FROM GATTZILLA\textsuperscript{1} TO THE GREEN GIANT: WINNING THE ENVIRONMENTAL BATTLE FOR THE SOUL OF THE WORLD TRADE ORGANIZATION

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1. INTRODUCTION

The ideological landscape of post cold-war America is coming into resolution. Liberal interests, specifically labor and environmental groups, are increasingly apprehensive of the World Trade Organization ("WTO" or the "Organization"). It is not difficult to understand why. Thus far, the WTO has been no friend to these interests. While globalized trade promoted by the WTO has provided the preconditions for a boom in corporate profits, American workers are less economically secure and, despite recent gains, probably less well compensated than in the period before globalization. Additionally, globalized free trade has imperiled the environment in ways that the WTO has done nothing to remedy. These challenges to both labor and the environment are similar, and in many ways, call for similar responses. Nevertheless, in this Article, I will focus on environmental concerns, leaving the question of how labor should respond to the WTO for another day.

While American environmentalists are not all of one mind, and have still not decided what their specific answers to the WTO challenge should be, one response emerging as a contender for

\textsuperscript{1} For a full page reproduction of an environmentalist depiction of the international trade regime (that is now the World Trade Organization ("WTO")) as the monster "GATTZILLA," see DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 34 (1994).

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ideological primacy among environmentalists is what I will label “environmental isolationism.” This response suggests that the WTO is incompatible with environmental protection and should be disbanded. Furthermore, the isolationists argue that the United States should take unilateral action to systematically ban the importation of goods that are made in ways deemed to cause unnecessary harm to the environment.

To be sure, environmental isolationism has not been set forth in a law journal or other academic or popular publication as a comprehensively fashioned ideological response to the WTO and the challenges of globalization. In fact, if explicitly considered, it would probably be rejected by many environmentalists as too absolute. Much of its popular dissemination can probably be traced to *ad homonym* either born of frustration or of a maximalist rhetorical strategy designed to gain advantage in various negotiations rather than as an overarching blueprint for policy. Nevertheless, because a clear composition built of sound bites is coming through and influencing popular perceptions, I believe it is important to recognize its existence and analyze its implications.

No one has offered more sonic morsels than consumer advocate Ralph Nader. Nader opposed the creation of the WTO and now suggests that the United States should consider abandoning the Organization. His objections are based not only on the fact that the Organization does not have an institutional mandate to deal with environmental concerns, but also on its adverse effects on workers.

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3 The best place to get an overview of Nader’s and his associates’ views on international trade is in *The Case Against Free Trade: GATT, NAFTA and the Globalization of Corporate Power* (Earth Island Press ed., 1993) [hereinafter *The Case Against Free Trade*].

4 See Ralph Nader, *No Child Should Work*, USA TODAY, June 12, 1996, at 14A (stating that the U.S. should “challenge or quit the anti-democratic... WTO”). Likewise, one of Nader’s associates, Lori Wallach, a trade lawyer and Director of Global Trade Watch for the activist group Public Citizen, founded by Nader, proposes withdrawing from the WTO stating, “[w]e should just get out of [the WTO]... [i]t’s not fixable.” Alan Kovski, *U.S. Appeals WTO Gasoline Ruling: Critics Doubt Prospects*, THE OIL DAILY, Feb. 22, 1996, at 3; see Loraine Woellert, *U.S. Loss at WTO Offset by Reversal*, WASH. TIMES, Apr. 30, 1996, at B7 (calling for the United States to withdraw from the WTO); see also, e.g., Alan Tonelson & Lori Wallach, *We Told You So: The WTO’s First Trade Decision Vindicates the Warnings of Critics*, WASH. POST, May 5, 1996, at C4 (arguing that Congress “should rethink America’s participation in the WTO”).

Perhaps his most vociferous criticism is the WTO's failure to provide citizen groups with access to its decision-making processes. Nader's perception is that the "democratic deficit" is made worse by the ability of the Organization to prescribe rules that supersede democratically created domestic legislation. He is particularly concerned that domestic environmental laws are threatened by the WTO.  

Feb. 21, 1997, at A1 (noting that Nader has been among those criticizing the WTO for imperiling U.S. jobs).  

6 In a recently published book comparing the past and present role of American lawyers, Nader emphasizes what he calls "the [General Agreement on Tariffs and Trade] GATT and [North American Free Trade Agreement] NAFTA systems of autocratic governance." RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 338 (1996). Likewise, in a CNN interview with Bernard Shaw, referring to the WTO's autocratic procedures, Nader proclaimed that the U.S. Government influenced by industry "is using GATT and NAFTA to ... subordinate our Democratic processes." Inside Politics Extra (CNN television broadcast, Apr. 9, 1996); see also Norman Ornstein, Elite Men of the People, THE WKLY. STANDARD, Mar. 18, 1996, at 16 (quoting Nader as saying that joining the WTO involves "replacing democratic powers residing in the U.S. government with the autocratic authority of a world government"). See generally Ralph Nader & Lori Wallach, GATT, NAFTA, and the Subversion of the Democratic Process, in The Case Against the Global Economy 92, 92-107 (Jerry Mander & Edward Goldsmith eds., 1996) (discussing the "undemocratic manner in which [GATT and NAFTA] were created, sold, and passed and, should they continue to exist, their crushing effects on worldwide democracy").  

7 See Letter from Ralph Nader to Vice President Gore (May 21, 1997) [http://www.citizen.org/rnlet2.htm] (criticizing the Clinton administration for caving in to WTO environmental demands, leading to the "evisceration of Congress' effectiveness in many policy areas"); see also GATT Rule On U.S. Tuna Ban Threatens Environmental Law, Oct. 7, 1991, LDC DEBT REP. 8 (citing Nader as saying that the WTO will precipitate a global downward spiral of environmental protection laws).  

Representatives of Nader's organization, Public Citizen, have also been vociferous in expressing their concern that the WTO imperils environmental law. See, e.g., Trade Implications of Congressional Action on U.S. Dolphin Protection Laws: Hearings on H.R. 2823 and H.R. 2856 Before Subcomm. on Fisheries, Wildlife, and Oceans of the House Comm. on Resources, 104th Cong. (1996) [hereinafter Hearings] (including testimony of Lori Wallach, Director, Public Citizen's Global Trade Watch, stating that the WTO threatens a number of domestic environmental laws); Nancy Dunne, Environment Rules Set Stage for GATT Conflicts, FIN. TIMES, Dec. 5, 1991, at 6 (discussing Public Citizen's view that the trade regime compromises nations' sovereignty to set and enforce health, safety, and environmental laws). Public Citizen and a number of other organizations placed full-page ads in major newspapers claiming that the WTO was going to "SABOTAGE ... America's Health, Food Safety, and Environmental Laws." C. Ford Runge, FREER TRADE, PROTECTED ENVIRONMENT 1 (1994).
While Nader, like those who limit their advocacy to environmental concerns, has not worked out a comprehensive program calling for the unilateral banning of goods made in ways that the United States would consider unnecessarily damaging to the environment, his ad hoc calls for such bans are consistent enough to lead to the popular impression of a programmatic solution. While recognizing Nader's criticisms as valid, I do not believe that it would be wise to eliminate the WTO or to unilaterally ban foreign products in an attempt to influence offshore environmental policy.

Unlike Nader, I regard the creation of the WTO as essentially a positive development. In many respects we are creating, for the first time in history, a global civilization. Changes in communication and transportation technologies, having already undergone a dramatic revolution in this century, now allow for the type of sustained interactions between people around the globe that were impossible little more than a decade ago. Not only have these

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9 There is a more fundamentalist critique of international trade than that provided by Nader. Some "deep" environmentalists believe that large scale social organizations as well as industrial organizations are inherently environmentally destructive and dehumanizing. There is a long and rich tradition of such thinking. In fact, there are many traditions taking many forms which, in different ways, have embodied this belief. Some examples are the Luddites smashing machines, Ghandi's small collectives, the Amish rejection of 20th century technology, and the self-sufficiency communitarian movement of the sixties. For one extremely influential mid-century expression of this philosophy, see E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1973). Many of the environmentalists who are heirs to this tradition today believe that trade-based economies that find their most extreme expression in international trade are in themselves destructive of human values and should not be encouraged. This Article does not address this more fundamentalist perspective. Accordingly those who adhere to that viewpoint are likely to find this Article irrelevant to their concerns.

10 "Historically, human activities have been structured by contiguity. The basic social, political, and economic units were villages or towns, aggregated into provinces, nations, and regions. Telecommunications and air transport are changing that." ITHEL DE SOLA POOL, TECHNOLOGIES WITHOUT BOUNDARIES 65 (1990). Technological developments in communications, especially those which are more active (e-mail, the world wide web, etc.) rather than passive (traditional mass media such as radio and television), make true
changes in technology allowed for international trade to grow dramatically, but they have also permitted the very process of production to become globally integrated. These technological

global interaction possible. See id. at 240. See generally RICHARD J. BARNET & JOHN CAVANAGH, GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER 25-41 (1994) (explaining that, as a result of travel and mass media, what were once unique national cultures have taken on a global dimension).

In recent decades, there has been a statistically demonstrable correlation between the level of telecommunications infrastructure and Gross National Product ("GNP") or Gross Domestic Product ("GDP"). See ROBERT J. SAUNDERS ET AL., TELECOMMUNICATIONS & ECONOMIC DEVELOPMENT 4-7 (1994). For the historical development of communications technologies and their impact on the international order, see HOWARD H. FREDERICK, GLOBAL COMMUNICATIONS & INTERNATIONAL RELATIONS (1993). See also ARTHUR C. CLARKE, HOW THE WORLD WAS ONE: BEYOND THE GLOBAL VILLAGE (1992) (discussing the development of telecommunications from the telegraph to satellites and fiberoptics). For a discussion of the role and impact of the computer revolution on the economy, see DON TAPSCOTT, THE DIGITAL ECONOMY: PROMISE AND PERIL IN THE AGE OF NETWORKED INTELLIGENCE 187-188 (1996).

While landmark developments in transportation technology have occurred more gradually than those in communications, they have nevertheless been of great significance in the overall movement toward globalization. With the development and widespread use of jet aircraft, it became feasible, both in terms of economics and time, for large numbers of people to take international trips. See T.A. HEPPENHEIMER, TURBULENT SKIES, THE HISTORY OF COMMERCIAL AVIATION 304 (1995). See generally GEOFFREY KNIGHT, CONCORDE: THE INSIDE STORY (1976) (discussing the development and impact of the creation of supersonic air travel). In addition, recent developments in high speed rail systems have increased the efficiency of international land-based transport. See MITCHELL P. STROHL, EUROPE'S HIGH SPEED TRAINS: A STUDY IN GEO-ECONOMICS (1993).

Commercial entities increasingly have the ability to structure their manufacturing or production processes in the most economically efficient manner. Through decreased logistical barriers and transfers of technology, multinational corporations are able to create global production facilities. See BARNET & CAVANAGH, supra note 10, at 273-82; JOHN H. DUNNING, MULTINATIONALS, TECHNOLOGY AND COMPETITIVENESS (1988). For an example of the advantages of international technology transfers, see Tetsuo Abo, Japanese Motor Vehicle Technologies Abroad in the 1980s, in THE TRANSFER OF INTERNATIONAL TECHNOLOGY 167-90 (David J. Jeremy ed., 1992) (discussing the exportation of Japanese automobile manufacturing processes and the international exchange of industrial technology). See also ROBERT GILPIN, THE POLITICOECONOMY OF INTERNATIONAL RELATIONS 251 (1987) (discussing the benefits to developing countries).

Technological developments allow for "intellectual capital" to become a global commodity. Through the use of satellites, fiberoptics, and other developing telecommunication technologies, multinational corporations can efficiently manage their operations. See MARSHALL McLuhan & BRUCE R. POWERS, THE GLOBAL VILLAGE: TRANSFORMATIONS IN WORLD LIFE AND MEDIA IN
developments have additionally helped spur the largest migrations of peoples between societies in history.\textsuperscript{12} Complementing all of these changes, the world's people are increasingly receiving the same news, watching the same movies, reading the same books, and organizing their social relationships in similar ways.\textsuperscript{13} This emerging global civilization requires global regulation. In many areas in need of regulation (for example, deciding which human activity threatens the environment), a global scale is now necessary to effectively deal with the problems domestic regulation was originally designed to ameliorate.\textsuperscript{14} Given this need for global regulation, if we wish to have a just, open, and peaceful international order, global regulatory regimes adapted from domestic democratic systems must be implemented.

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\textsuperscript{12} Over the course of the last decade, there has been a resurgence in the migration of individuals leaving developing countries for more industrialized nations. See Stephen Castles & Mark J. Miller, The Age of Migration: International Population Movements in the Modern World 65, 80 (1993); see also Peter Stalker, The Work of Strangers: A Survey of International Labour Migration 5, 253, 275-82 (1994) (chronicling the social and political aspects of migration and providing quantitative case studies of several key nations). For an example of how immigration to one industrialized nation has soared in the last two decades, see Vernon M. Briggs, Jr., Mass Immigration and the National Interest (1992).

\textsuperscript{13} As new forms of communicative media emerge, the people of the world become more accessible to one another and begin to share information and culture in a manner that was once only possible in one's local community. See De Sola Pool, supra note 10, at 65-99. As a result of the widespread and instantaneous availability of information, individuals identify with, if not develop a kinship with, like-minded individuals within the global community. See Wriston, supra note 11, at 46-61; see also Frederick, supra note 10, at 272-75 (discussing the increase of cultural exchanges as a result of technological innovations and articulating concerns that this can lead to cultural imperialism). Through international marketing and exports by major corporations, individuals around the globe are attempting to "buy into" a uniform culture and lifestyle. See Baret & Cavanagh, supra note 10, at 42-67 (discussing the globalization of the corporate world, using Sony as an example).

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In this Article, I will explain why the WTO is arguably the most effective international regulatory institution thus created. Although it has yet to offer any positive contribution to global environmental protection, and while its procedures are not yet transparent and open, I will demonstrate the WTO's potential to be an effective forum for the creation and enforcement of harmonized international standards relating to process production methods ("PPMs"). Such PPMs could be effectively employed in such areas as clean air, clean water, hazardous waste, occupational health and safety, and national resource preservation.

In order to lay the groundwork for my argument against the environmental isolationist approach, in Section 2, I will describe the General Agreement on Tariffs and Trade ("GATT") and the WTO. I will then briefly discuss the origins and history of international environmental law. Section 2 will conclude with an explanation of why the domain of international trade regulation has come to overlap with that of international environmental regulation. To explain why the WTO should become a forum for global environmental regulation, Section 3 will focus on the specific relationship between the WTO and the environment. I will also explain why some free trade advocates believe that the WTO should not involve itself with environmental regulation, and why I believe they are mistaken.

Section 4 of the Article will explain why a unilateral approach to compelling global environmental protection is ill-advised. Finally, Section 5 will explain the benefits of bringing both the enforcement and negotiation of global environmental agreements within the ambit of the WTO.

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15 The Organization for Economic Cooperation and Development ("OECD") defines process production methods ("PPMs") as standards that specify how a product is manufactured, harvested, or taken. They encompass emission and effluent standards, certain performance or operations standards, and practices prescribed for natural resource sectors. Terms such as "made with," "produced by," and "harvested by" signify a PPM standard. All PPM standards apply to the production stage, such as the time period before a product is placed on the market for sale. These standards specify criteria for how a product is produced or processed. The PPM standard may also address the environmental effects of a product throughout its life-cycle such as the effects which may emerge when the product is produced, transported, consumed or used, and disposed of. See Typology of Trade Measures Based on Environmental Product Standards and PPM Standards: Note by the Secretariat, Joint Session of Trade and Environment Experts, OECD Environment Directorate and Trade Directorate, COM/ENV/TD (93) 89 (Sept. 28-30, 1993).
None of this Article's prescriptions should be taken as dogma. My arguments are essentially tactical. It may be that there are rare instances when unilateral action by the United States to enforce global environmental standards is necessary. There may also be times when the WTO is not the best multilateral structure to negotiate, and later to govern, international environmental agreements. Obviously, we live in an extremely fluid political climate. As events unfold, there may be alternative forums that would better allow agreements to be reached. Yet, enforcement could still be sought within the framework of the WTO. There may be times when only coordination with the WTO is called for; there may even be times when it is best to circumvent the Organization altogether. I write at a very high level of generality, for the purpose of presenting (1) the implications of the preference for unilateral approaches to solving global environmental problems to which some environmentalists seem partial, and (2) the overall advantages that can be achieved within the WTO.


2.1. The History and Function of the GATT and the WTO

The sixty-four year time-line leading to the establishment of the WTO began with Congressional passage of the Smoot-Hawley Tariff Act in 1930. Smoot-Hawley dramatically increased United States tariffs on foreign goods, triggering retaliatory tariff increases by other countries. In the eyes of American and British post-war planners, these increases caused a contraction in international trade, greatly exacerbating the depression of the 1930s. They saw the resulting economic turmoil, particularly in Germany, as a major contributing cause of the Second World War. In their attempts to learn the lessons of history, the post-

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(2) See Esty, supra note 1, at 243-44; Michael Lusztig, Risking Free Trade: The Politics of Free Trade in Britain, Canada, Mexico, and the United States 51, 53, 60.
war planners ultimately succeeded in establishing a global trade regime. 19 This regime, the GATT, 20 was designed to discourage governments from pursuing policies which placed imports from foreign countries at a disadvantage relative either to domestically produced goods or goods produced in other foreign countries. 21

The primary rules promoting this objective were the following: (1) Article I, the “Most Favored Nation” provision which required that countries not discriminate in trading between foreign nations; (2) Article III, the “National Treatment” provision, which required that countries not discriminate against foreign

(1996). The measure was purportedly aimed at protecting United States jobs in the recessionary economy, but prompted other nations to enact retaliatory protectionist measures. See id. at 53. These protectionist measures succeeded in choking off international trade. See LUSZTIG, supra at 53; PETER TEMIN, LESSONS FROM THE GREAT DEPRESSION 81 (1989); Bartram S. Brown, Developing Countries in the International Trade Order, 14 N. ILL. U. L. REV. 347 (1994). Economies world-wide were affected; among the most severely affected were the United States and Germany. See John Linarelli, Peace Building, 24 DENV. J. INT’L L. & POL’Y 253 (1996). The economic crisis in Germany created a window of opportunity for the Nazi’s rise to power, and the “decline of the political moderates in Japan” precipitating World War II. Id. at 266. Lessons learned from protectionist measures of the 1930’s were a major impetus in the post-war development of the GATT, International Monetary Fund (“IMF”), and World Bank. See id at 267; TEMIN, supra at 46; Louis B. Sohn, Uruguay Round, 28 INT’L LAW. 565, 567 (1994); Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 YALE L.J. 2039 (1993).

19 See NIGEL GRIMWADE, INTERNATIONAL TRADE: NEW PATTERNS OF TRADE, PRODUCTION AND INVESTMENT 30 (1989) (documenting both the motivation behind the adoption of the GATT and the fact that “[t]he most important vehicle of increased economic integration after the Second World War was the General Agreement on Tariffs and Trade”).

20 The GATT was only one of the three so-called “Bretton Woods” institutions, which were designed to play a complementary role in promoting a liberal international economic order. The other two were the IMF and the World Bank. The IMF was created to ensure the liquidity necessary for international trade and to avoid the types of competitive devaluations that, along with tariff increases in the 1930s, had been the instruments of trade wars. The World Bank was intended to provide the capital necessary for rebuilding war-torn Europe. See generally David Vines, The WTO in Relation to the Fund and the Bank, in The WTO AS AN INTERNATIONAL ORGANIZATION 59, 63-67 (1998) (focusing specifically on the inter-relationship between the WTO and the World Bank, and the IMF).

importers in establishing or applying domestic regulations; and (3) Article XI which prohibited (subject to exceptions) the use of quantitative restrictions, such as quotas, on the import of foreign goods.  

The post-war planners only intended that the GATT provide substantive trade rules. They did not intend for it to endure as an international organization. An institutional structure was to be created in a separate treaty establishing what was to be called the International Trade Organization ("ITO"). As a result of opposition within the United States Congress, however, this agreement never came into being and the GATT was left to assume, by default, the administrative burdens created by the growth of international trade. Rising to this challenge, the GATT took on the responsibilities of an international organization. Acting in this capacity, over the years, it sponsored a series of multilateral negotiations which succeeded in virtually eliminating tariffs on manufactured goods. Under the GATT, international trade has increased dramatically during the last half century.

By 1986 most of the countries in the world had signed the GATT and had become members of the Organization. That year, in Punta del Este, Uruguay, these members initiated the most


23 For a detailed history of the efforts to develop the International Trade Organization ("ITO"), see John H. Jackson, The World Trading System 27-34 (1989) (noting that "the principal reason" for the ITO not being realized was the "failure of the United States Congress to approve it"). See also Stephen Zamora, Voting in International Economic Organizations, 74 Ariz. J. Int'l L. 566, 579 (1980) ("The ill-fated International Trade Organization... succumbed to the refusal of the United States and other Western powers to subject national trade policies to the control of an organization whose voting structure was not weighted in their favor... ").

24 See Kenneth W. Dam, The GATT: Law and International Economic Organization (1970); Zamora, supra note 23, at 579 ("[T]he GATT did survive to become a unique international economic organization.").

25 Successive rounds of negotiation have reduced the average tariffs on goods imported by industrialized countries from around 40% to below 4%. The number of signatory countries to the GATT has risen from 23 to 133 and now represents over 80% of world trade in goods. See David M. Gould & William C. Gruben, Will Fair Trade Diminish Free Trade?, Bus. Econ., Apr. 1997, at7.

ambitious round of trade negotiations ever undertaken. In 1994, after eight years of discussion, the Uruguay Round finally came to an end with the establishment of the WTO, a de jure international trade organization. Today, the WTO administers the trading rules established by the GATT, as well as several other trade related agreements, that resulted from the Uruguay Round. These include agreements related to trade in services and the protection of intellectual property.

2.2. Emergence and Scope of International Environmental Law

The early 1970s saw the emergence of, or what appeared to be at the time, the distinct area of international environmental law. The seminal event was the 1972 Stockholm Conference on the Human Environment. In addition to catalyzing the international environmental movement, the Stockholm Conference succeeded in articulating a statement of fundamental international environmental principles known as the Stockholm Declaration, and in serving as the impetus for the United Nations Environment Programme ("UNEP"). In the ensuing years, multilateral environ-

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28 The WTO is a multilateral organization which administers the GATT, the General Agreement on Trade in Services ("GATS"), the Agreement on Technical Barriers to Trade ("TBT"), as well as a number of other trade-related agreements. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 31; 33 I.L.M. 81 (1994) [hereinafter WTO Agreement].


30 Since its formation, UNEP has played a prominent role in the development of multilateral environmental agreements. See Daniel C. K. Chow, Recognizing the Environmental Costs of the Recognition Problem: The Advantages of
mental agreements ("MEAs") were promulgated in a wide variety of areas,\(^{31}\) including the protection of plant and animal species,\(^{32}\) the climate,\(^{33}\) and waste disposal.\(^{34}\)

2.3. The Overlap Between Trade and Environmental Regulation

As I will explain shortly, powerful state and commercial interests are committed to the ideological proposition that the regime that regulates international trade should not concern itself with the environment.\(^{35}\) Such ideology notwithstanding, the regulatory spheres governed by international trade law and international environmental law have increasingly come to converge.\(^{36}\)

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\(^{35}\) See infra Section 3.1.

\(^{36}\) An acknowledgement of this linkage was the basis for the WTO's creation of the Committee on Trade and the Environment ("CTE"). The CTE was established and its work program set at the Uruguay Round. See Trade and Environment, TN.TNC/MIN(94)/1/REV (Apr. 14, 1994), 33 I.L.M. 1267 (1994). For a review of some of the major works of the Committee, see *Report of the WTO Committee on Trade and the Environment*, PRESS/TE/014 (Nov. 18, 1996) [hereinafter Report on Trade and the Environment] (discussing eco-labeling, the relationship between multilateral environmental agreements
The first reason for this convergence has been the increasing use of trade restrictive measures in MEAs. For example, the Convention on the International Trade in Endangered Species requires signatories to prohibit importation of certain species that are threatened with extinction. This presents a potential conflict ("MEAs") and the WTO, and non-product, environmental PPMs). For a discussion of the convergence between trade and the environment as it relates to NAFTA, see David S. Baron, NAFTA and the Environment—Making the Side Agreement Work, 12 ARIZ. J. INT'L & COMP. L. 603 (1995) (discussing the North American Agreement on Environmental Cooperation).

There has been a significant amount of commentary on the linking of trade and environmental issues in recent years. See, e.g., CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, TRADE AND THE ENVIRONMENT (Durwood Zaelke et al. eds., 1993) (containing a collection of essays by noted trade experts and environmentalists). The CTE and the European Commission recently published a report on the conflict between international trade and international environmental law. See Chronological Summary: International Treaties and Agreements, 7 COLO. J. INT'L ENVTL. L. & POL'Y 417 (1996).


This conflict is not limited to the Endangered Species Convention. Generally speaking, WTO members who become parties to environmental agreements with trade restricting provisions potentially face conflicting obligations. See PATRICK LOW, TRADING FREE: THE GATT AND U.S. TRADE POLICY (1993); Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 27 CORNELL INT'L L.J. 459, 491-92 (1994). Where enforcement of an MEA results in trade restrictions against a member of the WTO that is not a party to the MEA, the potential for conflict is exacerbated. See Thomas E. Skilton, Note, GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy, 26 CORNELL INT'L L.J.
between GATT rules (guaranteeing free trade) and environmental rules (promoting species survival).

The second reason for this convergence has been the tendency of some countries to resort to unilateral trade restrictions in order to remedy what they perceive to be extrajurisdictional environmental infractions. The best known examples of this have been American attempts to restrict the import of foreign tuna that are caught outside of U.S. territorial waters in ways that kill large numbers of dolphins, and of shrimp caught outside of U.S. waters in ways that kill a large number of endangered sea turtles. Such unilateral attempts to promote global environmental norms come into conflict with GATT-based provisions designed to en-

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455, 478-81 (1993). See generally Hudnall, supra note 37, at 175 (recognizing a reconcilable conflict between environment and trade objections).

Several environmental agreements contain provisions permitting or requiring the use of trade restrictive measures against those not in compliance with the agreement. See, e.g., Endangered Species Convention, supra note 32; Protocol on Substances That Deplete the Ozone Layer, supra note 33; Basel Convention, supra note 34.


39 See infra note 40 and accompanying text.

40 This restriction was challenged within the WTO dispute resolution system and resulted in the first two WTO panel decisions dealing with whether states can unilaterally restrict trade to protect offshore environmental resources. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, D/S1/R (Aug. 16, 1991) [hereinafter Tuna-Dolphin I]; GATT Dispute Settlement Panel Report on United States Restrictions on Tuna, D/S1/R (June 1994) [hereinafter Tuna-Dolphin II]. For a more detailed discussion of the GATT rules as applied in the Tuna-Dolphin decisions, see infra note 50 and accompanying text. For a discussion of the WTO dispute resolution system, see infra notes 93-101 and accompanying text.

sure that foreign "products"\textsuperscript{42} are allowed access to domestic markets.

This creation of both international and domestic environmental law that impacts international trade is based on an increasing understanding of the profound link that exists between global trade and the global environment. The extent to which this link justifies giving the WTO a role in environmental regulation is the topic to which we will now turn.

3. **THE RELATIONSHIP BETWEEN THE WORLD TRADE ORGANIZATION AND THE ENVIRONMENT**

3.1. **The Case for Environmental Sovereignty**

In order to understand the environmentalist criticism of the WTO, some knowledge of the WTO's historic position on the link between trade and the environment is necessary. Many of the industry and developing country supporters of free trade argue that the WTO should respect and even protect what I will call the "environmental sovereignty" of its members. They claim that in fulfilling its mandate to promote free trade, the Organization should not interfere or allow interference with what they consider to be the entirely domestic concern of deciding the appropriate level of local environmental protection.\textsuperscript{43} Poorer countries

\textsuperscript{42} The use of the word "product" in GATT parlance refers to manufactured and natural goods as well as to non-human species of beings that are killed and used for commercial purposes. Such beings should not be considered products because they are not produced, i.e., "manufactured." See MERRIAM-WEBSTER COLLEGIATE DICTIONARY (10th ed. 1974). I explain this term because I believe that such unfeeling use of language ensures us of the vitality of the living world, and this, of course, has everything to do with global environmentalism.

\textsuperscript{43} Many developing country members of the WTO see attempts by developed country members to use trade measures to force them to change their domestic environmental standards as an infringement of their sovereignty. See Andrea C. Durbin, *Trade and the Environment: The North-South Divide*, 37 ENV'T 16 (1995); see also Robert L. McGeorge, *The Pollution Haven Problem in International Law: Can the International Community Harmonize Liberal Trade, Environmental and Economic Development Policies?*, 12 WIS. INT'L L.J. 277, 280 (1994) (discussing the concern of less developed countries ("LDCs") over "eco-imperialism"); *Protectionism: The Modern Face of Imperialism*, SWISS REVIEW OF WORLD AFFAIRS, May 2, 1996 (arguing that developing nations' concerns that impediments to free-trade have the potential to bring about "eco-imperialism" are not entirely unfounded).
they claim, for example, might well wish to tolerate higher levels of environmental degradation in exchange for certain economic benefits and should be left free to do so. This is an application of the still dominant view of state sovereignty,44 which asserts that states should be left free to regulate all matters of human activity within their territories.45

Indonesia is an example of a country that has taken a particularly strong position in support of maintaining the WTO's adherence to "environmental sovereignty." See Bhimanto Suwastoyo, Jakarta Tells WTO to Heed the Needs of Developing Countries, AGENCE FR. PRESSE, Sept. 4, 1996 (quoting Indonesian Foreign Minister Alatas who stated that "WTO member countries should not impose inappropriate environmental standards on their fellow members and should not use trade measures for the protection of the environment").

44 For international law purposes a state is defined as "[a]n entity that has a defined territory and a permanent population, under the control of its own government, and that engages in or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). Under the traditional notion of state sovereignty, the state's authority within its territory is nearly unqualified. This understanding of state sovereignty is reflected in Justice Marshall's famous observation:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent, of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.


45 Cyrille De Klemm and Clare Shine apply the concept of state sovereignty to the environment:

The most fundamental rule in international relations is that States are sovereign entities and that, subject to international law, they may conduct their business as they please. States exercise sovereign rights over all natural resources on their territory, which means that they may
The GATT's articles, as interpreted by the WTO's dispute resolution panels and appellate body, work to protect the thus described "environmental sovereignty" of its members. To start, the Organization refrains from interfering with the environmental sovereignty of member states. Nothing in the WTO Agreement provides for the imposition of substantive environmental standards on countries, and the Organization does not presently attempt to do this. The WTO even more assertively promotes conserve, exploit or destroy them, or allow them to be destroyed as they wish.

Cyrille De Klemm & Clare Shine, Biological Diversity: Conservation and the Law 1 (1993); see also Werner Levi, Contemporary International Law 263 (1991) (stating that traditional notions of sovereignty are a major complication in the implementation of effective, global environmental solutions).

The concept of sovereignty is embodied in what is perhaps international environmental law's most foundational document, the Stockholm Declaration. Principle 21 of the Stockholm Declaration states the following:

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


With the exception of the vague preamble to the Agreement Establishing the World Trade Organization, neither the GATT nor the WTO has been involved in the negotiation of a multilateral agreement for the protection of the environment. See David A. Gantz, A Post-Uruguay Round Introduction to International Trade Law in the United States, 12 Ariz. J. Int'l & Comp. L. 7, 31 (1995). Some commentators, however, have characterized the TBT and the Agreement on the Application of Sanitary and Phytosanitary Measures as environmental agreements. See Agreement on Technical Barriers to Trade, in WTO Agreement, Annex 1A [herinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, in WTO Agreement, Annex 1A [herinafter SPS Agreement]; Christine M. Cuccia, Note, Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Regulating Methods of Harvesting, 13 B.U. Int'l L.J. 481 (1995); see also Richard H. Steinberg, Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 Am. J. Int'l L. 231 (1997) (discussing WTO's limited environmental mandate to the CTE and the Committees that administer the TBT and SPS). For a discussion of the role and function of the SPS agreement, see infra note 51. The CTE specifically dis-
environmental sovereignty by prohibiting member states from infringing on the environmental sovereignty of other member states. The authority to do this is found in decisions by WTO adjudicative bodies which hold that the GATT forbids states from using trade restrictive measures to attempt to influence the environmental standards of other countries.

Two provisions circumscribing the permissible scope of domestic regulation are particularly important. Article III establishes what is called "the National Treatment" standard.\(^47\) Generally, this allows countries to require that foreign products conform to domestic regulations as long as such regulations treat foreign products no less favorably than like domestically produced goods. The other important provision, Article XX,\(^48\) allows for GATT inconsistent measures (specifically, for the purposes of this Article, to protect human, animal, or plant life or health, or to conserve exhaustible natural resources) as long as such measures do not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail, or restrict international trade.\(^49\)

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47 Article III(4) requires the following:

> [T]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT 1947 art. III, para. 4.

48 Article XX, entitled General Exceptions, reads in relevant part as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (b) necessary to protect human, animal or plant life or health ... (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 1947 art. XX.

49 Article XX's "necessary" protection requirement has been alternatively defined by different WTO panels as the "least GATT inconsistent approach" or as the "least trade restrictive measure." See Steve Charnovitz, The Environment
The Organization’s panels and appellate body have interpreted these two articles to mean that states can require environmental health and safety standards for foreign manufactured imports, but may not use trade measures in an attempt to impose their own standards on the off-shore production processes used to fabricate such products. 50

Thus, for example, (subject to what has become a major exception51) the United States may impose any limits on automobile

vs. Trade Rules: Defogging the Debate, 23 ENVTL. L. 475, 514 (1992). The “least GATT inconsistent approach” or the “least trade restrictive” requirement provides for national environmental measures to be upheld under Article XX only if no other reasonably available measure would have achieved the same environmental goals with lesser burdens on trade. See Maury D. Shenk, United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996), 90 AM. J. INT’L L. 669, 672 (1996). Although no panel decision has ever ruled a measure illegal based specifically on this provision, Article XX could have a chilling effect as the requirement “can be very strict in practice, permitting a tribunal to invalidate an environmental measure on the basis of often-speculative judgments on the availability of less trade-restrictive alternatives.” Id.

50 See Janet McDonald, Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order, 23 ENVTL. L. 397 (1992). This distinction between the off-shore “process” of production and the importation of products for domestic consumption has become crucial to whether a state’s restriction is permissible under the exceptions of Article XX. See John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, 49 WASH. & LEE L. REV. 1227, 1242-43 (1992) (noting that “if a nation is allowed to use the process characteristic as the basis for trade restrictive measures,” there would be problematic consequences “that could open large loopholes in the GATT”).

This distinction was in large part based on readings of the analysis developed in the Tuna-Dolphin opinions. See supra note 40 and accompanying text (describing the circumstances leading to the Tuna-Dolphin decisions); RUNGE, supra note 7, at 79-80 (1994) (“The [tuna-dolphin] panel reasoned that Article III requires a comparison between products of the exporting and importing nations, and not a comparison between different nations’ production processes that have no effect on the product qua product.”); Ian Isaac Zreczny, The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement, 1 BUFF. J. INT’L L. 79 (1994).

51 This exception is found in the SPS agreement. The agreement sets limits on states’ ability to restrict imports that are not in compliance with domestic environmental standards, thereby undermining the claim that the WTO supports environmental sovereignty. Under the SPS Agreement, WTO member states have the right to take sanitary and phytosanitary measures that are “necessary” for the protection of human and animal health. See SPS Agreement art. 2.2. One of the requirements that must be fulfilled is that the measure must be based on “scientific principles” and “sufficient scientific evidence.” Id. Recently, a WTO dispute resolution panel found a European Union regulation banning (for health reasons) the domestic selling of beef that is hormone fed not
emissions that it desires, as long as it does not establish more burdensome standards for imported cars than for domestic cars. It may not, however, restrict the import of cars from foreign nations based upon the amount of effluents that car factories inside those countries are releasing into the air.

3.2. Responding to the Case for Environmental Sovereignty

Environmentalists are justifiably critical of this approach. The WTO's limited mission does not, in fact, leave each state free to choose its own level of ecological welfare. This is so for several reasons. We are increasingly coming to understand that the whole of the earth's biosphere is ecologically interconnected and that seemingly isolated damage to local environments has complex and deleterious effects throughout the planetary system, though these effects may be difficult to observe. Sometimes, so-called domestic pollution can have quite obvious effects beyond national borders. Those emissions from automobile assembly plants in foreign nations contribute to global warming and may be based on scientific evidence. The WTO found the European Union in violation of its treaty obligations despite the fact that the regulation banning hormones was applied to domestic and foreign beef alike. See Report of the 1997 Panel on the EC, Measures Concerning Meat and Meat Products (Hormones), WT/0526/R/USA (Aug 18, 1997). For further discussion of the SPS agreement and its effect on the environment, see John J. Barcelo, Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement, 27 CORNELL INT'L L.J. 755, 769 (1994).

52 For a classic popular work which played a very important role in popularizing the concept of ecological interconnection, see RACHEL CARSON, SILENT SPRING (1962). Vice President Albert Gore recently authored a book that draws its inspiration from his understanding of global ecological interconnectedness. ALBERT GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT (1993).

53 Certain airborne effluents (mainly halocarbons and carbon dioxide) trap heat within the earth's atmosphere and are believed by the weight of scientific authority to be raising the average global temperature. This may lead to very deleterious results such as the raising of ocean levels (due to the melting of the polar ice caps), possibly imperiling the earth's islands and coastal areas. Large scale and potentially very damaging changes in the earth's weather patterns are also anticipated. See COMMITTEE ON SCIENCE, ENGINEERING AND PUBLIC POLICY, POLICY IMPLICATIONS OF GREENHOUSE WARMING: MITIGATION, ADAPTATION AND THE SCIENCE BASE (1992); see also U.S. ENVIRONMENTAL PROTECTION AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-1994, EPA-230-R-96-006 ES1-6, at 91-99 (1995) (projecting greenhouse gas emissions, correlating them to climate change, and discussing how the various greenhouse gases interact with the atmosphere to alter the radiation balance). The release of ozone destroying gases impacts regions far removed from the
be a cause of air pollution and/or acid rain in neighboring countries.\textsuperscript{54} The danger to the earth’s ozone layer is caused by chlorofluorocarbons ("CFCs") regardless of the country in which they are produced or used.\textsuperscript{55} Deforestation, especially the destruction of tropical rain forests, has obvious effects on the global climate,\textsuperscript{56} source of emission. See Irwin N. Forseth, \textit{Plant Response to Multiple Environmental Stresses: Implications for Climatic Change and Biodiversity}, in \textit{Biodiversity II} 187, 195 (Marjorie L. Reaka-Kudla \textit{et al.} eds., 1997). For a comprehensive scientific discussion of the causes and resulting problems of global warming, see \textit{A Global Warming Forum: Scientific, Economic, and Legal Overview} (Richard A. Geyer ed., 1993). For a non-technical overview of global warming and contributing factors, see Michael L. Parsons, \textit{Global Warming, The Truth Behind the Myth} 9-15, 141-168, 213-229 (1995).

\textsuperscript{54} Acid rain forms when, as a result of the burning of fossil fuels, sulphur and nitrogen compounds combine with atmospheric moisture. See Gregory S. Wetstone \& Armin Rosencranz, \textit{Acid Rain in Europe and North America: National Responses to an International Problem} (1983) (providing an overview of the science and technology of acid rain and the laws and policies governing control in the United States and internationally). For a discussion of the progression of the acid rain problem with a focus on affected regions in the United States and Canada, see Ross Howard \& Michael Perloj, \textit{Acid Rain: The Devastating Impact on North America} (1982). For a collection of articles addressing issues related to transboundary air pollution, see Bennett A. Caplan, Comment, \textit{The Applicability of Clean Air Act Section 115 to Canada’s Transboundary Acid Precipitation Problem}, 11 B.C. ENVTL. AFF. L. REV. 539, 542-54 (1984) (identifying the causes and sources of ecological and economic effects of the transnational acid precipitation problem in North America).

\textsuperscript{55} The layer acts to shield the Earth’s inhabitants from harmful ultraviolet radiation. See Daniel L. Albritton, \textit{Stratospheric Ozone Depletion: Global Processes, in Ozone Depletion, Greenhouse Gases, and Climate Change} 10 (1989) (elaborating on the necessity of the ozone layer and the harm resulting from the release of chlorofluorocarbons ("CFCs") into the atmosphere). Ozone depletion is truly an issue of global consequence, as the danger to the earth’s ozone layer is not limited to areas above countries where ozone damaging CFCs are released. See F. Sherwood Rowland, \textit{The Role of Halocarbons in Stratospheric Ozone Depletion, Ozone Depletion, Greenhouse Gases, and Climate Change} 33 (1989) ("Although about 95 percent [sic] of the chlorofluorocarbons (CFCs) are released in the Northern Hemisphere, the redistribution between the hemispheres is rapid enough that the Southern Hemisphere lags behind the Northern by only about 10 percent [sic]."); see also Committee on Science, Engineering, and Public Policy, \textit{supra} note 53, at 377 (noting that chlorine from man-made sources in various countries contributed to ozone loss above Antarctica).

\textsuperscript{56} Deforestation accounts for an estimated 20\% of worldwide greenhouse warming. See Rowland, \textit{supra} note 55; Marjorie L. Reaka-Kudla, \textit{The Global Biodiversity of Coral Reefs: A Comparison with Rain Forests}, in \textit{Biodiversity II}, \textit{supra} note 53, at 86 (noting that "the potential effect of burning rain forests on global climate" justifies the "international concern over biodiversity [being] fo-
as well as on the planet's biological diversity.\textsuperscript{57} Intensifying these global environmental problems, one of the main purposes of WTO-supported free trade is to promote economic growth. Such growth will result in increased industrial activity, and without enhanced pollution controls, this will result in more degradation to the global environment.\textsuperscript{58}

There is another important reason that the WTO's promotion of free trade does not leave each state free to choose its own level of ecological welfare. By establishing the preconditions for free trade, the Organization facilitates the unleashing of an environmentally destructive global regulatory and economic dynamic that is beyond the power of individual states to curtail.

\textsuperscript{57} See Reaka-Kudla, \textit{supra} note 56, at 86 (recognizing the importance of "how many species are present in these tropical wonderlands, the potential uses of such genetic diversity ... and the shocking rates ... at which these habitats are being eclipsed by the activities of humans"). "Any degradation of tropical forests, whether it is caused by climate or land-use changes, will lead to an irreversible loss of biodiversity." \textsc{INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE}, \textit{CLIMATE CHANGE 1995 IMPACTS, ADAPTATIONS AND MITIGATION OF CLIMATE CHANGE: SCIENTIFIC-TECHNICAL ANALYSES} 113 (1996). Forests are a key factor in the determination of the amount of carbon present in the eco-system. \textit{See id.}

\textsuperscript{58} Various commentators and environmentalists have noted the connection between economic growth and environmental degradation. See Edward Goldsmith, \textit{Global Trade and the Environment, in THE CASE AGAINST THE GLOBAL ECONOMY, supra} note 6, at 78, 78-91 (using Taiwan as an example to show that "our environment is becoming ever less capable of sustaining the growing impact of our economic activities"); Ralph Nader, \textit{Free Trade and the Decline of Democracy, in THE CASE AGAINST FREE TRADE, supra} note 3, at 1, 3; see also McGeorge, \textit{supra} note 43, at 280 ("[F]ree trade can destroy the environment.") (quoting Robert Schaeffer, \textit{Trading Away the Planet, 15 GREENPEACE}, Sept.-Oct. 1990, at 15).
This is true because free trade furthers a so-called regulatory "race to the bottom," whereby independent national regulatory regimes are all forced to lower their environmental standards. In the contemporary world of relatively free trade, promoted by the WTO, and open capital markets, free-flowing capital grav-


For a discussion of the "race to the bottom" in the international context, see Nader, *supra* note 58, at 6. While the "race to the bottom" is widely accepted, its existence has been debated in recent years. Professor Revesz has written the leading article questioning the existence of a "race to the bottom" in the area of environmental regulation. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (questioning the existence of the "race to the bottom," based on theoretical as well as empirical grounds).

For a response to Revesz's theory, see Esty, *supra* note 14, at 638 ("[E]nvironmental policymakers remain justified in fearing the dynamic of a regulatory race to the bottom."). Others have questioned the applicability of the race to the bottom in environmental regulation. See Thomas J. Shoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 293 (1997) (stating that the race to the bottom in the area of international environmental regulation has been exaggerated). For a summary of the literature debating the existence of a regulatory race to the bottom in the environmental context, see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 274-75 (1997).


Friendship, Commerce and Navigation treaties "include a variety of agreements that establish ground rules for the daily intercourse between countries." Patricia McKinstry Robin, Comment, *The Bit Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 940 (1984). For further discussion on Friendship, Commerce and Navigation treaties, see Beth Ann Is-
tates towards global export operations in those places where the cost of meeting regulatory burdens are the lowest and profits are the highest. In what has become a global regulatory market place, states are forced to relax domestic environmental regulations while attempting to out-bid each other to attract jobs and tax revenues. A systematic reduction of global environmental standards is the result.

A second related concern is competitiveness. Within a globalized system of free trade, companies that operate in countries with stricter environmental regulations will tend to be burdened by higher production costs and will, therefore, have difficulty selling their goods at prices which are competitive with firms which do not have to bear these costs. Therefore, even controlling for free mobility of capital and disregarding the dynamic of the race to the bottom, such firms will tend to be either driven out of business or forced to devote their production resources to industries that are less environmentally problematic.

Some free trade apologists for the status quo justify this as a beneficial environmental application of David Ricardo's famous rationale for international trade, the law of comparative advantage. According to Ricardo's theory, if trade barriers between

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See Robert F. Housman, The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts, 10 CONN. J. INT'L L. 301, 317 (1995) ("[W]hile environmental regulatory costs may be trivial in some sectors, they can be substantial in those sectors that are most in need of regulation because of their high impacts. In these high impact sectors, environmental costs can be significant enough to effect investment and production decisions."); see also Joseph R. Dancy, The Impact of the Clean Air Act's Ozone Non-Attainment Areas on Texas: Major Problems and Suggested Solutions, 47 SMU L. REV. 451, 453 (1994) (noting the inability of firms in countries with high compliance costs to compete globally).

The theory of comparative advantage was developed by economist David Ricardo at the turn of the eighteenth century. See 1 WORKS OF DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY 128-41 (P. Strafa ed., 1975). The theory generally states that if every country produces that which it can produce most efficiently and engages in trade for other goods needed, overall global production will be maximized. See RYAN C. AMACHER & HOLLEY H. ÜLBIRCH, PRINCIPLES OF ECONOMICS 62-64, 890-96 (1992).

See WORKS OF DAVID RICARDO, supra note 62, at 128-41.
nations are removed, each nation will come to produce what it can produce most advantageously, and the greatest sum total of world production will occur. Under the classic theory, a country gains a comparative advantage in producing certain goods if it has access to factors of production which allow such goods to be produced at a relatively lower cost than in other countries. For example, a country may have a comparative advantage in growing roses if soil and rainfall are conducive to rose production.

The argument that lax environmental standards should be considered a way of gaining a comparative advantage rests on the assumption that a preference for degrading the local environment should be seen as a low cost factor of economic production. This is a false assumption. The appearance of comparative advantage is created because neither the producer who sells the product, nor the consumer who buys it has to pay for the environmental costs of the pollution. These costs are instead borne by those third parties whose quality of life the pollution adversely effects. Because the cost of pollution is not borne internally by the participants in the market transaction, economists refer to it as an “externality.” Once environmental degradation is correctly understood to be an externalized cost of production, it becomes clear that when that

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64 See id. See generally Jackson, supra note 50, at 1243 (providing a contemporary overview of Ricardo’s theory).
65 See WORKS OF DAVID RICARDO, supra note 62.
cost is correctly attributed to the market cost of the products, the advantage disappears.

Deputy Treasury Secretary Lawrence Summers made the economic argument for encouraging environmental degradation in developing countries when he was the Chief Economist at the World Bank.67 In an internal memorandum that ultimately became public (generating considerable controversy), Summers argued that the World Bank should be encouraging migration of "dirty" industries to developing countries.68 Part of his rationale rested on the contention that "the demand for a clean environment for aesthetic and health reasons is likely to have very high income-elasticity."69 In other words, the demand for a clean environment, like the demand for many other goods, is likely to increase as people have more money. In a poor society, people would be less likely to choose to utilize scarce resources to clean up the environment.70 This assumes that pollution is not a true externality, but rather that the local population has collectively chosen to bear this cost because of a perceived group benefit.

If there is such a benefit to the local population, however, it is not clear what it is. While there may be some effect on local employment71 or wages, determining whether this would be the case,

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68 Id.
69 Id.
70 This argument is frequently made by developing countries. They argue that industrialized nations who advocate more stringent environmental standards fail to recognize the plight of the impoverished working classes. See Developments in the Law—International Environmental Law, 104 HARV. L. REV. 1483, 1505 (1991) ("The Brazilian Delegate, at the historical Stockholm Conference, declared that 'his country had no interest whatever in the subject of pollution control' which he viewed as a 'rich man's problem.'") (quoting M. ROYSTON, POLLUTION PREVENTION PAYS 3 (1979)). Many developing country governments defend their lax environmental standards by citing economic growth and increased employment. See Edward J. Williams, The Maquiladora Industry and Environmental Degradation in the United States-Mexico Borderlands, 27 ST. MARY'S L.J. 765, 772-3 (1996) (noting that Mexico's Programa de Industrialización Fronteriza, which has resulted in the much criticized environmental degradation near the United States-Mexico border, was developed in 1965 to promote industrial relocation and provide jobs).
71 Some would argue that harmonized PPM standards would cause companies to leave, and that jobs would be lost. However, those who accept the theory of comparative advantage would argue that new jobs would be created. See PAUL KRUGMAN, INTERNATIONAL ECONOMICS: THEORY AND POLICY 145 (1967) (explaining that in theory, job loss, purely as a result of international trade, should cause temporary economic dislocation).
how many people it would effect, and the extent to which this would be adequate compensation for the environmental degradation is quite complex and speculative. What is obvious is that only in the most fictitious sense are local populations in developing countries making a collective market decision to choose domestic pollution in exchange for perceived economic rewards. Rather, a sovereign preference for such environmental degradation is a function of the observable fact that in most developing countries, such third party locals are not as politically influential as producers.

In trade terms, forcing local populations in developing countries to bear pollution costs is the equivalent of a general tax on the local population that is being used to subsidize producers. It is well accepted that subsidies that can give a competitive advantage to certain products are not sovereign matters immune from discipline by the WTO. Therefore, understood correctly as a subsidy, under basic GATT principles, environmental degradation is not exclusively a matter of domestic concern.

Even if local populations in developing countries could be understood to be choosing domestic pollution in exchange for perceived economic rewards, the sovereignty rationale for allowing states to gain an environmental "comparative advantage" still does not hold. If the prior argument that the effects of environmental degradation transcend national borders is correct, a choice to create an environmental comparative advantage cannot be seen as an exclusively sovereign matter.

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72 Several commentators have analyzed environmental degradation as the equivalent of a subsidy for trade purposes. See Robert F. Housman & Durwood J. Zaelke, Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability, 23 ENVTL. L. 545, 555 (1993); Thomas K. Plofchan, Jr., Recognizing and Countervailing Environmental Subsidies, 26 INT'L L. 763, 771 (1992). For a more detailed discussion of the conceptual similarity between subsidies and the allowance of environmental degradation and how the WTO dispute resolution system could be used to enforce countervailing duties, see infra notes 105-07 and accompanying text.

73 Subsidies aimed solely at exports are explicitly banned by the GATT, and countries are allowed to impose countervailing duties to make up for subsidies not tied specifically to exports. See GATT 1947 art. VI, art. XVI; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, in WTO Agreement, Annex 1A, art. 10, n. 36.
4. THE DANGER OF THE UNILATERAL ALTERNATIVE TO GLOBAL ENVIRONMENTAL REGULATION

Given the WTO's failure to address environmental concerns, why should environmentalists work within its framework? Part of the answer lies in understanding the unsatisfactory nature of the isolationist approach, manifested by Ralph Nader's suggestion that the United States consider withdrawing from the WTO, and unilaterally enforce environmental standards by closing its markets to goods that are produced in environmentally unacceptable ways. Even if the United States were to stop short of withdrawal from the WTO, such unilateralism would not be the answer.

Most importantly, such a unilateral approach would very likely be completely ineffective at stemming the long-term tide towards global environmental degradation. Regulatory standards which are unilaterally imposed by the United States are simply not going to be considered legitimate, and countries' willingness to comply voluntarily with international norms is highly dependent upon their legitimacy. It is possible, of course, that under

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74 See supra note 4.
75 See supra note 4 and accompanying text. Nader is not alone in his calls for the United States to use access to its relatively large marketplace as a means of advancing social policy goals. For instance, William Greider states the following:

The American political system also has enormous leverage over the behavior of foreign-owned multinational enterprises—access to the largest, richest marketplace in the world. Because of that asset, the United States could lead the way to new international standards of conduct by first asserting its own values unilaterally. If trade depends upon price advantage derived mainly from poverty wages for children or defenseless workers prohibited from organizing their own unions or factories that cause great environmental destruction, this trade cannot truly be called free.

The purpose of asserting America's political power through its own market place would be to create the incentive for a new international system of global standards, one which all of the trading nations would negotiate and accept.


76 As international law often lacks coercive enforcement mechanisms, states' willingness to obey various international laws is highly dependent upon acceptance of their legitimacy. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990) (rendering "[a] partial definition of legitimacy" as "a property of a rule or rule-making institution which
the threat of unilateral United States sanctions, some countries sometimes may be bullied into implementing stricter environmental regulations. However, the United States is obviously not capable of single-handedly coercing the world into adopting the comprehensive environmental standards necessary to secure a world in environmental harmony. In fact, the international ill will that would result from such a heavy handed American effort would make it very difficult to create the type of positive negotiating atmosphere conducive to successfully concluding MEAs.

It is true that, if the United States resorts to such an approach, many countries would probably act unilaterally as well. This "help," however, would hardly improve the chances of successfully meeting global environmental challenges. The success of a global regime based on each country's establishment of its own idiosyncratic scheme of excluding foreign goods would be impaired by its incoherence. Given the myriad of haphazard and conflicting requirements for exporting goods that global indus-


77 Unilateral trade sanctions to enforce environmental norms are likely to lead to resentment that would impede the ability to negotiate multilateral environmental standards. See GATT, 1 INTERNATIONAL TRADE 21 (1989) (proclaiming, on behalf of the GATT Secretariat, that negative incentives "are not an effective way to promote multilateral cooperation"); Daniel P. Caswell, Comment, The Promised Land: Analysis of Environmental Factors of the United States Investment in and Development of the Amazon Region in Brazil, 4 NW. J. INT'L L. & BUS. 517, 544 (1982); Steve Charnovitz, Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices, 9 AM. U. J. INT'L L. & POL'Y 751 (1994) ("[T]rade sanctions are also likely to sour relations, making multilateral cooperation much more difficult and international agreements harder to achieve."") (quoting NATIONAL CONSUMER COUNCIL, INTERNATIONAL TRADE: THE CONSUMER AGENDA 131 (1993)); Piritta Sorsa, GATT and Environment: Basic Issues and Some Developing Country Concerns, in INTERNATIONAL TRADE AND THE ENVIRONMENT, 325, 337 (Patrick Low ed., 1992).
tries would face, any overall benefit to the environment would be far from ensured. This ineffectiveness would be compounded by the political reality that without the discipline of international oversight, many country regimes would be prone to lose touch with their environmental raison d'État. Given the inherent complexity of differentiating between legitimate environmental measures and disguised trade barriers, such national regimes would be very susceptible to cooptation by their own domestic protectionist interest.

Logistical realities related to the complexity of enforcement would further undermine such an approach. Given that national environmental regulators are already over-burdened, imagine

See, e.g., Charnovitz, supra note 77, at 758 (citing W. Rob Storey, New Zealand's Minister of Transport, stating that "unilateral measures to reconcile trade and environmental objectives are likely to be ineffective or counterproductive"); Naomi Roht-Arriaza, Precaution, Participation, and the "Greening" of International Trade Law, 7 J. ENVTL. L. & LITIG. 57, 86 (1992) (acknowledging that the diverse standards which are a result of unilateral action can be problematic).

There is the additional concern that in many cases, the offending nation will be able to direct its exports to another market. See Sorsa, supra note 77, at 337; Kevin C. Kennedy, Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach, 18 HARV. ENVTL. L. REV. 185, 226 (1994).

Commentators have noted the potential for governments, in response to corporate lobbying, to institute protectionist restrictions in the guise of environmental measures. See Michael I. Jeffery, The Environmental Implications of NAFTA: A Canadian Perspective, 26 URB. LAW. 31, 48 (1994); Gabriel Canahuante, Earth Summit: NGOs Say Free Trade Won't Save the Planet, INTER PRESS SERVICE, Jun. 3, 1992, available in LEXIS, News Library, Inpres File (noting that Greenpeace stresses the importance of preventing protectionist regulations from being presented as environmental measures); John C. Stauber & Sheldon Rampton, Green PR: Silencing Spring, ENVTL. ACTION, Jan. 1, 1996, available in 1996 WL 10156375 ([A] generation of PR executives have become accustomed to donning the green hat.

See Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws, 34 BUFF. L. REV. 833 (1985); David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by The United States, The States and Their Citizens?, 54 MD. L. REV. 1552 (1995) (arguing that the scarce resources and complex regulatory schemes prevent the United States Environmental Protection Agency ("EPA") from providing effective enforcement, and that citizen suits should play a larger role in enforcement of domestic environmental laws); Paul R. Portney et al., The EPA at "Thirtysomething" 21 ENVTL. L. 1461 (1991); Barton H. Thompson, Jr., The Search for Regulatory Alternatives, 15 STAN. ENVTL. L.J. 8 (1996). The shortage of resources in environmental regulatory and enforcement agencies is not limited to the United States. See Bacon, supra note 29, at 281. ("National environmental ministries are generally over-burdened and underfunded.").
the cost and difficulty (especially, but not only, for poor countries) of attempting to unilaterally assess environmental problems in countries all over the world. Countries would be assessing pollution controls in places where technologies and appropriate environmental solutions may differ from their own, and where the local authorities would have little incentive to be cooperative with what they would likely deem intrusive foreign regulators.

A unilateral approach would not only fail to protect environmental interests, but it could also spell disaster for the international trade order. The reality or perception that trade restrictions on targeted countries were being used for protectionist ends, coupled with a general aversion to foreign attempts to export environmental standards, would very likely lead target countries to impose their own retaliatory trade restrictions. More fundamentally, significant implosion of the international trading system would become almost inevitable as disagreements over approaches to local environmental regulations have caused countries to mutually restrict the import of each other's products. A consideration of the arguments for and against free trade is outside the scope of this Article. \(^{81}\) Suffice it to say, however, that as we learned in the 1930s, such an implosion of the international trading system could cause widespread and serious economic hardship for many people, even heightening the possibility for war. \(^{82}\)

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\(^{81}\) For a limited reference to the historically most accepted economic theory in support of international trade, see supra notes 62-65 and accompanying text (discussing David Ricardo and the theory of competitive advantage). For a more extensive discussion about the policy concerns raised by international trade, see DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE (1996) (providing a review and analysis of the major arguments both for and against free trade). See also MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 1-17 (1995) (offering a brief discussion of the underlying theories in favor of free trade and some key criticisms); James Bovard, The Morality of Protectionism, 25 N.Y.U. J. INT'L L. & POL. 235 (1993) (highlighting the negative impacts of protectionist measures); Robert W. McGee, An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe, 26 GEO. WASH. J. INT'L L. & ECON. 539 (1993) (giving a concise account of the arguments both for and against free trade from the perspective of a free trade supporter). See generally LOW, supra note 38 (examining the GATT and the trade policy of the United States); Jagdish N. Bhagwati, Challenges to the Doctrine of Free Trade, 25 N.Y.U. J. INT'L L. & POL. 219 (1993) (discussing how demands for fair trade and harmonization of domestic policies and institutions in trading nations have multiplied).

\(^{82}\) See supra notes 17-18 and accompanying text.
5. **Accomplishing Global Environmental Regulation with the Help of the WTO**

5.1. *WTO’s Limitations as a Forum of Environmental Regulation*

Clearly, when the implications are examined, unilateralism is not the answer. Global environmental regulation requires a multilateral regime. Many environmentalists accept this, but nevertheless argue that the WTO should not be that regime. They do not believe that the Organization can make the transition from promoting “environmental sovereignty” into a force for global environmentalism. They contend that it is inherently biased in favor of business and against environmental interests. In sup-

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83 See, e.g., Jeffrey L. Dunoff, *Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes*, 15 MICH. J. INT’L L. 1043 (1994) (arguing that the WTO’s “trade first” philosophy cannot be reconciled with the need for environmental preservation). Several commentators and environmentalists have advocated the formation of a body designed to balance environmental and trade concerns. For one of the most persuasive works, see id. at 1045 (arguing that such an organization would be able to recognize the “interdependent nature of global economic and environmental issues . . . [and] should have access to scientific and technical expertise which would enable it to resolve trade-environment disputes knowledgeably”). See also Stephen A. Silard, *The Global Environment Facility: A New Development in International Law and Organization*, 28 GEO. WASH. J. INT’L L. & ECON. 607 (1995); Lori Wallach, *Hidden Dangers of GATT and NAFTA*, in *THE CASE AGAINST FREE TRADE* 59 (1993) (calling for the formulation of a new environmentally friendly body for the resolution of trade-environment disputes).

Commentators and environmentalists have also proposed the establishment of an independent tribunal to adjudicate trade-environment disputes. See Dunoff, *supra* at 1106; Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements within the Existing World Trade Regime*, 5 J. TRANSNAT’L L. & POL’Y 341 (1996); Alison Raina Ferrante, *Comment, The Dolphin/Tuna Controversy and Environmental Issues: Will the World Trade Organization’s “Arbitration Court” and the International Court of Justice’s Chamber for Environmental Matters Assist the United States and the World in Furthering Environmental Goals?*, 5 J. TRANSNAT’L L. & POL’Y 279, 306 (1996) (suggesting that the ICJ may be an appropriate organization). For a description of the WTO dispute resolution system and my arguments for using it to adjudicate environmental disputes, see *infra* notes 93-101 and accompanying text.

Commentators in a Worldwatch Institute publication charge, “the decks are stacked against the environmental cause at the GATT” as a result of the “pro-trade bent of the organization and the limited nature of the exceptions to its rules that are granted to preserve human health and natural resources.” *Costly Tradeoffs: Reconciling Trade and the Environment*, WORLDWATCH PAPER 113 (1993), quoted in *GATT Biased Against Protection of Environment*, World-
port of this contention they point to its fundamental mandate and mind set of advancing free trade. They point to its traditional function as a forum where governments represented by trade ministries bargain for trade concessions on behalf of various industrial constituents. Finally, they point to its secretive and exclusionary processes under which environmentalists have a hard time

watch Report Says, 16 INT'L ENVTL. REP. (BNA) 248 (Apr. 7, 1993); see also Dunnoff, supra note 83, at 1047 ("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."). Several commentators have argued that, as a result of its history and focus, the WTO will never be able to give appropriate deference to environmental concerns. See U.S. Coalition Declares WTO Gasoline Finding, Feb. 21, 1996 ("Public Citizen and Friends of the Earth said the WTO . . . places trade liberalization above all other concerns."). Others have pointed to the fact that the WTO/GATT mandate is to break down trade barriers, and many environmental agreements seek to use trade measures as a means of enforcement. See Wold, supra note 37, at 894. Wold does not go so far as to say, however, that the WTO is an altogether inapprop-riate entity to oversee trade-environment matters, only that significant conflicts exist in several areas and that to be effective, reform would be required of both the WTO and MEAs. See id.

85 For example, one environmentally minded commentator writes that attempts to reconcile trade measures with environmental concerns have failed because strategies in trade negotiations generally "are built upon the premise that free trade is more important than protecting the environment." Alberto Bernabe-Rieffkohl, "To Dream the Impossible Dream": Globalization and Harmonization of Environmental Laws, 20 N.C. J. INT'L L. & COM. REG. 205, 207 (1995); see Wallach, supra note 83, at 28.

While many have argued that the WTO is the nemesis of MEAs, others have proposed varying degrees of reform which arguably would make the WTO a more even-handed arbiter of trade-environmental issues. See Wold, supra note 37; Anna Beth Snoderly, Note, Clearing the Air: Environmental Regulation, Dispute Resolution, and Domestic Sovereignty Under the World Trade Organization, 22 N.C. J. INT'L L. & COM. REG. 241 (1996).

86 Michael McCloskey of the Sierra Club has said of the WTO, "there's nobody there to represent our interests." Charles T. Haag, Comment, Legiti-
mizing "Environmental" Legislation Under the GATT in Light of the CAFE Panel Report: More Fuel for the Protectionists?, 57 U. PITT. L. REV. 79, 89; see also Gena Grossman, In Poor Regions, Environmental Law . . ., N.Y. TIMES FORUM, Mar. 1, 1992, at 11 (stating that environmentalists are concerned that the WTO is only concerned with the interests of big business). Environmentalists have also expressed concern that the WTO talks "shut environmentalists out of the decision-making process, while their business opponents are heavily represented on advisory groups." Dunne, supra note 7; Nader, supra note 58, at 5; Ralph Z. Hallow, Gingrich Stood Behind GATT Because 'We Gave Our Word', WASH. TIMES, Nov. 30, 1994, at A6 (quoting Ralph Nader as stating that the WTO Agreement was designed "by the big corporations, for the big corporations").

87 See William M. Reichert, Note, Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations, 5 MINN. J. GLOBAL
gaining a seat at the table. 88 While these arguments raise real
problems, they overlook the fact that the GATT historically, and
to a lesser extent the WTO today, do not have an agenda distinct
from that of their member states. Until very recently, the WTO
had a small secretariat that rarely took action which could be con-
strued as independent of direct control by its member states. 89

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TRADE 219 (1996). Although the WTO has taken some steps towards increased
transparency,

Dispute settlement panels continue to be held in closed sessions; the
WTO will not release basic biographical information about panel-
ists . . .; panel reports are not released to the public until after a report
is adopted; [nongovernmental organizations] NGOs may not observe
regular meetings of the WTO General Council and, indeed, minutes of
these meetings remain secret for two years; and finally all WTO com-
mittees . . . convene in closed session . . .

Steve Charnovitz, Participation of Nongovernmental Organizations in the World
vitz states that not only does the WTO lack a legitimate reason for the ex-
clusion, NGOs could make meaningful contributions to the WTO. See id. at 356-
57.

88 A major criticism of the GATT and the WTO has been their reluctance
to grant NGOs sufficient access to the WTO or provide for a meaningful ex-
change of information. See Charnovitz, supra note 87. Charnovitz advocates
increased participation by NGOs, noting the minimal role they are afforded at
the WTO in relation to other intergovernmental organizations (“IGOs”). See
id. at 335. “[S]ome critics described the GATT as having ‘secret’ trade negoti-
ations.” Reichert, supra note 87, at 225-26 (advocating a greater role for NGOs
in the WTO); see also Wallach, supra note 83, at 60 (advocating that GATT be
reformed to allow for more open proceedings). One commentator advocates
the use of the “trade stakeholder’s model” in the WTO. See G. Richard Shell,
Trade Legalism and International Relations Theory: An Analysis of the World
Model emphasizes direct participation in trade disputes not only by states and
businesses, but also by groups that are broadly representative of diverse citizen
interests.”); see also Dunne, supra note 7 (“[E]nvironmentalists have a distaste for
what seems to them the undemocratic GATT practice of behind-doors negotia-
tion.”).

89 The WTO Secretariat as bureaucracies go is not large. See HOUSE WAYS
AND MEANS TRADE SUBCOMMITTEE, Testimony of Ambassador Michael Kan-
tor , Mar. 13, 1996, available in 1996 WL 7136812. Its predecessor, the GATT,
likewise had a secretariat with a staff of approximately 400. See GATT—Short
for Lower Duties, More Trade, More Jobs, AGENCE FR.-PRESSE, Dec. 14, 1993,
available in LEXIS, News Library, News/Wires File. Although intended as a
criticism of the WTO, Alan Tonelson has stated, “The WTO is going to set
precedents and hand down rulings that reflect the values, policies and practices
of the majority of its member states.” Ian Jones, Fair Deal or Foreign Threat?,
WORLD TRADE, Jan. 1997, at 24-28. Former United States deputy trade repre-
sentative, Jules Katz, has observed that the WTO is a “paper tiger” by design.
Id.; see also Thomas J. Dillon, Jr., The World Trade Organization: A New Legal

https://scholarship.law.upenn.edu/jil/vol19/iss3/3
While national trade ministries, with an arguable bias in favor of trade over environmental protection, are the lead agencies working with the WTO, this arrangement is not written in stone. In fact, to the extent environmental matters begin to come before the WTO, states are likely to increasingly rely on environmental ministries in dealing with the WTO. This means that, ultimately, the ability to overcome existing institutional bias and to make the environmental voice heard is contingent upon the overall strength of the global environmental movement and not upon the ephemeral architecture of the trade regime.

In addition to concerns about institutionalized bias, some environmentalists argue (oddly enough, together with the anti-environmentalists) that the WTO lacks the expertise necessary to create and monitor environmental agreements because it was not founded as an environmental organization.\(^9\) Just as there is no inherent reason why the Organization’s anti-environmental bias cannot be overcome, so too is there no inherent reason why such expertise cannot be acquired. The World Bank was certainly not established as an environmental organization and yet, born out of a realization of the connection between development, lending, and the environment, the World Bank established an environ-

__Order for World Trade?, 16__ MICH. J. INT’L L. 349, 355-56 (1995) (concluding that the WTO presents _neither_ a qualitative change in the scope and functions of GATT nor the advent of a supranational trade institution with power and authority to usurp sovereignty from its Member Nations). Some commentators have concluded that the WTO has “no more real power than . . . the GATT.” _Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Finance Committee_, 103d Cong. 197 (1994) (quoting prepared statement of law professor, John H. Jackson). For a discussion of how member state attitudes are specifically reflected in the WTO’s environmental policies, see Geza Feketekuty, _The Link Between Trade and Environmental Policy_, 2 MINN. J. GLOBAL TRADE 171, 200 (1993) (discussing the organization’s approach to environmental matters, specifically noting that the decision to replace the long dormant GATT working party on the environment with the CTE reflected the desires of the membership).

\(^9\) “The GATT is not equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards, or developing global policies on the environment.” Jeffrey L. Dunoff, _Resolving Trade-Environment Conflicts: The Case for Trading Institutions_, 27 CORNELL INT’L L.J. 607, 608 (1994) (citing a Report by Ambassador Hidetoshi Ukawa, Chairman, Group on Environmental Measures and International Trade). Dunoff advocates the removal of trade-environment issues to a “forum expressly designed to address these difficult issues.” _Id_. _See generally Report of the WTO Committee on Trade and the Environment_, supra note 36 (noting that the WTO is limited in scope and competence to those environmental matters which substantially affect trade).
mental department and now requires environmental impact statements on loans.91 Similar institutional changes have also occurred at the major regional development banks.92

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In addition to the establishment of an Environmental department and requiring EIAs, the World Bank, in cooperation with UNEP and the United Nations Development Program (“UNDP”), is administering the Global Environment Facility (“GEF”). See Young, supra. The GEF was designed to facilitate the transfer of funds to developing countries to help offset the cost of implementing environmental initiatives. See Kyle W. Danish, International Environmental Law and the “Bottom-Up” Approach: A Review of the Desertification Convention, 3 IND. J. GLOBAL LEGAL STUD. 133 (1995); David Reed, The Global Environment Facility and Non-Governmental Organizations, 9 AM. U. INT’L L. & POL’Y 191 (1993). In addition, the World Bank has published a three volume Environmental Assessment Sourcebook. See Prince & Nelson, supra.

92 The World Bank and the Regional Development Banks have agreed that they “[w]ill, to the best of their abilities, endeavour to ... [i]nstitute procedures for systematic examination of all development activities, including policies, programs and projects, under consideration for financing to ensure that appropriate measures are proposed for compliance with Section I.” Declaration on Environmental Policies and Procedures Relating to Economic Development, Feb. 1, 1980, 19 LL.M. 524 (relating to the importance of sustainable development and the protection of the environment). The Asian Development Bank has instituted a two-tiered environmental assessment program. See Prince & Nelson, supra note 91, at 283. An Initial Environmental Examination (“IEE”) is required for projects that are likely to impact the environment. Id. If the IEE projects a substantial adverse impact on the environment, a formal EIA is required. Id.

“The African Development Bank, the Inter-American Development Bank and the Asian Development Bank have all set up environmental units.” William Wilson, Environmental Law as Developed Assistance, 22 ENVTL. L. 953, 969

https://scholarship.law.upenn.edu/jil/vol19/iss3/3
To be clear, I wish to emphasize that I am not proposing a specific, definitive environmental mandate for the WTO. While institutional change is possible, there may be many reasons, including the extent to which critical expertise could be best found outside the WTO, that the WTO should not take the lead in global environmental regulation. There are clearly many ways the Organization could play a role in the negotiation and enforcement of global environmental agreements. My purpose here is to point to the advantages that the WTO offers generally, not to rigidly advance any particular institutional structure as necessary for implementing these advantages.

5.2. Taking Advantage of the WTO’s Compliance Mechanisms

5.2.1. Dispute Resolution Under the WTO

Not only can the Organization’s deficiencies as a forum for global environmental regulation be overcome if the political support can be garnered, but also certain qualities unique to the WTO’s trade mission make it well suited to be such a forum. Another facet of the previously mentioned connection between trade and the environment is that it provides a formal justification for resorting to the WTO’s trade-based dispute resolution system to enforce international environmental standards.

Under this dispute resolution system,93 parties must first attempt to resolve their conflict through joint consultation.94 If such consultations are unproductive, the parties may agree to request good offices conciliation or mediation from the Director General of the WTO.95 If no settlement is forthcoming, the

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93 Understanding on Rules and Procedures Governing the Settlement of Disputes, in WTO Agreement, Annex 2 [hereinafter Dispute Settlement Understanding or DSU Agreement].

94 Where one party requests consultation as set forth in the agreement, the other party must “enter into consultations in good faith within a period of no more than 30 days.” Id. art. 4, para. 3. “Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.” Id. art. 4, para. 1.

95 See id. art. 5, paras. 1, 6. The parties may request good offices, conciliation and mediation. See id. art. 5, para. 3. The complaining party may request the formation of a panel where procedures for good offices, conciliation or mediation has terminated. See id.
complaining party can request adjudication by a three member panel. After a decision is rendered, the losing party may appeal issues of law and legal interpretation to a permanent appellate body. A final decision becomes binding unless the entire WTO membership agrees that a decision should not be adopted. Since this unanimity requirement necessitates that the winning party agree to forego its own victory, such adoption by the membership is almost certain. After adoption, the losing party must either comply with the decision or offer compensation.

Parties seldom defy adverse decisions. In a well known study, Professor Hudec found that even under the older and much weaker GATT system, panel decisions were generally honored.

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96 See id. art. 6, para. 1; art. 8, para. 5. Where the complaining party requests the establishment of a panel, one shall be formed unless the “DSB [Dispute Settlement Body] decides by consensus not to establish a panel.” Id. art. 6, para. 1.

97 See id. art. 17, paras. 1, 4. “A standing Appellate Body shall be established by the DSB.” Id. art. 17, para. 1. Although the Appellate Body will have seven members, three individuals will serve on a given case. See id.

98 See id. art. 16, paras. 3, 4 (relating to DSB reports); see id. art. 17, para. 14 (pertaining to appellate review).


99 See Dispute Settlement Understanding, art. 3, paras. 1, 3 (noting that immediate compliance, or if impracticable, compliance within a reasonable time is “essential to the effective functioning of the WTO”). Where recommendations are not implemented within a reasonable time, a member must pay compensation to the aggrieved member(s). See id. art. 22, paras. 1, 2. Compensation is deemed to be a temporary measure. See id. art. 22, para. 1.

100 Professor Hudec and his co-authors attempt to provide a statistical analysis of the effectiveness of GATT dispute resolution procedures. Robert E. Hudec et al., A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989, 2 MINN. J. GLOBAL TRADE 1 (1993). They focus their analysis on the 207 complaints arising between 1948 and 1989. See id. at 3. Of those legally valid complaints, sixty-seven are known to have resulted in violation rulings. See id. at
In part, this is because states have a strong economic interest in maintaining the integrity of the international trading order and, in part, because the Organization's regulation of world trade provides the opportunity to employ a powerful system of trade sanctions. If a party is found to be in breach of WTO rules and does not correct the situation or pay compensation, the prevailing party can seek permission from the WTO membership to withdraw trade concessions previously given to the losing party. Because such remedial sanctions are backed by the Organization, the reputational cost to the loser of retaliating in kind is very high. This minimizes the potential for dangerous trade wars to develop.

5.2.2. Directly Enforcing PPM Standards with the WTO System

Because the WTO's adjudicatory system is so effective, its application to environmental disputes could serve to greatly enhance the enforcement of global environmental agreements. Notably, the system is well suited to effectively enforcing multilaterally agreed upon PPM standards. The practices of any country alleged to not be in compliance with WTO-supported environmental standards, could be opened to challenge within the WTO dispute resolution system described above. Under this system, if a WTO panel or appellate body ultimately found a country's practices not to be in conformance with PPM standards, the country could be required to remedy the infraction, pay compensation, or face trade sanctions. Non-compliance by member states with their obligations to enforce basic international PPM standards, such as those regulating air or water quality, might constitute a competitive disadvantage to a wide array of industrial producers all over the world. In most conflicts under the GATT either particular tariffs or regulations are alleged to illegally disadvantage a limited

10. According to the authors, 90% of those rulings "ended with a positive outcome." Id. More specifically, "just over half of the violation rulings achieved full compliance directly, two-thirds resulted in full compliance somehow, and nine out of ten produced a worthwhile positive result." Id.

101 If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

Dispute Settlement Understanding art. 22, para. 2.
number of products from specific countries. In contrast a failure by a country to adhere to basic international environmental production standards would disadvantage industrial competitors all around the world giving causes of action to all, or nearly all, countries. Under the present system, each of these countries would have the right to bring a claim, and if compliance was not forthcoming, each would have the right to compensation. Because countries violating WTO-enforced environmental rules would face potentially costly legal actions by so many other countries, the legal incentive to comply with such rules would be even stronger than it already is to comply with the traditional rules of international trade.

5.2.3. Alternative Remedial Schemes

Two other remedial schemes within the WTO system allow members, on their own initiative, to restrict trade in furtherance of organizationally sanctioned goals. These could ultimately be adapted to induce countries to comply with international PPM standards. The first would be for the Organization to allow members to ban the importation of goods that they determine not to be produced in accordance with WTO-sanctioned environmental regulations. This would be analogous to the Organization’s current practice of permitting members to ban goods that are made with prison labor.102 Alternatively, the Organization could authorize members to place what is called a “countervailing duty” on goods that they determine to result from production processes not in conformance with WTO-sanctioned environmental standards. Countervailing duties are surcharges on imported goods and, in this case, would be equal to the savings that producers realized from not having met the more stringent internationally defined environmental standards.103

The Organization currently allows states to impose countervailing duties when foreign companies “dump” goods into their markets at less than the market value, and to offset the previously discussed104 competitive trade advantage that foreign companies

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102 The GATT permits “the adoption or enforcement by any contracting party of measures . . . (e) relating to the products of prison labour,” so long as such measures are not discriminatory or “a disguised restriction on international trade.” GATT 1947 art. XX(e).

103 See Agreement on Subsidies and Countervailing Measures.

104 See supra notes 72-73 and accompanying text.
gain when they receive subsidies from their governments. In fact, some environmentalists have argued that lax local environmental production standards should be considered de facto subsidies under existing law. While many technical difficulties would need to be overcome to accurately assess the appropriate level of such countervailing duties, in theory, said duties could

The GATT allows for the importing country to impose duties on goods where the goods are being "dumped" (sold below fair value or at less than the cost of production). See GATT 1947 art. II. In addition, a member may, in some cases, impose a countervailing duty on goods which have been subsidized by the exporting member nation. See WTO Agreement, art. X. For further discussion on dumping and subsidies under the GATT, see Claire Moore Dickerson, GATT 1994: Fool's Goal?, 11 ST. JOHN'S J. LEGAL COMMENT. 259, 264-65 (1996); Alan O. Sykes, The Economics of Injury in Antidumping and Countervailing Duty Cases, 16 INT'L REV. L. & ECON. 5, 19-23 (1996). Although the GATT contained provisions pertaining to antidumping and countervailing duties, this area has changed significantly following the Uruguay Round. See James A. Meszaros, Note, Application of the United States' Law of Countervailing Duties to Nonmarket Imports: Effects of the Recent Foreign Reforms, 2 ILSA J. INT'L & COMP. L. 463, 466-67 (1996) (describing the changes in U.S. countervailing duty obligations following the Uruguay Round).

Numerous commentators have proposed that weak environmental standards be considered a subsidy or unfair trade practice.

A lack of adequate environmental regulation or effective enforcement would be characterized as dumping. Hence the imported goods would be subject to countervailing duties equal to the amount that the exporter was thought to have saved by not having to install appropriate controls. Alternatively, the lack of environmental regulation could be characterized as an indirect subsidy...


Most significantly, it would be difficult to calculate the extent of the subsidy-like cost savings enjoyed by producers as a result of lax environmental standards. See Robert F. Housman & Durwood J. Zaelke, Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability, 23 ENVTL. L. 545, 555 (1993) (acknowledging that there would be some valuation difficulties, and discussing various ways of attempting to value environmental subsidies, for the purpose of assessing the amount of countervailing du-
be used to negate the cost advantage that companies enjoy by basing production in foreign markets that have lax standards. If states were unable to entice companies by offering this regulatory cost advantage, they would lose much of their incentive to disregard globalized environmental standards.

To the extent there is a potential for countries to unjustifiably implement product bans or countervailing duties, the Organization’s dispute resolution and enforcement system could guard against the problem. Instead of members using the system to directly challenge alleged environmental infractions, they, on their own, target remedial actions against countries with relatively deficient environmental standards. These targeted countries are then the parties that must, if they feel such remedial actions are unjustified, seek redress through the dispute resolution system.

5.2.4. Assessing the Enforcement Alternatives

The rapidly changing global institutional and political situation, with respect to the environment, makes it difficult to anticipate the relative merits of pursuing variations of these alternatives. Nevertheless, a few very basic comparisons can be made. The first alternative, legalizing bans on products not produced in conformance with the environmental standards of importing countries, would be very destructive to global trade for many of the same reasons that apply to previously discussed non-legalized unilateral bans. While WTO-sanctioned bans would ultimately be subject to WTO multilateral surveillance and discipline, the initial determination of whether to institute them would be influenced by each state’s own idiosyncratic environmental standards and would lie with the states themselves, which would be subject to cooptation by local protectionist interests. Given its problems, this remedy should be reserved for those narrowly tailored cases where fundamental questions of values are at stake. These might include cases of animal mistreatment or species survival, rather

\footnote{With the growth and development of factory farming in the United States, legalized cruelty to farm animals has become a serious problem. Given the deficiency of standards at home, the United States would have great difficulty justifying trade sanctions against other countries. See generally JOHN...}
than cases of contention over differences in laws regulating pollution generally.

The use of countervailing environmental duties as an alternative has the benefit of helping to offset the cost advantage producers' gain as a result of operating in regimes with lax environmental standards. Therefore, this use would encourage countries to upwardly harmonize their environmental standards. While far less destructive of global trade than an allowance of bans, this alternative has its problems. The inherent difficulty of distinguishing between legitimate environmental duties and disguised restrictions on trade would increase the likely advent of many disputes which would be difficult to resolve satisfactorily. Because of its authority, expertise, and impartiality, the decisions of the WTO dispute resolution system would likely be followed. Nevertheless, fundamental and potentially extremely divisive disagreements would persist. The WTO membership, however, may find that the best alternative, an agreement on acceptably rigorous substantive international PPM standards, is elusive. If so, countervailing environmental duties have the unique ability to meet the twin objectives of allowing each member to maintain its own environmental standards while, at the same time, reducing the incentive for countries to lower their environmental standards.

ROBBINS, DIET FOR A NEW AMERICA (1987) (describing and documenting torture and otherwise cruel treatment of animals on America's factory farms).

109 Under the present system, it can often be difficult to distinguish legitimate duties imposed to offset an unfair trade advantage and protectionist measures. See E. Kwaku Andoh, Note, Countervailing Duties in a Not Quite Perfect World: An Economic Analysis, 44 STAN. L. REV. 1515 (1992) (noting the inherent risk that countervailing duties will be imposed for protectionist reasons); Seoul Hesitates to Offer Special Central Bank Loan to Kia, ASIA PULSE, July 24, 1997 (noting that there is concern that governmental assurances of repayment of loans may violate WTO subsidy provision). If lower environmental standards held the potential to be considered as a subsidy for purposes of imposition of a countervailing duty, the confusion and potential for abuse would be exacerbated. See Michael B. Smith, Trade and the Environment: GATT, Trade, and the Environment, 23 ENVTL. L. 533, 539 (1993) ("The potential for protectionist mischief boggles the mind.").
5.3. The Advantages of Using the WTO as a Forum to Negotiate International Environmental Agreements

5.3.1. Noting the Political Realities

Use of the WTO compliance system to enforce environmental agreements does not necessarily imply using the WTO as a forum to negotiate globally harmonized PPM standards. Utilization of the WTO as a negotiating forum, however, would offer significant advantages of its own. Reaching an agreement on effective globally harmonized environmental standards is undoubtedly going to be extremely difficult no matter what arena is chosen, and ultimately will depend upon the strength of the environmental movement. There is no getting around the difficult reality that developing countries and many business interests oppose internationally harmonized PPM standards. Businesses oppose the standards because of the costs, while developing countries oppose the standards because they want to maintain their perceived competitive advantage. By including environmental negotiations as part of a WTO comprehensive trade round, such opposition to global environmental production standards, as we will see, can be at least partially neutralized.

5.3.2. Securing Developing Countries’ Agreement

Until most recently, the offer of economic aid has been the only method available to induce reluctant developing countries to join environmental regimes. The Global Environmental Facil-

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110 The maintenance of relaxed environmental standards, all else being equal, gives developing countries a competitive advantage over nations with higher environmental standards. See Carl F. Schwenker, Note, Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal, 71 Tex. L. Rev. 1355, 1369 (1993) (noting that less stringent standards or lax enforcement schemes may translate into reduced compliance costs).

111 Direct financial transfers have been useful in persuading developing countries to adhere to MEAs. See William Wilson, Environmental Law as Development Assistance, 22 Envtl. L. 953 (1992) (noting the widespread association of development assistance to LDCs with environmental considerations); Revisiting Rio, J. COM., June 18, 1997, at 6A (noting that the pervasive linking of development assistance with environmental reforms in LDCs has been ineffective); Jonathan C. Randal, Third World Seeks Aid Before Joining Ozone Pact, WASH. POST, Mar. 7, 1989, at A16 (referring to developing nations as maintaining that “they would delay joining a ban on chemicals harmful to the atmosphere’s protective ozone shield until industrialized countries committed themselves to financial and technical aid”); see also Bradley C. Bobertz & Robert L.  

https://scholarship.law.upenn.edu/jil/vol19/iss3/3
ity and the Montreal Protocol's Multilateral Fund were established for this purpose. By linking harmonized PPM standards to trade pacts in future WTO negotiating rounds, a new means of securing developing country acceptance of such standards—the maintenance of access to international markets—would be available. Today, having committed to export led growth policies, almost all countries perceive a tremendous need to maintain market access. Developing countries, in particular, increasingly see participation in WTO trade agreements as an economic necessity. Continued access to global markets is likely to become even more important in the future. Integrating environmental negotiations into trade rounds will therefore continue to produce a very potent incentive to accept international PPM standards.

The present system of stand-alone environmental agreements not only lacks alternative means for inducing reluctant countries to participate in global environmental agreements, but it also discourages participation by some countries—namely those envi-


112 For a description of the GEF and the World Bank's role in its administration, see supra note 91. For a comprehensive discussion on the development, structure, and functions of the GEF, see Stephen A. Silard, supra note 83; GREENING INTERNATIONAL INSTITUTIONS 149-62 (Jacob Werksman ed., 1996).

ronmentally-minded developing countries which are predisposed, in the absence of compensation, to agree to global environmental standards. In a classic example of the "free-rider problem," these countries are unlikely to impose the costs of complying with global standards on domestic producers when other similarly situated countries refuse to do the same. Even if some developing countries were to accept an unequal burden, effective global action requires participation by a critical mass of countries.

While it is relatively easy to secure participation by developed countries whose industries are already required to meet relatively stringent environmental laws, future population and eco-

114 Free-rider problems are among the most common forms of collective action problems that exist in essentially three forms: free-rider problems, communication and coordination problems, and rational apathy problems. See MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION 1-2 (1965); OETE C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION 222 (1986). For specific application to environmental problems, see MANAGING THE COMMONS (Garett Hardin & John Baden eds., 1977).

115 Some developed countries are generally inclined to push harder for meaningful global accords than are others. See Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 YALE L.J. 2039, 2052 (1993). The record of the United States has been mixed. While the United States has been at the forefront of pushing for some global environmental agreements, it was very reluctant to commit to binding limitations on greenhouse gasses. See Hilary F. French, Reforming the United Nations to Ensure Environmentally Sustainable Development, 4 TRANSNAT'L L. & CONTEMP. PROBS. 559, 591-92 (1994); see also In the Americas, MIAMI HERALD, May 11, 1995, at A20 (stating that the United States would most likely oppose a side agreement dealing with the environment if Chile were to join NAFTA).

In addition, once environmental treaty regimes are established, developed nations do not always do everything necessary to implement the goals or mandates of MEAs. See generally Mary Ellen O'Connell, Enforcement and the Success of Environmental Law, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995) (noting several examples of developed nation actions which are either not in compliance with MEAs or demonstrate a lack of commitment to the environment while in compliance). The record of the United States complying with MEAs already in force is also ambiguous. See Save the World's Climate, ST. LOUIS POST DISPATCH, June 25, 1997, at 6B (noting the failure to meet non-binding Rio targets); see also Hamish MacDonell, America Urged to Act Over Greenhouse Gas, PRESS ASSOC. NEWSFILE, June 22, 1997 ("Only the UK and Germany have met the Rio Target of stabilizing greenhouse-gas emissions at 1990 levels."); Robert Samuelson, The Hypocrisy Over Global Warming, CHI. TRIB., July 11, 1997, at 21 (noting that United States emissions of greenhouse gasses are disproportionately high); Warren P. Strobel & Betsy Pisik, Clinton Pledges War on Global Warming: But Critics Blast Lack of Definitive Emissions Standards, WASH. TIMES, June 27, 1997, at A11.

116 As previously discussed, such globalized standards may benefit the industries of developed countries by forcing overseas competitors to pay the costs
nomic growth (along with corresponding increases in environmental damage) will occur most dramatically in developing countries. Obtaining a critical mass, therefore, in most instances will depend on broad-based participation by these countries. The WTO can provide this. There are approximately 200 countries in the world. Of those, 133 are presently members of the WTO, and approximately thirty more have applied for membership. With minimal exceptions, all member countries are required to comply with the related agreements governed by the Organization. Linking PPM standards to trade agreements would therefore ensure the adherence of those countries that wish to maintain the benefits of membership.

of meeting heightened environmental standards. See supra note 70 and accompanying text.

117 To effectively combat global environmental problems, it is important for all countries that have an impact on the global environment to be parties to environmental agreements. See Weiss, supra note 31, at 691. It should be noted that developing countries are not uniformly opposed to global environmental reforms. See C. Russell H. Shearer, International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation, 7 TUL. ENVTL. L.J. 391, 397 (1994) (noting the concern by developing nations regarding global warming); Green Group Backs Move for Broader Timber Pact, REUTER EUR. BUS. REP., May 10, 1993 (stating that developing nations were among those pushing for sustainable felling of both tropical and temperate forests); Farhan Haq, Disarmament: U.N. Meet Will Test Nuclear Commitments, Groups Say, INTER PRESS SERVICE, Apr. 3, 1997 (noting that developing countries are outraged by nuclear testing and are now pushing for "nuclear elimination").

118 The text of the WTO Agreement reads, "The agreements and associated legal instruments included in Annexes 1, 2, and 3 . . . are integral parts of this Agreement, binding on all Members." WTO Agreement art. II, para. 2. Although members are bound by the GATT, and Annexes 1, 2, and 3, Annex 4 sets forth the "Plurilateral Agreements," which are only binding on those members who have accepted those agreements. Id. art. II, para. 3; see also id. Annex 4 (containing the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement).

Certain developing countries, such as Malaysia, Mexico, and India, have been fighting particularly hard to keep environmental concerns off of the WTO's agenda. Developing countries presently feel that they did not get a very good deal in the Uruguay Round. At the moment, they are not likely to be convinced to enter into a new trade round, particularly if environmental standards are included. The lack of short term political viability, however, does not change the significant benefits that could be gained by ultimately winning the battle to integrate environmental agreements into trade negotiations.

5.3.3. Neutralizing Business Opposition

Bringing PPM standards into WTO multilateral negotiations not only gives developing countries incentives to agree to such standards, but it can also strengthen the ability of developed countries to promote such standards. The major internal constraint on this ability has been anti-environmental lobbying by business interests concerned about the cost of global environmental compliance. The potency of such lobbying would likely be diminished if negotiations over PPM standards were brought into comprehensive trade negotiations. During the negotiations, business sectors with anti-environmental agendas will have finite negotiating capital available and, most likely, a wide range of interests at stake. As compared to stand-alone negotiations, less negotiating capital will be available solely to defeat environmental

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standards. In fact, in comprehensive trade negotiations, these sectors are more likely to find it in their interest to acquiesce to environmental provisions. Major export oriented sectors have tended to gain far more than they have given up in global trade deals. The goal of "keeping negotiations on track," as well as that of presenting a final package likely to be ratified by domestic legislative bodies, may militate for acquiescing to environmental standards.

Once negotiations are concluded and a final agreement is reached, many corporate sectors are likely to be largely unaffected by environmental provisions (i.e., finance or telecommunications) but may benefit from the agreement as a whole. While these sectors would not normally lobby for the ratification of environmental agreements, they would put their resources behind the selling of an overall trade pact. Even corporate sectors that will

120 Businesses may decide that other issues are of more immediate concern or of a higher priority than cost savings from anti-environmental measures. For example, export oriented businesses are likely to be most concerned with gaining access to foreign markets. See Ivan K. Fong & John Kent Walker, International High-Technology Joint Ventures: An Antitrust and Antidumping Analysis, 7 INT’L TAX & BUS. L. 57, 78 (1989). Businesses may have concerns regarding domestic tax consequences of new agreements. See Sheldon Yett, Corporations Bummed Out by Provisions that Fund GATT at Their Expense, CORP. FIN. WK., Sept. 19, 1994, at 1 (discussing businesses voicing opposition to a proposed bill which would increase United States corporate income tax to fund GATT programs). Every business sector will, of course, have its own unique agenda. See Robert W. Kastenmeier & David Beier, International Trade and Intellectual Property: Promise, Risks, and Reality, 22 VAND. J. TRANSNAT’L L. 285, 289 (1989); Holly Emrick Svetz, Note, Japan’s New Trade Secret Law: We Asked for it—Now What Have We Got?, 26 GEO. WASH. J. INT’L L. & ECON. 413, 424 (1992) (“Largely due to the efforts of the Intellectual Property Committee, a U.S. industry lobby, TRIPs [Agreement on Trade-Related Aspects of Intellectual Property Rights] proposals have been included in the Uruguay Round of GATT negotiations.”).

121 See Jim Lobe, U.S.-Politics: Sanctions Debate Latest Episode of Identity Crisis, INTER PRESS SERVICE, Apr. 20, 1997, available in LEXIS, News Library, Inpres File; see also Leon Hadar, US Biotech Firms Set Sights on Asia, BUS. TIMES, Dec. 12, 1995, at 12 (noting that export oriented Silicon Valley companies are strong supporters of free trade); William Schneider, Trade Protectionism is Growing from the Top Down, NAT’L J., Jan. 29, 1983, at 240 (citing studies that show businesses have historically been opposed to protectionist measures).

122 It has been widely acknowledged that business played an instrumental role in the decision of the United States to become a member of the WTO. See Ralph Nader, CITY NEWS SERVICE, July 26, 1996 ("GATT . . . [is] all big pro-corporate bills that (President) Clinton pushed through."); Behr, supra note 8 (stating that American corporations, “lobbyists and lawyers worked hand in hand with U.S. negotiators under three presidents and the congressional trade committees to set goals [for the WTO]”).
bear the costs of complying with environmental standards may well place their support behind the agreement. Having participated in the process of creating a final deal, they may conclude, as during negotiations, that the overall benefit from a trade deal outweighs the anticipated costs of meeting globalized standards. On the other hand, if environmental agreements are kept separate from trade negotiations, those corporate sectors that would bear compliance costs will likely continue to oppose such agreements.

Finally, bringing PPM standards into multilateral WTO negotiations facilitates the opportunity for environmentalists to form strategic alliances with "protectionist oriented" industries. These are domestic industries that face stiff import competition and cannot easily relocate overseas. Characteristically, these industries lobby to resist allowing domestic market access to foreign goods. Having failed for the most part, they now have an interest in ensuring that their overseas competitors at least do not enjoy a cost advantage as a result of lax environmental standards. They have not, however, thus far, committed themselves to promoting such standards. By bringing consideration of such standards into multilateral trade negotiations where these industries are actively engaged, environmentalists would maximize the likelihood of mobilizing a new ally in the fight for global environmental standards.  

123 There, in fact, may be many different kinds of industries that could become allies of environmentalists for many different reasons. For example, certain large American manufacturers may have an interest in elevated environmental standards. Such an interest is illustrated by the chemical manufacturer DuPont's support for the Montreal Protocol to phase out ozone-depleting CFCs. Because DuPont had more resources than its competitors, it perceived that it had an advantage in its ability to develop products that could substitute for CFCs. See RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY 31 (1991) (noting that DuPont, along with other leading United States chemical manufacturers, announced plans to cease production of CFCs before the imposed deadline). More generally, Gabriel Kolko, writing about the progressive era, gives a number of reasons (which can be applied to global environmental regulation today) why various corporate sectors in the United States came to support regulation. He identifies these as stability, predictability, and security. See GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 3 (1963). Kolko explains his terms as follows:

*Stability* is the elimination of internecine competition and erratic fluctuations in the economy. *Predictability* is the ability, on the basis of politically stabilized and secured means, to plan future economic action on the basis of fairly calculable expectations. By *security* I mean protection from the political attacks latent in any formally democratic political structure. I do not give to *rationalization* its frequent defini-
5.3.4. A Cautious Look at the Benefits of Alternative Forums

Given the negotiating advantages offered by the WTO, environmentalists should be wary of the apparent ease of getting an agreement in an alternative forum. It is important to weigh the benefits of what could turn out to be illusory victories in alternative forums with calculations of how hard to pursue the WTO. A great deal can be learned in this regard from the 1970s experience of the Third World’s Non-aligned Movement with the United Nations Conference on Trade and the Development (“UNCTAD”). The Non-aligned Movement found itself stymied in its attempts to point the GATT in the direction of helping implement the New International Economic Order, whose purpose was to help fundamentally rebalance the inequality in global income between the north and the south. Frustrated, it chose UNCTAD as a parallel, though far easier to control forum in which to attempt to achieve its objectives. While UNCTAD became the center of a good deal of debate and has attempted to influence the development of norms related to international trade, the real trade action, which eventually led to the globali-

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125 Developing countries successfully pushed for the Charter of Economic Rights and Duties of States and proposed the formation of a New International Economic Order. See No-Hyoung Park, The Third World as an International Legal System, 7 B.C. THIRD WORLD L.J. 37, 57 (1987).


127 Although UNCTAD provided the Third World with a forum to voice its concerns, the resulting documents “have little substantive value in international law.” Id.
zation of the world economy with implications for global distribution of wealth, occurred at the GATT. And indeed, much closer to home, the normative declarations from the United Nations Conference on Environment and Development (the Rio Conference) and even very important legal instruments, such as the Convention on Biological Diversity, run the risk of ultimately being judged as little more than empty promises. It may well be that certain opponents of global environmental production standards would be more than willing to recite the beautiful poetry promulgated by an alternative organization if, only in exchange, the environmentalists will leave the World Trade Organization alone.

6. CONCLUSION

As the process of globalization proceeds apace, the precise structure of international governance that will meet the growing need for international regulation is still evolving. This formative historical period provides a unique opportunity for those concerned about global ecological welfare to influence the basic structure of the emerging global environmental regulatory regime. To take full advantage of this opportunity, the environmental community must analyze and discuss the implications of various alternative organizational configurations. Thereafter, it will be necessary to reach some degree of consensus about what would constitute an effective regulatory structure and take coordinated action to promote that structure. I have written this Article in hope of contributing to the primary analysis and discussion. I have attempted to identify in a way accessible to environmentalists the fundamental issues relevant to international environ-

128 See supra notes 20-24 and accompanying text.
129 The Rio Conference has been criticized for its failure to produce binding and definitive obligations. See Paul H. Brietzke, Insurgents in the "New" International Law, 13 WIS. INT'L L.J. 1, 26 (1994) ("[T]he Rio Earth Summit was one grand and very expensive exercise in creating soft law.").
130 In recent years, a number of multilateral agreements for the protection of the environment have suffered from either the lack of definitive timetables and standards, or have been non-binding. The Convention on Biological Diversity, for example has been characterized as vague and "impressively opaque." Klaus Bosselmann, Plants and Politics: The International Legal Regime Concerning Biotechnology and Biodiversity, 7 COLO. J. INT'L ENVTL. L. & POL'Y 111, 136 (1996); see Judy J. Kim, Note, Out of the Law and Into the Field: Harmonization of Deliberate Release Regulations for Genetically Modified Organisms, 16 FORDHAM INT'L L.J. 1160 (1993).
mental regulation. Specifically, I have tried to point out the dangers of environmental unilateralism and to demonstrate how international environmental regulation could be made more effective through increased coordination with the WTO regime.

What I have not intended to do is specify a precise architecture for the allocation of environmental regulatory responsibilities between the WTO and other organizations with environmental mandates. No doubt, there are a variety of ways the WTO's authority can be constitutionally linked to other organizations. A parallel environmental organization, for example, could be charged with overseeing the environmental aspects of a comprehensive trade round that is otherwise within the purview of the WTO. An environmental organization could also, while operating within the overall framework of the WTO dispute resolution system, be charged with overseeing disputes with environmental implications. While it is beyond the scope of this Article to explore these possibilities, it is clear that a wide variety of possible structures could be designed to take advantage of the WTO's unique negotiating and compliance machinery.

Even if environmentalists speaking with a unified voice were to make a concerted effort to bring environmental regulation into the World Trade Organization, success will not come easily. As experience with the WTO's existing Committee on Trade and the Environment\footnote{See supra note 36 and accompanying text.} has shown, because they understand just how potent an environmental regulator the WTO would be, the foes of international environmental regulation will fight hard to keep the Organization from interfering with their "environmental sovereignty." This, however, should strengthen, rather than weaken, the resolve of environmentalists. The unique benefits of winning the environmental battle for the soul of the World Trade Organization is likely to make the struggle well worth the effort.