GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation

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I.
INTRODUCTION

With the passage of the Uruguay Round[1] of the General Agreement on Tariffs and Trade ("GATT")[2] and the creation of the World Trade Organization ("WTO"),[3] there has been much debate over what role, if any, the WTO should play in reconciling tension between liberal trade policies and environmental protection.[4] In the words of the WTO Committee on Trade and Environment, the multilateral trading system must be able to "apply [the principle of] non-discrimination[5] while ensuring that coun-

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1. Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter URUGUAY ROUND].

2. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A-5, T.I.A.S. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948); [hereinafter GATT].

3. URUGUAY ROUND, supra note 1, at 1144 (establishing the WTO); While the WTO is technically a new organization, it has incorporated all of the prior GATT agreements. *Id.*

4. *See, e.g., World Trade Organization Trade and Environment Bulletin No. 1*, <http://www.wto.org/wto/Trade+Env/te1.html> (stating that the "GATT's competence is limited to trade policies which may result in significant trade effects for GATT Contracting Parties. In respect neither of its vocation nor of its competence is the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment"). This file is part of the World Trade Organization's internet server located in Geneva, Switzerland.

5. In order to be non-discriminatory a country must treat like products alike regardless of national origin. For example, the non-discrimination principle would require the United States to treat shirts coming from Chile the same as shirts from Taiwan. Furthermore, under the non-discrimination principle a country would be required to treat similar products alike once they have entered the country. This again is accomplished by removing the national origin of the product from the regu-

tries can implement domestic environmental policies appropriate for their social, political, economic and environmental preferences."[6]

Many environmentalists, however, argue that the very premise of the WTO, that of free-trade,[7] directly conflicts with environmental preservation and protection.[8] Furthermore, they argue that the most troubling aspect of the Uruguay Round and the WTO is that the new legalism of the WTO[9] will diminish the effectiveness of United States environmental legislation[10] by al-

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latory equation. *See infra* Part II.A. (discussing the principle of non-discrimination as embodied in the GATT's article I, the "Most Favored Nation Clause" and article III, the "National Treatment Clause").

6. *WTO Trade and Environment Bulletin · No. 4* <http://www.wto.org/wto/Trade+Env/te4.html> (outlining suggestions for future discussion on the future role of the WTO in addressing trade related environmental concerns).

7. *See The Agreement on Trade Related Investment Measure* <http://trading.wmw.com/gatt/pdf/tradrinv.pdf> (stating that the basic premise of GATT is "to promote the expansion and *progressive liberalization of world trade* and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, and particularly developing country Members while ensuring free competition") (emphasis added); Similar language appears at various preambles throughout the agreement. *See Agreement on Preshipment Inspection* <http://trading.wmw.com/gatt/pdf/preship.pdf>; *Agreement on Rules of Origin* <http://trading.wmw.com/gatt/pdf/ruleorgn.pdf>; *Agreement on Safeguards* <http://trading.wmw.com/gatt/pdf/safeg.pdf>.

8. *See, e.g., Recent WTO Ruling Undermines U.S. Sovereignty; Corn Growers Request Appeal By Trade Representative*, PR Newswire, Jan 24, 1996, *available in* WESTLAW, NEWS-ASAP database (discussing a recent WTO decision and its purported affect on U.S. sovereignty); Maize & Kennedy, *Final hurdles on GATT vote*, Newsbytes, Nov. 28, 1994, *available in* WESTLAW, NEWS-ASAP database (discussing the congressional debate over the loss of U.S. sovereignty and whether to adopt the Uruguay Round agreement); *Preston Gates Ellis & Rouvelas Meeds Issues Gatt ReporT; Expert On Gatt Available For Comment*, PR Newswire, Oct. 5, 1994, *available In* WESTLAW, NEWS-ASAP database (discussing Pat Buchannan's objection to adopting the Uruguay Round agreement on sovereignty grounds); *Paye, Watanabe Express Hope for Early GATT Talks Success*, Kyodo News, Apr. 13, 1992, *available in* WESTLAW, NEWS-ASAP database (quoting a Japanese official in the Ministry of International Trade and Industry as expressing similar fears over the loss of sovereignty).

9. The WTO is said to be a more legalistic institution because of the adoption of the Dispute Settlement Understanding (DSU), the creation of the Dispute Settlement Body (DSB) (a specialized WTO institution to monitor the dispute settlement mechanism), and the WTO Appellate Body, whose function is to review issues of law contained in dispute panel reports. *See* Miquel Montana i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 108 (1993).

10. *See, e.g., WTO: Kantor to Appeal RFG Decision; Critics Slam Ruling*, American Political Network, Inc., GREENWIRE, *available in* LEXIS/NEXIS Library, NEWS File; Evelyn Iritani, *First WTO Ruling Provides Grist For Opponents Citing Threat To U.S. Law*, L. A. TIMES, Jan 14, 1996, at D1; Frances Williams, *U.S. may appeal against WTO ruling*, FIN. TIMES, Jan. 1996, at 4. .

lowing the WTO the final say over what domestic legislation is or is not GATT legal.[11]

This article analyzes the interplay between the principle of non-discrimination and the need for a comprehensive system for environmental protection. Part II examines the principle of non-discrimination in the WTO and the WTO's new dispute resolution process. Part III explains some of the domestic forces that corrupt the multilateral trading system by influencing domestic environmental regulations in the direction of protectionism. Part IV analyzes how trade and the environment interplay within the WTO, paying particular attention to some recent GATT/WTO panel decisions: the Reformulated Gasoline Case and the Tuna-Dolphin Case. Finally, this article concludes with the observation that, despite the criticism levied against the WTO, the new legalism of the WTO is a blessing in disguise for environmentalists because it is only through the principles of non-discrimination and legalism that environmental concerns can be shielded from political forces that use environmental protection as a guise for protectionism. In effect, the Uruguay Round will allow national decision makers to focus on the real and important concern of protecting the environment.

II.

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Some scholars have suggested that the collapse of the world economy and ultimately the cause of World War II arose from the nationalistic sentiments and economic protectionism that existed during the 1930s.[12] As such, one of the primary purposes behind the creation of many of the post-World War II international organizations was the prevention of this type of nationalistic protectionism.[13]

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11. Paul Cough, *Trade-Environment Tensions: Options Exist for Reconciling Trade and Environment*, 19(2) EPA J. 28-32 (1993) <http://www.ciesin.org/docs/008-065/008-065.html>.

12. *See, e.g.*, PIERRE LORTIE, ECONOMIC INTEGRATION AND THE LAW OF GATT VIII (1975). Some scholars have also argued that the transportation revolution, beginning in the 1850's, was the major impetus for the reliance upon trade in national economies and the developing interdependence of nations. The experience of the 1930s is therefore seen as the effect of protectionism on this interdependence. MARCEL F. VAN MARION, LIBERAL TRADE AND JAPAN: THE INCOMPATIBILITY ISSUE 7-12 (1993).

13. The International Monetary Fund ("IMF"), the International Bank for Reconstruction and Development ("IBRD" or "World Bank"), the Food and Agricultural Organization ("FAO"), the International Labor Organization ("ILO"), the

GATT, in particular, was adopted[14] to address specific issues thought to hinder the free flow of goods between countries.[15] The original agreement addressed both overt governmental interference[16] as well as individual corporate actions[17] believed to be counterproductive and injurious to the world economic order.[18] Although the original GATT agreement and subsequent rounds of negotiations addressed a variety of issues,[19] essentially three basic principles underlie GATT: (1) trade should be conducted on the basis of non-discrimination,[20] (2) markets should remain open and any protection afforded domestic industries should be accomplished exclusively through overt measures such as tariffs and import quotas,[21] and (3) violations of the principle of fair trade should be adjudicated exclusively through GATT.[22]

International Trade Organization ("ITO"), and upon the ITO's failure to be implemented, GATT were all part of a comprehensive plan to move the world "away from economic nationalism toward international cooperation and interdependence." LORTIE, *supra* note 12, at viii; *see also* VAN MARION, supra note 12, at 7 (stating that the reason behind these protectionist measures was the interdependence between nations and a large fall in international demand for products leading to the perceived need for measures to protect failing domestic industries. Under this analysis, this type of protectionism simply exacerbated an already existing problem).

14. Technically, GATT is not an international organization but rather a series of treaties adopted by the members. Over the years however, GATT has developed into the functioning equivalent of an international organization with the underlying goal and purpose of harmonizing domestic practices that affect international trade. John H. Jackson, *GATT and Recent International Trade Problems*, 11 MD. J. INT'L L. & TRADE 1, 8 (1987); *see also* GATT, *supra* note 2, at Preamble.

15. LORTIE, *supra* note 12, at viii; *see also* VAN MARION, supra note 12, at 7.

16. *See* GATT, *supra* note 2, arts. III, VIII-XIII, XVI, XVII (addressing governmental interference in the form of tariffs, quantitative restrictions, subsidies, taxation, and trade regulations).

17. *See* GATT, *supra* note 2, art. XI (addressing countervailing duties and dumping).

18. VAN MARION, supra note 12, at 7.

19. *See generally* LORTIE, *supra* note 12 for an overview of GATT law.

20. The non-discrimination principle is said to be embodied in the Most Favored Nation (MFN) clause and the National Treatment requirement. *See* GATT, *supra* note 2, arts. I, III. *See also* Frieder Roessler, The Scope, Limits and Function of the GATT Legal System 2-6 (1985) (on file with the Case Western Reserve University Law School Library); LORTIE, *supra* note 12, at 1. This principle is incorporated into most of the other provisions in GATT & the Uruguay Round additions. *See, e.g.*, GATT, *supra* note 2, art. XIII ¶ 1 ("Non-discriminatory Administration of Quantitative Restrictions" which provides: "1. No prohibition or restriction shall be applied ... unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted").

21. Roessler, *supra* note 20, at 2; *see also* GATT, *supra* note 2, art. XIII ¶ 2 (a)-(b) (providing that where an import quota is to be assessed, whenever practicable a specific quota should be assessed and notice given and only where a quota is "impracticable" can the parties resort to other measures such as import licensing).

22. *See* LORTIE, *supra* note 12, at 1; Roessler, *supra* note 20, at 2.

These substantive benchmarks are also largely premised on a liberal notion of "free-trade."[23] The method by which free-trade is accomplished is through the harmonization and containment of the domestic barriers to the free-flow of goods.[24] In essence, the GATT was created to facilitate economic integration to further the ultimate goal of convergence by "adopt[ing] rules of international behavior and . . . imposing those rules on member states."[25] Thus, the GATT has evolved into a twofold process: first, the Contracting Parties to the GATT agree upon principles regarding the trade process and second, they attempt to enforce those principles upon the Contracting Parties in specific instances. The next section discusses two principles that were developed in the early years of the GATT and the exceptions to those principles that have evolved over the years.

A. *The Uruguay Round of GATT Negotiations And The Principle of Non-Discrimination*

The GATT's Articles I and III obligate a Contracting Party to treat imports no less favorably than other imports (the "Most Favored Nation" or "MFN" clause)[26] and no less favorably than similar domestic goods after border duties (the "National Treatment" clause).[27] Article XX, however, provides some general

23. *See* VAN MARION, *supra* note 12, at 7-15 (stating that the world trade rules were developed through a combination of "liberal ideology and pre-war economic experience"). The premise of liberal trade is that the interdependence of nations has developed into a system where the free-flow of goods is a necessary attribute for the smooth functioning of the world economy. Basically, the fewer the restrictions on trade, the better the functioning of the multilateral trading system and hence the better functioning of the world economy. *See id.*

24. GATT, *supra* note 2, at Preamble. The preamble provides:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods;
>
> Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.

Id.

25. LORTIE, *supra* note 12, at viii.

26. GATT art. I; Roessler, *supra* note 20, at 2-6; LORTIE, *supra* note 12, at 1.

27. GATT art. III ("The contracting parties recognize that internal taxes and other internal charges . . . should not be applied to imported or domestic products so as to afford protection to domestic production") This provision applies to "directly competitive" or "substitutable" products. *Id.* at art. III para 1.

exceptions to these obligations. For purposes of this article, the relevant exceptions state: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade . . . ,"[28] Contracting Parties may adopt measures that are "*necessary* to protect human, animal or plant life or health"[29] or that "relat[e] to the conservation of exhaustible natural resource[ ]."[30] Finally, a measure invoking an Article XX exception must still avoid "arbitrary or unjustifiable discrimination between countries"[31] and must not be a "disguised restriction on international trade."[32]

The "necessary" requirement under Article XX(b) has been interpreted narrowly as only allowing measures which are "least GATT-inconsistent."[33] This interpretation has been criticized as being too narrow because less GATT-inconsistent measures inevitably will be found in every case.[34] At first glance this narrow interpretation of "necessary" may appear to allow a GATT panel to sit as a super-legislature and dictate national environmental priorities.[35] A closer look reveals, however, that this is clearly not the case.

In the words of a GATT panel:

> [C]omplainants are required to show the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported product than to the like product of national origin.

General Agreement on Tariffs and Trade, On the Rule Issued By The Environmental Protection Agency On 15 December 1993, Entitles [sic] "Regulation Of Fuels and Fuel Additives—Standards For Reformulated And Conventional Gasoline", World Trade Organization Panel Decision, GATT Doc. WT/DS2/1 para. 6.5 (1996), *available in* WESTLAW, GATT database (citing GATT art. III para. 4).

28. GATT art. XX para. 1.

29. GATT art. XX(b) (emphasis added).

30. GATT art. XX(g).

31. GATT art. XX para. 1.

32. *Id.*

33. In the Thai-Cigarette case, the United States requested a GATT panel to determine that import restrictions on foreign tobacco in Thailand were GATT illegal in that similar obstacles were not imposed on the state tobacco monopoly. The GATT panel ruled in favor of the United States, stating that less GATT restrictive measures, such as labeling requirements, were available to the Thai government. Thai-Cigarette Case, GATT Panel Decision, GATT Doc, DS 10/R (1990), *available in* WESTLAW, GATT database [hereinafter Thai-Cigarette Case].

34. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 48-49 (1994).

35. For instance, the Government may have decided that labeling is an inherently insufficient means of protecting the public from potential harms. In the Thai-cigarette case the Thai government could have determined that labels on cigarettes are

It is important to note that the Article XX exceptions are only invoked when a Contracting Party wishes to use a GATT-inconsistent measure.[36] That is, the measure must treat an import differently than another similar import, thereby violating the MFN clause, or the measure must treat the import differently than similar domestic goods, thereby violating the National Treatment clause. As such, invoking the Article XX exceptions must be justified by legitimate differences between the products.[37]

Even though application of these principles to trade disputes was suppose to be a very straightforward process, prior to the Uruguay round the Contracting Parties to the GATT had a very difficult time applying these principles to the actual trade disputes that arose. At the center of the difficulty lay the pre-Uruguay Round dispute resolution process.

B. *The WTO Dispute Resolution Process*

In the past, the United States expressed some concern over the cumbersome and sometimes ineffective GATT dispute resolution process.[38] The primary justification for the use of unilateral measures outside of the GATT was the lack of enforcement of GATT obligations by the contracting parties.[39] The United States, therefore, led the drive to enhance the GATT dispute res-

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inherently insufficient to protect the public from the known harms of smoking. The GATT however, does not prohibit the ban of certain products. It merely states that if there is a ban or other measure it must be applied equally to domestic and imported items. *See* Thai-Cigarette Case, *supra* note 33; GATT arts. I & III.

36. *See generally*, GATT art. XX; *see also* ESTY, *supra* note 34, at 46 (for a discussion on article XX and its application to environmental measures).

37. A different and more difficult scenario is presented when the issue relates to the ingredients of foodstuffs. Where, for instance, a product enters a market with unknown and potentially harmful ingredients a strong case can be made that overly protective safeguards are essential to protect the public. In those situations the least GATT-inconsistent test might allow potentially harmful products into domestic markets with minimal safeguards such as the use of labeling requirements. This was actually the case in the Procymidone in Wine Case where European wine growers were using Procymidone fungicide on their vines. Procymidone residue was detected in wine imported from Europe and the U.S. responded by banning the use of all wine with Procymidone residue pending a safety determination by the FDA. While this case was resolved when the U.S. allowed the wine in with a fast track approval by the FDA with further studies to be completed in the future, under the least GATT-restrictive test a GATT panel may have determined that simple labeling of the wine would have been sufficient to protect the United States public. *See* ESTY, supra note 34, at 271. While there was no evidence to suggest that Procymidone is harmful to humans, the fact that a trade agreement was able to force a bypass through the normal FDA process is alarming. *Id.*

38. *See infra* Part II.B.i .

39. See *infra* Part II.B.i.

olution process and hold contracting parties in strict compliance with the agreement.[40]

i. *The History and Problems of the GATT Dispute Resolution Process*

The original purpose of GATT dispute resolution, and more generally the original purpose of the GATT itself, was not to gain strict compliance with GATT law.[41] Its purpose was twofold: (1) to reach a settlement acceptable to the parties; and (2) to restore the balance of advantages[42] to the parties.[43] GATT dispute resolution is not based on a system of stare decisis and, therefore, the rulings of the panel do not have any legal force whatsoever beyond the reconciliation of the dispute between the parties.[44]

The procedure for settling disputes within GATT begins with bilateral consultations.[45] If bilateral consultations are ineffective in resolving the dispute, the parties may request outside intervention and assistance.[46] Finally, a party may request a panel[47] to hear the dispute.[48]

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40. William F. Buckley Jr., *WTO Coming Up*, NATIONAL REVIEW, Sept. 12, 1994 at 94; LORTIE, *supra* note 12, at 4-5.

41. *See* Guy de Lacharrière, The Settlement of Disputes Between Contracting Parties to the General Agreement 2 (1985) (on file with the Case Western University Law School Library).

42. When a Contracting Party erects a trade barrier (a tariff for instance), other countries are damaged in many ways including: (1) the actual price of the tariff; and (2) lost sales, profits and market-share due to higher prices (necessitated by the tariff). Restoring the balance of advantages can be accomplished by: (1) paying a cash settlement of the actual amount lost by all the industries affected by the tariff; (2) a reduction of a different tariff that effectively pays the damaged country a like-kind sum (in this scenerio the country not the specific industries are being compensated); or (3) a retaliatory tariff hike by the affected country in the same or different industry in order to restore the parties to their former trading status. Thus, the goal of this process is not necessarily to make trading on an equal basis, but rather to restore the parties to where they were prior to the time when the trade barrier was erected. *See generally*, LORTIE, *supra* note 12.

43. *Id.*

44. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990).

45. GATT art. XXIII, para. 1; URUGUAY ROUND art. XXIII, para. 1.

46. *See* Lacharrière, *supra* note 41, at 3.

47. GATT art. XXIII, para. 2; URUGUAY ROUND art. XXIII, para. 2. (allowing both individuals as well as panels to be selected to hear the dispute). The use of panels, however, has become the usual procedure. Lacharrière,, *supra* note 41, at 3. In order to support the request for a panel, the requesting party need only claim that a benefit accruing to it under the agreement is being nullified or impaired. *Id.*

48. *See* Lacharrière, supra note 41, at 3. It is possible that the party which is subject to the complaint may challenge the justification for establishing a panel, and indeed art. XXIII para. 10 implies that establishment of a panel is not an absolute

After hearing the parties, the panel, through an objective assessment of the facts and the applicability of the GATT, delivers its findings and recommendations.[49] The purpose of these findings, however, is not to state the strict letter of the law, but rather to help the parties reach a mutually acceptable solution to the problem.[50] Once the recommendations are adopted,[51] the only enforcement mechanism is the allowance of retaliatory measures by the complaining party.[52] However, there has been only one instance of the use of this enforcement mechanism.[53]

In the past, the primary problems with the GATT dispute resolution rested with the inability to enforce, in an orderly fashion, the dispute resolution process or any resulting findings or conclusions upon the Contracting Parties. For instance, the length of time for a normal ruling to run its course has in many ways favored the tendency to not address many contentious issues.[54] In fact, the political implications of many issues has been said to make it advantageous for parties to fully drag down the entire system.[55] As an example, in 1970, the European Community brought a complaint against the United States, claiming that certain United States tax legislation constituted an export subsidy contrary to Article XVI.[56] This case bogged down, requiring over three years to determine the composition of the panel.[57] In fact, this case exemplifies multiple inadequacies in the prior GATT dispute resolution process including "undue delays, meager resources contributing to inadequate consideration, inadequate fact-finding [and] undefined roles of panels."[58]

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right. However, in practice there have been no instances of a refusal to establish a panel. *Id.*

49. *Id.* at 6.

50. *Id.* at 7.

51. The recommendations are usually adopted as is, without alteration. *Id.* at 8.

52. *Id.* at 7.

53. The Netherlands complained about dairy quotas in the United States. After resolution and non-compliance, the Netherlands was authorized to discriminate, in the form of quotas, against United States wheat flour. *Id.* at 7.

54. Montana i Mora, *supra* note 9, at 128.

55. *Id.*

56. *See* John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 779-81 (1978); United States Tax Legislation (DISC), in GENERAL AGREEMENTS ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1980), 23 BISD 98 (1977).

57. *Id.* (GATT panel concluding that the DISC legislation was an export subsidy and that therefore "there was a prima facie case of nullification or impairment of benefits which other contracting parties were entitled to expect under the General Agreement").

58. Jackson, *supra* note 56, at 780-81.

Troubles with the dispute resolution process also have been particularly acute in situations when a politically powerful country insists on open defiance, leading other countries to feel helpless to enforce the agreement.[59] Interestingly enough, another United States case serves as a prominent example of this problem. In 1970, the United States was granted a waiver under Article XI to impose quantitative restrictions on agricultural products.[60] The waiver was granted by "the Contracting Parties . . ., believing that a refusal would damage the GATT system by forcing the United States either to defy GATT principles openly or to withdraw from the GATT altogether."[61] As one commentator noted, "[t]he breadth of this waiver, coupled with the fact that the waiver was granted to the contracting party that was at one and the same time the world's largest trading nation and the most vocal proponent of freer international trade, constituted a grave blow to GATT's prestige."[62] The result was a "poison[ing] [of] the entire atmosphere and departures from the rules dealing with agriculture became a normal practice."[63] In essence, the GATT was quickly losing its effectiveness and its ability to affect change in the multilateral trading system. As such, the Uruguay Round of GATT negotiations developed into the last chance to save the GATT.

ii. *The New Legalism Of The Uruguay Round*

To combat the problems associated with the pre-Uruguay Round GATT, the contracting parties sought to enhance the GATT dispute resolution process. Thus, the changes in the dispute resolution process in the Uruguay Round reflect a more standardized and legalized dispute resolution process.[64] The new

59. *See* CLYDE V. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD 3 (1988); KAREL VAN WOLFREN, THE ENIGMA OF JAPANESE POWER: PEOPLE AND POLITICS IN A STATELESS NATION 21 (1989) (arguing that there is nothing inherently wrong with managed trade).

60. *See* Jon G. Filipek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 123, 137-38 (1989).

61. *Id.*

62. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 260 (1970).

63. Montana i Mora, *supra* note 9, at 119.

64. One stated purpose of the new dispute resolution mechanisms under the WTO is to become "a central element in providing security and predictability to the multilateral trading system," URUGUAY ROUND at part II A2 at 3.2 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

legalized approach to dispute resolution begins with the modification of the procedures by which disputes are heard and resolved[65] and it ends with the appellate process which standardizes the interpretation of legal issues within the GATT.[66]

For instance, in the first stage of reform,[67] a limited agreement was reached which, while being of limited scope,[68] subjected consultations to a strict schedule and instituted binding arbitration[69] as a possible means of adjudicating clear-cut issues.[70] This clause was in fact carried over verbatim to the final act of the Uruguay Round.[71]

The new procedure also creates the right of a complaining party to establish a panel.[72] Adoption of the panel report has also been made a mere formality[73] and a party has been given the right to appeal an unfavorable ruling.[74] In addition, even though third-parties that may be affected by the outcome of a decision

65. Montana i Mora, *supra* note 9, at 103.

66. *Id.*

67. *See generally,* Montana i Mora, *supra* note 9, at 136 (an overview of "the improvements of 1989"); Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. L. 38 (1990).

68. *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, 36 BISD 61 (1990). This decision was to have been applied only from May 1, 1989 until the completion of the Uruguay Round and only with respect to complaints brought under arts. XXII or XXIII. *Id.*

69. "Binding" in this context has been interpreted as meaning simply that the parties agree in advance to be bound, as a matter of international obligation, with the decision of the panel. *See The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, 83 AM. SOC'Y INT'L LEGAL PROC. 251, 268 (1989); Montana i Mora, *supra* note 9, at 103.

70. In the "improvements of 1989," § E.1 states "[e]xpeditous arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties." *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, 36 BISD 61 (1990).

71. URUGUAY ROUND art. II. A2 para. 3.2 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

72. *Id.* "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda"; a consensus would therefore be needed to not adopt a panel upon request. *Id. See also* Montana, *supra* note 9, at 103.

73. URUGUAY ROUND art. XVI, para. 16.4 ("Within sixty days of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report"). Under the prior GATT agreement a panel decision was not adopted unless all parties agreed to the adoption. As such, the party that lost the dispute could effectively block the adoption of a lost case. *Id.*

74. For a more in-depth analysis of the appellate procedure see Montana i Mora, *supra* note 9, at 103.

have the right to be heard during the panel discourse,[75] only parties to the dispute have standing to appeal a decision.[76] The issues to be resolved on the appellate body are limited to issues of law and legal interpretations developed by the panel.[77] Finally, all of the procedures are subject to a strict timetable.[78]

This new appellate body will "evolve GATT dispute procedures into a more coherent, consistent and uniform body of case law which will enhance the normative force of GATT law."[79] Furthermore, "the Uruguay Round will add legitimacy to the GATT as a legal system . . . lead[ing] to a more balanced set of rules, thus increasing the willingness of the contracting parties to abide by the norms."[80]

After the Uruguay Round the GATT should provide one truly effective forum for the enforcement of GATT law, thereby negating the need to use unilateral measures outside the agreement. As such, the new adjudicatory measures in the Uruguay Round should become a more legitimate and effective means for addressing and adjudicating issues under the GATT. Furthermore, the GATT should provide a more effective forum to insulate national bodies from the pressures asserted by industries that lose their comparative advantage under free-trade rules. The key issue for the future of the multilateral trading system is the ability to provide effective ground rules for free-trade that

75. URUGUAY Round art. X.

76. URUGUAY Round art. XVII.4.

77. URUGUAY Round art. XVII.6.

78. URUGUAY Round art. II.A2. In addition, "a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda . . . " URUGUAY Round art. II.A2.5 The limitation on the modification of the scope of inquiry of a panel is 20 days. URUGUAY Round art. II.A2.7 In addition, "Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines" URUGUAY Round art. II.A2.12.5. The dispute resolution process "shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties to the dispute within three months." URUGUAY Round art. II.A2.12.8. *See also* URUGUAY Round art. II.A2.16.4 (60 day time limit for adoption once panel issues a report); URUGUAY Round art. II.A2.17.5 (60 day time limit after issuance of panel report for issuing notice of appeal); URUGUAY Round art. II.A2.21.1 (Total time for adopting a panel report or report on appeal not to exceed 9 months); URUGUAY Round art. II.A2.21.4 (within 30 days of an adverse ruling the losing party must notify other members of their intent with respect to compliance and timeframe for compliance. The period of time for compliance with decision not to exceed time agreed by parties are timeframe determined in binding arbitration); URUGUAY Round art. II.A2.21.4 (total time for compliance not to exceed 15 months unless parties agree).

79. Montana i Mora, *supra* note 9, at 177.

80. *Id.*

have leeway for legitimate environmental legislation, but are capable of weeding out those laws that are purely protectionist measures in disguise.

First, however, it is important to fully understand the internal influences that affect and attempt to subvert domestic environmental laws to their advantage.

III.
DOMESTIC TENSIONS REGARDING THE ENVIRONMENT

A producer of a commodity has an inherent incentive to insulate itself from outside competition. One way to accomplish this goal is to influence the creation or implementation of laws that affect imports.

For instance, while the cost of compliance with environmental regulations is not a major part of the cost of the end product for most industries,[81] environmental regulation still remains a very important and touchy subject for corporate America.[82] Furthermore, within particular industry groups, environmental compliance costs can have a major effect on a slim competitive margin.[83] This concern over the direction and implementation of environmental regulations gives many corporations a vested interest in attempting to affect the direction and application of those regulations.[84]

However, there is much debate over the degree of influence a private interest group can exercise over legislation.[85] In individ-

81. For instance, studies dealing with environmental regulation and its relationship to trade "have concluded that environmental regulation does increase the costs for U. S. producers, but that these increases are relatively small." *See* Office of Technology Assessment, *Trade and the Environment: Conflicts and Opportunities*, Report no. OTA-BP-ITE-94 15 (1992) [hereinafter *Trade and the Environment*].

82. The simple fear of criminal sanctions may lead to costly transaction costs and overcompliance. *See generally*, Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889 (1991) (discussing the potential dangers of overcriminalizing environmental laws).

83. *Trade and the Environment, supra* note 81, at 15.

84. *But see*, PERCIVAL ET AL, ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 187 (1992) (stating that Congress was aware of the "agency capture" criticism when enacting more recent versions of environmental laws and therefore incorporated provisions for judicial review and citizen suits to combat it).

85. This debate has primarily come about within the context of judicial interpretation of legislative intent. Some authors have suggested that the interest group model should be applied to the judiciary because interest group influence is not suspended at the courthouse steps. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). Some judges, however, have

ual cases, a multitude of factors weigh heavily in the legislative process.[86] It is important to note, however, that even if private interest group politics[87] and regulatory capture models[88] of our government are disregarded as a general rule, legislation heavily influenced by private,[89] rather than a purely public,[90] interest is still inevitably part of the political picture.[91] As such, it is important to understand the forces that act upon our legislators (when they create environmental laws) and our administrative agencies

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suggested just the opposite because of the difficulty in determining the true intent of any individual legislator much less congress as a whole. *See e.g.*, Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 541 (1983) (Judge Easterbrook, for instance, suggests that the trading of votes in Congress to pass measures benefiting special interests makes legislative intent difficult to ascertain); *See also* Jonathan Turley, *Transnational Discrimination And The Economics Of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 355-364 (1990) (discussing the interpretation of legislative intent within the context of the normative and economic theories of legislation); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 888-91 (1987) (describing interest group impact on legislation).

86. *See generally*, Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713-14 (1984) (stating that "legislatures always act on the basis of mixed motives"); *Cf.* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (describing the legislative process as a market in which special interest groups purchase legislation).

87. Private interest group politics is discussed in the following section. *See infra* Part III.A .

88. *See infra* Part III.B.iii.

89. "The difference between a special interest lobbyist and a public interest advocate, like the difference between a private interest and a public value, is itself at the heart of many political disputes." Farber & Frickey, *supra* note 85, at 925. For purposes of this paper, however, "private interest" is used to denote legislation which favors domestic industries or interests where there is no legitimate reason for the different treatment. This would, of course, include those situations of mixed motives where the discriminatory effect is purely incidental to the primary purpose of the legislation.

90. "Legislation may be said to be public-regarding if it serves some purpose other than obtaining particular legislators the pecuniary advantage of the political support of some narrow interest group, even if this purpose is the transfer of wealth from one group to another." Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 228-29 n.29 (1988).

91. Some authors divide the politics of legislation and regulation into four models: majoritarian, interest group, client and entrepreneurial. James Q. Wilson, *The Politics of Regulation, in* THE POLITICS OF REGULATION 357, 367-70 (James Q. Wilson, ed. 1980). Even those that do not subscribe to the interest group model, however, do recognize that in individual situations interest group processes appear to have taken hold of the political process. *See* Sustein, *supra* note 86, at 1713-14. The non-discrimination principle outlined in the GATT can therefore, be considered a second check on those rare cases that do exhibit the characteristics of a pure interest group transfer. *See generally, infra* Part II.A and accompanying text on the principle of non-discrimination as outlined in the GATT.

(when they attempt to implement those laws), so that the influence of private industry groups can be kept in check.

A. *Public Choice Theory:*[92] *Private Interests Influencing Public Legislation*

Under the Public Choice theory, legislators are primarily driven by self-interest.[93] This self-interest manifests itself in a desire to maximize reelection chances.[94] The ultimate outcome of the political process is that legislators will attempt to maximize their votes by appealing to the self-interested desires of their constituents[95] or they will take advantage of the lack of access to perfect information by their constituents[96] and vote according to the needs of special interests.[97]

In essence, access to information is extremely important because the interests of a legislator's constituents take a back seat to the public image a legislator is able to convey.[98] This public perception is created through public endorsements and access to funds for public advertising and campaigning.[99] These funds are primarily provided by special interest groups and corporations,[100] and it is through this mechanism that special interest groups are able to influence legislation.[101]

While this model has been largely rejected as a comprehensive system of explaining legislative behavior in specific instances,[102]

92. "Public choice, sometimes referred to as the economic theory of legislation, applies game theory and microeconomic analysis to the production of law by legislatures, regulatory agencies and courts." Macey, *supra* note 90, at 43.

93. Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 12-13 (1985); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 356 (1974) (evaluating the relative merits of "the traditional public interest theory of regulation and the newer economic theory," and concluding that not only did neither approach have any demonstrated empirical support, but neither had "been refined to the point where it can generate hypotheses sufficiently precise to be verified empirically").

94. Farber & Frickey, *supra* note 85, at 891.

95. *Id.* As such, "legislative votes should be highly predictable on the basis of the economic interests of constituents." *Id.* at 892.

96. This lack of access to perfect information includes access to information about a particular legislators conduct in voting and his financial backing. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. The primary reason for this rejection stems from the initial assumption in the economic model: That self interest is the *exclusive* causal agent in political decision making. Farber & Frickey, *supra* note 85, at 890; *see also* KAY LEHMAN

it has been used extensively to explain the incentive structure within the legislative branch of our government.[103] Furthermore, most authors agree that special interest groups do have some influence over the political process.[104] While this influence may be tempered in highly publicized legislation, in other cases, private interests do have a disproportionate influence on the outcome.[105] In many instances this influence manifests itself in the form of a protectionist law that seeks to insulate a domestic industry from outside competition.[106]

Even after a law has been passed it is still susceptible to outside influence. As such, the implementation and enforcement of environmental laws are equally important subjects that need to be discussed.

B. *The Importance of Administrative Agencies in Environmental Legislation*

The role of administrative agencies in executing specific legislative mandates and in determining the direction of legislative policy has increased exponentially in recent years.[107] In fact, some authors have suggested that our regulatory scheme is backwards in that "the executive branch, in the form of the administrative agencies, led the way to the new policies, deregulating under pre-existing regulatory statutes, with congressional action trailing well behind."[108]

SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 129-30 (1986) (noting that intangible gratifications such as a belief in the organization's goals are also inducements); Jack. L. Walker, *The Origins and Maintenance of Interest Groups in America*, 77 AM. POL. SCI. REV. 390, 396 (1983) (suggesting that ideology actually plays a major role in motivating group membership); *but see* Book Note 29 HARV. J. ON LEGIS. 321, 322 (1996) (reviewing DANIEL A. FARBER & PHILIP P. FRICKEY LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1996)) (stating that the authors "too often . . . assert, the legislative product of Congress reflects particular private concerns at the expense of public policy and social welfare").

103. *See* Farber & Frickey, *supra* note 85, at 890; *see also* SCHLOZMAN & TIERNEY, supra note 102, at 129-30 (1986).

104. Farber & Frickey, *supra* note 85, at 890; This influence has also been recognized in other fields such as political science. *See id.* at 885-90 (for an overview of thinking of prominent political scientists).

105. *Id.* at 892-95.

106. See *infra* Part IV.A for a discussion of the Marine Mammal Protection Act as an example of this type of legislation.

107. Linda R. Hirshman, *Postmodern Jurisprudence And The Problem Of Administrative Discretion*, 82 Nw. U. L. REV. 646, 647 (1988).

108. *Id.*

The Environmental Protection Agency (EPA), for instance, plays an extremely important role in formulating and implementing environmental legislation. It is, therefore, important to understand the level of discretion given to the EPA and how that discretion may be influenced. The following sections outline three areas that influence the level of discretion that the EPA has in the implementation of environmental laws.

i. *Agency Discretion and Judicial Review*

Agency discretion can be seen as a function of the level of review a decision will receive from the judicial branch.[109] Judicial deference to agency action hit a high point with the decision in *United States v. National Resources Defense Council*[110] where the Supreme Court formulated the current standard of review. This standard gives deference to the agency in question unless the agency's interpretation of the law is contrary to unambiguous language of the statute.[111] This deferential standard is also exacerbated by the fact that review of agency action can be achieved only after "final agency action"[112] and exhaustion of all administrative remedies.[113]

Thus, there has been a limited amount of judicial obstruction of agency action, which obviously gives agencies much leeway in determining the scope, direction and standards governing a particular legislation.[114]

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109. Virtually all federal environmental laws authorize judicial review of agency action. *See e.g.,* Resource Conservation and Recovery Act (RCRA), § 7006(a), 42 U.S.C. § 6976 (1996); Clean Water Act (CWA), § 509(b), 33 U.S.C. 1369(b) (1997); Clean Air Act (CAA), § 307(b), 42 U.S.C. 7607(b) (1996). *See also* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) This review begins with the issue of standing. It has been said that environmental legislation singlehandedly transformed the law of standing in administrative law.

110. 467 U.S. 837 (1984).

111. *Id.* at 842 ("the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

112. Heckler v. Chaney, 470 U.S. 821, 827 (1987). Administrative Procedure Act, 5 U.S.C. § 704 (1996).

113. *Heckler,* 470 U.S. at 827.

114. So long as the agencies' reading of the law is "reasonable" there is no abuse of discretion and the courts will not intervene. *Id.*

ii. *The EPA's Discretion in the Implementation of Environmental Legislation*

The Environmental Protection Agency is the federal agency charged with implementing federal environmental laws.[115] The EPA's discretion can manifest itself in two important ways:[116] (1) where Congress attempts to implement a health-based environmental standard,[117] and the EPA is given the discretion to determine the acceptable standard governing the legislation;[118] or (2) when Congress outlines a technology-based mandate[119] but gives the EPA discretion in the implementation of that mandate.[120]

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115. *Id.*

116. There are, of course, other ways in which an agency can display an enormous amount of discretion. For example, there may be disparate or little enforcement of certain provisions or selective enforcement of others. This type of discretion, however, is not likely to affect trade. If a law is not discriminatory on its face it would pass minimal GATT Article I or III scrutiny. A complaining party would therefore have to prove that the enforcement of that law was so one sided as to make the law discriminatory on its face. *See generally infra* Part II .

117. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1615 (1995). The current trend in U.S. environmental legislation is toward technology based mandates. *See id.*n.7. (citing the Clean Air Act (CAA), the Clean Water Act (CWA) amendments as switching to a technology based mandate from a health based mandate). Furthermore, even when there was a health-based mandate, courts have stated that the use of a technology based implementation scheme is "reasonable in light of the scientific uncertainty and difficulty inherent in implementing a health-based mandate". *Id.* (quoting Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 363 (D.C. Cir. 1989)). However, there are, and will continue to be, some health-based mandates where wide discretion is given to the EPA to effectively determine acceptable levels of a pollutant that can be safely discharged into the environment. *Id.* (citing the simultaneous enactment of the water quality backup system which is primarily based on a health-based standard). *See also* Oliver A. Houck, The Regulation of Toxic Pollutants Under the Clean Water Act, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,528, 10,541, 10,549 (Sept. 1991) (discussing the preferable alternative of setting a limited time-table for the elimination of toxics, to the stgnant nature of technology based mandates). This timetable would presumably leave a wide margin of discretion in the hands of the EPA for full implementation.

118. This type of legislation would be the science based mandates which prevailed in the past. Wagner, *supra* note 117, at 1614.

119. The convention of categorizing environmental legislation into the two categories of technology-based mandates and health-based mandates is adopted from Professor Wendy Wagner's authoritative article on this subject. *See id.*, at 1615-16 n.9. Health-based legislation appears to be the trend in Congress due to the failure of science based mandates in the past. *Id.*

120. This was the case under the Refined Gasoline Case, where congress mandated acceptable levels of a pollutant by 1998 but left it up to the EPA to determine a proper time-table for compliance by that time. *See* discussion *infra* Part IV.B.

In the first category of cases, the science of determining a health-based standard is far from conclusive.[121] The lack of scientific certainty in determining a health-based standard allows the EPA a wide range of discretion in determining acceptable levels of a pollutant.[122] The blurring of the line between a science-based determination and a mixed policy-science decision[123] allows the EPA to shield itself from many politically unpopular decisions by allowing it to make policy choices under the guise of a pure science.[124] Furthermore, political parties use this science-policy shield to influence the course of any given environmental law.[125] Finally, this shield is also one mechanism by which the EPA can be influenced by political forces[126] and conceal a protectionist measure under the integument of a science-based environmental decision.[127]

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121. *See generally* Wagner, *supra* note 117, at 1618-28 (discussing the impossibility of determining the exact quantity of toxins that would pose a risk to humans). These types of questions are said to be "trans-science" questions because the lack of scientific certainty in their determination. *Id.* at 1619.

122. *Id.* at 1621-22.

123. Because of the lack of current scientific abilities to definitively find harmful levels of toxins, policy choices must necessarily fill in the gaps. *Id.* at 1622.

124. According to Professor Wagner, an agency technocrat or scientist "substitute[s] their own values for the policy choices needed at the trans-scientific junctures and characterize the final science-policy decision as the result of scientific experimentation and scientific judgment." *Id.* at 1632. In effect, the EPA is able to make what might be considered partially policy choices under the guise of a purely scientific judgment. *Id.* at 1640.

125. The science-policy shield allows a great deal of influence over any given environmental law due to the flexibility of science. *See id.* As stated by Professor Wagner:

> Once the wide-ranging political and/or economic implications of a standard proposed by agency scientists are understood, high-level agency officials become aware of the scientific uncertainties and begin to consider whether a weaker or a more stringent standard could be set by substituting different policy assumptions at the trans-science juncture.

Id.

126. "[A]lthough the guidelines appeared to be based completely on scientific considerations, they varied predictably from administration to administration *and had clearly been influenced by differing political ideologies.*" *Id.* at 1644 (emphasis added). The influence of political parties over environmental legislation has also been documented. *See e.g., id.* at 1648-49:

> [a]ccounts of the premeditated charade in the early years of the Reagan Administration are the most abundant. During that period high-level officials attempted to eliminate or substantially weaken protective standards, and in each case these decisions were framed as decisions based on principles of "good science" which, according to the Administration, necessitated "hard proof of damage to health" before toxic materials could be regulated.

Id.

127. *See infra* Part III.

iii. *Regulatory Capture*

Regulatory Capture[128] occurs when the regulated industry is able to influence the agency decision making process to its advantage.[129] While there has been much debate over the accuracy of the agency capture model in fully describing agency action,[130] this model is still a useful (and well used) tool for describing and analyzing agency behavior.[131] As such, it is important to note that the influence of industry in the agency decision making process may be problematic in environmental legislation because agencies have much discretion in setting environmental standards.[132] Furthermore, this discretion may be influenced with little or no outside detection.[133]

The forces acting on the creation and implementation of environmental laws are an extremely important aspect of the trade-environment conflict because trade rules must be able to distinguish between illegitimate protectionism and legitimate environmental protection. As the next section explains, the GATT has accomplished that goal in a very effective, yet not too intrusive manner.

IV.
THE ROOT OF THE TRADE-ENVIRONMENT CONFLICT: HOW THE GATT DEALS WITH THE ENVIRONMENT

There are roughly three categories of environmental measures that affect trade: (1) measures aimed at reducing the comparative

128. The idea of "regulatory capture" stems from the notion that administrative agencies tend to be dominated by the industries that they regulate. Posner, *supra* note 93, at 341.

129. Agencies are "captured," so to speak, because of the focused concern of a limited number of regulated parties. *Id.* at 341-42.

130. For instance, some have argued that very rarely will an agency be in a situation where it can be influenced by any single interest group. Rather, the administrative process reflects an "interest representation model" where agency decisions are in large part a product of input from competing private interests. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

131. Farber & Frickey, *supra* note 85, at 925; WILSON, supra note 91, at 69-70.

132. *See infra* Part III.B.

133. Because of the science-policy shield, the EPA can effectively cover any industry influence under the guise of a purely scientific determination. *See* Wagner, *supra* note 117, at 1618-28. For example, so long as the EPA's determinations are reasonably based on science it would be very difficult to detect the influence of industry on that decision. *See generally*, *infra* Part III.B.

advantage[134] gained by lax environmental laws in a foreign nation;[135] (2) Measures aimed at protecting the domestic environment;[136] and (3) Measures aimed at protecting global resources.[137] Environmental laws inherently contain a wide range of social and policy choices. While few would advocate the use of a supranational body to make these choices,[138] concerns have been raised that the WTO may be dangerously close to becoming such a body; *i.e.*, because of the intertwining of the environment and trade, whether trade related decisions that are directed towards environmental measures are necessarily making national environmental policy choices.[139]

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134. In its simplest form, the theory of comparative advantage dictates that countries will be more efficient at producing different goods. If each country specializes in the production of its "efficient" goods then every country will benefit through greater access to lower priced goods and more efficient use of global resources. *See* RICHARD E. CAVES & RONALD W. JONES, WORLD TRADE AND PAYMENTS: AN INTRODUCTION (1990). Problems arise, however, when countries gain a comparative advantage due to lax protection of the environment. ESTY, supra note 34, at 52.

135. In situations where the environmental harm does not spill over and affect neighboring nations or the global environment, there is still a concern over companies gaining a competitive advantage in countries with lax environmental laws. Thus some would argue that the U.S. should use trade as a means of raising the level of environmental protection in foreign nations to eliminate environmental degredation as a basis for comparative advantage. ESTY, supra note 34, at 50-54.

136. For purposes of this article domestic measures include the protection of natural resources and human health. Thus, a ban on the import of certain agricultural products due to domestic concerns over the content of those goods and a domestic law regulating the level of discharge of a toxin into the environment would both fall under this category. See *supra* note 134 for an explanation of comparative advantage.

137. A perfect example of this type of measure would be the global restriction on the use of chemicals which are harmful to the ozone layer. *See* The Montreal Protocol. There is currently no provision within the GATT that specifically addresses this situation. ESTY, supra note 34, at 53.

138. Countries in the EU, for example, have submitted themselves to a supranational body which has expansive power to determine the legality of national environmental laws. *See* N. Haigh, THE EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL POLICY *in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS AND INSTITUTIONS, (A. Hurrell and B. Kingsbury, eds., 1991).

139. Critics of the GATT have used certain provisions within the GATT as support for the assertion that there will be a great loss of sovereignty upon the enactment of the WTO. David C. Korten, *GATT: WTO & Compliance,* People-Centered Development Forum, <http://www.ciesin.org/docs/008-083/008-083.html>. Korten states that:

> A particularly key provision buried in Paragraph 4 of Article XVI states that: Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.... This provision thus obligates each member country to revise any national or local laws in conflict with the provisions of the GATT, [resulting in a situation where] any local

This section explains how the WTO addresses, or does not fully address, these three categories of environmental laws. As is discussed next, the first category of environmental laws is left largely untouched by the WTO.

A. *Environmental Comparative Advantage: Is The Environment A Casualty To International Competition?*

Some authors have advocated the use of trade measures to eliminate a theoretical comparative advantage gained by a country with low environmental standards.[140] The common justification for this type of action is the prevention of corporate migration to countries on the basis of national environmental laws.[141]

However, considerable studies document the fact that corporate migration due to environmental concerns is not an issue for most industries.[142] The lack of corporate migration is partially due to the fact that environmental compliance only ranges from one to five percent of the total cost of the finished product, certainly not enough to be a substantial factor in a move abroad.[143]

In addition, it is not clear whether the environment should be removed from the comparative advantage calculus. For instance, differences may exist in a nation's environment that would create a naturally occurring environmental comparative advantage.[144] Thus, the nature and extent of environmental laws may not be proper indicators of the status of the environment. In addition, this type of comparative advantage is fully consistent with the

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or national health, safety or environmental standards that exceed international standards set by an unelected body maybe challenged as trade barrier.

Id.

140. Currently the GATT does not permit this type of measure. Some authors however, have advocated the use of unilateral measures to do exactly that. ESTY, *supra* note 34, at 16-17.

141. *Id.*

142. *Trade and the Environment, supra* note 81, at 15.

143. This level of cost increase is not likely, in and of itself, to justify a move across borders. *Id.*

144. For instance, England is said to have swiftly running rivers which helps clean the water, while the rivers of Germany run slowly and, despite considerable efforts to clean the rivers, they still remain polluted. *Id.*

theory of comparative advantage and should promote better utilization of the earth's limited resources.[145]

Furthermore, it would be very difficult to determine the level of harm to a domestic industry that can be attributed to environmental regulations of a foreign nation.[146] It may also be virtually impossible to determine a workable and fair set of criteria that fully considers issues of efficacy and cost.[147] Finally, the incentives to corrupt the process to benefit domestic industry groups regardless of benefit to the environment would be considerable.[148]

In the end, the WTO does not recognize, and, for the reasons noted above, the WTO should not recognize the legitimacy of this type of law.[149] The WTO, however, does address the second and the third substantive environmental categories: measures to protect the domestic environment and measures aimed at protecting global resources. The WTO deals with these two categories indirectly, but effectively, through the principle of nondiscrimination. In both of these scenarios, it is also important to reflect upon the forces that act upon domestic legislative and administrative bodies as they attempt to address environmental issues.[150]

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145. *Id.* (In the example above, neither the amount spent on cleanup, nor the status of the domestic environmental laws (measured in terms of strictness) would effectively measure the true state of the environment).

146. A suggested solution to this problem would be to raise tariffs in an amount equal to the cost differential between the two countries. *See* ESTY, *supra* note 34, at 17. If only cost is considered, however, then inefficient and costly environmental measures would be rewarded regardless of the actual environmental benefit of the laws. As such, it would be important to consider the actual environmental benefit of a nation's laws in conjunction with the costs associated with those laws.

Currently, environmental cleanup technology is a big and growing business. A nation should not be penalized for being good at cleaning up the environment. *See generally, Trade and the Environment, supra* note 81.

147. If environmental efficacy is the foremost consideration a country should not be penalized for having a workable and efficacious environmental program that happens to be more efficient and cost effective. Otherwise the complaining nation would be rewarded for spending money regardless of the extent of environmental good that is being done.

148. *See generally infra* Part III.

149. Any measure that treats a product differently from other imports based on the environmental laws of the originating country would violate the MFN clause. *See generally*, GATT arts. I and III. *See also* Thomas J. Schoenbaum, *International Law, Trade Friction with Japan and the American Policy Response*, 82 MICH. L. REV. 1647, 1713 (1984) (stating that measures aimed at extraterritorial reach are also unacceptable as a general rule).

150. *See infra* Part III.

B. *Protecting The Domestic Environment: Equal Footing For The Environment*

The WTO does not delve deeply into the legitimacy of domestic environmental measures. It does, however, require that those measures be applied equally to all parties in a non-discriminatory manner.[151] Application of the non-discrimination principle does, to some extent, regulate the manner in which national legislation may be implemented.[152] This limitation, however, is extremely limited in scope and results in environmental legislation that is more directly related to the environment. The key to success in this area is the ability of an organization to limit the power of domestic industries to unfairly influence the application of domestic environmental laws, while fully protecting the environment within the context of the original intent of the legislature. As the Reformulated Gasoline Case[153] shows, the WTO clearly accomplishes this goal.[154]

The basis of the complaint in the Reformulated Gasoline Case was the EPA's application of the Clean Air Act ("CAA"),[155] which requires the sale of reformulated gasoline[156] in non-attainment areas[157] throughout the country. When the regulations required an improvement in the content of certain compounds,[158]

151. *See infra* Part II.A for a discussion on the principle of non-discrimination embodied in arts. I and III of the GATT.

152. The Reformulated-Gasoline case, discussed in both this and the following parts, is a perfect example of how the GATT places limitations on the method of enforcement of domestic environmental laws. *See infra* notes 155-170 and accompanying text.

153. WTO Panel Decision on United States Standards for Reformulated and Conventional Gasoline, WT/DS2/1 1996 WL 738802 (WTO Jan. 29, 1996) [hereinafter Reformulated Gasoline Case].

154. This is not to ignore the vast realm of scientific uncertainty that is inherently a part of environmental regulations. *See generally*, Wagner, *supra* note 117, at 1615. However, as long as a reasonable scientific basis exists for the regulation and it is applied equally to all the GATT is not violated. *See generally infra* Part II.

155. Reformulated Gasoline Case, *supra* note 153, para. 1.1, 2.1.

156. The gasoline is reformulated to create a less polluting mixture of gasoline. The regulations specified the oxygen content in the gasoline (not less than 2%), the benzene content (not to exceed 1%) and zero content of heavy metals. Reformulated Gasoline Case, *supra* note 153, para. 2.3. It also required a 15 percent reduction in the emissions of both volatile organic compounds ("VOCs") and toxic air pollutants ("toxics") and no increase in emissions of nitrogen oxides ("NOx"). *Id.*

157. The CAA requires attainment of national standards for air quality throughout the country. (National Ambient Air Quality Standards (NAAQS)). Areas that do not reach this standard are said to be in ozone non-attainment. This specific regulation was aimed at gasoline used by consumers in these non-attainment areas to assist them in reaching the NAAQS. *Id.* (citing CAA § 211(k)).

158. *Id.* para. 2.2.

the 1990 levels of those compounds were used as a baseline to measure future improvements.[159] The dispute centered around the fact that, while domestic producers were not allowed to opt to the statutorily determined baseline,[160] certain importers were required to do so.[161] By assigning the statutory baseline to all imports, the United States was effectively requiring all importers to have cleaner gasoline than roughly one half of the domestic producers, a violation of the National Treatment Clause under the WTO.[162]

The United States, however, argued that products produced in a different manner were not "similar products" under Article III and therefore it was justified in assigning all imports the statutory baseline.[163] The intent behind the use of the baseline method was presumably to ease the transition to cleaner gasoline and eventually improve the overall quality of the air. This method of determination, however, is fundamentally flawed. First, this method rewards the worst polluters by allowing them to use their historic practices as a base for determining the level of improvement required. Second, this method of determination allows these polluters to remain the dirtiest polluters even after full

159. In the words of the GATT panel:

> The rule establishes three methods for the purpose of determining a domestic refiner's individual historic baseline. Under Method 1, the refiner must use the quality data and volume records of its 1990 gasoline. . . . If Method 1 type data are not available, a domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that neither one of these two methods is available, a domestic refiner must turn to Method 3 type data which consist of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition.

Reformulated Gasoline Case, *supra* note 153, para. 2.6. Domestic refiners are not permitted to choose the statutory baseline. *Id.*

160. The EPA used the average U.S. gasoline quality as the baseline. *Id.* para. 2.5.

161. "Firstly, [non-domestic] refineries which began operation after 1990 or were in operation for less than 6 months in 1990 are required to use the statutory baseline. Secondly, importers and blenders are assigned the statutory baseline unless they can establish their individual baseline following Method 1. If actual 1990 data are not available, which is, as for domestic refiners, anticipated by EPA, importers and blenders are assigned to the statutory baseline." Reformulated Gasoline Case, *supra* note 153, para. 2.8.

162. This was the basis of Brazil's argument for under GATT art. III that there was a nullification of a benefit under GATT "deriving from the fact that 'roughly half' of the domestic gasoline must be 'cleaner' than imported gasoline . . . " Reformulated Gasoline Case, *supra* note 153, para. 3.26. This fact was not disputed by the U.S. *See generally id.*

163. Reformulated Gasoline Case, *supra* note 153, para. 6.11.

compliance with the statute.[164] In fact, if the environment were the central issue and the regulation had a reasonable basis in science,[165] all the gasoline sold in these areas would be required to meet the same criteria.[166]

Some justifications undoubtedly exist for the disparate treatment in this type of case.[167] The limitations placed on the EPA in this instance, however, are minimal.[168] With regard to the means chosen, therefore, all that the WTO requires is either that the decision be based on scientifically and reasonably supportable

164. For example, if company A had a baseline of Y content of mercury in their gasoline and company B had a baseline content of Y+100, after full compliance with the statute company A would have .85Y as their current content, while company B would have .85(Y+100). Essentially, even after compliance with the statute, company B could be polluting in excess of company A's original baseline. As such, those companies that anticipated this type of regulation or who simply thought that the use of cleaner gasoline was better on their own are now penalized by having to overcomply with the statute and have even cleaner gasoline. *Id.*

165. The basis for the distinctions drawn was not related to the environment but was targeted at distinctions in refining methods. The U.S. attempted to argue that the similar requirement under article III could be applied to similar refineries and should not be limited to similar end products. Reformulted Gasoline Case, *supra* note 153, para. 6.11-13. However, the GATT panel said that even if this interpretation were adopted, there were no reasonable distinctions to be drawn between domestic and foreign refineries. *Id.* para. 6.14. Remember, the statutory baseline could not be adopted by domestic refineries regardless of how similar they were to a foreign refinery. *Id.* para. 6.15. In the panel's words, "many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were similarly situated." Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. *Id.* para. 6.13.

166. An environmentally based discharge level could be determined by finding the current levels of discharges into the air attributable to this type of gasoline. Then, determining an acceptable level of discharge into the environment to make the air cleaner and calculating backwards to the content requirement for all gasoline sold.

167. The basis of the distinction in the Reformulated Gasoline Case was administrative convenience. While the U.S. did not explicitly offer this argument, the basis of the disparate treatment was the difficulty that may be encountered in administering the 1990 baseline. The statute, therefore, used the convenience of a statutorily based guideline for imported gasoline.

The U.S. also argued that the disparate treatment qualified as an exception under GATT article XX. The GATT panel disagreed stating that there was no real justification for the disparate treatment and, in any case, less GATT inconsistent measures were certainly available. Reformulated Gasoline Case, *supra* note 153, para. 6.10-6.14.

168. The GATT panel suggested the solution that the EPA determine a uniform baseline for all parties. *See generally*, Reformulated Gasoline Case, *supra* note 153, para. 3.77.

distinctions[169] or that non-scientifically based determinations be applied equally.[170]

In this section we saw how the GATT applied the principle of non-discrimination to the standards set by the EPA. The next section shows how the GATT handles a law purportedly created to preserve a world resource (Dolphins), but which appears to have been disproportionately affected by industry pressure.

C. *Protecting A Global Resource: The Problem of Domestic Industries Regulating The Global Economy*

A nation may have many reasons to protect a global resource.[171] For instance, the degradation of that natural resource may have global consequences[172] or the degradation of that resource may have specific and disproportionate effects on one or more nations. The question in these situations is not—in light of evidence suggesting an actual global harm—whether measures should be taken to protect the global resource, but rather, what forum is best suited to determine the legitimacy of the concern over the global resource.

Unilateral decisions by national bodies also have a natural tendency to favor those interests associated with the domestic decision making body.[173] This natural bias is injurious to the natural

169. *Id.* para. 6.14. The GATT panel also held that distinctions between difficulty in enforcement of certain laws are a legitimate reason for disparate treatment. Specifically the panel stated "the United States should not have to prove that it cannot verify information and enforce its regulations in every instance in order to show that the same enforcement conditions do not prevail in the United States and other countries." The Section 337 panel acknowledged the legitimacy of this concern in noting that a measure could provide apparently less favorable treatment to imports in situations where "it might be considerably more difficult to identify the source of infringing products or to prevent circumvention of orders limited to the products of named persons." As such, "[t]he impracticability of verification and enforcement of foreign refiner baselines in this instance shows that the 'discrimination' is based on serious, not arbitrary or unjustifiable, concerns stemming from different conditions between enforcement of its laws in the United States and abroad." *Id.* para. 3.23

170. *Id.* para. 6.14.

171. At present there appears to be a growing awareness of our global environmental interdependence. The reasons for this awareness stem from advancing technological methods of detecting problems in their early stages as well as the world growth in industrialization and the critical stage of many historic problems. *See generally* ESTY, *supra* note 34, at 9-32.

172. The degradation of the ozone layer and pollution of the high seas are perfect examples of environmental concerns that affect multiple (if not all) nations. *Id.*

173. *See infra* Part III and accompanying text discussing the forces acting upon national law making bodies and the agencies entrusted with the enforcement of specific laws.

progress of free-trade and its inherent benefits.[174] This type of bias also manifests itself in the form of unneeded or discriminatory environmental laws which do not benefit the environment. The Reformulated Gasoline Case[175] and the Tuna-Dolphin Case[176] for instance, reveal the true subtlety of how environmental measures can be corrupted to serve interests other than the environment. Understanding the pressures which act upon the domestic decision-makers, however, allows us to clearly establish that a unilateral decision making process will not likely yield effective and environmentally sound results.

Thus, in most cases international consensus is the most effective and efficient method of preserving global resources. Furthermore, customary international law is based upon the premise that international law and decisions affecting multiple nations should be made by all of the affected nations.[177] This underlying premise is incorporated into the WTO.[178] As such, unilateral decisions affecting multiple nations[179] have been severely criticized in the international arena.[180] There are also a variety of eco-

174. *See generally, infra* Part II.

175. *See infra* Part IV.B for a discussion of the Reformulated Gasoline Case.

176. General Agreement on Tariffs and Trade (GATT), *United States—Restrictions on Imports of Tuna*, Report of the GATT panel para. 2.3, 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin Case].

177. "A violation of an international obligation entails an obligation to make reparation . . . [but Section 301] [f]irst and foremost [requires] the United States Trade Representative 'to obtain the elimination of that act, policy or practice.'" Jean Heilman Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms*, 17 N.C. J. INT'L L. & COM. REG. 1, 4 (1992).

178. *See* GATT preamble; URUGUAY Round art. IX (discussing the formation of the World Trade Organization and stating "The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947").

179. For instance, the United States has used unilateral measures in an attempt to open foreign markets in ways not contemplated by the GATT-such as the multiple attempts during the late eighties and early nineties to open the Japanese market. *See* GARY R. SAXONHOUSE, THE ECONOMICS OF THE US-JAPAN FRAMEWORK TALKS, Executive Summary (1994) (stating that "President Bill Clinton's administration insists that, regardless of negotiated agreements, Japan's discriminatory economic practices never change.") The problems encountered by U.S. firms attempting to enter the Japanese markets are not covered by the GATT. As such, the U.S. has used unilateral measures to address those problems. *See e.g.*, Gregory K. Bader, *The Keiretsu Distribution System of Japan: Its Steadfast Existence Despite Heightened Foreign and Domestic Pressure For Dissolution*, 27 CORNELL INT'L L.J. 365 (calling for the dissolution of the formitable trade barrier, the Keiretsu).

180. *See* Fusae Nara, *A Shift Toward Protectionism under § 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International* Law, 19 HOFSTRA. L. REV. 229, 246-247 (1990) (arguing that unilateral (§ 301) actions violate GATT and international law); *See also* Alan H. Greenspan, *Japan And The United States: The Need To Prosper Together, in* BEYOND TRADE FRICTION 23-30 (2d ed.

nomic reasons for not using unilateral measures to resolve international disputes.[181]

The next section discusses the outcome of the Tuna-Dolphin case as it was adjudicated in the GATT. As the Tuna-Dolphin case is discussed, it is important to consider two issues: (1) how and why was the law subverted to serve industry interests over the environment; and (2) whether the GATT served as an efficient safeguard against this type of law.

i. *The Marine Mammal Protection Act*

The Marine Mammal Protection Act of 1972, as revised (MMPA),[182] prohibited the incidental "taking"[183] of particular marine mammals[184] in the Eastern Tropical Pacific Ocean.[185]

1990) (arguing that unilateral protectionism by the United States will not succeed in protecting U.S. markets in the long run); Schoenbaum, *supra* note 149, at 1657 (concluding that "[t]he retaliatory protectionist moves aimed at bilateral trade imbalances, in the form of requests for orderly marketing agreements and voluntary restaints, impede world economic progress . . .").

181. *See* Greenspan, *supra* note 180, at 23-30 (arguing that unilateral protectionism by the United States will not succeed in protecting U.S. markets in the long run); Schoenbaum, *supra* note 149, at 1657 (concluding that "[t]he retaliatory protectionist moves aimed at bilateral trade imbalances, in the form of requests for orderly marketing agreements and voluntary restaints, impede world economic progress . . .").

Unilateral decisions may also become a call to action for other nations to retaliate against the U.S. when it fails to live up to their expectations concerning the global environment. For instance, a parallel can be drawn between the use of unilateral measures under § 301 of the Trade Act of 1974 and the use of unilateral measures to address a perceived international environmental problem. One of the criticisms levied against the use of § 301 is that it will lead to retaliation by other nations. As Professor Robert. E. Hudec elaborates, "Section 301 would be for both critics and other governments to call attention to each case in which the United States failed to conform to the new Section 301 itself, and for other governments to retaliate against such practices to the same extent called for by 301." Thomas J. Trendl, *Self-Help in International Trade Disputes,* 84 AM. SOC'Y INT'L L. PROC. 32, 39 (1990) (quoting Professor Robert E. Hudec, former Assistant General Counsel of the Special Representative of Trade Negotiations).

182. 16 U.S.C. §§ 1361-1407 (1994).

183. A taking includes the harassment, hunting, capture, killing or attempt thereof. Any importation into the United States of marine mammals is prohibited except where an exception is explicitly authorized. Tuna-Dolphin Case, *supra* note 176, para. 2.3.

184. In particular, the MMPA governed the taking of marine mammals incidental to harvesting of yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP), as well as importation of yellowfin tuna and tuna products harvested in the ETP. Section 101(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by United States fishermen in the course of commercial fishing pursuant to a permitting system. Only one such permit was issued and it limited the number of dolphins that may be incidentally taken while tuna fishing. *Id.*

The MMPA provides that "[t]he Secretary of Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[186] This prohibition was to be carried out, under § 101(a)(2)(B), unless the Secretary of Commerce finds that the foreign country has a comparable regulatory scheme governing the taking of dolphins.[187] This finding must include a positive comparability of harvesting regulatory scheme as well as a positive finding on comparable harvesting rates.[188]

Under the general permit issued to this Association, no more than 20,500 dolphins may be incidentally killed or injured each year by the United States fleet fishing in the ETP. Among this number, no more than 250 may be coastal spotted dolphin and no more than 2,750 may be Eastern spinner dolphin. *Id.* para 2.4.

185. This was only a problem in the ETP and with regard to a particular fishing method (purse seine fishing). *Id.*

Purse Seine Fishing is a method of fishing where a school of fish, once located, is encircled by a motor boat laying the purse seine net around the perimeter of the school of fish. Once the school is encircled, the net is pursed by the fishing boat "by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents." Tuna-Dolphin Case, *supra* note 176, para. 2.4. As stated by the dispute resolution panel a problem arises because:

> In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean surface and intentionally encircling them with nets to catch the tuna underneath. This type of association has not been observed in other areas of the world; consequently, intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the Eastern Tropical Pacific Ocean. When dolphins and tuna together have been surrounded by purse-seine nets, *it is possible to reduce or eliminate the catch of dolphins through using certain procedures.*

Id (emphasis added).

186. MMPA, § 101(a)(2). This requirement was also mandatory. Tuna Dolphin Case, *supra* note 176, para. 2.4.

187. Specifically, the Secretary must find "(i) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by United States vessels." Tuna Dolphin Case, *supra* note 176, para. 2.4. Furthermore, "the Secretary need not act unless a harvesting country requests a finding. If it does, the burden is on that country to prove through documentary evidence that its regulatory regime and taking rates are comparable. If the data show that they are, the Secretary must make a positive finding." *Id.*

188. *Id.* Furthermore, "The average incidental taking rate (in terms of dolphins killed each time the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of United States vessels in the same period." *Id.* In addition, "the share of Eastern spinner dolphin and coastal spotted dolphin relative to total incidental taking of dolphin during each entire (one-year) fishing season must not exceed 15 per cent and 2 per cent respectively." *Id.*

A related measure, the Dolphin Protection Consumer Information Act (DPCIA)[189] specifies a labeling standard for any tuna product exported from or offered for sale in the United States.[190] The DPCIA essentially prohibited the use of terms such as "Dolphin Safe" on tuna related products unless certain criteria were met.[191]

ii. *GATT Panel Report: Mexico v. United States and the Tuna-Dolphin Case*

Mexico brought an action under the GATT[192] alleging a violation of Articles I & III.[193] The United States invoked the environmental exceptions to these articles[194] stating that the "MMPA embargo was necessary to protect the life and health of dolphins . . . [and] [n]o alternative measure was available or had been proposed that could reasonably be expected to achieve the objective of protecting the lives or health of dolphins."[195]

As such, part of the dispute centered upon whether the Article XX exceptions could be applied extraterritorially to protect animal life beyond the borders of a country. [196] Noting that there was nothing specifically mentioned in Article XX to either affirm or deny that view, the panel decided to view this problem in light of its history.[197] The panel noted that the provision was originally created as part of the International Trade Organization

189. Dolphin Protection Consumer Information Act, § 901, Pub. L. No. 101-627, 104 Stat. 4465-67 (1990) (codified in part at 16 U.S.C. § 1685).

190. Tuna-Dolphin Case, *supra* note 176, para. 2.11-2.12.

191. The prohibition was generally targeted at two situations: "(1) harvesting in the Eastern Tropical Pacific Ocean by a vessel using purse-seine nets which does not meet certain specified conditions for being considered dolphin safe, and (2) harvesting on the high seas by a vessel engaged in driftnet fishing." *Id.*

192. On 5 November 1990, Mexico requested consultations with the United States concerning restrictions on imports of tuna. A satisfactory solution was not reached and on 25 January 1991, Mexico requested the Contracting Parties to establish a panel under Article XXIII para. 2 of the GATT. Tuna-Dolphin Case, *supra* note 176, at para. 1. Consultations are the first stage of the dispute resolution process under the former GATT rules as well as under the WTO. *See infra*, Part III on WTO dispute settlement; Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance adopted 28 November 1979, BISD 26S/210, 216; *see also infra* Part II.B. for a discussion on the past and current GATT dipuste resolution procedures.

193. *See infra* Part II for a discussion of articles I and III of GATT.

194. *See infra* Part II.A. for a discussion of the exceptions to articles I and III of GATT.

195. Tuna-Dolphin Case, supra note 176, para. 3.33.

196. *Id.* para. 5.24.

197. *Id.* para. 5.25.

(ITO).[198] The panel then mentioned one specific example where the ITO charter had been altered to express the desire to prevent extraterritorial effect of another provision.[199] Using this single analogy to the ITO charter, the panel determined that Article XX was not meant to be applied extraterritorially.[200] The panel then held that the United States should instead attempt to use customary methods of addressing this perceived international problem.[201]

This result—that the United States is not allowed to implement internal regulations to protect an exhaustible global resource—may appear harsh. However, one of the most troubling aspects of this legislation, according to the panel, was that the "United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period."[202] While the panel did not specifically say so, it would appear that on its face this trade measure was set at a level which had little, if anything, to do with the preservation of a natural resource,[203] but rather had its partial objective in having the world's fishermen operate at United States levels regardless of

198. The ITO was suppose to take the place of GATT in 1947. However, it never came into being and GATT was left without any governing multilateral institution to oversee its operation. LORTIE, *supra* note 12, at 3-9.

199. Tuna-Dolphin Case, *supra* note 176, para. 5.26.

200. *Id.* para. 5.27-28. The panel noted further that the Article XX(g) exception only applied to the preservation of a natural resource within the boundaries of a country and therefore could not be applied extraterritorially. *Id.*

The panel noted further that "Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable." *Id.* para. 5.27.

201. Specifically, the panel noted that the U.S. should pursue "the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas." *Id.* para. 5.28. The panel further noted that

> The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement; The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

Id.

202. *Id.* para. 5.28.

203. *Id.*

the scientific basis or the resulting harm to dolphins.[204] Essentially, the MMPA lacked a real basis in environmental protection and its sole purpose was to protect United States industries. As such, the Tuna-Dolphin Case[205] is a perfect example of the problems associated with a nation's attempt to unilaterally protect a global resource.[206]

In general, a statute and its legislative history will not disclose a bias created by industry pressure. However, certain statutes which do show an extreme bias, like the MMPA, are occasionally undercovered. The GATT is only concerned with this type of law. Essentially, the GATT acts as a safeguard in situations where the legitimacy of underlying environmental justification is questionable and the law, as enacted or applied, is discriminatory.[207]

V.
CONCLUSION

The theory of comparative advantage and the development of free-trade anticipates serious growing pains by all nations. As the situation gets more difficult for inefficient and dying domestic industries, industry groups may develop a more focused and vested interest in preventing the progress of free-trade regardless of the overall cost to society. Once focused, these groups may be able to influence the legislature and administrative agencies in order to hide protectionist measures in the guise of environmental regulations.[208]

Under the former GATT rules, it was very difficult for countries to separate legitimate environmental legislation from a disguised trade restriction.[209] The new legalism of the Uruguay Round, however, should make it much more difficult for Contracting Parties to the GATT to create trade barriers in this man-

204. *See id.* Little scientific evidence or scientific basis existed for the enactment of that law. *Id.*

205. *See generally*, Tuna-Dolphin Case, *supra* note 176.

206. Protecting a global resource was both the stated goal of the legislation as well as the basis of the GATT decision regarding the legality of extrajudicial use of U.S. laws under the GATT. Tuna-Dolphin Case, *supra* note 176, paras. 4.1, 4.25, 4.5.

207. Environmental benefits are normally weighed as a function of a cost-benefit analysis; i.e., the costs to society in protecting the environment and the benefit conferred upon society through the protection. In that the marine mammals protected by the act were not in need of protection, the cost associated with the act cannot be justified. *See generally*, Tuna-Dolphin Case, *supra* note 176, paras. 4.09-4.10.

208. *See generally, infra* Part III.

209. *See infra* Part II.B.i.

ner. In effect, the legalism of the WTO can insulate politicians and the political process from this type of special interest group pressure.[210]

The WTO is incapable of making national environmental policy choices. Such choices should be left to national bodies, or in the case of global issues, to the international consensus building process. As this article suggests, however, the WTO and the principle of non-discrimination are fully capable of setting the outer-limits of acceptable rules and behavior as countries create their own environmental laws to suit their particular cultural and sociological needs. Furthermore, contrary to the concern raised about the loss of sovereignty and environmental rights in the WTO, the WTO will be able to protect legitimate environmental laws that benefit the environment, while shielding the world trading system from protectionist laws (or portions of those laws) that have little to do with environmental preservation.

210. It has been suggested that the Judiciary should take a more proactive role in controlling agency discretion in order to limit the ability of rent-seeking industries from dominating the political and regulatory process. See Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion,* 82 Nw. U. L. REV. 646, 649 (1988). Here I have suggested that such an organization already exists and, at least within the context of agency discretion and protectionists measures, that the principles of non-discrimination embodied in GATT form the perfect tool for keeping that discretion in check within the context of environmental legislation.