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WORLD TRADE RULES AND ENVIRONMENTAL POLICIES: CONGRUENCE OR CONFLICT?

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INTRODUCTION[1]

Proposition 1: Protection of the environment has become exceedingly important, and promises to be more important for the benefit of future generations. Protecting the environment involves rules of international co-

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1. In connection with the subject of this paper, readers may want to examine the following other works by this same author. *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990) [hereinafter JACKSON, RESTRUCTURING GATT]; JOHN H. JACKSON, WORLD TRADE AND GATT (1969) [hereinafter JACKSON, WORLD TRADE AND GATT]; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989) [hereinafter JACKSON, WORLD TRADING SYSTEM]; JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1986); JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984) [hereinafter JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND].

operation, sanction, or both, so that some government actions to enhance environmental protection will not be undermined by the actions of other governments. Sometimes such rules involve trade restricting measures.

Proposition 2: Trade liberalization is important for enhancing world economic welfare and for providing a greater opportunity for billions of individuals to lead satisfying lives. Measures that restrict trade often will decrease the achievement of this goal.

These two propositions state the opposing policy objectives that currently pose important and difficult dilemmas for governments. This type of "policy discord" is not unique; there are many similar policy discords, at both the national and the international levels, that governments must confront.[2] Indeed, there is some evidence that environmental policy and trade policy are complementary, at least in the sense that increasing world welfare can lead to citizen demands and governmental actions to improve protection for the environment. The poorest nations in the world cannot afford such protection, but as welfare increases protection becomes more affordable.[3]

An unfortunate development in public and interest group attention to trade and the environment is the appearance of hostility between proponents of the two different propositions stated above. The hostility is misplaced because both groups will need the assistance and cooperation of the other group in order to accomplish their respective policy objectives. Of course, some of this tension is typical of political systems. Political participants often seek to achieve opposing objectives and goals. Each side may endorse legitimate goals, but when the goals clash, accommodation is necessary.

To some extent, the conflicts between the trade liberalization proponents and the environmental protection proponents derive from a certain "difference in cultures" between the trade policy experts and the environmental policy experts. Oddly enough, even when operating within the framework of the same society, these different "policy cultures" have developed different attitudes and perceptions of the political and policy processes, and these different outlooks create misunderstandings and conflict between the groups.[4]

These problems are part of a broader trend of international economic relations that is posing a number of perplexing and troublesome situations for statesmen and policy leaders. Part of the difficulty inevitably results from the growth of international economic interdependence.[5] Such interde-

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2. An example of policy discord is the conflicting goals of providing adequate medical coverage while minimizing budget expenditures.

3. Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, 158 DISCUSSION PAPERS ECON. (Woodrow Wilson School of Public and International Affairs, Princeton, N.J.), Nov. 1991.

4. The "culture of difference" is well described in Robert W. Jerome, *Traders and Environmentalists*, J. COM., Dec. 27, 1991, at 4A.

5. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 2; John H. Jackson, *Transnational Enterprises & International Codes of Conduct: Introductory Remarks for Experts*, Address Before International Bar Association Meeting in Berlin (Aug. 27, 1980), *in Law Quadrangle Notes* 19, 19-24.

pendence increases trade in both products and services across national borders and brings many benefits to participating countries. International interdependence also results in efficiencies and economies of scale that can raise world welfare (but not necessarily *everyone's* welfare, because some groups will be required to adjust in the face of increased competition).[6] This trend towards increased international economic interdependence requires a different sort of attitude towards government regulation. Within a nation, government regulations in such areas as consumer protection, competition policy, prudential measures (of banking and financial institutions), health and welfare (for example, alcohol and abortion control), and human rights (for example, prohibiting discrimination), are all designed by governments to promote worthy policies that sometimes clash with market oriented economic policies. When economic interdependence moves a number of these issues to the international scene, they become (at least in today's defective international system) much more difficult to manage. The circumstances and the broader scope of the international system create in many contexts (not just those concerning environmental policies) a series of problems and questions including:

— General questions of effectiveness of national "sovereignty" in the face of a need to cooperate with other countries to avoid some aspects of the "prisoners dilemma"[7] or "free rider"[8] problems. Unless there is cooperation, individual countries can profit from the efforts of other countries without contributing to those efforts, but in the longer run all may suffer;

— Perplexing questions of how new international rules should be made, questions that often involve voting procedures;

— General questions of the appropriateness and degree to which national sovereignty will submit to international dispute settlement procedures to resolve differences on various policy matters;

— Problems of a single national sovereign using the extraterritorial

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6. *See, e.g.*, PETER B. KENEN, THE INTERNATIONAL ECONOMY 167-92 (1985).

7. "Prisoners dilemma" refers to the hypothetical economic paradigm where two persons have partially opposing goals and might achieve a better result from cooperation than competition. The example often used is two prisoners being interrogated separately by a police official who is offering each one some advantage in return for confessing to a joint crime, or for giving information about the other's involvement in the crime. If the two cooperate and refuse to give any information, it is suggested that they may be in a better situation than if each tells on the other. In economic terms, countries, firms, or individuals could pursue competitive policies which, when pursued by everyone, cause aggregate damage to all (for example, competitive subsidization). The question then arises what would be the case if they cooperate so as to prevent the incentive to compete against each other with damaging policies.

8. "Free rider" refers to the situation where a group of countries agree to some discipline such as a restraint on using certain trade barriers. Under Most-Favored-Nation (MFN) they may be required to give the advantages of that discipline to other countries including countries that have not entered the specific agreement. Consequently, those countries that have not joined the agreement enjoy a benefit without submitting themselves to the discipline and are "free riders."

reach of its regulation (sometimes termed unilateralism) to impose its will on the actions of other nations, or the citizens of other nations;

— Significant legitimate differences of view between nations as to economic structure, level of economic development, forms of government, appropriate role of government in economic activities, etc. Developing countries, for example, will have different views than on many "trade-off" matters, with developing countries generally arguing that environmental regulations unfairly restrain their economic development. They note that rich countries have benefitted from decades or centuries of freedom from environmental protection rules, and that even today the rich countries are responsible for most of the world's pollution. Furthermore, poor countries argue that the imposition of environmental regulations threatens their economies with stagnation and populations with starvation.

All these circumstances and arguments occur in the context of a relatively chaotic and unstructured international system, which in many ways has not evolved adequately to keep up with the implications of growing international economic interdependence. This paper will probe the more specific issues of the relationship of international trade policy rules to environmental policies and rules,[9] primarily in the context of the General Agreement on Tariffs and Trade (GATT)[10] (which is the most important set of international trade policy rules). This will be done in the eight parts. Part I surveys the policies and certain rules of the GATT system and is followed by five parts that discuss areas of conflict between GATT policies and environmental policies. Part VII discusses institutional and dispute settlement issues and Part VIII draws conclusions about the relationship between trade policies and environmental policies.

The term "environmental policies" is defined very broadly for purposes of this paper. It includes, for example, measures relating to health or health risks. The phrases "trade policies" and "trade liberalization" also are defined broadly to include not only trade in goods, but also trade in services.

I. Objectives of Trade Rules and Relation to Environmental Policy

The most significant and widespread rule system for international trade is the GATT system, which includes the GATT and over 200 ancillary

9. The literature and documents discussing environmental policy are so voluminous and numerous that it is pointless to cite very much. Obviously the drafts for "Agenda 21" for the Rio June 1992 conference are an important expression of environmental policies, as are the 27 "Principles" set forth in a document for "Agenda item 9." The rather high generality of these expressions leave many questions open for further analytical works on detail.

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All, 55 U.N.T.S. 187 [hereinafter GATT].

treaties, as well as a number of other related arrangements and decisions. The GATT may soon be modified by the Uruguay Round,[11] so this paper will refer to the GATT/MTO system as broadly embracing the system as it is now and as it may emerge within a year or two. Of course, a number of other treaties or arrangements, such as regional blocs like the proposed North American Free Trade Agreement (NAFTA),[12] are relevant to this discussion of "trade-environment policy discord," but most of the essential principles of the discord can be discussed in the context of GATT. Consequently, this paper will focus on the GATT/MTO rules and policies as worthy generic examples of problems that also occur in other contexts.

The basic policy underlying the GATT (and the broader "Bretton Woods System" established in 1944-1948) is well known.[13] The objective is to liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as "comparative advantage." The notion of comparative advantage relates partly to the theories of economies of scale. When nations specialize, they become more efficient in producing a product (and possibly also a service). If they can trade their products or services for the different products or services that other countries specialize in producing, then all parties involved will be better off because countries will not waste resources producing products that other countries can produce more efficiently. The international rules are designed to restrain governmental interference with this type of trade.

There are exceptions to the general policy of liberalizing trade, one of which arises from the problem of "externalities," a concept that is closely associated with environmental protection. If a producer pollutes a stream during its manufacturing process, and there are no laws prohibiting such pollution, then it has imposed an "externality cost" on the world. The externality cost is the difference between the values of the unpolluted stream and the polluted stream. Because there is no law against polluting the stream, the cost is not recouped from the producer or passed on to the consumers of the product. This concept appears to be one of the most important core dilemmas or policy problems of the relationship between trade and environmental policies. Thus, much of the relationship is concerned with how environmental protection costs can be "internalized," to follow what is sometimes termed the "polluter pays principle."

The problem often boils down to the need to provide certain kinds of governmental rules or incentives that in certain ways either clash with the

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11. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]. An Agreement Establishing the Multilateral Trade Organization (MTO) is proposed in a Draft Charter in the Dunkel Draft, Annex IV. *See* Dunkel Draft, *supra*, at 91-101.

12. North America Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., *available in* LEXIS, GENFED-EXTRA Database; WL, NAFTA Database (awaiting ratification as this article went to press).

13. *See* JACKSON, WORLD TRADE AND GATT, *supra* note 1; JACKSON, WORLD TRADING SYSTEM, *supra* note 1.

basic trade liberalization rules, or that alter them significantly. As soon as this occurs, however, there is a risk of undermining the GATT liberalization policies and rules. It is this "policy discord" that raises the difficult question of how to accommodate the competing values of trade liberalization on the one hand, and environmental protection on the other hand, without undermining the basic principles of both policy sets.

The GATT trade liberalization policies that have been deemed fundamental for almost one-half of a century include:

— Tariff reduction: Originally the basic goal of the GATT was to reduce tariffs. In this respect the GATT has been most successful (particularly with respect to tariffs on industrial products imported into industrial nations).[14] Indeed, in the last several years this goal has had a profound influence on a number of countries that are not industrialized.[15] (GATT Article II).

— National treatment: The national treatment rule requires that nations, when applying their domestic taxes and regulations, treat imports no less favorably than they treat their domestically produced goods (and services). (GATT Article III).

— Most-Favored-Nation (MFN): Nations are required to treat other nation participants in the system (GATT members) equally with respect to imports (or exports). Thus, under the GATT rules a nation cannot discriminate (with some exceptions) between bicycle imports from Japan and bicycle imports from Italy. (Article I).

— Non-Tariff Barriers: As the decades of GATT history passed, it became increasingly clear that tariffs were no longer the major problem of trade barriers. Instead, so-called "non-tariff barriers (NTBs)" became much more important, and were addressed systematically for the first time in the Tokyo Round of the 1970s which produced a series of "codes" (special side treaties or agreements) that attempted to address some of the key NTB issues.[16] In the current Uruguay Round Negotiation, this process is being extended even further, and of course new issues involving intellectual property and trade in services are being added (with considerable complexity).[17] NTBs are very numerous, and new trade restriction and distortion techniques are constantly arising.[18]

Arguably the current GATT system is not capable of handling the trade liberalization problems of the forthcoming decades, and improvement will be necessary. One major emerging problem is the effect of differences in economic structures and cultures. Issues formerly thought to be well within

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14. JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 115-31.

15. *See, e.g.*, Richard E. Feinberg, *Latin America: Back on the Screen*, INT'L ECON. INSIGHTS, July-Aug. 1992, at 2, 2-6.

16. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND, *supra* note 1.

17. Dunkel Draft, *supra* note 11.

18. JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 130.

the exclusive terrain of national sovereignties, such as exchange rates and taxing policies, now must be examined for their impact on trade liberalization or barriers.

The GATT has established a new program to systematically look at governmental trade policies, called the Trade Policy Review Mechanism (TPRM).[19] In addition, the United States and Japan have bilaterally entered into a discussion process called Structural Impediments Initiative (SII)[20] that has probed very deeply into the two different societies and the systemic problems that affect trade flows between them. (SII could very well be generalized gradually to include other groups of countries, and ultimately become part of the GATT TPRM). These procedures are part of a trend for the future, and while environmental discussions could become a part of these procedures, further evolution will be needed.

Several recent important studies have tried to inventory some of the particular GATT system rules and clauses that have implications for environmental policy. Rather than repeat those inventories here, I refer to them in the footnotes,[21] and include some text in an Annex.[22] Needless to say, this area is very complex and important work needs to be done on understanding the particular relationship between a number of the GATT/MTO system rules on the one hand, and the environmental policies on the other hand.

A few "hypothetical" cases will demonstrate some of the possible policy clashes. In the cases below I use the initials "ENV" to indicate the environmentally "correct" country that imports (or exports), and the initials "EXP" to indicate the exporting country, and "IMP" to indicate an importing country.

— ENV establishes a rule that requires a special deposit or tax on packaging which is not biodegradable, arguing that such packages are a danger for the environment. It so happens that ENV producers use a different package that is not so taxed. Only the packages from EXP are effected. (In some cases it can be established that the tax imposed is in excess of that needed for the environmental protection.)

— ENV establishes a rule that requires any business firm which sells a product in the ENV market to establish a center that will

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19. *See* GATT Doc. Series C/RM/. . ., and recent reports such as GATT Doc. C/RM/S/26A&B (June 12, 1992) (regarding Uruguay) and GATT Doc. C/RM/S/23A&B (Nov. 7, 1991) (regarding United States).

20. Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiations*, 12 MICH. J. INT'L L. 436 (1991).

21. GENERAL AGREEMENT ON TARIFFS AND TRADE, INTERNATIONAL TRADE 90-91, at 19-39 (1992) [hereinafter GATT REPORT 90-91]; U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES (1992) [hereinafter OTA REPORT]; Robert F. Housman & Durwood J. Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992).

22. See Annex A, which includes the text of some of the relevant GATT provisions.

recycle, or appropriately dispose of the product when the ENV consumer is finished with the product's useful life. Such centers are relatively easy for domestic producers to establish, but much more difficult for importers (or exporters in EXP), and particularly difficult for EXP sellers of small quantities (which is often the case for new market entrants) to establish.

— ENV establishes a subsidy for machinery purchased and used by domestic producers to assist in environmental protection (such as smoke stack cleaners). The subsidy could be in the form of special income tax depreciation deductions. When products from plants benefitting from the subsidy are exported, foreign countries such as IMP apply a countervailing duty to the exports to offset the benefits of the "subsidy."

— ENV establishes a border tax (countervailing duty) on any electronics product that is imported from a country that does not have an environmental rule required by ENV. ENV argues that the lack of such a rule is in effect a "subsidy" when measured by economic principles of internalization and "polluter pays," and that the subsidy should be off-set by a countervailing duty. EXP argues that while its own method of pollution control is different, it is fully adequate and more efficient than ENV's and is also cheaper. Consequently, EXP argues either that its products should not incur the clean up duty or that its environment can better withstand pollution activity.

— ENV prohibits the importation of tropical hardwoods on the ground that imports of tropical hardwood products tend to induce deforestation in important tropical forest areas, and that such deforestation damages the world environment. ENV is a temperate zone nation with temperate forests, but does not apply any rule against temperate forest products, domestic or imported.

— ENV has an important fishing fleet that captures salmon and herring. It also has an important fish processing industry. ENV establishes a rule against the exportation of the unprocessed salmon or herring caught within its territorial and protected zone area, arguing that landing those fish at its ports is necessary for an appropriate count of the fish supply. This count is needed for economic and environmental models designed to assist regulators in limiting the catch and promoting the growth of the fish supply. Local ENV fish processing plants enjoy the benefit of avoiding competition for purchase of the fish by foreign processors in IMP.

— ENV prohibits the sale of domestic or imported vegetables that have been genetically engineered to achieve certain characteristics, such as longer shelf life and better color. Its domestic industry does not use these genetically engineered plants, while certain foreign countries do. The foreign countries wish to export to ENV, arguing that the genetically engineered products are equal in every respect, and better in some respects, to the safety and other characteristics

of products that are not so engineered.

— IMP establishes a rule against the importation of products from any producer in a foreign country that utilizes women in its factory. IMP argues that it is culturally offensive to its domestic producers to utilize women in their factories. Furthermore, because IMP prohibits the employment of women in factories, it feels obliged to prohibit the importation of goods that were produced from female labor.

A number of different trade policy problems are posed by the examples above and some of these will be discussed further under specific parts below. As a logical exercise one can use an unrealistic hypothetical to illustrate the conflict between trade policy and environmental policy. Imagine a country, ENV, establishing a rule that prohibits the importation of products from "any country that pollutes." Presumably that would cause virtually all trade to cease, totally undermining the GATT/MTO policies of liberalization. Although the example is extreme, one thing seems reasonably clear: The GATT/MTO system, and its policy and government specialists, need to change so as to better accommodate environmental policies. All too often during the past decade, it has appeared that the trade policy specialists have feared the incursion of the environmental policies on their terrain (partly because the environmental policies can be so easily used as an excuse for protectionism), and this fear has led to a certain attitude of "fending off," or other "lack of friendliness" towards environmental policies. Likewise, there has been a certain "unfriendliness" on the part of some of the environmental policy experts towards trade policies, reflected in large newspaper advertisements and "anti-GATT-zilla" posters![23]

The purpose of this paper is to probe the differences between the two policy sets, and to identify ways in which some of those differences can be narrowed. It is not possible to cover all of the problems that are involved in this clash, so I will focus on a selected number of key legal and institutional issues: particularly the problem of national treatment and its relation to product standards (Part II); the problem of the general exceptions in GATT Article XX (Part III); the related problem of the "process-product" characteristics that have been involved in the tuna/dolphin case, and concern with what is sometimes called the global commons (Part IV); the intricate and elaborate problem of subsidies (Part V); the subject of "competitiveness" (Part VI); and finally, a certain group of institutional problems related to the GATT/MTO system, including dispute settlement, transparency, and jurisprudence (Part VII).

II. National Treatment and Product Standards

One of the core principles of the GATT/MTO system of trade liberalization is the rule known as "national treatment," found in GATT Article

23. *See SABOTAGE! of America's Health, Food Safety and Environmental Laws*, N.Y. Times (Midwest ed.), Apr. 20, 1992, at B5; *see also* Nancy Dunne, *Fears Over "GATT-Zilla the Trade Monster,"* Fin. Times, Jan. 30, 1992, at 3.

III. The national treatment clause can be traced far back into treaties of centuries ago, and is applied to a number of different governmental activities.[24] For purposes of a variety of governmental actions, it obligates a government to treat foreign products or persons the same as it treats its domestic products or persons. Before World War II, the national treatment clause was perhaps most commonly found in the Treaties of Friendship Commerce and Navigation (FCN Treaties), and in that context called for nondiscriminatory treatment by treaty parties with respect to citizens or firms of the other party to a treaty, operating within the territory of a treaty party. This principle has been applied extensively to issues of arrest and criminal process, and human rights.

In traditional international law practice there were two possible dimensions of national treatment. On the one hand, national treatment was deemed to be a rule of "nondiscrimination," requiring a government to treat aliens in a manner no less favorable than it treats its own citizens. However, under that approach, if its treatment of its own citizens was very bad (for example arbitrary arrest, or very poor jail conditions) similar treatment of foreigners would comply with the clause. Thus, there developed a second aspect of national treatment under phraseology and customary practice of certain treaty clauses that requires a certain minimum standard of treatment.

In general, the GATT national treatment clause (expressed in ten paragraphs of Article III, with certain exceptions built in) opted primarily for the nondiscrimination standard.[25] Thus it has been said that while GATT requires a nation to tax and regulate imports from other GATT parties in a manner no less favorable than it treats its domestic product, if a government imposed a regulation on its domestic product that is utterly foolish, it could also impose such a regulation on imported products. The government, for example, could prohibit the sale of both domestic and imported shampoo when the container showed a picture of a blond woman. Likewise, it could arguably prohibit the sale of domestic and imported products if the label contained any words in a language other than that of the importing country. Thus, the latter regulation often requires specialized labels on imports.

The GATT, however, does contain some language in paragraph 1 of Article III which states that regulations and taxes shall not be imposed in a way "so as to afford protection" against import competition. Thus, GATT contains some element of minimum standard that is related to principles of liberal trade. This type of minimum standard has resulted in an interpretation of Article III that prohibits government regulation even when it appears "on its face" to be nondiscriminatory, if in fact it is "de

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24. *See* JACKSON, WORLD TRADE AND GATT, *supra* note 1, at 273-303; JACKSON & DAVEY, *supra* note 1, at 266, 483-537.

25. *See* GATT, *supra* note 10, art. III, 61 Stat. at A18, 55 U.N.T.S. at 204; *see also* sources cited *supra* note 23.

facto" discriminatory. An important case in United States jurisprudence of some decades ago struggled with this concept[26] and GATT panel cases and other discussions have made references to the problem of government regulation that affords effective protection, even though on its face it appears neutral.[27]

One example of a de facto discriminatory regulation would be a regulation that imposed a higher tax on automobiles with greater horse power and speed, when the importing country knew that its own automobile production tended to concentrate heavily in automobiles with lesser horse power and speed. Likewise, a less favorable tax treatment for automobiles priced in excess of a certain amount of money, say $25,000, in circumstances where domestic production tended not to produce such higher priced autos while imports tended to concentrate in them, could be suspect. Clearly there are some difficult issues in these circumstances, particularly because governments may have a legitimate regulatory interest in classifying goods in certain ways, for example, taxing luxury goods more heavily than daily staples. Thus, there are some delicate decisions that have to be made in interpreting the GATT Article III.

Similar issues of interpretation arise in a number of "environmental" type cases. For example, an Ontario regulation[28] imposing a higher tax on the sale of beverages in aluminum containers than on other types of containers is arguably designed to help environmental matters. On the other hand, when it is discovered that very few Ontario-made beverages are sold in aluminum cans, while imports from the United States are very frequently sold in those containers, the regulation becomes suspect as a "de facto discrimination." The key issue then becomes one of determining who should decide whether the regulation is appropriate.

Even if a regulation is both *facially* nondiscriminatory and also *de facto* nondiscriminatory, some important issues about a "minimum standard" arise. The Beef Hormone Case, a current significant case between the United States and the European Community (EC) raised this issue.[29] In that case the EC had prohibited the sale of beef that had been grown with the assistance of artificial hormone infusions. The United States argued that it applied hormones by a method that was totally safe for human ingestion, and that the EC had no scientific basis for its regulation, which incidentally happened to hurt U.S. exports of beef products to the EC. The EC replied that it had no obligation to provide a scientific justification for its regulation.

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26. JACKSON & DAVEY, *supra* note 1, at 496; *see Report of the GATT Panel, United States—Section 337 of the Tariff Act of 1930*, para. 3.18, GATT Doc. L/6439 (Nov. 7, 1989), BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD] 36th Supp. 345, 360 [hereinafter *Section 337 Panel Report*].

27. JACKSON & DAVEY, *supra* note 1, at 483-537; *Report of the GATT Panel, United States—Alcoholic Beverages*, GATT Doc. DS23/R (Mar. 16, 1992).

28. *See, e.g.*, *Beer Blast*, WALL ST. J., Aug. 4, 1992, at A14.

29. *See* Janice Castro, *Why the Beef Over Hormones*, TIME, Jan. 16, 1989, at 44.

This dispute has festered. The United States pointed to a clause in the Tokyo Round Standards Code[30] that might have given some opportunity to require scientific justification for a product regulation. However, negotiators in the Uruguay Round have developed a draft phyto-sanitary text designed to provide some minimum standards for government regulation requiring "scientific principles" as justification.[31] This draft text has raised some serious concerns on the part of environmental policy experts in the United States and elsewhere. The experts worry that this text would inhibit national governments, or sub-federal governmental units, from determining the appropriateness of a regulation that went beyond some minimum international standard. The language of the text itself does not seem to call for this, but the implication is that there will be an opportunity for exporting countries to challenge regulations of importing countries and to require importing countries to justify their regulations on the basis of "sound science." This raises substantial fears that GATT panels will tend to rule against regulations that go beyond a lowest common denominator of national environmental regulations in the GATT/MTN system.[32] This concern pushes the discourse into the question of institutions.

In summary, the GATT relatively easily accommodates national government environmental regulations that concern the characteristics of imported products. Thus, if a nation wishes to prohibit the sale of domestic and imported croissants which have a high cholesterol content, presumably this would be consistent with the GATT obligations of Article III. Under the Tokyo Round Standards Code and the Uruguay Round phyto-sanitary draft text approach there might be some opportunity to challenge the regulation. Nevertheless, it would seem that the national treatment standard would not be a major impediment or a major conceptual problem for environmental regulation, unless a requirement of scientific justification was interpreted to require such a high degree of justification as to unreasonably inhibit governments from imposing environmental standards. To ensure against that, it might be useful to have some interpretive notes for the Uruguay Round text.[33]

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30. *Agreement on Technical Barriers to Trade*, GATT Doc. L/4812 (Nov. 12, 1979), BISD 26th Supp. 8, 8. Article 2, paragraph 2.1 states that "[p]arties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade." *Id.* para. 2.1, at 9. The Agreement also provides "technical expert groups" to assist dispute settlement panels. *Id.* annex 2, at 31.

31. Dunkel Draft, *supra* note 11. *See* Text on Agriculture, Part C, which at paragraph 6 reads: "Contracting parties shall ensure that sanitary and phyto-sanitary measures are applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained against available scientific evidence." *Id.* § L, para. 6, at L.36.

32. *See* Stewart Hudson, *Trade, Environment, and the Pursuit of Sustainable Development*, Paper Prepared for World Bank Symposium on International Trade and Environment, Washington, D.C. (Nov. 1991) (transcript available from author). Stewart Hudson is with the National Wildlife Federation, Washington, D.C.

33. Some text in the October 7, 1992 NAFTA draft is interesting in connection with the

The minimum standard scientific justification approach can be very significant for the future of trade rules in the GATT/MTN system. For certain interests within a large country like the United States to argue that there should never be an international "second guess" (such as a tribunal process) of any national regulations in the environmental, or other area, could prevent important international cooperative measures to allow the trading system to evolve in a way to meet the new challenge. But there are some legitimate concerns on the part of the environmental policy advocates, and further work needs to be taken in the GATT/MTO context, some of which will extend over the next decade, to address those concerns. Briefly, the major concerns include:

1) The question of how difficult it will be to justify national or sub-federal governmental unit regulations on environmental matters, in the context of international dispute settlement processes and a new treaty text that requires certain minimum standards of scientific justification for such regulations;
2) The amount of latitude that will be granted to nation-states to impose environmental regulations that require higher standards than some international minimum.

III. General Exceptions in Article XX: Health & Conservation

The GATT contains an Article XX entitled "General Exceptions" which includes important provisions that override other obligations of the GATT, under certain circumstances defined in the Article. Again it is not practical or appropriate in this paper to deal with all of Article XX, but there are certain key measures that should be addressed. Quite often, concern for environmental matters focuses on paragraphs (b) and (g) of Article XX:[34] (See Annex A).

(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 . . .

The exceptions of Article XX are subject to some important qualifications in the opening paragraph of Article XX, however, which reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

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burdens of scientific proof. For example, articles 904(3), 905(3), and 907, which are quoted in Annex C. The language specifies a right of governments to use a "higher level of protection" for the environmental international standards.

34. GATT, *supra* note 10, art. XX, 61 Stat. at 1460, 55 U.N.T.S. at 262; *see* Jackson & Davey, *supra* note 1, at 514 (Doc. Supp. 1989); OTA Report, *supra* note 21, at 32.

> 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.

To a large degree, these provisions provide a softened measure of "national treatment," and MFN obligations. They require governments that take measures which arguably qualify for the exceptions of Article XX to do so in such a way as to minimize the impacts mentioned in the opening paragraph. This has led some panel reports to interpret Article XX[35] to require nations to use the "least restrictive alternative" reasonably available to it as measures designed to support the goals of the exceptions of Article XX.

There are a number of important interpretive problems with respect to Article XX, and some of them are key to the environmental-trade liberalization clash. Two interpretive questions in particular stand out, namely the interpretation of the word "necessary," and the question of *whose health*, or *which exhaustible natural resources* can be the object of an acceptable national government regulation.

The word "necessary" clearly needs interpretive attention. It is partly interpreted by the "least restrictive alternative" jurisprudence mentioned above. Thus, if there are two or more alternatives that a government could use to protect human life or health, it is not "necessary" to choose the one that places more restrictions on trade, when an alternative that is equally efficient in protecting human life or health exists. This will obviously impose some restraint on the latitude that nations, or sub-federal governments have to impose regulations for environmental purposes.[36] On the other hand, it is considered important to prevent Article XX from becoming a large loop hole that governments can use to justify almost any measures that are motivated by protectionist considerations. It is this slippery slope problem that worries many in connection with Article XX. The problem arises in a number of cases, including the packaging and fish examples that were discussed in the introduction.

The other interpretive problem is conceptually more difficult. When GATT Article XX provides an exception for measures necessary to protect human, animal or plant life or health, should it be interpreted to mean only the life or health of humans within the importing country, or extend to the life or health of humans throughout the world? This interpretive problem is intimately related to the process-product characteristic difficulty. As far as this author can determine, Article XX has not been interpreted

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35. *Section 337 Panel Report*, *supra* note 26, para. 5.26, BISD 36th Supp. at 393; General Agreement on Tariffs and Trade: Disupe Settlement Panel Report on Thai Restrictions on Importation of and Internal Taxes on Cigarettes, 30 I.L.M. 1122 (1991).

36. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna/Dolphin Panel Report].

to allow a government to impose regulations to protect the life or health of humans, animals, or plants that exist outside of the government's own territorial borders. This problem was addressed, although somewhat ambiguously, in the tuna/dolphin case.[37] The problem is that of the typical slippery slope danger, combined with the concern that powerful and wealthy countries will impose their own views regarding environmental or other social or welfare standards on other parts of the world, even where such views may not be entirely appropriate. The term "eco-imperialism" has been coined for this problem.[38]

If a nation can prohibit the importation of goods from a poor third world country where the method of production is moderately dangerous to humans, why would a nation not also be able to prohibit the importation of goods produced in an environment that differs in many social or cultural attributes from its own society? Why should one country be able to use its trade laws to depart from the general liberal trade rules of the GATT/MTO system, to enforce its own view of how plant or animal life in the oceans (beyond territorial sea, or other jurisdictional limits), or to protect the ozone layer (as suggested in the tropical hardwoods hypothetical case)?

Other countries may have a somewhat different view of the trade-off between economic and welfare values of production, and human life or health. Even in the industrial countries, there is tolerance of certain kinds of economic activity that almost inevitably will result in human deaths or injuries, an example being major construction projects for dams or bridges. These are tough issues, and ones that will require a lot of close and careful attention, presumably in the context not only of new rule making or treaty drafting, but also in the processes of interpretation through the dispute settlement mechanisms. Thus, once again, institutional questions become significant.

It has been argued by one author[39] that the drafting history of the GATT would lead to an interpretation of Article XX that would permit governments to take a variety of environmental measures and justify them under the general exceptions of GATT. While this view is interesting, and the research is apparently thorough, it is not entirely persuasive and overlooks important issues of treaty interpretation. Under typical international law, elaborated by the Vienna Convention on the Law of Treaties,[40] preparatory work history is an ancillary means of interpreting treaties. In the

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37. *Id.*

38. Gijs M. DeVries, *How to Banish Eco-Imperialism*, J. COM., Apr. 30, 1992, at 8A.

39. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 37-55 (1991). A more recent article by Charnovitz, which has just come to the attention of this author and with which this author substantially agrees, is Steve Charnovitz, *Environmental and Labor Standards in Trade*, 15 WORLD ECON. 335, 335-56 (1992).

40. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27, arts. 31, 32, 8 I.L.M. 679, 691-97 (entered into force Jan. 27, 1980).

context of interpreting the GATT, we have more than forty years of practice since the origin of GATT, and we also have some very important policy questions raised by the "slippery slope arguments" mentioned above. Thus, unlike certain schools of thought concerning United States Supreme Court interpretation of the United States Constitution, it is this author's view that one cannot rely too heavily on the original drafting history.[41]

IV. THE PROCESS-PRODUCT PROBLEM: THE TUNA DOLPHIN CASE & THE GLOBAL COMMONS QUESTIONS

An important conceptual "difficulty" of GATT is the so-called process-product characteristic problem, which relates closely to the Article XX exceptions and also to the national treatment obligations and other provisions of GATT.[42] This issue is central to the so-called tuna/dolphin case[43] and needs to be explained.

Suppose that an importing country wishes to prohibit the sale of domestic or imported automobiles that emit more pollutants in their exhaust than permitted by a specified standard. Subject to the discussion in Part II, there seems to be little difficulty with this regulation. It relates to the characteristics of the product itself. If the product itself is polluting, then on a nondiscriminatory basis the government may prohibit its sale (or also prohibit its importation, as a measure to prohibit its sale).[44]

Suppose, on the other hand, that the government feels that an automobile plant in a foreign country is operated in such a way that it poses substantial hazards to human health, possibly through dangers of accidents from the machinery, pollutants or unduly high temperatures in the factory. On an apparently nondiscriminatory basis, the government may wish to impose a prohibition on the sale of domestic or imported automobiles that are produced in factories with certain characteristics. However, in this case it should be noted that the imported automobiles themselves are perfectly appropriate and do not have dangerous or polluting characteristics. Thus, the target of the importing country's regulation is the production "process." The key question under the GATT/MTO system is whether the importing country is justified either under national treatment rules of nondiscrimination, or the exceptions of Article XX (which do not require strict national

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41. The criticism regarding some theories of interpretation refers to various doctrines of "original intent" in connection with theories of U.S. Constitutional interpretation.

42. JACKSON & DAVEY, *supra* note 1, at 448, 514; Frederic L. Kirgis, Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses and the GATT*, 70 MICH. L. REV. 859 (1972); *see also supra* note 25.

43. Tuna/Dolphin Panel Report, *supra* note 36; *see* JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 197-99; GATT REPORT 90-91, *supra* note 21, at 27; OTA REPORT, *supra* note 21, at 49; *see also supra* note 37.

44. *See supra* notes 24-33 and accompanying text (discussing national treatment and product standards); *see also* JACKSON & DAVEY, *supra* note 1, at 448 (citing to GATT Report on Belgian Family Allowances adopted by GATT Contracting Parties on November 7, 1952); GATT, *supra* note 10, annex I, 61 Stat. at A85-90, 55 U.N.T.S. at 292-305.

treatment nondiscrimination as was discussed above). Trade policy experts are concerned that if a nation is allowed to use the process characteristic as the basis for trade restrictive measures, then the result would be to open a pandora's box of problems that could open large loopholes in the GATT. The following are some hypothetical illustrations of potential "process" problems further down the road:[45]

> — An importing country prohibits the sale of radios, whether domestic or imported, that are produced by workers who are paid less than a minimum amount of wages specified by the importing country. This minimum amount might be the importing country's own minimum wage, or it might be an amount considerably less but still substantial (in deference to poor countries).
> — An importing country that prohibits women from working in certain types of manufacturing plants also prohibits the importation of goods produced in similar plants that utilize women employees.
> — An importing country that specifies a weekly religious holiday, for example, Saturday or Sunday, prohibits the importation of goods produced by work on the specified religious holiday.
> — An importing country has strong political interests regarding the threat to marine mammals from certain fishing practices on the high seas, and thus prohibits the sale of products from both its domestic fishing industry and from foreign fishing if the products come from countries that permit the destructive fishing practices.

Obviously the tuna/dolphin case[46] relates to these issues. Although the GATT panel report is not entirely clear on this matter, it seems fair to say that there were two important objections to the U.S. embargo on the importation of tuna. First, there is the question of "eco-imperialism," where one nation unilaterally imposes its fishing standards (albeit for environmental purposes) on other nations in the world without their consent or participation in the development of the standard. Second, there is the problem that the import embargo is inconsistent with the GATT rules unless there is some GATT exception that would permit the embargo. Of course, that exception relates to the "process-product" interpretation problem and therefore also to the problem in the national treatment rule (Article III) and the general exceptions of GATT (Article XX).

The approach in the GATT system so far has given great weight to this slippery slope concern, and thus tilted towards interpreting both the Article III (including some Article XI questions) and the Article XX exceptions to apply to the product standards and to life and health within the importing country, but not to extend these concepts and exceptions to "processes" outside the territorial limits of jurisdiction. The alternative which threatens to create the great loop hole is a serious worry. The theories of comparative

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45. *See* sources cited *supra* note 20, 38-40.
46. *See* Tuna/Dolphin Panel Report, *supra* note 36.

advantage which drive the policy of liberal trade, suggest that differences among nations are an important reason for trade. These can be differences of natural resources, as well as differences of cultural and population characteristics such as education, training, investment, and environment. To allow an exception to GATT to permit some governments to unilaterally impose standards on production processes as a condition of importation would substantially undermine these policy objectives of trade liberalization. On the other hand, trade sanctions, which include embargoes, are a very attractive and potentially useful means of providing enforcement of international cooperatively developed standards, including environmental standards.

Thus, there is an important trade-off that the GATT must face. It is not adequate, in this writer's view, for the GATT simply to say that trade should never be used as a sanction for environmental (or human rights, or anti-prison labor) purposes. There are already a number of situations in which the GATT has at least tolerated, if not explicitly accepted, trade sanction type activity for what is perceived to be valid overriding international objectives.[47] What are the implications of this problem? To this writer, it seems clear that the GATT/MTO system must give specific and significant attention to this trade-off in order to provide for exceptions for environmental purposes. The exceptions should have well-established boundaries so as to prevent them from being used as excuses for a variety of protectionist devices or unilateral social welfare concerns. Possibly these exceptions should be limited to the situation where governments are protecting matters that occur within their territorial jurisdiction.

It may be feasible to develop an explicit exception in the GATT/MTO system, possibly by the waiver process which is reasonably efficient,[48] for a certain list of specified broad-based multilateral treaties. One of the concerns expressed about the tuna/dolphin case in GATT is the implications that it might have for the so-called "Montreal Protocol" concerning chlorofluorocarbons (CFCs) and the danger to the Earth's ozone layer. The Montreal Protocol[49] provides a potential future authorization of trade sanction measures against even nonsignatories for processes, not product characteristics, that violate the norms of the treaty. If the current rules of the GATT are

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47. Instances where the GATT has tolerated such uses include the imposition of trade sanctions on South Africa and Southern Rhodesia. Article XXI of GATT provides an exception for national security, and for measures in pursuance of a Contracting Parties "obligations under the United Nations Charter for the maintenance of international peace and security." GATT, *supra* note 23, art. XXI, 61 Stat. at A63, 55 U.N.T.S. at 266. The GATT Analytical Index to Article XXI reports various practices that have been tolerated by the GATT system, including an Egyptian boycott against Israel, an EC action during the Falkland/Malvinas situation, and United States measures prohibiting trade involving Nicaragua.

48. *See* JACKSON, WORLD TRADE AND GATT, *supra* note 1, at 541-52; *see also* Annex B.

49. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]. See a description of this problem in OTA REPORT, *supra* note 21, at 43-46.

interpreted to exclude exceptions for the process situation, the Montreal Protocol Measures, except as among the signatories to the Montreal Protocol, would be contrary to GATT obligations.[50] It may take some time and study to develop the precise wording of an appropriate amendment or treaty exception for the GATT/MTO system for these environmental treaty cases, but in the short run for a limited period of years, it could be efficient to use a GATT waiver to clarify the issue as to specifically named treaties.[51]

In all likelihood, there are a sufficient number of signatories to the Montreal Protocol that are also GATT members so that a GATT waiver authorizing the trade measures contemplated in the Montreal Protocol could be adopted. Adoption of a waiver requires approval by two-thirds vote of the GATT contracting parties. But at the same time, it might be wise to go a few steps further and include in such a waiver several other specified treaties.[52] Obviously the waiver can also be amended in the future to add more specifically named treaties.

Even under such a waiver approach, there are still some important policy and treaty drafting questions that must be faced. For example, should the exception to the GATT be worded to apply only to the mandatory trade measures required by the specified environmental treaties? Or should it also be extended to those measures that are deemed discretionary but "authorized" by the environmental treaties? Or, would the GATT waiver even go one step further and authorize GATT members to take trade measures unilaterally to help enforce the substantive environmental norms contained in the environmental treaties, even when such environmental treaties do not have trade measures or sanctions indicated in the their treaty texts?

V. SUBSIDIES

The problem of subsidies in international trade policy is perhaps the single most perplexing issue of the current world trading system, and one that is very complex. Some of the major controversies and negotiation impasses, such as the question of agriculture, relate to this problem. The GATT rules have become increasingly elaborate, and contain several different dimensions. Not only are there provisions in the GATT itself (Articles VI and XVI), but there is also the Tokyo Round "Code" on subsidies and

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50. Montreal Protocol, *supra* note 49. *See* OTA REPORT, *supra* note 21, at 44. The OTA Report notes that the Montreal Protocol has seventy nine members. GATT has more than one hundred members, and a waiver requires two-thirds of those voting, which must include at least one-half of the total membership.

51. Some language used in the NAFTA text suggests the possibility of a GATT waiver along the same lines as the NAFTA article 104. *See* Annex C, art. 104.

52. Apart from the Montreal Protocol, other treaties mentioned as candidates for a GATT waiver include: The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 27, 1989, U.N. Doc. UNEP/IG. 80-3 (1989), *reprinted in* 28 I.L.M. 657 and The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

countervailing duties which provides obligations to the signatories of that code.[53] It is not feasible in this paper to go into great detail about the subsidies question. Indeed, the subsidies question in relation to environmental policies may be one of the most intricate and difficult issues facing the world trading system during the next decade. Here I will only outline some of the major characteristics and problems of the potential clash between trade policies and environmental policies in relation to subsidies.

First, to look briefly at the subsidy trade rules,[54] the trade system has traditionally divided subsidies into two types: export subsidies (subsidies that apply only to exported products), and general subsidies (subsidies that apply to all products produced in the country, whether exported or not). The international system has imposed considerably more restraint on the use of export subsidies, thus deeming them to be particularly suspect.

Subsidies can have at least three different kinds of impacts on international trade. Two of these relate to exports from a subsidizing country regardless of whether the subsidies are general or export subsidies. First, the subsidized exports can have an impact on an importing country, and the rules will often allow the importing country to impose a so-called "countervailing duty" to offset the effect of the subsidized imports. Second, subsidized exports may be introduced into a third country market to which a nonsubsidizing country is also exporting. In that case, the countervailing duty remedy is not available. The international system (GATT and the Subsidies Code) imposes specific international obligations on the use of certain kinds of subsidies, and it is this international obligation and its enforcement procedures (through dispute settlement) that is almost the only available remedy to the competing nonsubsidizing country in its complaint against that country that subsidizes. This international rule enforcement mechanism and dispute settlement process has been one of the most troublesome areas in the GATT, and there is considerable thought that the Tokyo Round Subsidies Code has largely failed in this respect. It should also be noted that the United States is the only major user of countervailing duties, although there is some evidence that other countries are now interested in increasing their use of them.

The third influence of subsidies on trade is to inhibit imports into a subsidizing country. If an importing country subsidizes its domestic producers, these producers can often reduce their prices and thus inhibit imports that are not equally subsidized simply through increased price, quality, or other forms of competition. Indeed, the system is tilted against imports in that it permits a subsidizing importing country to subsidize its domestic

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53. *Agreement on Interpretation and Application of Articles VI, XVI and XXIII*, GATT Doc. L/4812 (Nov. 12, 1979), BISD 26th Supp. 56. The current number of signatories to this Convention is approximately twenty-five (25). *See* GATT Doc. L/6453 and addenda (through Mar. 12, 1992).

54. JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 249-73; JACKSON, WORLD TRADE AND GATT, *supra* note 1, at 365-99; JACKSON & DAVEY, *supra* note 1, at 723-89.

product, and yet impose a countervailing duty on imports that are equally subsidized!

An underlying problem for all of these complex rules concerning subsidies is the definition of "subsidy" itself. The definition is often stated in very broad terms such that it would include governmental measures such as fire and police protection, roads, and schools. If the subsidy definition is so broad, the various trade response rules, particularly the countervailing duty, could totally undermine the liberal trading system. Thus, it has been necessary either to use a restricted definition of subsidy, or to define a "subset" of the broader set which subset is called "actionable" and thus subject to trade response measures.[55]

Having presented this all too brief outline of the general trade subsidies rules in the GATT/MTO system, it is now important to turn to how they might apply in the environmental context. The following hypothetical cases can illustrate some of the problems that could occur:

— Suppose an exporting country establishes a subsidy for certain of its manufacturing companies that allows them to receive grants or tax privileges for establishing environmental enhancement measures (such as machinery to clean up smoke or water emissions, or other capital goods for environmental or safety and health purposes). When those producers export their goods, the goods could be vulnerable to foreign nations imposing countervailing duties. Is this appropriate or should a special exception for environmental measures be carved out?

— Suppose an exporting country lacks meaningful environmental rules, and exports goods into an importing country that has strict environmental rules for its manufacturers. The importing country's domestic industry will likely complain about what it perceives to be "unfair import competition." Can the importing country argue that the lack of environmental rules in the exporting country is the equivalent of a "subsidy" and impose a countervailing duty? Again this poses a slippery slope problem. Could such an importing country likewise impose countervailing duties against imports based on the argument that the imports were produced in a country that lacked competition policy (antitrust laws)? Or lacked minimum standards of safety and health in the factories? This is a problem that closely relates to the process-product characteristic problem discussed in Part IV.

— Similarly, suppose a nation lacks environmental rules such that its domestic producers can produce goods cheaper than its competitors and thus compete to keep out goods that are imported from other countries that have substantial environmental rules. In that

55. JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 249-73; Dunkel Draft, *supra* note 11 (Draft Agreement on Subsidies and Countervailing Measures).

situation, the lack of environmental rules becomes an effective protectionist device.

Obviously these hypotheticals are not so "hypothetical." A good part of the discourse about the proposed NAFTA treaty expresses the concern that if Mexico lacks environmental rules it will have a competitive advantage vis-á-vis American or Canadian producers.[56] These problems illustrate the need for careful examination of the subsidy rules so as to design appropriate environmental exceptions or rules without destroying the advantages of the subsidy rules. These environmental exceptions or rules should probably include:

1) A modification to the definition of "actionable subsidy" to allow certain types of environment enhancing government benefits and to exempt them from countervailing duties or other trade obligations.
2) A provision allowing trade restrictions, whether called "countervailing" or not, under authority of other multilateral treaties designed to enforce certain international agreements.
3) A recognition that just because the environmental rules of an exporting nation are not as stringent as those of an importing nation, the latter should not apply "countervailing duties" based on a subsidy theory. On the other hand, international minimum standards might be formulated over time, possibly creating a benchmark required for goods to move freely in international trade.

VI. Exports and Competitiveness

Apart from the problems of the various technical rules of the GATT discussed above, there are also some important additional considerations for the relationship and possible effect of trade liberalization on environmental policies. One of those can be characterized as the question of "competitiveness." The situation is as follows: an exporting country has important environmental rules and standards, which its producers meet. These environmental efforts obviously have a cost, and the producers must bear those costs and build them into the price structure of the products that they export. These products compete in other countries with products from countries that do not have such environmental standards or efforts. This could be the case when the environmentalist country exports to a relatively nonenvironmentalist country, or when the two countries compete in some third market. Because the producers in the nonenvironmentalist country escape the cost of the environmental regulations, presumably they can produce at a lower cost and thus offer their product at a lower price.

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56. *The Trade Accord*, N.Y. Times, Aug. 13, 1992, at A2, C3. See also the reports of discussions on the environment in the July 10, 1992 issue of relation to the NAFTA agreement in Inside U.S. Trade.

The concern of the producers in the environmentalist country is that this will be a form of competition for them that will be hard to meet and, thus, in their minds, is "unfair" because they are contributing to the world environment by their compliance with environmental standards.

This problem was touched on in the previous section when we discussed subsidies, but even apart from the rules of subsidies it can be an important problem, especially as it relates to political perceptions. Furthermore, because it is primarily a question of "export competitiveness," it does not get discussed in connection with many of the problems of national treatment, or the general exceptions to the GATT, which have been previously expressed. There are some GATT rules that cover exports, but they are not closely related to the problem posed here.

To some extent, this problem is similar to many other problems resulting from differences among societies. Some societies will have more stringent rules with respect to plant worker safety. Other societies will have stringent rules regarding family allowances or holidays. Still other societies will have minimum wages, and many other social measures can differ from society to society. As indicated earlier in this paper, attempts to use trade rules to make the world uniform in this regard could be futile and very damaging to the underlying policies of trade liberalization. Thus, the questions posed are whether environmental policies are substantially different than some of the other policies mentioned, and if so, do they deserve a different kind of treatment in the world trading system.

First, it might be conceptually feasible to separate the environmental problems that affect only the environment of the country concerned (within its borders), from other problems that have an effect either across borders, or, even more broadly, on the world's environment (the global commons). It could be, and has been, argued that because different countries vary in their degrees of environmental quality, and in the extent to which they tolerate environmental problems as a trade-off to gaining other benefits (such as eating better), that these issues can and should be left to the national sovereign states. Consequently, the international trading system ought not to try to redress or "harmonize" the different environmental approaches. Obviously there are many intricacies in this argument, and some of them have already been subjects of full papers elsewhere.[57]

Perhaps the more important question relates to the situation where the environmental degradation is of a type that impacts on the world as a whole, or at least on countries other than the acting or exporting nation. Here we have something of the "free rider" problem, or "prisoner's dilemma" issue, that points towards the need for international cooperation. Given the imperfections of the international system, and particularly its

57. *See, e.g.*, Jagdish Bhagwati, *Why The Sins of One Economist Should Not Be Visited On All*, FIN. TIMES, Feb. 18, 1992, at 21; *A Greener Bank*, ECONOMIST, May 23, 1992, at 79 (talking about World Bank's *World Development Report*, and mentioning provocative memo by Lawrence Summers, the Bank's Chief Economist).

system for developing new rules (with its least common denominator constraints) environmental policy experts can legitimately argue that there must be some room for unilateral nation state actions designed to support the world environment. This is perhaps the trickiest area for which to develop appropriate policy. It relates closely to the process-product characteristic question discussed above. Certainly the optimal approach would seem to be through broad based multilateral treaties and rules, which then in turn raises the question of how to make such rules effective. This latter question quite often leads to a focus on trade sanctions as a means to make such rules effective, and as indicated earlier, an argument can be made that there should be an explicit exception in the GATT for certain kinds of trade actions to help enhance the effectiveness of international environmental rules, while preventing misuse of the exception.

Let us return for a moment to the first category of problems, those in which the environmental issues involve the environment only within the producing country, or the importing country which has competing producers that will benefit from lack of environmental rules. In some of these cases, the importing country's political system would in fact desire some additional pressures on its decision making processes to help induce the development of environmental rules. This is a common feature of the relationship of international action, particularly in the area of economic affairs, but also in the human rights area. In many cases, domestic leaders find it politically difficult to implement a preferred course of action unless there is some external pressure that helps them in their domestic advocacy, and also in some cases gives them an "excuse" for taking that action.

Some of this attitude certainly exists in the context of environmental rules,[58] and may in fact justify a broader approach in the GATT/MTO trading system. Thus, it could well be feasible and worthwhile, although time-consuming, to develop some rules in the trading system that impose certain kinds of harmonizing minimum level standards for environmental protection. In the alternative, rules that impose certain kinds of trade detriments, such as compensatory duties, on countries that do not adopt or enforce the harmonized or minimal environmental rules, might also be worthwhile.

VII. The Institutional Problems: Dispute Settlement, Transparency, and Jurisprudence

The GATT is a rather strange and troubled institution. It was born with several birth defects because it was never meant to be an organization. Instead, it was intended that an International Trade Organization (ITO) Charter would come into effect that would provide the institutional framework, in which the GATT would be one part. Because of this troubled

58. These views on external pressure are expressed in private conversations with various foreign government officials, but are not generally stated in public, or in publications.

birth history, the GATT has always been deficient in the institutional clauses normally found in a treaty establishing an international organization.[59] These problems have become increasingly troublesome as world economic developments have gone beyond the rules provided by the GATT system. Some of these problems are being addressed in the current Uruguay Round GATT negotiation, and if that is ultimately successful, it may help improve the institutional situation. Other GATT issues include problems of accepting new members, particularly those with different economic structures; the problem of assisting developing countries; the difficulty of facing up to some of the more newly appreciated issues that are effecting international trade flows, such as cultural and economic structural differences; questions of competition policy (antitrust); and, of course, environmental policies.

More broadly, the GATT generally suffers from institutional deficiencies in the two essential ingredients for an effective international organization, namely the making of new rules, and the provisions for making those rules effective through dispute settlement procedures. With respect to rule making, the GATT basically relies heavily on a consensus treaty making process. With a membership that now exceeds one hundred countries, this becomes extremely difficult. This difficulty is accentuated by the MFN obligations that give rise to a potential "free rider" problem of nonsigning countries receiving the benefits of new agreements. This in turn tends to force negotiations towards a consensus for a new rule, into a "least common denominator" approach.

Likewise, the dispute settlement procedures of the GATT have been troubled. The actual GATT clauses setting them up are extremely sketchy. Nevertheless, through trial and error and general practice over four decades, the GATT dispute settlement procedures have now developed into a remarkably full procedure that has been largely, but not totally, effective. Its effectiveness has been such, however, as to attract various interests who see in the GATT dispute settlement procedures an important attribute for subject matters that they would like to see placed under the GATT, such as the area of intellectual property.[60] Likewise, other trading arrangements, particularly some of the arrangements for trading blocs or free trade areas, have followed some of the general outlines of the GATT dispute settlement procedure, paying it the compliment of emulation.

The Uruguay Round Negotiation currently sponsored by the GATT (the eighth since its origin) has been troubled. It was launched in September 1986, but is not yet complete. Nevertheless, in December 1991, the negotiating groups, through the coordination of the Secretariat and the Director-General, Arthur Dunkel, issued a tentative draft text of an entire package of agreements which could form the basis of the final negotiations towards a complete package to be approved. This is commonly called the "Dunkel

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59. *See supra* note 1, and particularly JACKSON, RESTRUCTURING GATT, *supra* note 1.

60. *See Symposium: Trade Related Aspects of Intellectual Property*, 22 VAND. J. TRANSNAT'L L. 223 (1989); Dunkel Draft, *supra* note 11, annex III at 57.

Draft," and it contains two important institutional texts that relate to the problems discussed above. First, there is a charter for a Multilateral Trade Organization (MTO), which will provide some measure of improvement in the basic institutional structure of the GATT. It will not change such things as the structure of rule making, but it does provide, for the first time, a definitive legal treaty text to establish the organization, and put it on a sounder footing for future evolution. The existence of this text has been criticized by some interests in various participating countries, including some of the environmental interests. Some of this criticism is, I think, due to misunderstanding of the specific draft charter provisions and their relation to broader international law principles. Indeed, the draft charter is very minimal, and in many ways will result in no differences in the normal work of the organization, as compared to the existing organizational structure.[61]

Another important text in the Dunkel Draft is a draft agreement concerning revised dispute settlement procedures in the GATT. It should be noted that these dispute settlement procedures could exist independently of an MTO, if an MTO failed to come into being. However, an MTO does facilitate and help administer a broadened dispute settlement system that would now apply, not only to trade in goods, but also to intellectual property and trade in services. This procedure would provide a more effective "umbrella" for a single dispute settlement procedure and avoid some of the contentious problems of competing procedures that existed after the various Tokyo Round texts came into force.

Of course, there are those who would prefer not to have a more effective dispute settlement procedure, or for that matter, a more effective organization. They see any such organization, or procedure at the international level as a threat to their ability to achieve the results which they wish within a particular country. There is not much that can be said in response to that desire. In the view of this author, such a desire is somewhat irresponsible because the basic trends of world economic interaction, regardless of what happens in connection with new treaties, are such that some kinds of international cooperation and coordination are essential to avoid the rancorous and damaging disputes that are constantly arising between nations. International cooperation also provides the measure of predictability and stability that is essential for individual entrepreneurs and firms to act effectively. Often the action desired is investment, which depends on decisions that need a predictable rule system.

Several particular aspects of the legal effects of international actions should be clarified because there have been statements by various interest groups that suggest some misunderstanding about them. The first of these is the question of the domestic law application of international decisions of a GATT/MTO system. For the United States, it is very unlikely that any international GATT/MTO decision as to new rules (such as a new treaty) or a dispute settlement procedure result, would have direct application (self-

61. Dunkel Draft, *supra* note 11, at 92.

executing effect) in United States law. Although some treaties can have self-executing effect in the United States, in recent years Congress has rather consistently negated such effect by provisions in its legislation approving the international trade treaties.[62] This result, incidentally, differs from country to country.

Many other countries are in the same position as the United States, such that the international treaty or international decisions will not automatically become part of their domestic law.[63] Instead, there must be an "act of transformation," which is some sort of domestic legal action that would implement the international rules or decisions. In the United States this could be an Act of Congress, or in cases where the power is delegated to the President, an action by the President or his delegatees. If the domestic law institutions fail to enact the appropriate transformation, the United States or other country may be placed in contravention of international obligations. Such a situation, however, will not result in automatic domestic law change. To some extent this provides a certain escape hatch from inappropriate and overreaching international decisions. Needless to say this is a matter of considerable discussion and literature.[64]

A second potential misunderstanding of the legal situation relates to the effect of the GATT dispute settlement panel decisions. Under the current and proposed procedure, a "panel" will make its ruling in a report, and this report must be approved by the GATT Council. Under the new proposed procedures, this approval would be fairly automatic, subject to an appeal to a higher tribunal.[65] The GATT panel report is not binding until it is approved. After such approval, it is binding on the participant nations as a matter of international law, even though it does not directly become domestic law. In the case of the Canada-U.S. Free Trade Agreement (FTA), and possibly some new FTA arrangements, there is one portion of the dispute settlement procedures available that does provide for direct, or nearly direct, application of the decisions of the tribunal. This is relatively rare and quite novel.[66]

Even with respect to international law obligations, the general international law rule is that the doctrine of precedent, or "stare decisis," does

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62. Trade Agreements Act of 1979, § 3(a), (f), 19 U.S.C. § 2119(a), (f) (1988); S. REP. No. 249, 96th Cong., 1st Sess. 4, 36 (1979); JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND, *supra* note 1, at 169-72; JACKSON, WORLD TRADING SYSTEM, *supra* note 1, at 68, 75.

63. *See generally* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 310-40 (1992). The United Kingdom and Canada are generally considered "dualist" nations where treaties do not apply in domestic law, but must be implemented through parliamentary or other governmental acts of transformation. R. Higgins, *United Kingdom*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 123 (Francis G. Jacobs & Shelley Roberts, eds., 1987).

64. *See supra* note 60.

65. Dunkel Draft, *supra* note 11, §§ S (Understanding on Rules and Procedures on Dispute Settlement), T (Elements of an Integrated Dispute Settlement System).

66. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293; H.R. Doc. No. 216, 100th Cong., 2d Sess. 512 (1988).

not apply to rulings of international tribunals. Thus, the result of a panel report as between countries A & B, for example, is not technically a rule that obligates countries C & D, or even A & D. This leaves open the possibility that through general international negotiating processes, or actions in a council of the GATT or MTO, the results of a panel report, even when approved, could be modified when applied to future cases. Nevertheless, it is true that panels do tend to follow prior panel decisions as a matter of persuasiveness and logical consistent reasoning. In some cases, however, the panels have expressly departed from prior panel reports.[67]

What are the implications of all of this for environmental policy? First, as is fairly frequently noted in the text discussion in prior sections, many of the policy clashes that environmental policy has with trade policy point towards institutional questions. This is most importantly the case for the dispute settlement processes of the GATT. It is in those processes that some of the interstitial decisions involving interpretation of current or future GATT/MTO treaties will be fought out. One example of that was the tuna/dolphin case, in which the panel itself noted that it would be inappropriate for the panel to make the requested interpretation of the GATT general exceptions of Article XX. It stated that such decisions should be made by the negotiators or the appropriate GATT bodies as a matter of treaty law alteration, rather than simply an interpretation of a panel.[68] In that sense, the tuna/dolphin case was praiseworthy, and in a broader sense should be praised even by the environmentalists who dislike the outcome. It suggests a certain amount of "judicial restraint." A contrary approach, with the panel seizing the issue and going forward with it, might in some future case be severely contrary to the interests of environmental policy.

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67. *See Report of the GATT Panel, European Economic Community Restrictions on Imports of Dessert Apples*, para 12.1, GATT Doc. L/6491 (June 22, 1989), BISD 36th Supp. 93, 124. The Report states that "[t]he Panel . . . did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report." *Id.* This is generally consistent with international law. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 21 (4th ed. 1990).

68. Tuna/Dolphin Panel Report, *supra* note 36, at para. 6.3, at 1623 reads:

> The Panel further recalled its finding that the import restrictions examined in this dispute, imposed to respond to differences in environmental regulation of producers, could not be justified under the exceptions in Articles XX(b) or XX(g). These exceptions did not specify criteria limiting the range of life or health protection policies, or resource conservation policies, for the sake of which they could be invoked. It seemed evident to the Panel that, if the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the CONTRACTING PARTIES were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the CONTRACTING PARTIES to impose such limits and develop such criteria.

Nevertheless, the environmentalists, apart from the question of precedent, have several legitimate complaints about the GATT dispute settlement procedures, among others. First, they note appropriately that the GATT lacks a certain amount of transparency. By that, we can understand that the GATT tends too often to try to operate in secrecy, attempting to avoid public and news media accounts of its actions. In recent years, this has become almost a charade, because many of the key documents, most importantly the early results of a GATT dispute settlement panel report, leak out almost immediately to the press. For purposes of gaining a broader constituency among the various policy interested communities in the world, gaining the trust of those constituencies, enhancing public understanding, as well as avoiding the "charade" of ineffective attempts to maintain secrecy, the GATT could go much further in providing "transparency" of its processes.

Secondly, there is criticism and concern that the GATT lacks the kind of expertise that would help it to make better decisions in dispute settlement processes. In particular, it is believed that the GATT lacks expertise in environmental issues. Again, there is considerable room for improvement in this regard, perhaps with procedures that would give panels certain technical assistance.

Finally, there is criticism of the GATT panel processes in that they (while operating in secret) fail to make provisions for the transmittal of arguments, information, and evidence from a variety of interested groups including nongovernment environmental policy groups. Once again, there should be ways that the GATT can improve on this problem.

Apart from the dispute settlement procedures, the overall institutional set up of a GATT and a possible MTO could be likewise improved. In particular, transparency could be enhanced, perhaps by Non-Governmental Organizations (NGOs) as well as Inter-Governmental Organizations (IGOs) gaining some share of participation in the GATT processes, possibly through an annual open meeting. Furthermore, as the GATT or MTO continue to evolve, procedures such as the already set up TPRM might build in provisions for explicit attention to environmental concerns. It is clear that some of the GATT rules need to be changed. There are a variety of ways for them to be changed, some discussion on which is provided in Annex B.[69]

VIII. Some Conclusions

The discussions of this paper cover only the tip of the iceberg regarding the problematic relationship between world trade system policies and environmental policies. But in the light of those discussions, what can we say about the relationship of two policy sets? Are they congruent or conflicting? The answer obviously is a bit of both.

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69. *See* Jackson, World Trade and GATT, *supra* note 1; John H. Jackson, *Changing GATT Rules* (Nov. 7, 1991) (appended as Annex B).

In the broader long term perspective there would seem to be a great deal of congruence. Some of that congruence derives from the economic and welfare enhancement of trade liberalization policies. Such welfare enhancement can in turn lead to enhancement of environmental policy objectives, as mentioned at the outset of this paper.

On the other hand, it is clear that the world trade policies and environmental policies do provide a certain amount of conflict. This conflict is not substantially different from a number of other areas where governmental policies have to accommodate conflicting aims and goals of the policy makers and their constituents. Thus, to some degree it is a question of where the line will be drawn, or how the compromises will be made. In that sense, institutions obviously become very important because the decision making process can tilt the decision results. If the world trade rules are pushed to their limit, for example, free trade with no exceptions for problems raised by environmental policies and actions effecting environments, clearly the trade rules will cause damage to environmental objectives. Likewise, if the environmental policies are pushed to their limit at the expense of the trading rules, so that governments will find it convenient and easy to set up a variety of restrictive trade measures, in some cases under the excuse of environmental policies, world trade will suffer.

Furthermore, there is no doubt that the "cultures" of the two policy communities: that of trade, and that of environment, differ in important ways. The trade policy experts have tended, over decades and perhaps centuries, to operate more under the practices of international diplomacy, which often means secrecy, negotiation, compromise, and to some extent behind the scenes catering to a variety of special economic interests. In addition, at the international level, because there is no over-arching "sovereign leader," the processes are slow, faltering, and lend themselves to lowest common denominator results, or to diplomatic negotiations that agree to language without real agreement on substance.

On the other hand, the environmental policy groups, perhaps partly because they primarily operate on the national scene, have become used to using the processes of publicity and lobbying pressure on Congress or Parliaments, to which they have considerable access. There is, thus, a much broader sense of "participation" in the processes, which the international processes have not yet accommodated. Furthermore, the environmental policy groups, like many other groups working on the domestic level, have a sense of power achieved through successes in the legislative and public discussion processes. They feel somewhat frustrated with the international processes because those are sufficiently different to pose puzzling obstacles to the achievement of environmental goals.

This difference in culture is not inevitably permanent, and indeed the international processes need to accommodate more transparency and participation. This is true not only of the environmental case, but it is increasingly an important consideration for the broader way that international economic interdependence is managed. As more and more decisions that effect firms, citizens, and other groups, are made at the international level, it will be

necessary for the international decision making process to accommodate the goals of transparency, adequate expertise, and participation in the advocacy and rule making procedures.

To some extent, the rhetoric of some environmental policy advocates has been the rhetoric of antagonism to international organizations and procedures altogether. This, I suggest, is not constructive. The notion that the United States, for example, can, or should impose unilaterally its environmental views and standards on other parts of the world, without any constraint from international rules or international dispute settlement procedures, is not likely to be a viable approach in the longer run. This means that in some cases when the United States submits (as it must, partly so as to reciprocally get other countries to submit) to international dispute settlement procedures, it will sometimes lose, and find itself obliged to alter its own domestic policy preferences. This has already been the case, and the United States has a mixed record of compliance with GATT rulings, although for a large powerful nation that record is not too bad.[70]

Apart from these longer run and institutional issues, there are matters that can be undertaken jointly by the trade and environmental policy communities, in the context of the GATT/MTO system. By way of reviewing some of the discussion in sections above, there seem to be two groups of actions that would be called for, the near term, and the longer term.

Focusing first on the near term actions: it seems feasible for the international trading system to accommodate some of the following actions or goals:

1) Greater transparency both in the rule making and in the dispute settlement procedures of the trading system. This would call for more participation, greater opportunity for policy advocacy inputs, and for more openness in terms of publication of the relevant documents faster and in a way more accessible to interested parties;
2) Greater access to participation in the processes,
3) Some clarification is needed about the degree to which the international process will be allowed to intrude upon the scope of

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70. In a number of not too recent GATT panel cases that were brought by complaints against the United States, and in which the panel ruled that the U.S. measures were inconsistent with GATT, the United States subsequently revised its legislation or other measures in order to comply with the GATT panel report. *See, e.g., Report of the GATT Panel, United States—Customs User Fee*, GATT Doc. L/6264 (Feb. 2, 1988), BISD 35th Supp. 245; *United States Manufacturing Clause*, GATT Doc. L/5609 (May 5, 1984), BISD 31st Supp. 74; *Report of the GATT Panel, United States—Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175 (June 17, 1987), BISD 34th Supp. 136; *Report of the GATT Panel, United States—Tax Legislation (DISC)*, GATT Doc. L/4422 (Nov. 12, 1976), BISD 23rd Supp. 98. On the other hand, the United States has not complied with several other panel reports. In some cases the United States has announced that it will accept the panel report and ultimately comply, but will wait until after the end of the Uruguay Round in case the Uruguay Round modifies the rule. *See, e.g., Section 337 Panel Report, supra* note 24; *Report of the Committee on Anti-Dumping Practices*, GATT Doc. L/6609, BISD 36th Supp. 435, 438 (addressing complaint of Sweden).

decision making of national and sub-national governments. For example, the "scope of review" of international GATT/MTO panels over national government regulatory decisions concerning environment needs to be better defined. This is not an easy question, and it will not be solved quickly, but there probably needs to be some near term accommodation through interpretive notes or otherwise in the Dunkel Draft texts, for example. Some of the NAFTA text approach can be an useful example; and

4) Finally, there will have to be some near-term rule accommodation by the GATT, by which I mean some adjustments or changes in those rules through one or another of the techniques for changing GATT rules (probably focusing on the waiver procedure) to establish a reasonably clear set of exceptions for certain multilateral environmental treaty provisions that call for trade action that would otherwise be inconsistent with the GATT/MTO rules.

Looking at the longer term, it is clear that there is a substantial agenda that must be addressed with regard to the intersection and potential clash of trade policies and environmental policies. The GATT/MTO system must develop mechanisms, including working parties and negotiations, to address these, and they will take time. The long term agenda includes the following actions and goals:

1) The subsidies area will need substantial study and some kind of rule alteration to accommodate the respective interest;

2) Some type of more permanent exception will be needed either as an amendment or waiver embellishment of the Article XX exceptions of the GATT system, or possibly in the context of the national treatment rules. This can build upon the short term rule alterations (for example, by waiver) mentioned above, with particular reference to the process-product characteristic question, so as to accommodate the broadly agreed international environmental policy provisions, such as those now contained in some treaties;

3) Undoubtedly the GATT/MTO dispute settlement procedure will continue to evolve, in the light of experience. Even if near term provision is made for policy advocacy inputs from environmental policy experts, as time goes on and experience is obtained, there will need to be further adjustments in that procedure, possibly with some added limitations on the scope of review of international panels over domestic national environmental provisions; and

4) In particular, there needs to be some clarification about the rules and exceptions to accommodate national government unilateral imposition of environmentally justified rules that require or provide incentive for a higher standard of environmental protection than that for which the international community is able to develop a consensus.

It would be tragic if increased antagonism between the two policy groups occurred in such a way that the essential policy goals of both groups

would be damaged unnecessarily. Hopefully, with some of the clarifications of the policies outlined in this paper, combined with some of the institutional measures suggested, such antagonism can be largely avoided, or creatively channeled to promote a constructive accommodation of the discordant policy objectives.

ANNEX A: SELECTED PROVISIONS OF GATT

PART I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba ;
(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and pref-

erential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraphs (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

PART II

Article III*

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale,

offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-

dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (*a*) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(*b*) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (*a*) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (*a*) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(*c*) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (*b*) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

> (*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
> (*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article XI*

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (*c*) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion

prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

Article XVI*

Subsidies

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B—Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Article XX

General Exceptions

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:

(*a*) necessary to protect public morals;
(*b*) necessary to protect human, animal or plant life or health;
(*c*) relating to the importation or exportation of gold or silver;
(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(*e*) relating to the products of prison labour;
(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;
(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products,

and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

ANNEX B: JOHN H. JACKSON MEMO, "CHANGING GATT RULES"

(NOVEMBER 7, 1991)
The University of Michigan
Law School
MEMORANDUM
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Re: Changing GATT Rules
Date: November 7, 1991

I have been asked to review the various techniques by which governments may be able to change GATT rules, perhaps to provide that these rules better accommodate some of the important environmental concerns and objectives of GATT Contracting Parties.

The following is a brief review of this subject. I have appended a list of some of the published works by this author, which can be consulted for greater detail.

I. INTRODUCTION.

Despite some occasional misguided or misinformed statements to the contrary, the GATT is a binding treaty obligation accepted by the nations which are Contracting Parties. Because of the odd beginnings of the GATT, however, there is considerable confusion about this and other matters concerning it.[71] The GATT was not originally intended to be an international organization, nor to be the central international institution for facilitating international trade. That role was to be for an ITO—International Trade Organization, as embodied in the so-called Havana Charter of 1948 which never came into force. Because it never came into force, the GATT has had to fill that role. Because of the structure of the drafting of the GATT agreement, the GATT treaty as such has never come into a force either, but it is nevertheless applied by the 1947 Protocol of Provisional Application (PPA), which is a binding treaty obligation. The practice of nations in GATT since this treaty came into force on January 1, 1948, entirely confirms the treaty nature. There is very little doubt expressed among the people who have looked at this issue closely, that the GATT has this binding treaty status.

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71. *See* JACKSON, WORLD TRADE AND GATT, *supra* note 1; JACKSON, WORLD TRADING SYSTEM, *supra* note 1.

However, because of this peculiar history of origin, the GATT has a number of institutional weaknesses, what I have sometimes called "birth defects." I will not elaborate on these, but reference can be made to some of my other works where I have given this detail.[72] One example, has been the difficulty of amending the GATT, and this has led to approaches other than amendments, such as the various separate treaty "side-codes" resulting from the Tokyo Round. Furthermore, ambiguities in the GATT treaty relating to institutional procedures such as powers of the contracting parties, or voting, have provided a number of risks to the contracting parties, risks that have been felt particularly important to large trading powers. Thus, although the language in some cases might be deemed loose enough to authorize certain kinds of procedural ways to change the GATT, the contracting parties have been understandably and appropriately reluctant to exercise these procedures to their fullest scope.

II. Changing the GATT Rules.

The following is a quick summary outline of most of the various possibilities:

1) Formal Amendments to the GATT Treaty.

Article XXX of the GATT provides for amendment. Of course, the GATT is applied through the Protocol of Provisional Application, and one must look first to that protocol, but the practice in GATT has been to utilize the provisions of GATT as applied by the PPA, including Article XXX regarding amendments. In technical legal terms, the Protocol of Provisional Application applying the GATT is amended through the procedure of Article XXX, as incorporated in the PPA.

The provisions of Article XXX, however, are very stringent. This article requires unanimous consent to amend certain portions of the GATT (particularly Articles I & II on MFN and tariff concessions), and two-thirds approval to amend other provisions of the GATT. The practice has been that approval must be through a treaty ratification process of a protocol of amendment. Thus, many national governments find it necessary to submit amendments to their parliaments. When the "membership" numbered in the thirties, this procedure of amendment was more feasible. However, a unanimous amendment has never succeeded. As the membership has enlarged, and now exceeds 100, it appears to be increasingly difficult to fulfill the amending requirements. The Council of GATT was set up in the late 1950's by resolution of the Contracting Parties (there is no provision in the treaty for such a body), and the Council was formulated to be open to any Contracting Party which is interested. Yet, only about two-thirds of the GATT Contracting Parties have established membership in the Council as

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72. *See* JACKSON, WORLD TRADE AND GATT, *supra* note 1; JACKSON, RESTRUCTURING GATT, *supra* note 1.

"interested." This can possibly be a signal of relative lack of interest of the other one-third, which could make it very difficult to achieve a two-thirds vote, especially if among the two-thirds "interested" parties there were even a small number who oppose an amendment.

Even if an amendment procedure succeeds, GATT Article XXX provides that those countries that do not accept the amendment are not bound by it. Thus, even an amendment has a certain "GATT à la carte" characteristic, with some countries bound and others not. In the Uruguay Round, there is some discussion of a fairly radical new technique for changing the GATT, by substituting a whole new treaty. I will refer to this below.

2) Waivers.

Article XXV paragraph 5 of GATT, provides that the Contracting Parties can adopt a "waiver" of the GATT, in circumstances not otherwise provided for, by two-thirds of votes cast (which must include at least a majority of the total membership). Waivers have been used for a variety of circumstances in GATT, including even waivers from Article I & II (thus somewhat undermining the amending unanimity requirement). Some waivers have been open ended without a termination date, and there is considerable discussion about a) whether that is appropriate; and b) whether even such waivers can be terminated by later vote of the Contracting Parties. Nevertheless, a waiver can be a very important and flexible means of changing GATT rules, at least for a temporary period of time. For example, a five year waiver could be adopted by the Contracting Parties that would specifically refer to certain listed multilateral environmental agreement (such as the Montreal Protocol) and provide that actions under them would not be deemed inconsistent with other GATT rules.

3) Decisions of Article XXV.

The language of Article XXV provides that the Contracting Parties acting jointly can "meet from time to time for the purpose of giving effect to those provisions of this agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this agreement." Article XXV provides for one nation, one vote, and unless otherwise specified, actions by a majority of the votes cast.

This is extraordinarily broad and flexible language, and thus could be subject to abuse. A large number of small countries could theoretically adopt new binding rules in the GATT to achieve an advantage for themselves at the expense of a minority of even very large and powerful trading countries, although such rules would not likely be followed. However, during the history of GATT it appears that there has never been a Contracting Party vote that imposed a new obligation on GATT Contracting Parties (except sometimes as a condition, or prerequisite to a waiver opportunity).

4) Interpretations of the GATT Agreement.

The language of GATT Article XXV is broad enough to conclude that the Contracting Parties have the power to definitively interpret the GATT provisions. By definitive interpretation, I mean an interpretation which would be binding as a matter of treaty law on all parties to the agreement including those which oppose the interpretation. Such is explicitly provided for in the charters of a number of other organizations including the IMF and the World Bank. There is no such explicit provision in GATT, and thus it could be contrarily argued that the intent of the draftsman was to exclude this power. However, the language of Article XXV is so broad, and there have been a number of instances of GATT practice consistent with the notion of GATT Contracting Party interpretations of the agreement, that in my judgment it can be successfully argued that Contracting Parties have this power of interpretation.

However, this raises a number of additional legal issues. An important first consideration is how to draw the line between an "interpretation," and a "new rule, or new obligation." There is no easy way, except in general an interpretation implies that the structure of the *existing language* reasonably permits a legal body, or tribunal to conclude that that language shall have the implications decided by the "interpretation." In instances of interpretation practice of the GATT, this has been the case.

Under general international law regarding treaties, as expressed, inter alia, in the Vienna Convention on the Law of Treaties, the practice of an international organization's bodies and organs over a period of time, is an important source of interpreting the charter, at least when that practice implies the agreement of the parties in the organization. Thus, the practice of GATT, including practice which interprets the provisions of GATT (whether by chairman's rulings, formal resolutions, waivers, etc.) all becomes part of the source material on which to base interpretations.

5) Dispute Settlement Panel Interpretations.

In the light of the previous section, dispute settlement panel reports which almost always include interpretations of the GATT rules become an important element of GATT practice. This is also the case for various dispute settlement bodies of the other related GATT treaties or side codes.

In fact there are several different ways to interpret the impact of a GATT dispute panel report. The practice of GATT, is that these reports must be approved by the Council. Thus, it can be successfully argued that without approval, the panel reports do not have any legal binding status (but they may still be persuasive as the opinion of important experts.)

Assuming that a panel report is adopted by the Council, however, there is still considerable ambiguity about its impact. There are at least two possibilities for that impact: 1) That the adoption by the Council is an exercise of the Contracting Parties authority under Article XXV to issue a definitive interpretation of the GATT binding on all; or 2) a decision by the Contracting Parties to adopt the panel report is a statement of how the

particular dispute between the disputing parties involved in the case shall be resolved, thus imposing a binding international law obligation on those disputing parties (and only those disputing parties), to carry out the recommendation, decisions, or implications of the panel report.

It seems reasonably clear to me that the general practice of GATT supports the second but not the first interpretation. Indeed, arguably if the first were intended, a formal vote (at least a mail or telegraph ballot) should be taken of the Contracting Parties, and action should not merely be by Council decision. Furthermore, if one were to ask delegates at a Council meeting which adopted a panel report, if they intended that to be definitive in the broader binding sense, I feel secure in saying that most would indicate they had not thought of that question, but did not intend such an important impact.

If the second interpretation is the correct one about the result of an adopted GATT panel report, then we must understand that under international law there is no formal doctrine of "stare decisis" or precedent. Thus, the panel report legally binds only the disputants in the particular case, and even then only for that case (not even for a future case between the same disputants). This is the impact of explicit provisions in the statute governing the world court (the International Court of Justice, statute Article 59), which is also generally deemed to be the rule in international law (and indeed in most legal systems of the world, excepting the common law systems such as the UK and the United States). Nevertheless, such a GATT panel report is now "practice" of the organization, and becomes part of the source materials for interpreting the agreement. Furthermore, the panels themselves often use "precedent," by referring to prior panel reports, and certainly after a period of time, panel reports are relied and acted upon in a way that reinforces their impact as definitive interpretations through practice. Nevertheless, it must be understood, that the Contracting Parties (and thus the Council) do have the authority to depart from prior panel reports, and indeed subsequent panels themselves have departed from the conclusions of prior panel reports.

Of course, again, a panel's work engages the issue of when is a recommendation/decision an "interpretation," or really an exercise in "law making," of new rules. This issue is always involved in legal systems, and is certainly prominent among those debated in the context of national courts such as the U.S. Supreme Court. At the international level, there are likewise similar issues, and one can find in GATT panel reports language which is criticized because of the alleged overreach of a panel, encroaching upon the authority of the nation-state contracting parties to negotiate new rules.

6) Separate Treaties.

Another way to effectively change the significance and impact of GATT rules, is for those countries that are willing to undertake such change to enter into a separate treaty agreement embodying that change. This was the

technique heavily used in the Tokyo Round Negotiation, developing a series of side "stand alone" treaties, sometimes called codes (such as those for customs valuation, antidumping, subsidies, government procurement, product standards, aircraft, etc.). This can be an effective legal device, particularly if such a treaty agreement is accepted by a large number of Contracting Parties, representing a very large proportion of world trade. Such treaties, of course, only bind those that accept it, so that those that refuse to accept it can argue that they are entitled to continue to rely upon the GATT agreement. Since the GATT agreement includes MFN—Most Favored Nation, some of those hold-out countries can argue they are entitled to the benefits of a side agreement even though they do not accept the side agreement, or its obligations. This has been an important limitation—sometimes termed the "free rider" or "foot dragger" problem of MFN. In the GATT, among the Tokyo Round codes, the one most widely accepted is that of product standards, and the number of countries which have accepted that is only about 40. Because this approach fragmented the rules system, it is termed "GATT à la carte" and has been heavily criticized, particularly in the context of Uruguay Round plans.

Treaties can have an impact on GATT, even though they are not negotiated or concluded in the GATT context. For example, if a number of GATT Contracting Parties in a totally different context (such as a multilateral environmental conference) enter into a treaty, that latter treaty will prevail in the event of conflict with GATT, as to the Contracting Parties which have accepted the latter treaty. Thus, for example, the Montreal Protocol dealing with CFC's, would be deemed to prevail as among those countries which have accepted it, even if inconsistent with GATT provisions. However, once again, it would not be deemed as a matter of law to prevail over the GATT obligations owed to GATT Contracting Parties which have *not* accepted the later treaty, or Montreal Protocol. Sometimes, a sufficiently large number of important trading countries have accepted a later treaty such that those members have felt that the risk of complaint by GATT Contracting Parties who have not accepted the later treaty making is minimal. This is legally a bit messy, but may be pragmatically acceptable.

7) Replacement Treaty Concepts and the Uruguay Round.

An additional way to change GATT rules, probably only available in the context of a very broad based reform or negotiation, such as the result of a major trading round, is in effect to replace the GATT with a totally new GATT agreement. Under the Protocol of Provisional Application of GATT, countries can withdraw from the protocol and GATT by only sixty days notice. It is possibly that a large number of GATT Contracting Parties, embodying an overwhelmingly large part of world trade, could come to a new GATT agreement, and agree to offer the benefits of the new agreement only to those countries which accept it. At the same time (or after a delay) these countries would exercise their right to terminate their obligations in

the old GATT. If the numbers of new GATT followers were sufficiently large, this could effectively establish a new GATT, and put such heavy pressure on the hold out countries that they would deem it virtually essential to go along with the new GATT, thus abandoning the old GATT entirely.

This is not an approach to be lightly or repeatedly undertaken. It is probably available only in major reform circumstances, such as embodying the results of the end of the Uruguay Round. It would not be useful for time to time adjustments in the rules to keep abreast of rapidly changing international trade circumstances. It is also likely not to be available at this stage of the Uruguay Round for rather new subjects that could be acrimoniously controversial and thus a threat to the success of the Round as a whole.

III. Concluding Remarks

To summarize, there are a number of different ways to effectively change the GATT rules. It is likely that the most flexible for time limited and short term changes may be the "waiver" at least when the result is not to impose a new obligation on GATT Contracting Parties. But overall, the institutional defects and ambiguities of the GATT legal structure, while apparently providing a number of different options for changing the GATT rules, do not easily accommodate permanent change of a nature requiring new affirmative obligations. To slide by the legal requirements of GATT, or to rely on ambiguous clauses such as those of Article XXV, can raise considerable risks at least for major trading countries. These risks arise from the vulnerability to a one-nation, one-vote system in the context of more than 100 nation participants. It is thus likely that the United States, Europe, and Japan among others, would be reluctant to endorse a procedure that would provide a precedent for such future risks.

ANNEX C: SELECTED TEXT FROM NORTH AMERICAN FREE TRADE AGREEMENT (October 7, 1992)

ARTICLE 104: RELATION TO ENVIRONMENTAL AND CONSERVATION AGREEMENTS

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979;
(b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990;
(c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico and the Untied States; or
(d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

ANNEX 104.1

BILATERAL AND OTHER ENVIRONMENTAL AND CONSERVATION AGREEMENTS

1. The *Agreement Between the Government of Canada and the Government of the Untied States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, October 28, 1986.

2. The *Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, August 14, 1983.

ARTICLE 903:AFFIRMATION OF AGREEMENT ON TECHNICAL BARRIERS TO TRADE AND OTHER AGREEMENTS

Further to Article 103 (Relation to Other Agreements), the Parties affirm with respect to each other their existing rights and obligations relating to standards-related measures under the *GATT Agreement on Technical Barriers to Trade* and all other international agreements, including environmental and conservation agreements, to which those Parties are party.

ARTICLE 904:BASIC RIGHTS AND OBLIGATIONS *Non-Discriminatory Treatment*

3. Each party shall, in respect of its standrads-related measures, accord to goods and service providers of another Party:

(a)national treatment in accordance with Article 301 (Market Access) or Article 1202 (Cross-Border Trade in Services); and

(b)treatment no less favorable than that it accords to like goods, or in like circumstances to service providers, or any other country.

ARTICLE 905:USE OF INTERNATIONAL STANDARDS

3. Nothing in paragraph 1 shall be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard.

ARTICLE 907:ASSESSMENT OF RISK

1. A Party may, in pursuing its legitimate objectives, conduct an assessment of risk. In conducting such assessment, a Party may take into account, among other factors relating to a good or service:

(a) available scientific evidence or technical information;
(b) intended end uses ;
(c) processes or production, operating, inspection, sampling or testing methods; or
(d) environmental conditions.

2. Where pursuant to Article 904(2) a Party establishes the level of protection that it considers appropriate and conducts an assessment of risk, it should avoid arbitrary or unjustifiable distinctions between similar goods or services in the level of protection it considers appropriate, where the distinctions:

(a) result in arbitrary or unjustifiable discrimination against goods or service providers of another Party;

(b) constitute a disguised restriction on trade between the Parties; or

(c) discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits.

3. Where a Party conducting an assessment of risk determines that available scientific evidence or other information is insufficient to complte the assessment, it may adopt a provisional technical regulation on the basis of available relevant information. The Party shall, within a reasonable period after information sufficient to complete the assessment of risk is presented to it, complete its assessment, review and, where appropriate, revise the provisional technical regulation in the light of that assessment.