warming Network—GWN Online Today, Sept. 16, 1991 (international meeting of environmentalists calls for formation of international court of environment); Cameron & Zaelke, *supra* note 217, at 285 (calling for creation of new International Environmental Court if ICJ does not evolve in consideration of international environmental issues); BIODIVERSITY AND INTERNATIONAL LAW, *supra* note 283, at 142 (calling for environmental tribunal if ICJ does not evolve); *International Environmental Court Needed to Handle Disputes*, EC Official Says, Int'l Envtl. Daily (BNA) (June 28, 1991).

in Rome in 1989. The Congress issued a final report and recommendation that expressly called for the creation of a "Convention" that would "establish the principle of an individual right to the environment" and for the establishment of "an International Court for the Environment as part of the United Nations."³¹⁸ The Congress called for this Court to be open to States and private citizens, and for the Court to "ha[ve] the power to impose itself on all individuals and countries because it judges in the name of the international community — i.e., for the whole of mankind today and for future generations."³¹⁹

Although proposals such as this may deserve close attention, it is unlikely that a new, international environmental court will be formed in the near future. First, there appears to be only a small constituency that wishes to see adjudication of international environmental disputes. The initiative for the founding of such a court must come from the political leaders whose freedom to maneuver would be most threatened by such a court.³²⁰ This is an unlikely scenario. In fact, according to a European Parliament Deputy present at the Earth Summit, "the question of an international, environmental court was taken off the agenda in Rio de Janeiro because the different states rejected the idea."³²¹

In addition to the "considerable time and effort to establish a new court system able to handle the dynamics of environmental law,"³²² there is little reason to think that the proposed new court would avoid the problems that have plagued the ICJ. The mere act of creating a new court would do little to address the historical reluctance to relinquish (or appear to relinquish) "sovereignty" by agreeing to binding third party dispute resolution procedures by international institutions. As one leading commentator concluded, "[t]he characteristic distaste of states for judicial settlements is likely to prevail in future international environmental regimes."³²³

318. See Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL. L. 321 (1990) [hereinafter Postiglione, *Setting Up an ICE*]. See also Amedeo Postiglione, *An International Court for the Environment?*, 23 ENVTL. POL. & L. 73 (1993); Audra E. Dehan, *An International Environmental Court: Should There Be One?*, 3 TOURO J. TRANSNAT'L L. 31 (1992) (endorsing the International Congress' proposal).

319. Postiglione, *Setting Up an ICE*, *supra* note 318, at 325.

320. STONE, *supra* note 29, at 60.

321. *Parliamentarians Pledge Aggressive Action on Climate Change, Other Earth Summit Issues*, Int'l Env'tl. Daily (BNA) (Dec. 1, 1992).

322. TROLLDALEN, *supra* note 214, at 20.

323. Abram Chayes & Antonia H. Chayes, *Adjustment and Compliance Processes in International Regulatory Regimes*, in PRESERVING THE GLOBAL ENVIRONMENT 280, 287 (Jessica Tuchman Mathews ed., 1991). See also TROLLDALEN, *supra* note 214, at 20.

In addition, with respect to trade-environment disputes, the proposed environmental world court might present a mirror image of the institutional myopia that undermines attempts by the GATT or NAFTA to resolve fairly disputes involving conflicting obligations under international trade and environmental law. A body designed primarily to protect environmental interests, like a body designed primarily to advance trade interests, will be systematically biased in its consideration of disputes that involve both trade and environmental interests.

Finally, even if the new court has liberalized standing rules and were to announce a well developed set of rules governing legal responsibility and liability, adjudication would still be inappropriate. Even a specialized court would be ill-equipped to address the polycentric nature of international environmental issues. Moreover, it is unlikely that an adjudicatory body would possess the management authority and expertise necessary to oversee environmental practices on a continuing basis.

This argument does not, of course, demonstrate that adjudication of international environmental issues is never appropriate. Rather, it attempts to outline the political, doctrinal, and structural reasons why adjudication has not been and is unlikely to be the international community's primary means of resolving global environmental issues. For this reason, environmentalists should look toward other international fora for the resolution of global environmental conflicts.

III. FROM CONFRONTATION TO COOPERATION

Given the inability of existing and proposed institutions to resolve sensibly trade-environment conflicts, and the increasing frequency of such disputes,³²⁴ it is imperative to develop a different forum to consider these conflicts. In calling for a new forum to consider trade-environment disputes, this article joins others that recognize that a new and different institution needs to emerge to "serve as an honest broker to settle disputes

324. There is widespread consensus that trade-environment conflicts are "on the rise." ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE STATE OF THE ENVIRONMENT (1991); SCHMIDHEINY, *supra* note 19, at 81. There is congressional concern that elements of President Clinton's climate change action plan may be challenged as an unfair trade barrier. See *Energy Official Says Pact Would Enhance Clinton's Action Plan On Climate Change*, Int'l Trade Daily (BNA) (Nov. 17, 1993). The E.U. is challenging U.S. fuel economy standards as impermissible environmental trade measures. *European Challenge*, *supra* note 75. For recent examples of such issues in the context of the European Union, see *Threat of Split in Union Looms in Talks of Packaging Directive*, Int'l Envtl. Daily (BNA) (Dec. 7, 1993) (probable challenge to strict recycling laws of Germany, the Netherlands, and Denmark as inconsistent with trade provisions of the Treaty of Rome); *EC Negotiators Reject Several Laws As Stricter than Community Standards*, Int'l. Envtl. Daily (BNA) (Dec. 3, 1993) (EC negotiators reject several Swedish environmental laws that are more rigorous than EC laws).

. . . [or] the response to the planet's ecological problems will remain unfocused, ineffective and insufficient."³²⁵

The drawbacks identified above to using trade bodies or adjudicatory bodies to resolve trade-environment conflicts suggest a number of institutional features that would facilitate the successful resolution of these conflicts.³²⁶ Trade-environment conflicts should be considered by an institution with a mandate to further both economic and ecological interests. These conflicts should be considered in a nonbinding forum, using a consultation, negotiation, and consensus-building approach. Particular trade-environment conflicts, such as the Tuna-Dolphin Panel Report, should serve as the vehicle for a multilateral discussion of the underlying interests at stake. Multilateral discussions over any particular dispute would "represent not an end point, but rather a punctuation mark in an ongoing process of negotiation."³²⁷

Over time, these negotiations could serve several simultaneous purposes: to coordinate policy, progressively develop legal norms, supervise the implementation of those norms, generate community pressure on recalcitrant nations, and resolve international conflicts of

325. Daniel C. Esty, *GATting the Greens*, 72 FOREIGN AFF. 32, 34 (Nov./Dec. 1993). There have been other calls for new international environmental institutions. See, e.g., Declaration of the Hague, Mar. 11, 1989, reprinted in 5 AM. U. J. INT'L L. & POL'Y 567 (1990); Maurice Strong, Statement as President of the World Federation of U.N. Associations at National Conference on Peacemaking and Peacekeeping: Canada and the United Nations, Halifax, Nova Scotia (June 5, 1988) (urging use of U.N. Trusteeship Council for international stewardship of global commons areas); Rt. Hon. Geoffrey Palmer, *General Debate Statement of New Zealand Government*, U.N. Doc. A/44/PV.15, at 76-77 (1989) (New Zealand proposal for Environmental Protection Council); Maurice Bertrand, *Can the United Nations Be Reformed?*, in UNITED NATIONS, DIVIDED WORLD 204-08 (H. Roberts & Benedict Kingsbury eds., 1992) (proposal for Environmental Security Council); Rt. Hon. Geoffrey Palmer, *New Ways to Make Environmental Law*, 86 AM. J. INT'L L. 259 (1992) (urging creation of International Environmental Organization within the U.N.).

326. There is a growing body of literature discussing the establishment and implementation of environmental regimes. See, e.g., Peter Haas, *Do Regimes Matter: Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377 (1989); PETER SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE (1990); GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE (Oran Young et al. eds., 1991); INSTITUTIONS FOR THE EARTH, *supra* note 3; Winfried Lang, *Diplomacy and International Environmental Law-Making: Some Observations*, 3 Y.B. INT'L ENVTL. L. 108 (1992); Lawrence Suskind & Connie Ozawa, *Negotiating More Effective International Environmental Agreements*, in INTERNATIONAL POLITICS, *supra* note 2, at 142. There have also been a number of studies on environmental conflict resolution, including Bilder, *Settlement of Disputes*, *supra* note 222. See also, TROLLEDALEN, *supra* note 214. The focus here, of course, is on the much narrower issue of institutional features appropriate to an institution focusing on trade-environment conflicts.

327. Daniel Bodansky, Commentary, *The United Nations Framework Convention on Climate Change*, 18 YALE J. INT'L L. 451, 493 (1993) (suggesting that the Climate Change Treaty signed at the Earth Summit represents one point in an ongoing process of international negotiation and accommodation).

interest.³²⁸ Addressing trade-environment conflicts in a diplomatic forum offers the promise of multilateral resolution of what are fundamentally issues involving the entire international community.³²⁹ It also invites the "negotiated application and development" of international environmental standards in this area.³³⁰ Such institutions meet the international community's needs more effectively than traditional forms of dispute resolution and are already included in a wide variety of environmental treaties.³³¹ In fact, the use of bodies with features similar to those described below has become the international community's preferred method of ensuring compliance with environmental norms.³³²

In addition, many domestic environmental commissions or councils are adopting this model. Canada, Finland, Mauritius, Netherlands, Nigeria, and Singapore have domestic legislation that provides for the participation of industry, the private sector, nongovernmental organizations, and the scientific community in national environmental bodies.³³³ These commissions and councils are increasingly adopting a "consultative and consensus-building approach" to environmental issues.³³⁴

Several institutional features would help to ensure the success of such a body.³³⁵ These features are interdependent and interact with each other

328. See generally BIRNIE & BOYLE, *supra* note 3, at 138; Alan Boyle, *Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions*, 3 J. ENV'T'L. L. 229, 230 (1991); Marc A. Levy, Robert O. Keohane & Peter M. Haas, *Improving the Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH, *supra* note 2, at 397-426 (international environmental institutions facilitate environmental protection by raising governmental concern, providing a forum for negotiations, monitoring national compliance, and offering technical assistance). For a somewhat similar proposal advocating an ongoing negotiation process in the climate change context, see David G. Victor, *How to Slow Global Warming*, 349 NATURE 451 (1991).

329. Boyle, *supra* note 328, at 230.

330. Birnie & Boyle, *supra* note 3, at 138.

331. Variants of the model this article proposes are used in the Montreal Protocol noncompliance procedure. Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/OzL.Pro.4/15, Nov. 25, 1992 (creating an "Implementation Committee" of ten Parties to consider any Party's "reservations" regarding another Party's implementation of its obligations under the Protocol). See also Montreal Protocol, *supra* note 26; C.I.T.E.S., *supra* note 108, art. 13 (institutional measures to follow in event of allegation that a party is not effectively implementing treaty); Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 28, art. 20 (establishing Committee for Environmental Protection, open to all Parties with access to scientific expertise, to provide advice and formulate recommendations regarding the implementation of the Protocol).

332. Similar approaches are also used in international institutions outside of the environmental context. See, e.g., *Officials Agree APEC To Be Market Oriented, Consensus Group*, Int'l. Trade Daily (BNA) (Nov. 17, 1993).

333. *Report of the Secretary-General*, *supra* note 230, at 9.

334. *Id.*

335. The list of institutional features outlined below does not address all of the institutional questions that would face a new international institution. In particular, it would be necessary to work out in some detail the relationship of this body to the GATT and other existing bodies

synergistically. Reinforcing one is likely to strengthen the others, while weakness on one front is likely to spill over on another. These features should include the following:

*A. An Institutional Mandate that Expressly Incorporates
Both Economic Development and Environmental Protection*

There is a simple logic to housing trade-environment conflicts in an institution designed to serve both interests; the policy response to a problem should be as broad as the sources of the problem.³³⁶ It follows that the sensible resolution of trade-environment conflicts necessarily implicates both trade and environmental policies. Thus, the institution's constitutive text must ensure that the resolution of environment and trade issues occurs within a framework in which environmental concerns are valued as highly as trade interests. The institution should seek to integrate environmentally sustainable development and economic growth.³³⁷

The failure to have such an institutional mandate can prove fatal to attempts to address trade-environment conflicts. As the GATT experience demonstrates, institutions designed to advance only one of these sets of interests cannot adequately balance the competing values implicated by trade-environment disputes. More importantly, when policy responses address only one of several interrelated variables, they often ignore policies that would achieve more efficient results.³³⁸

B. Access to Impartial Scientific and Technical Expertise

One of the most striking characteristics of international environmental law and negotiations is the critical role played by the scientific community.³³⁹ In trade-environment conflicts, credible scientific and

that consider international environmental issues, as well as defining the jurisdiction of this body in relation to the jurisdiction of these other bodies. In addition, the relationship of decisions made in the proposed body and decisions made in pre-existing bodies would need to be clarified. See, e.g., Richard H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of Other International Organizations*, 82 MICH. L. REV. 1604 (1984). The author intends to address these interesting and difficult issues in a subsequent publication.

336. See Richard Stewart & Jonathan Weiner, *The Comprehensive Approach to Global Climate Policy*, 9 ARIZ. J. INT'L & COMP. L. 83, 91 (1992) (developing similar argument in climate change context).

337. Agenda 21, calling for an "integration of environment and development concerns" to produce a "better protected and managed ecosystem and a safer, more prosperous future" is an example of such a commitment. Agenda 21, U.N. Doc. A/CONF.15.1/4, paras. 1.1 (1992), reprinted in 1 AGENDA 21 & THE UNCED PROCEEDINGS vii (Nicholas A. Robinson ed., 1992) [hereinafter 1 AGENDA 21]. See also Weiss, *supra* note 280, at 728.

338. See Stewart & Weiner, *supra* note 336, at 84.

339. An interesting general discussion of the role of science and scientists in international negotiations is found in Symposium, *Knowledge, Power and International Policy Coordination*, 46 INT'L ORG. 1 (1992).

technological information is critical for several reasons. Such information greatly facilitates an understanding of the environmental interests at stake in any particular dispute and the likely effects of the relevant environmental trade measure. It also facilitates the formation of an effective response to any particular conflict and the acceptability of a proposed solution to the affected parties.

International environmental regimes³⁴⁰ have successfully used scientific bodies to clarify similar issues on numerous occasions. For example, longstanding disputes over the type and level of risk prevented international agreement for some time in both the ozone depletion and climate change negotiations. Reports by international scientific bodies addressing these issues became authoritative statements of the environmental risks faced by the global community.³⁴¹ Once broad consensus on the underlying science was reached, nations were able to reach multilateral agreements in both these areas. In addition to clarifying the nature of the risk, scientific bodies also help to identify the type or quantity of economic activity that can occur without causing unacceptable environmental damage. For example, nations have by treaty established an International Whaling Commission³⁴² which has generated scientific estimates of the sustainable yield of whale populations.³⁴³ Based upon such estimates, the parties to the treaty agreed to limit and eventually to halt certain forms of commercial whaling.³⁴⁴

Finally, environmental regimes establish scientific bodies to keep abreast of changing environmental conditions and scientific knowledge. For example, the Climate Change Convention establishes a "Scientific

340. A regime is, broadly, "all sets of norms of behavior and of rules and policies which cover any international issue, and facilitate substantive or procedural arrangements among the States they address." S. Klein, *International Regimes*, in 9 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 202 (Rudolph Bernhardt ed., 1986).

341. For authoritative scientific reports that helped frame the international debate in the ozone depletion context, see *Report of the Ad Hoc Working Group of Legal and Technical Experts for the Elaboration of a Global Framework Convention for the Protection of the Ozone Layer*, U.N. Environment Programme, U.N. Doc. EP/WG.78/8 (1983), at 1. In the climate change context, the scientific reports prepared by the Intergovernmental Panel on Climate Change served as the authoritative scientific statements regarding climate change. These reports helped focus the debate that produced the Climate Change Convention. See, e.g., *INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT* (J.T. Houghton et al. eds., 1990); *INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 1992 IPCC SUPPLEMENT* (1992).

342. International Convention for the Regulation of Whaling, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter Regulation of Whaling Convention].

343. *Id.* art. 5, para. 2.

344. A history of some of these efforts is recounted in *Japan Whaling Ass'n. v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

and Technological Committee,"³⁴⁵ which is to assess the state of scientific knowledge and provide the parties with "information on innovative, efficient, and state-of-the-art technologies."³⁴⁶ This information will presumably enable nations to modify and update practices to ensure that they are consistent with the objectives of the treaty.

To be useful as a tool for resolving interstate conflict, the scientific information must be generated by an impartial scientific body. Credible scientific data is, of course, more likely to come from international collaborations or multilateral institutions than from unilateral assessments produced by one of the disputing parties. "[M]any countries, especially developing countries, simply don't trust assessments in which their scientists and policymakers have not participated."³⁴⁷ Thus, the institution that considers trade-environment conflicts must have access to scientific information generated by other multilateral bodies and the ability to spearhead international scientific collaborations.³⁴⁸ Alternatively, it may wish to follow the model of other recent international environmental regimes and form a standing body with scientific and technical expertise.³⁴⁹

C. Transparent, Participatory Processes to Enhance Institutional Legitimacy

To maximize its effectiveness, the proposed institution must structure its activities in a way that enhances institutional legitimacy. Legitimacy, in this context, is "a property of a rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being

345. Climate Change Convention, *supra* note 26. An excellent analysis of this Convention is found in Bodansky, *supra* note 327, at 451.

346. Climate Change Convention, *supra* note 26, art. 20.

347. Stephen H. Schneider, *Three Reports of the Intergovernmental Panel on Climate Change*, ENV'T, Jan./Feb. 1991, at 25 (quoting Professor Bert Bolin, Chairman of the Intergovernmental Panel on Climate Change).

348. There is solid precedent for seeking a forum with access to scientific expertise. A number of environmental agreements provide for scientific advisory bodies that participate in a periodic review and assessment of the treaty. *See, e.g.*, Montreal Protocol, *supra* note 26, art. 30; Regulation of Whaling Convention, *supra* note 342, art. 3.

349. The Convention on Biological Diversity establishes a Subsidiary Body on Scientific, Technical, and Technological Advice which provides expertise regarding the implementation of the treaty as well as scientific assessments of the status of biodiversity. Convention on Biological Diversity, June 5, 1992, art. 25, *reprinted in* 31 I.L.M. 822, 833. The Climate Change treaty establishes a subsidiary body for scientific and technological advice. Climate Change Convention, *supra* note 26, art. 9. The Montreal Protocol provides for a Scientific Assessment Panel to evaluate the ozone depleting potential of different substances and a Technology Review Panel to identify state-of-the-art technologies that help reduce the use of ozone depleting substances. Montreal Protocol, *supra* note 26, art. 30.

and operates in accordance with generally accepted principles of right process."³⁵⁰ The institution must take several practical steps to ensure "right process" and thereby enhance the legitimacy that surrounds its decisions.

1. Broadly Representative Membership and Widespread Participation

As the proposed institution will be considering issues that often place Northern tier nations at odds with Southern tier nations,³⁵¹ it is imperative that the institution avoid a perception of regional bias or of domination by one "bloc" of nations.³⁵² It should have a membership that is broadly

350. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (emphasis omitted). The concept of "legitimacy" has received extended analysis in the academic international legal community in recent years. See e.g., *id.*; Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Jose A. Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations*, 24 N.Y.U. J. INT'L L. & POL. 199 (1991); Phillip R. Trimble, *A Revisionist Critique of Customary International Law*, 33 U.C.L.A. L. REV. 665, 716-27 (1986).

Rather than attempt to set forth a general account of the concept of legitimacy in the international realm, this article presents the basic idea so as to situate the discussion that follows.

351. This happens often, but not always. The United States and the EC have been on opposite sides of a number of trade-environment conflicts. See, e.g., Tuna-Dolphin Panel Report II, *supra* note 43 (EC challenge to U.S. tuna embargo); Werner P. Meng, *The Hormone Conflict Between the EEC and the United States Within the Context of the GATT*, 11 MICH. J. INT'L L. 819 (1990) (discussing the U.S.-EC conflict over trade in beef from cattle raised with bovine growth hormone); *European Challenge*, *supra* note 75 (EC challenge in the GATT to U.S. automobile fuel efficiency standards).

352. To some degree, both the GATT and the ICJ suffer from the perception of regional bias. Historically, the GATT has been perceived as a body designed primarily to further the interests of advanced, industrialized economies. See, e.g., JACKSON & DAVEY, *supra* note 6, at 1138-39 (outlining the reasons for the "perception among the developing countries that GATT is a club for the rich nations, and . . . although it purports to operate on a one country/one vote principle, in fact it is an organization where the views of only a very few major developed nations count"); Konrad von Moltke, *The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit*, 23 ENVTL. L. 519, 529 (1993) ("[t]he GATT has been an institution which reflects industrial interests first and foremost"). Indeed, as a senior U.S. official frankly acknowledged in the context of the Uruguay Round, "[t]he big markets dictate the trading rules The U.S. can't do it independently and the EC can't do it independently, but when the two lock arms, they can determine the fate of the round." Keith Bradsher, *Asians and Latins Object to GATT Deals*, N.Y. TIMES, Dec. 9, 1993, at D1.

The ICJ likewise has suffered from allegations of regional bias, notwithstanding a structure designed to avoid such bias. For example, all parties to the U.N. Charter are parties to the ICJ Statute, and the composition of the ICJ bench is designed to reflect the different legal systems of the world. U.N. CHARTER, arts. 92, 93; ICJ STATUTE, *supra* note 215, arts. 1-20. Nevertheless, for many years developing nations perceived the Court to be biased in favor of Western interests. See, e.g., Richard B. Bilder, *Adjudication and Dispute Settlement*, 23 VA. J. INT'L L. 1, 3 (1982); Ibrahim F.I. Shihata, *The Attitude of New States Towards the International Court of Justice*, 19 INT'L ORG. 203 (1965); Richard Falk, *The Role of the International Court of*

reflective of the international community. It should avoid a membership structure like that found in the consultative meetings of the Antarctic Treaty system, which includes only those nations that benefit from the activity or resource at issue.³⁵³ Rather, its membership should be drawn from a wider community of nations, including not only nations whose actions are harmful to the environment but also those with an interest in preventing such harm.³⁵⁴

Of course, membership alone is not sufficient. The institution must actively promote widespread participation in its deliberations. The institution must be structured to ensure that, despite differences in resources and capabilities, all members can play meaningful roles in the institution's various tasks. Mechanisms must be developed to give developing nations the means and opportunity to participate appropriately in the institution's work. For example, financial or technical assistance can be offered to assist this participation, as is done in other international environmental regimes.³⁵⁵ Institutional authority should be diffused in a way that encourages broad participation. In addition to enhancing the legitimacy of the institution, widespread participation will enhance the quality of decisions reached.

A key decision, in this context, is the voting formula to be used.³⁵⁶

Justice, 37 J. INT'L AFF. 253 (1984); R.P. Anand, *Role of the 'New' Asian-African Countries in the Present Legal Order*, 56 AM. J. INT'L L. 383 (1961). More recently, actions taken by the United States and other western nations suggest a belief that the Court is biased against wealthy and powerful states. See, e.g., Gulf of Maine Case, *supra* note 244 (the United States and Canada insisted that the case be heard by a panel of "western" judges); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on Jurisdiction June 27) (the United States suggested that its decision to withdraw from compulsory jurisdiction of the Court was based, in part, on the alleged bias of the Court). See also Bilder, ICJ CROSSROADS, *supra* note 214, at 168. But see Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in ICJ CROSSROADS, *supra* note 214, at 123 (undertaking a quantitative analysis of the voting records of judges in contentious cases before the Court and finding no regional, political, or economic alignments among judges based on their voting records).

353. See Boyle, *supra* note 328, at 242.

354. See Boyle, *supra* note 328, at 233. There are precedents for this in other environmental regimes as well. For example, a number of nonwhaling nations have joined the Regulation of Whaling Convention, *supra* note 342, and a number of nations that do not engage in ocean dumping are members of the London Convention. London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 11 I.L.M. 537.

355. The international community established funds to enable developing nations to participate fully and effectively in the Earth Summit and its preparatory processes, G.A. Res. 44/228, U.N. GAOR, 44th Sess., U.N. Supp. No. 49, at 155, U.N. Doc. A/44/49 (1980), and the Climate Change Treaty negotiating process. G.A. Res. 45/122, U.N. GAOR, 45th Sess., U.N. Supp. No. 48, para. 10, U.N. Doc. A/45/49 (1990).

356. There is an extensive literature on decision-making processes in international organizations. An excellent overview of this issue may be found in Clarence Wilfred Jenks, *Unanimity, The Veto, Weighted Voting, Special and Simple Majorities, and Consensus as Modes of Decisionmaking in International Organizations*, in CAMBRIDGE ESSAYS IN INTERNA-

Many environmental regimes seek to make decisions by consensus and, if all efforts at forming a consensus have been exhausted, use a one nation, one vote formula.³⁵⁷ This process is preferable to the "weighted voting" system used by the Bretton Woods institutions, which effectively ties voting power to wealth. In the trade-environment context, developing nations are unlikely to participate for an extended period in an organization where a nation's voting power corresponds to its wealth.³⁵⁸ On the other hand, industrialized nations will be reluctant to give responsibility for trade or other economic policies to "one nation, one vote" bodies.

It is possible to develop a compromise to bridge these positions. If consensus on a particular issue is not possible, institutional decisions could require a majority (or supermajority) of both industrialized and developing nation votes. A bifurcated voting scheme has been adopted by other international environmental regimes. For example, the 1990 amendments to the Montreal Protocol require parallel majorities from both developed and developing nations.³⁵⁹ Similarly, decisions by the governing council of the Global Environmental Fund, which helps developing nations implement programs to address global environmental issues, require a sixty percent majority of member states and a sixty percent majority of votes "weighted" according to contributions made to the Fund.³⁶⁰

Finally, institutional legitimacy can be greatly enhanced by expanding the role NGOs may play in the process.³⁶¹ In the international

TIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 48 (1965). The Third U.N. Conference on the Law of the Sea presented a number of difficult decision-making issues. These issues, and the formal and informal techniques used to facilitate consensus, are thoroughly discussed in Tommy T.B. Koh & Shanmugam Jayakumar, *Negotiating Process of UNCLOS III*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 29 (Myron H. Nordquist, ed. 1985). For more on decisionmaking in international organizations, see FREDERIC KIRGIS, INTERNATIONAL ORGANIZATIONS 211-37 (2d ed. 1993); D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 400-12 (4th ed. 1982).

357. See, e.g., Convention on Biological Diversity, *supra* note 349, art. 29 (voting procedure on amendments); Climate Change Convention, *supra* note 26, art. 15 (same); Vienna Convention, *supra* note 26, art. 9 (same); Montreal Protocol, *supra* note 26, art. 9(c) (voting procedures on adjustments to Protocol).

358. See, e.g., *Sixth Participants' Meeting of GEF Fails to Reach Accord on Major Issues*, Int'l Env'tl. Daily (BNA) (Dec. 16, 1993) (industrialized nations block agreement on proposed new voting and other procedures for Global Environmental Facility) [hereinafter *Sixth Participants' Meeting*].

359. London Amendments, *supra* note 26, at annex II, § H.

360. See *Agreement Reached on Funding GEF: Program to Receive More Than \$1.2 Billion*, 17 Int'l Env'tl. Rep. (BNA) 249 (Mar. 23, 1994); *Sixth Participants' Meeting*, *supra* note 358.

361. At the Rio Conference, the international community reaffirmed the importance of integrating NGOs into international environmental policymaking. See, e.g., 2 AGENDA 21, *supra* note 93, ch. 27 (chapter devoted to "[s]trengthening the role of non-governmental organizations:

environmental area, the largest NGOs have resources and expertise that are matched by only a few governments. Their participation will help to enlarge the debate since they often advance positions different from those of any nation or group of nations.³⁶² Already a number of different models exist for facilitating NGO participation in international environmental efforts. For example, the World Heritage Convention³⁶³ confers official status on three different NGOs. These groups are to serve as advisors³⁶⁴ and are called upon "for the implementation of [treaty] programmes and projects."³⁶⁵ The United Nations Conference on the Environment and Development provided direct funding for NGO participation and adopted rules of procedure designed to facilitate NGO participation at the preparatory meetings and at the conference itself. In other contexts, NGO representatives participate as members of national delegations.³⁶⁶ Still other environmental regimes permit NGOs to participate with "observer status."³⁶⁷ Some combination of these different forms of participation may be appropriate in the context of trade-environment conflicts.

2. Transparency

Generally, institutional legitimacy is enhanced by transparent procedures and decision-making processes. In the trade-environment context, this requires that both Northern and Southern tier nations have full access to the process of setting the institutional agenda and to all institutional deliberations.

An open process for agenda setting enables "weak" nations to focus international attention on particular issues in ways that cannot be ignored by "stronger" nations. The capacity to influence the international agenda

Partners for sustainable development"). For more on NGOs, see A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1993); Rubinton, *supra* note 283, at 475; David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 381-83 (1992).

362. Tarlock, *supra* note 361, at 72.

363. Convention for the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975).

364. *Id.*, art. 8, para. 3 (advisory roles for International Center for the Study of the Preservation and the Restoration of Cultural Property, the International Council of Monuments and Sites, and the International Union for Conservation of Nature and Natural Resources).

365. *Id.*, art 13, para. 7.

366. For example, the United States has invited NGO representatives to join the U.S. delegation at several meetings of the OECD Joint Trade and Environment Experts Group.

367. See, e.g., Climate Change Treaty, *supra* note 26, art. 7, § 6; Convention on Biological Diversity, *supra* note 349, art. 23, § 5.

has properly been identified as a particularly effective type of power.³⁶⁸ Developed nations have effectively focused international attention on issues that affect them most directly, while Southern tier nations have had less success in focusing attention on environmental problems most closely associated with development.³⁶⁹ Consideration of a wider set of issues can preempt charges that the institution reflects the international environmental agenda of the developed nations.

Discussions and deliberations must likewise be open, rather than secret. Existing trade-environment dispute resolution bodies are woefully inadequate in this respect. As outlined above, the GATT uses a secret and closed dispute resolution process with no opportunity for direct public participation at any stage of the process. NAFTA reproduces this closed dispute resolution system. Although ICJ proceedings are generally open,³⁷⁰ no mechanism for direct public participation in international adjudications is provided.³⁷¹ In contrast, the institution should develop mechanisms to ensure public participation in and access to its proceedings.

D. *The Tools Necessary to Create a "Culture of Compliance"*³⁷²

The use of fair and open processes by themselves will not always be sufficient to persuade a nation to comply with a decision reached by an international institution. To be effective, an international institution that attempts to resolve interstate conflicts must be able to encourage compliance with the decisions it reaches. However, the international community lacks the familiar domestic enforcement mechanisms that help to ensure compliance. There is neither an international "sheriff" nor any possibility of sending recalcitrant States to a "world jail." The institution that considers trade-environment disputes must possess tools to *induce*, rather than *coerce*, compliance with its decisions.

368. INTERNATIONAL POLITICS, *supra* note 2, at 37 (citing STEVEN LUKES, POWER: A RADICAL APPROACH (1974)).

369. *Id.*

370. ICJ STATUTE, *supra* note 215, art. 46. Under this provision, the parties can demand that the public not be admitted to a hearing. It appears that the Court has held parts of hearings in closed sessions on two occasions. SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 129 (1983).

371. Of course, the public can participate indirectly through scholarly and journalistic analysis of these institutions and their decisions.

372. This term is borrowed from Louis Henkin. See Louis Henkin, *International Law: Politics, Values and Functions—General Course on Public International Law*, in 216 RECUEIL DES COURS, vol. IV, 9, 67 (1989).

In addition to broad membership and widespread participation, international environmental institutions have developed other important compliance tools.³⁷³ One of the most frequently used tools involves reporting and monitoring requirements.³⁷⁴ This tool involves periodic reports generated by the parties in addition to observation and inspection by the international community. The creation and dissemination of information tends to deter and to correct violations by providing a base for political mobilization against the offending nation.³⁷⁵ Reporting requirements are particularly important in ensuring that activities affecting global commons resources receive adequate international scrutiny.³⁷⁶

In addition, positive incentives to encourage compliance are essential. These incentives may be especially important to developing nations, which are frequently unwilling or unable to absorb the short term costs imposed by costly pollution control regulations or technologies without

373. There is a rapidly expanding literature on compliance in international environmental regimes. See, e.g., J.H. Ausubel & D.G. Victor, *Verification of International Environmental Agreements*, 17 ANN. REV. ENERGY & ENV'T 1 (1992); RONALD B. MITCHELL, FROM PAPER TO PRACTICE: IMPROVING ENVIRONMENTAL TREATY COMPLIANCE (1992); GLOBAL ENVIRONMENTAL CHANGE: UNDERSTANDING THE HUMAN DIMENSIONS (Paul C. Stern et al. eds., 1992); Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); Karmen Sachariew, *Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms*, 1 Y.B. INT'L ENVTL. L. 31 (1992). See also THE EFFECTIVENESS OF INTERNATIONAL DECISIONS (Stephen M. Schwebel ed., 1971).

374. These tools are, of course, used in other international legal contexts as well. For the use of reporting and monitoring requirements in the international human rights context, see, for example, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 40, para. 1 (entered into force Mar. 23, 1976) (member states to submit reports on measures adopted to comply with the Covenant); Fischer, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 180 (H. Hannum ed., 1984).

375. Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311 (1991). This mobilization occurs at several levels. Parties are regularly called upon to explain and justify apparent departures from international norms in international institutions. "To remain a member of the club, states must be prepared to justify their activities in terms of norms that they themselves have previously accepted and may need to apply against others in the future." *Id.* at 323.

Moreover, the creation and dissemination of information may also help generate pressure for compliance at the national level. For example, such information can be used by domestic political factions in their efforts to shape political debates. It can also be utilized by bureaucrats in intergovernmental policy debates. *Id.* at 325-26. See also UNITED STATES GENERAL ACCOUNTING OFFICE, INTERNATIONAL ENVIRONMENT: STRENGTHENING THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS 5-7 (1992) (political support for the implementation of agreements strengthened by public availability of information).

Of course, parties do not always comply with reporting requirements. For example, only about sixty percent of the parties to the London Convention comply with the reporting obligations imposed by that treaty, and only 38% of the industrialized nations and 19% of the developing nations that are parties to C.I.T.E.S. submitted 1989 annual reports. 2 AGENDA 21, *supra* note 93, at 752.

376. BIRNIE & BOYLE, *supra* note 3, at 165.

international assistance in these areas. These incentives often involve preferential access to funding sources, goods, markets, and technology.

The Montreal Protocol, and its subsequent amendments, provide an example of how such incentives can be used. Pursuant to this treaty, a Multilateral Fund has been created to help developing nations meet the incremental costs of complying with the treaty's requirement to reduce the use of ozone depleting substances.³⁷⁷ Thus, for example, China was recently awarded a grant totaling U.S. \$6.92 million from the Multilateral Fund to finance the introduction of new technologies that use substitutes for ozone depleting substances.³⁷⁸

Similarly, the Montreal Protocol signatories attempt to encourage otherwise reluctant states to join the treaty regime by facilitating the transfer of technology among parties.³⁷⁹ The treaty calls for the "expeditious" transfer of "the best available, environmentally safe substitutes [for ozone depleting substances] and related technologies" to developing nations that join the treaty.³⁸⁰ Such transfers are to occur under "fair and most favorable conditions."³⁸¹ Conversely, parties to the treaty are discouraged from exporting to nonparties technology for producing or utilizing ozone depleting substances.³⁸²

377. The promises of financial assistance in the Montreal Protocol, *supra* note 26, art. 5, were concretized in the London Amendments. London Amendments, *supra* note 26, annex II. The initial capital of the fund is to be \$160 million over the years 1991-93. This amount is to be increased to \$240 million if additional developing nations become parties to the Montreal Protocol. Contributions are to be made in accordance with a U.N. assessment scale. *Id.* art. 10, para. 6 (as amended).

In particular, the fund is available for parties that reduce their use of ozone depleting substances according to the reduction timetable applicable to developed nations, rather than under the slower phase out schedule applicable to developing nations. *Id.*

378. *Nation to Receive \$6.92 Million to Address Ozone-Depleting Substances*, Int'l Env'tl. Daily (BNA) (Dec. 15, 1993). This grant is the largest awarded to date by the Fund. *Id.*

Special funds have also been established in the Convention concerning the Protection of the World Cultural and Natural Heritage, *supra* note 363; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245; the Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, *reprinted in* 19 I.L.M. 11 (1980); and the International Undertaking on Plant Genetic Resources, Res. 8/83, U.N. FAO, 22d Sess., Annex, Part II, U.N. Doc. C/83/REP (1983). These funds are generally aimed at helping developing nations fulfill their commitments under the treaty and to participate fully in treaty meetings.

379. Provisions regarding technology transfer are important as "[t]echnological innovation and diffusion will be critical determinants of the pace and character of future economic growth and environmental management." Ministerial Statement, OECD Meeting of Ministers of Environment and Development, December 2-3, 1991 (*quoted in* 2 AGENDA 21, *supra* note 93, at 680-81). On access to technology, see generally Peter Lawrence, *Technology Transfer Funds and the Law: Recent Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 4 J. ENVTL. L. 15 (1992); Gordon J. McDonald, *Technology Transfer: the Climate Change Challenge*, 1 J. ENV'T & DEV. 1 (1992).

380. London Amendments, *supra* note 26, art. 10A (as amended).

381. *Id.*

382. Montreal Protocol, *supra* note 26, art. 4, para. 5.

Finally, this regime uses restrictions on international trade to encourage nations to join the treaty. For example, the treaty severely restricts trade in certain ozone depleting chemicals with nonparty states.³⁸³ Of course, as outlined above, such trade restrictions are vulnerable to challenge under international trade law as impermissible nontariff barriers to trade.

Incentives such as these enable and encourage developing states to join particular environmental regimes and to engage in environmentally sound activities. These or similar incentives will be necessary to encourage developing nations to raise trade-environment conflicts in a forum other than the GATT.

E. The Protection of Broader International Interests in the Global Environment

Given the shared interest in a robust global ecosystem, the institution ought to do more than simply avoid or adjust differences between particular nations. It should also have, as a central part of its mission, the promotion of outcomes and policies that protect the interests of the international community as a whole.³⁸⁴

To facilitate such outcomes, the institution should permit any member to make representations regarding any other nation's trade-environment activities. There should be no requirement that the complaining nation be uniquely affected. In this respect, the institution would be following a practice developed by the parties to the Montreal Protocol, which permits any party to raise issues of possible noncompliance by any other party, without any requirement of a specialized showing of injury.³⁸⁵

When considered by the institution proposed here, particular disputes are not simply occasions for choosing between the trade or environmental policies of one or another nation. Rather, the disputes present opportunities to develop, elaborate, and implement global environmental policy. They are opportunities to articulate common goals, principles, and norms. Ideally, they present occasions to serve the common good.

383. *Id.* art. 2. To encourage even nonparties to comply with the treaty, the ban on imports from nonparties does not apply if the nonparty is in compliance with the control requirements applicable to member states. *Id.* art. 4, para. 8.

384. See, e.g., Bilder, *Settlement of Disputes*, *supra* note 222, at 162; BIRNIE & BOYLE, *supra* note 3, at 546-47 (advocating that international environmental institutions act as environmental trustees).

385. See also ILO Constitution, Oct. 9, 1946, art. 25, para. 1, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35 (state need not show harm to itself or its nationals to file a complaint against another member for failure to secure effective observance of a labor convention that both have ratified).

Moreover, in contrast to a rule-oriented approach, the negotiation-centered approach outlined above offers the flexibility to respond to new information and changing circumstances.³⁸⁶ It also permits the use of "asymmetrical standards," the imposition of differential obligations, and the use of selective incentives. Although it may seem difficult at first blush to reconcile selective incentives with the fundamental international legal doctrine of the sovereign equality of states,³⁸⁷ they are not uncommon in the international environmental area.³⁸⁸ Nations make "different contributions to global environmental degradation," and each nation possesses different abilities to address such degradation; thus, "States have common but differentiated responsibilities."³⁸⁹ In practice this means, as was affirmed at the Earth Summit, that "[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority."³⁹⁰

Differential standards may be criticized as loopholes designed to appease particular nations or special interests. However, without selective incentives, a regime may either lose important nations or coalesce around a lower level of collective agreement. "Paradoxically, therefore, [differen-

386. The "capacity to respond to frequent and rapid change . . . [is] critical to successful international management." Sand, *supra* note 326, at 6.

387. See, e.g., U.N. CHARTER, art. 2, para. 4 ("This Organization is based on the principle of sovereign equality of all its Members."); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) ("All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community . . . States are juridically equal."). This principle, of course, predates the U.N. Charter. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged than the perfect equality of nations . . .") (Marshall, C.J.). Good historical accounts of the development of this principle are found in P.H. KOOIJMANS, *THE DOCTRINE OF THE LEGAL EQUALITY OF STATES* (1964); EDWIN DEW. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920); and JULIUS GOEBEL, JR., *THE EQUALITY OF STATES: A STUDY IN THE HISTORY OF LAW* (1923).

388. The Montreal Protocol contains a number of asymmetrical standards. Developing nations were permitted to postpone compliance with the treaty's production and consumption levels for ten years. Montreal Protocol, *supra* note 26, art. 5. The Soviet Union was granted "grandfather rights" for factories under construction at the time the treaty was negotiated. *Id.*, art. 2, para. 6. The member states of the EC were also permitted to aggregate their national consumption limits. *Id.*, art. 2, para. 8.

389. Rio Declaration, *supra* note 43, prin. 7. See also Climate Change Convention, *supra* note 26, art. 3, para. 1 & art. 4, para. 1 (noting common but differentiated responsibilities of nations in context of climate change).

390. Rio Declaration, *supra* note 43, prin. 6. See also Climate Change Convention, *supra* note 26, art. 3, para. 2 (noting "specific needs and special circumstances of developing country Parties"); Convention on Biological Diversity, *supra* note 349, art. 20, para. 5 (requiring parties to "take full account of the specific needs and special situation of least developed countries" regarding funding and technology transfer).

tial standards] can serve to upgrade the overall standard of obligations in an agreement — above the predictable [lowest] common denominator, that is.”³⁹¹ The use of selective incentives and differential standards, like the other tools described above to encourage compliance, operate as “techniques that allow leeway to expediency without abandoning principle.”³⁹²

The proposal set out above may generate a number of criticisms. For example, some may object to this proposal because it relies upon a nonbinding mechanism to resolve trade-environment conflicts. The argument is that the absence of a mechanism to force the “losing” party in a conflict to comply with the “decision” effectively renders any decision reached “unenforceable.”

This argument, of course, can be directed against the use of trade or adjudicatory bodies for trade-environment conflicts.³⁹³ Dispute resolution in both sorts of institutions is substantially dependent upon the consent of states concerned. Absent consent, adjudicatory bodies do not even possess jurisdiction to hear a dispute. Under current GATT practice, dispute resolution panel reports are adopted by the GATT Council by consensus.³⁹⁴ Until adopted by the GATT Council, a report is of no legal force. Thus, the practice of adaptation by consensus permits the party against whom the GATT panel has found to block the report from having any legal force.

More importantly, a criticism based upon the consensual nature of the proposed forum and nonenforceability of its decisions proves too much. “[A]t some level *all* participation in any international organization is voluntary.”³⁹⁵ Unlike domestic law, international law “is applied, for the most part, through a variety of informal channels, and rarely benefits from formal appraisal by a court or tribunal.”³⁹⁶ For this reason, in the international system, “negotiation supported by various forms of third party intervention or mediation is the pervasive method for securing

391. Peter H. Sand, *International Cooperation: The Environmental Experience*, in PRESERVING THE GLOBAL ENVIRONMENT, *supra* note 323, at 236, 242.

392. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 71 (2d ed. 1986).

393. Indeed, the unenforceability argument may have even a wider application. For a provocative argument that much domestic law is unenforceable, see Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961).

394. The new WTO will not follow this practice. See GATT, *Multilateral Trade Negotiations*, *supra* note 83.

395. STONE, *supra* note 29, at 205.

396. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 10 (1984).

compliance regardless of the substantive area of regulation."³⁹⁷ Notwithstanding this voluntary aspect of the international legal system, and the absence of an effective coercive enforcement structure, the system is marked by a high degree of state compliance with legal norms.³⁹⁸

In the international environmental area in particular, the development of the law rarely results from binding adjudication or declarations of rules. Rather, "the evolution of international law in the field of environment and sustainable development is influenced by mechanisms other than formal legal agreements or instruments."³⁹⁹ A good example is the longstanding use of nonbinding, bilateral commissions to successfully resolve transboundary pollution problems between the United States and Canada.⁴⁰⁰

Thus, the appropriate search should be for a nonbinding forum and process that is most likely to be effective, rather than for an institution empowered to coerce compliance with binding determinations. The approach outlined above offers the opportunity to organize and thereby strengthen the noncoercive mechanisms that encourage recalcitrant nations to conduct their affairs in an environmentally sensitive manner.

A related series of criticisms might suggest that this proposal is misguided because it moves away from a "rule-based" resolution of trade-environment conflicts in favor of a "power-based" determination of these issues. While urging the creation of a new institution in the guise of advancing international environmental law, in fact this proposal would promote a turn away from *law* towards *politics*.⁴⁰¹ By relying on an

397. Chayes & Chayes, *supra* note 375, at 313.

398. HENKIN, *supra* note 229, at 47 ("almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"). The generally high level of compliance with international law is not a new phenomenon. See, e.g., HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF THE SCIENCE iii-iv (1st ed. 1836) (early international law treatise noting general observance of international legal norms).

399. 2 AGENDA 21, *supra* note 93, at 758.

400. See, e.g., Cooper, *supra* note 255; Edith Brown Weiss, *New Directions for the Great Lakes Water Quality Agreement*, 65 CHI.-KENT L. REV. 375 (1989); Richard B. Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation*, 70 MICH. L. REV. 469 (1972).

401. There is substantial literature on the relative merits of "rule-based" legalistic dispute resolution mechanisms and more flexible, nonadjudicatory mechanisms in the trade area. See, e.g., JACKSON, *supra* note 6, at 85-88 (contrasting "rule-oriented" and "power-oriented" approaches); OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1985); Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1299-1300, 1304 (1971); Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1017 (1985) (legalist v. pragmatist approaches); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 69-78 (1987) (distinguishing between "adjudication" and

essentially political process, this proposal will dilute the force of the legal standards that do exist.⁴⁰² In addition, the use of a politicized process runs the risk of legitimizing practices that would be otherwise unacceptable from an environmental viewpoint.⁴⁰³

At one level, this objection may rest on an overly constrained understanding of "international law." Often, where it exists, international law is not recognized. As Professor Henkin explained, international law

includes the structure of [international] society, its institutions, forms and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations.⁴⁰⁴

On a deeper level, this objection focuses on the complex interrelationships of international law, institutions, and politics. Although an extended discussion of these issues is beyond the scope of this article,⁴⁰⁵ there is no doubt that nonbinding deliberations of multilateral forums, like those urged above, "often play a central role in the creation and shaping of contemporary international law."⁴⁰⁶ This process is particularly pronounced in the international environmental field.⁴⁰⁷

Moreover, one significant role international institutions play is "to clear the channels of political change."⁴⁰⁸ The institution urged here

"negotiation"). A recent reconceptualization of this debate is found in Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1 COLUM. BUS. L. REV. 111 (1992); Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992).

402. Boyle, *supra* note 328, at 230.

403. *Id.*

404. HENKIN, *supra* note 229, at 14.

405. An extremely textured interpretation of recent literature addressing this relationship is found in Ann-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

406. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993) (describing how reports, proposals, and resolutions of specialized international bodies and multilateral diplomatic conferences contribute to development of international law). Others have commented on the ability of multilateral fora to advance the international lawmaking process. See, e.g., Schachter, *supra* note 245, at 127-30, 132; Eduardo Jimenez de Arechaga, *Custom*, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING I (Antonio Cassese & Joseph H.H. Weiler eds., 1988); Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms of International Law*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 21 (W.E. Butler ed. 1987).

407. Charney, *supra* note 406, at 549.

408. JOHN HART ELY, *DEMOCRACY AND DISTRUST*, 105 (1980). This proposition is extensively developed in Jeffrey L. Dunoff, *Polyarchy and Distrust* (arguing that, while counter-majoritarian, adjudicative bodies play this role in the U.S. domestic political system,

would play this role in the trade-environment field. This explains, in part, the stress above on open and participatory processes in the new institution. Transparent processes for setting agendas and reaching decisions make possible the ability to provide a forum for advancing "an agenda for change" in the international environmental field.⁴⁰⁹

Thus, the institution will not produce a static body of absolute rules to govern trade-environment conflicts. Rather, it should generate an evolving, growing customary law grounded in the claims, practices, and expectations of the international community. One should expect this law to change in response to changing environmental conditions, new scientific knowledge and technological advances, and emerging economic, social, and political interests.

If structured as suggested above, the institution's deliberations will play an important legitimizing function. Decisions of this sort by international bodies "tend to have a self-enabling, self-licensing, or self-authorizing power for states supporting them. Formal limitations on the competence of representative [institutions] are *not* an effective restraint in the face of a willful majority."⁴¹⁰ Thus, deliberations by the institution regarding particular trade-environment conflicts will create political space within which nations can act. The institutional framework proposed above is specifically designed to facilitate such action; to "empower governments rather than shackling them."⁴¹¹

Finally, critics may argue that any proposal for a new international environmental institution is politically unrealistic. Although a general reluctance to form new international bodies is often articulated,⁴¹² international institutions continue to proliferate, particularly in the international environmental area.⁴¹³ Although this is a relatively new field, already more than forty international environmental treaties create new

majoritarian, political bodies must play this role in the international system) (unpublished manuscript, on file with MICH. J. INT'L L.).

409. Through established leadership roles, institutions can give proponents of action a disproportionate influence that they would otherwise lack. Through its ability to link issues, the institution can increase the possibility of action. See *supra* text accompanying notes 368 to 383.

410. Gidon Gottlieb, *Global Bargaining: The Legal and Diplomatic Framework*, in *LAW MAKING IN THE GLOBAL COMMUNITY* 109, 123 (Nicholas G. Onuf ed., 1982).

411. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 13 (1984).

412. See, e.g., Institutional Proposals, Report of the Secretary-General of the Conference, paras. 3-9, U.N. Doc. A/CONF.151/PC/102, reprinted in 2 *AGENDA* 21, *supra* note 93, at 689, 689-92 (UNCED preparatory report noting objections of different nations to formation of new global institution to address environmental and developmental issues).

413. See, e.g., G.A. Res. 47/188, U.N. GAOR, U.N. Doc. No. A/RES/47/188 (1992) (forming an Intergovernmental Negotiating Committee, open to all States that are members of the United Nations, for the elaboration of an international convention to combat desertification).

international bodies or entrust existing ones with secretarial review or coordination functions.⁴¹⁴ The preparations for and results of the recent Earth Summit surely demonstrate that the international community continues to create new bodies when convinced that they are needed.

This article is, in part, an effort to demonstrate that such a need exists in the trade-environment field. It has tried to demonstrate that the status quo, namely reliance on trade bodies, is deeply problematic and that the use of adjudicatory bodies is both unlikely and undesirable. This analysis, if accurate, surely leads to the conclusion that there is a need for new institutional structures in this area.⁴¹⁵

The international community has already indicated that it recognizes this need and appears to be moving towards a consensus for change in the directions urged above. Indeed, the Earth Summit itself can be seen as a recognition of the need to create new fora for the discussion and resolution of international environmental issues. At that meeting, the international community declared that "[i]n order to meet the challenges of environment and development, States have decided to establish a new global partnership."⁴¹⁶ This partnership rests upon the recognition that

[a] sound environment . . . provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development The challenge is to ensure that trade and environment policies are consistent and reinforce the process of sustainable development.⁴¹⁷

Significantly, nations are experimenting with a variety of nonadjudicatory, nonbinding dispute resolution procedures in the international environmental field. The first major multilateral institution formed since the end of the Cold War, the Commission on Sustainable Development, represents an important development toward the sort of institution urged above.⁴¹⁸ Significant political momentum for more action

414. Sachariew, *supra* note 373.

415. Others have reached this conclusion. See, e.g., Barton & Carter, *supra* note 233, at 553 ("There is a pressing need for new international organizational machinery in the environmental area.").

416. 1 AGENDA 21, *supra* note 337, para. 2(1).

417. *Id.*, paras. 2.19-2.20.

418. The newly formed Commission is designed to, *inter alia*, monitor progress related to the integration of environmental and developmental goals throughout the U.N. system; review the progress of nations in the implementation of the commitments contained in Agenda 21; and review progress in the implementation of international environmental treaties. G.A. Res. 47/191, U.N. GAOR, 1 AGENDA 21, *supra* note 337, para. 38(13).

calls for action along these lines. In particular, there is substantial political pressure for the United Nations to form a new global environmental entity to coincide with the U.N.'s upcoming fiftieth anniversary. Formation of the body urged above would represent a timely and significant step in the progressive realization of a global partnership for sustainable development.

CONCLUSION

Trade-environment conflicts are currently addressed in trade institutions. This article has attempted to demonstrate why these bodies are incapable of providing a balanced response to the competing interests at stake in such conflicts. Although many have urged that such issues be resolved by adjudicatory bodies such as the International Court of Justice, such disputes possess a variety of features that render them particularly ill-suited for adjudication. For these reasons, a different institutional approach is needed. This article is an attempt to provoke a discussion regarding the type of approach that would be appropriate and to set forth one possible approach that might profitably be used.

The advantage of the framework urged above is that, unlike present methods of resolving such conflicts, it is designed to facilitate the identification and balancing of the economic and ecological interests implicated in trade-environment conflicts. Compared to the status quo, or to the potential adjudication of trade-environment conflicts, the adoption of this proposal would be a major advance. It is flexible enough to evolve over time in response to changing needs and circumstances. By attempting to build consensus at the intersection of the trade-environment and developmental areas, it can address the pressing problems of today and begin a global dialogue on the environmental challenges of the years ahead.