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# THE CASE FOR UTILIZING THE WORLD TRADE ORGANIZATION AS A FORUM FOR GLOBAL ENVIRONMENTAL REGULATION

ANDREW L. STRAUSS\*

## I. INTRODUCTION

In his article, *Environmental Policy in the New World Economy*, Alan Miller discusses the environmental implications of globalization.<sup>1</sup> Recognizing that the flow of international private capital to developing countries is far more significant than international development assistance,<sup>2</sup> he questions how we can use public policy to maximize the positive environmental effects of private investment.<sup>3</sup> Miller suggests the need to find strategies that utilize market forces to benefit the environment.<sup>4</sup> This Article heeds Alan Miller's call by suggesting new approaches to thinking about the potential for the World Trade Organization (WTO) to play a positive environmental role.

This is a particularly salient issue today because one question that will need resolution in the near future is which international regimes should have primary responsibility for global environmental regulation. The regimes being promoted as contenders to participate in global environmental regulation include, among others, the United Nations Environment Program, the specialized secretariats established under various environmental treaties,<sup>5</sup> and a newly proposed global environmental

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1. Alan Miller, *Environmental Policy in the New World Economy*, 3 WIDENER L. SYMP. J. 287 (1998).

2. *Id.* at 291.

3. *Id.* at 295-307.

4. *Id.*

5. A number of agreements provide for the establishment of a secretariat for the administration of the treaty. See United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 [hereinafter United Nations Framework Convention]; Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. TREATY DOC. NO. 105-5 (1991), 28 I.L.M. 649 [hereinafter Basel Convention]; Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]; see also Convention on the

organization.<sup>6</sup> Environmentalists understandably might presume that the substance of international environmental law is more important than which regime is given responsibility for administering such law. I will demonstrate, however, that the choice of administrative regimes can have a major impact on the ability of the international community to negotiate as well as enforce effective international agreements.

In this Article, my specific concern is the role of the WTO (the successor to the General Agreement on Tariffs and Trade)<sup>7</sup> in regulating process and

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Conservation of Migratory Species of Wild Animals, June 23, 1979, art. IX, 19 I.L.M. 15, 24 (providing for the establishment of a secretariat in the event that UNEP is no longer able to serve in that capacity); Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10-541, art. 11, 18 I.L.M. 1442, 47 (establishing that Executive Secretary to the Economic Commission for Europe shall be the Secretariat).

6. A recent U.S.-Japan study group has proposed the formation of a Global Environmental Organization which would "work in tandem with the World Trade Organization." *Global Environment Group to Work with WTO Part of Proposal by U.S.-Japan Study Team*, 7/15/97 IED D3 (BNA). In addition, individual commentators have suggested the formation of a new global environmental organization. See DANIEL C. ESTY, GREENING THE GATT 275-81 (1994); Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 177 n. 88 (1996); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 909 (1995); see also Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994) (citing various statements by individuals advocating the formation of a new global environmental organization or adjudicatory body); Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 237 (1997). Others have simply noted that the trade-environment dilemma could best be addressed by an independent body specifically formulated to deal with such issues. See Steve Charnovitz, *Environmental Trade Sanctions and the GATT. An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751, 796 n.265 (1994).

7. For the reasons that follow, references in this Article to the World Trade Organization (WTO) are to that institution. Unless otherwise indicated, references to the General Agreement on Tariffs and Trade (GATT) are to the treaty establishing the primary rules governing international trade. The GATT came into force in 1947. General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pt. 5, 55 U.N.T.S. 187. It was originally established as a multilateral arrangement to provide basic ground rules around which post-war international trade could be organized. *Id.* Another supplemental international agreement that was to provide the institutional structure for the international trade regime was to follow. When this agreement never came into being—as a result of opposition within the United States Congress—GATT was alone left to meet the administrative needs that the growth of international trade required. Rising to this challenge, the GATT became a *de facto* international organization. See generally KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970). As a consequence of the conclusion of a massive trade agreement known as the Uruguay Round in 1994, a *de jure* international trade organization, the WTO, finally came into being. See

production methods (PPM's).<sup>8</sup> I make the argument that the organization would be a uniquely effective forum for coordinating and enforcing harmonized global standards in such areas as clean air, clean water, hazardous waste, occupational health and safety, and natural resource preservation.

Before developing my case, two *a priori* questions need to be briefly addressed because of their continuing controversy. The first is whether there is a reason why environmental regulation should take place on a global scale.<sup>9</sup> The environmental impact of economic activity was traditionally considered to be limited to where industrial production occurred or products were consumed, and hence was not thought to be a valid subject for global regulation. The emergence of global environmental problems such as ozone depletion and global warming,<sup>10</sup> and the growing realization

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General Agreement on Tariffs and Trade: 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 Final Act]. Today, the WTO is the *organization* which administers the *trading rules* contained in the GATT as well as rules prescribed by several other related agreements. *Id.*

8. The OECD defines PPM's as standards that:

specify criteria for how a product is manufactured, harvested or taken. They encompass emission and effluent standards, certain performance or operations standards, and practices prescribed for natural resource sectors. Terms such as "made with," "produced by" and "harvested by" signify a PPM standard . . . . All PPM standards apply to the production stage, i.e. before a product is placed on the market for sale. These standards specify criteria for how a product is produced or processed. However, the PPM standard may address the environmental effects of a product all during its life-cycle, i.e., effects which may emerge when the product is produced, transported, consumed or used, and disposed of.

Typology of Trade Measures Based on Environmental Product Standards and PPM Standards: Note by the Secretariat, Joint Session of Trade and Environment Experts, OECD Environment Directorate and Trade Directorate, COM/ENV/TD 89 (Sept. 28-30, 1993).

9. For an expanded explanation as to why I believe that there is such a need for global regulation in these areas, see Andrew L. Strauss, *From Gattzella to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, \_\_ U. PA. J. INT'L ECON. LAW \_\_ (forthcoming 1998).

10. The global environmental problems that have most prominently come to the public's attention include the depletion of the ozone layer of the earth's atmosphere due to the globally diffused environmental release of chlorofluorocarbons and other chemicals and the warming of the earth's temperature due to the aggregate effect of the world-wide release of greenhouse gasses. See generally COMMITTEE ON SCIENCE, ENGINEERING AND PUBLIC POLICY, POLICY IMPLICATIONS OF GREENHOUSE WARMING (1992) (analyzing panel findings of the effects of greenhouse gases and reviewing policy proposals); THE EARTH AS TRANSFORMED BY HUMAN ACTION: GLOBAL AND REGIONAL CHANGES IN THE BIOSPHERE OVER THE PAST 300 YEARS (B.L. Turner II et al. eds. 1990) (analyzing the

that the global environment is in a general sense ecologically interconnected, has made the need for global environmental regulation increasingly clear.

Assuming the need for global environmental regulation, the second and more controversial *a priori* question is whether the WTO should, consistent with its overall trade mission, wear the mantle of global environmental regulator.<sup>11</sup> Briefly, one of the primary purposes of the WTO is to create a level playing field upon which international trade can take place.<sup>12</sup> As is

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“impacts of human activities on the ‘faces and flows’ of the global environment over the past three centuries or so.”); DONALD G. KAUFMAN & CECILIA M. FRANZ, *BIOSPHERE 2000: PROTECTING OUR GLOBAL ENVIRONMENT* (1993) (discussing ozone levels, deforestation and other environmental problems).

11. For a more detailed discussion of the convergence between trade and environmental policy and for my more comprehensive views as to why this convergence justifies environmental regulation by the WTO, see Strauss, *supra* note 9.

12. The essential mission of the World Trade Organization is to encourage the creation of a level playing field whereby governments refrain from pursuing policies that disadvantage imports from foreign countries either in favor of domestically produced goods or in favor of goods produced in other foreign countries. See Marsha A. Echols, *Sanitary and Phytosanitary Measures*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 191 (Terrence P. Stewart ed., 1996); see also David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT’L & COMP. L. 1, 19 (1995); Ernst-Ulric Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT’L L. & BUS. 398, 433 (1997). The intellectual inspiration for this mission came out of the economic theory of comparative advantage originally advanced by the 18th century economist David Ricardo. *THE WORKS OF DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY* 128-41 (P. Strafa ed., 1975). According to Ricardo’s theory, if trade barriers between nations are removed, each will come to produce what it can produce comparatively most efficiently and the greatest sum total of world production will occur. *Id.* See generally John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231, 1243 (1992) (providing a contemporary overview of Ricardo’s theory).

The primary articles of the GATT that embody this overall mission are Article I (Most Favored Nation provision requiring that countries do not discriminate in international trade as between foreign nations); Article III (National Treatment provision requiring that countries do not discriminate in favor of domestic industry and against foreign producers in establishing or applying domestic regulations); Article XI (restricting the use of quantitative restrictions (quotas) on the import of foreign goods). See General Agreement on Tariffs and Trade, *supra* note 7, arts. I, III, XI, U.N.T.S. at 187 incorporated in, Final Act, *supra* note 7, at 1125. For a more extensive discussion of the obligations of the GATT and the relevant exceptions, see generally Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992) (reviewing the GATT’s environmental provisions and their conflicts with U.S. law); Rex J. Zedalis, *A Theory of the GATT “Like” Product Common Languages Cases*, 27 VAND. J. TRANSNAT’L L. 33 (1994) (discussing extensively the obligations of the GATT and the relevant exceptions).

well known, this playing field can become uneven when some countries provide domestic producers with a competitive advantage over foreign producers<sup>13</sup> by establishing relatively lax environmental standards.<sup>14</sup> Assigning the organization the task of eliminating this competitive advantage through the oversight of global environmental standards is well within the overall trade mandate of the WTO. In addition, because of the increasing use of trade restrictive measures in multilateral environmental agreements, environmental regulation has already come to inhabit the domain regulated by the WTO. For example, the *Convention on the International Trade in Endangered Species* requires members to prohibit importation of certain endangered or threatened species<sup>15</sup> even though such a prohibition is

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13. See generally Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9, 71 (1996); Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1 (1996); Nancy Kubasek et al., *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. ENVTL. L. & POL'Y 1, 18 (1995) (discussing the phenomena of countries seeking a competitive advantage by weakening environmental standards); and C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47 (1990) (examining the disparity between the environmental regulatory and enforcement policies of developed and developing countries).

14. For an explanation as to why I do not believe that allowing countries to maintain relatively low environmental standards should be considered a legitimate way of creating a comparative advantage, see Strauss, *supra* note 9. My view, however, is not universally accepted. Some commentators consider relaxed environmental standards to be a legitimate way of creating a comparative advantage. See Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?*, 16 NW. J. INT'L L. & BUS. 441, 470-71 (1996); Eric Phillips, *World Trade and the Environment: The CAFE Case*, 17 MICH. J. INT'L L. 827, 838 (1996).

15. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243. For further discussion of the trade implications of the convention, see Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 COLUM. J.L. & SOC. PROBS. 175, 193, 206 (1996). Several other major environmental treaties also specifically provide for the use of trade restrictions to accomplish the goals of the treaty. See Basel Convention, *supra* note 5, at 662-63; and Montreal Protocol, *supra* note 5, at 1552-54. "In addition, two recent treaties, the Convention on Biological Diversity and the United Nations Framework Convention, incorporate or envision the use of trade measures." Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 844 (1996) (citing Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992)); and Convention on Climate Change, *supra* note 5, at 854-55. Other environmental instruments utilizing trade restrictions include the South Pacific Forum: Final Act of the Meeting on a Convention to Prohibit Driftnet Fishing in the South Pacific, Including Text of Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific and its Protocols, Nov. 24, 1989, 29 I.L.M. 1449 (1990); Association of South

probably in current violation of the trade privileges that exporters of endangered species enjoy as members of the WTO.<sup>16</sup> Finally, international trade rules are implicated when countries resort to unilateral trade restrictions to remedy what they perceive to be offshore environmental infractions.<sup>17</sup> This fusion between trade and environmental regulation means that a coherent international environmental regime demands some role for the WTO. The only open question is just how central that role should be.<sup>18</sup>

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East Asian Nations Agreement on the Conservation of Nature and Natural Resources, *reprinted in* 15 ENVTL. POL'Y & L. 64 (1985); International Code of Conduct on the Distribution and Use of Pesticides, 23 FAO/CONF/RES 10/85 (Nov. 1989); and Agreement on the Conservation of Polar Bears, Nov. 15, 1973, T.I.A.S. No. 8409, 27 U.S.T. 3922.

16. This conflict is not limited to the Convention on International Trade in Endangered Species. Generally speaking, WTO members who become parties to environmental agreements with trade restricting provisions potentially face conflicting obligations. See PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* (1993); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 491 (1994). Where enforcement of a multilateral environmental agreement results in trade restrictions against a member of the WTO that is not a party to the Multilateral Environmental Agreement, the potential for conflict is exacerbated. See generally Hudnall, *supra* note 15, at 175.

17. See *infra* note 30 and accompanying text.

18. Some of the areas about which I am proposing that the WTO play a regulatory role, such as domestic water quality standards, have as of yet not been the subjects of sustained state sanctioned efforts to create multilateral agreements on global standards. Others, such as the release of air borne effluents, have been the subject of various types of multilateral discussions and, in some cases, agreements. See Convention on Climate Change, *supra* note 5, at 855-59; Montreal Protocol, *supra* note 5, at 1547-48; United Nations: Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, Nov. 18, 1991, 31 I.L.M. 568; see also United Nations: Protocols to the 1979 Convention on Long-Range Transboundary Air Pollution, July 8, 1985, 27 I.L.M. 698 (entered into force Sept. 2, 1987).

Despite the overlap between trade and environmental policy, the World Trade Organization has not thus far served as a forum for the negotiation or implementation of the global environmental agreements that do exist. WTO negotiation and implementation of treaty provisions with environmental implications has been limited to Articles III and XX of the GATT and the Agreements on Technical Barriers to Trade, Sanitary and Phytosanitary Conditions, all of which seek to restrict the ability of states to prescribe environmental regulations with the potential to impact international trade. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994); Agreement on Technical Barriers to Trade, 33 I.L.M. 1 (1994); Agreement on the Application of Sanitary and Phytosanitary Multilateral Environmental Agreements, Apr. 15, 1994. For further discussion of the trade implications of these provisions, see Christine M. Cuccia, Note, *Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Environmental Agreements Regulating Methods of Harvesting*, 13 B.U. INT'L L.J. 481, 488 (1995); *infra* note 30; see also Steinberg, *supra* note 6 at 231 (discussing WTO's environmental mandate as limit-

The WTO has not yet offered any positive contribution to global environmental protection. Additionally, powerful political forces oppose the WTO entering the environmental arena. Clearly, making environmental progress within the framework of the WTO will be extremely difficult. Without denying this political reality, I nevertheless wish to demonstrate that the organization's unique attributes give it significant, though within the environmental community largely unacknowledged,<sup>19</sup> potential as a global environmental regulatory forum.

By way of examining this potential, I will first, in Part II, present the benefits of utilizing the WTO as a forum for the creation of environmental law. In Part III, I will then proceed to describe the advantages of utilizing the WTO as a forum for the administration and enforcement of such laws.

## II. UTILIZING THE WORLD TRADE ORGANIZATION TO NEGOTIATE INTERNATIONAL ENVIRONMENTAL AGREEMENTS

To date, the governments of developing countries have been extremely

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ed to the Committee on Trade and the Environment and the Committees that administer the agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Conditions).

19. Assuming that the World Trade Organization's failure to positively contribute to global environmental concerns is reflective of the organization's intrinsic nature, environmentalists have tended to emphasize the organization's problems rather than its unique potential. In a typical example, recalling the Tuna/Dolphin controversy, David Phillips of Earth Island Institute wrote "the dolphins now have become the warning light on what GATT has in store for health and the environment." David Phillips, *Dolphins and GATT, in THE CASE AGAINST "FREE TRADE:" GATT, NAFTA AND THE GLOBALIZATION OF CORPORATE POWER* 133 (RALPH NADER ET AL., EDS. 1993). For a brief discussion of the Tuna-Dolphin controversy, see *infra* note 30; see also Dunoff, *supra* note 6 at 1046.

Also reflecting the generally pessimistic view that many environmentalists have toward the future impact of the World Trade Organization was a piece in *The Guardian* by James Erlichman:

If you don't give a damn that dolphins die in their thousands in tuna nets, it's your lucky day. If you think anti-fur campaigners are pathetic, the world is moving in your direction. . . . Free trade forces look set to rout animal and human welfare campaigns worldwide now that the full impact of the World Trade Organization (WTO) regime has begun to emerge.

James Erlichman, *A Hard Price for Free Trade*, THE GUARDIAN, May 13, 1997, at T17.

While such rejectionist postures are common, some environmentalists have also proposed constructive reforms, which they argue would make the WTO a more even-handed arbiter of trade-environmental issues. See Anna Beth Snoderly, Comment, *Clearing the Air: Environmental Regulation, Dispute Resolution, and Domestic Sovereignty Under the World Trade Organization*, 22 N.C. J. INT'L L. & COM. REG. 241, 247 (1996); Wold, *supra* note 15, at 915-19.

reluctant to sign onto the few relatively<sup>20</sup> modest global environmental agreements that have been negotiated.<sup>21</sup> These governments have been jealously guarding their discretion to maintain comparatively weak domestic environmental standards. As mentioned, such relaxed standards allow these governments countries to gain competitive trade advantages<sup>22</sup> over more highly regulated developed countries by reducing environmental compliance costs that must be borne by local industry.<sup>23</sup>

Moreover, incentives for developing countries to participate in many global environmental agreements are undermined by the classic free-rider problem.<sup>24</sup> Every country facing a global environmental problem has an incentive to stand aside and allow other countries to bear the costs of complying with remedial agreements, while reaping its share of global environmental benefits for free. Democratic developed countries with relatively influential environmental movements and more stringent environmental laws<sup>25</sup> tend to be the ones promoting global environmental

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20. "There is an abundance of global, regional, and local declarations and conferences dealing with environmental protection in general. [However,] [f]ew binding norms have emerged." WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 263 (2d ed. 1991). See generally Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 *GEO. L.J.* 675 (1993) (outlining some of the major international environmental agreements).

21. See generally Bing Ling, *Developing Countries and Ozone Layer Protection: Issues, Principles and Implications*, 6 *TUL. ENVTL. L.J.* 91 (1992) (noting some reasons for developing country resistance to Multilateral Environmental Agreements); A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 *WM. & MARY ENVTL. L. & POL'Y REV.* 233, 254 (1997) (specifically identifying lack of financial capacity as a developing country justification for nonadherence to Multilateral Environmental Agreements); and Jeff Trask, *Montreal Protocol Noncompliance Procedure: The Best Approach to Resolving International Environmental Disputes?*, 80 *GEO. L.J.* 1973, 1975 (1992) (identifying nonadherence as resulting from a lack of funds and technology).

22. See *supra* text accompanying notes 12-14.

23. Carl F. Schwenker, Note, *Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal*, 71 *TEX. L. REV.* 1355, 1369 (1993) (drawing the connection between stringency of standards and rigorosity of enforcement on the one hand and compliance costs on the other); see also Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 *GEO. INT'L ENVTL. L. REV.* 593, 597 (1993) (noting cost savings resulting from non-compliance with environmental standards where enforcement is lax).

24. For a background discussion of the free-rider problem, see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); and PHILIP D. STRAFFIN, *GAME THEORY AND STRATEGY* 139-44 (1993).

25. See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 *GEO. WASH. J. INT'L L. & ECON.* 1, 103 (1994) (stating that developed countries have the highest environmental standards and the most stringent enforcement policies). Although developing nations often lag far behind the developed world

agreements.<sup>26</sup> There are, however, many more developing countries in the world, and because adherence to international treaty regimes is voluntary, these countries need not participate.

The WTO, at present, provides the ideal and probably only global organizational vehicle with the institutional capability to independently induce countries to participate in international environmental agreements.<sup>27</sup> In the WTO, with minimal exceptions, all countries are required to comply with the related agreements governed by the organization.<sup>28</sup> Integrating

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in terms of environmental regulation and enforcement, some progress has been made in recent years. See Barbara A. Boczar, *Toward a Viable Environmental Regulatory Framework: From Corporate Environmental Management to Regulatory Consensus*, 6 DEPAUL BUS. L.J. 291, 319 (1994); Schwenker, *supra* note 23, at 1366-67.

26. Among developed nations, some countries are generally inclined to push harder for meaningful global accords than are others. See Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2052 (1993).

Once environmental treaty regimes are established, developed nations do not always do everything necessary to implement the goals or mandates of Multilateral Environmental Agreement. See generally Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995) (noting several examples of developed nations' actions which are either not in compliance with Multilateral Environmental Agreement or while in compliance, demonstrate a lack of commitment to the environment).

Developing countries, in certain cases, have been advocates for environmental agreements. See C. Russell H. Shearer, *International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation*, 7 TUL. ENVTL. L.J. 391, 397 (1994) (noting the concern of certain developing, low lying coastal nations regarding global warming); see generally *Green Group Backs Move for Broader Timber Pact*, THE REUTER EUROPEAN BUSINESS REPORT, May 10, 1993 (developing nations were among those pushing for sustainable felling of both tropical and temperate forests); and Farhan Haq, *Disarmament: U.N. Meet Will Test Nuclear Commitments, Groups Say*, INTER PRESS SERV., Apr. 3, 1997 (developing countries outraged by nuclear testing are now pushing for "nuclear elimination").

27. Presently, the promise of international financial transfers has been the only major inducement available to secure the participation of most developing countries in most Multilateral Environmental Agreements. See William Wilson, *Environmental Law as Development Assistance*, 22 ENVTL. L. 953, 966 (1992) (discussing the use of development assistance to developing countries to secure environmental cooperation); *Revisiting Rio*, J. COM., June 18, 1997, at 6A (arguing that the pervasive linking of development assistance to developing countries to environmental reforms has been ineffective). See also John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 911-16 (1991) (noting that technology transfers play a supplemental role in inducing developing countries to accept Multilateral Environmental Agreements).

28. Under the old GATT system (see *supra* note 7 for an explanation of GATT as prior trade system), members had the option of participating in several specialized but important trade arrangements. Jackson, *supra* note 12, at 1227, 1271. As a result of the Uruguay Round,

global environmental agreements into the framework of the WTO would therefore ensure the adherence of the 133 member countries that wish to maintain the significant benefits that membership otherwise provides.

Because of their recognition of the significance of "losing the battle" at the WTO, developing countries have been steadfast about keeping serious environmental issues out of the WTO. Working through a specialized WTO committee established to deal with trade and environmental issues, the Committee on Trade and the Environment (CTE), these countries have worked diligently and successfully to keep the WTO's agenda free of significant environmental initiatives.<sup>29</sup>

As a result of this and other frustrations<sup>30</sup> at the WTO, many

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membership in the WTO became largely an "all or nothing" proposition. Echols, *supra* note 12; Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 358 (1995); and David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 18 (1995). The Agreement Establishing The World Trade Organization states, "The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, *binding on all Members.*" Agreement Establishing the World Trade Organization, *supra* note 18, art. II, para. 2 (emphasis added). The exceptions to the "all or nothing" character of WTO membership are several highly sector specific "Plurilateral Agreements," which are only binding on those members who have accepted the agreements. *Id.* at para. 3. See Final Act, *supra* note 7. The Plurilateral agreements include the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Multilateral Environmental Agreement Agreement. *Id.*

29. See Adrienne Fox, *The Next Big Battle Over Trade*, INVESTOR'S BUS. DAILY, Dec. 19, 1996, at A1 (explaining that developing countries had "banded together at the WTO to block most of the green agenda," and that these countries were pleased by the failure of the WTO Committee on Trade and the Environment to promote an environmental mission for the organization). For further press accounts documenting developing country opposition to WTO environmental initiatives and the success of that opposition, see also *Green Activist, Sweden Slam WTO on Environmental Foot-dragging*, AGENCE FR. PRESSE, Dec. 10, 1996; and Richard Lawrence, *Clinton Pressed to Revive Free-Trade Initiatives: APEC, WTO Officials Urge Strong Message*, J. COM., Oct. 31, 1996, at 2A.

30. Also disappointing environmentalists, (see *supra* note 29) existing GATT treaty provisions have been interpreted by WTO adjudicative bodies, (see *infra* notes 44-49 and accompanying text (discussing adjudicative bodies)), as not allowing unilateral trade restrictions whose purpose is to protect the offshore environment. See Dunoff, *supra* note 6, at 1051-58. See also Cuccia, *supra* note 18, at 489; and Wold, *supra* note 15, at 845. For my own discussion of the problems with allowing nations to remedy offshore environmental infractions by unilaterally imposing restrictions on the import of foreign goods, see Strauss, *supra* note 9.

The so-called Tuna-Dolphin disputes between the United States and Mexico and the United States and the European Union resulted in the two primary WTO panel decisions dealing with whether states can unilaterally restrict trade to protect offshore environmental resources. These disputes centered around whether the United States could restrict the

environmentalists have concluded that the organization is intrinsically unfriendly to environmental concerns.<sup>31</sup> In response, some American environmentalists argue that the United States should leave the organization.<sup>32</sup> Others argue that environmental regulation should be left to other organizations.<sup>33</sup> Giving primary responsibility for environmental regulation to other organizations whose mandates are primarily environmental makes sense for a variety of reasons. For the reasons I have stated, however, such responsibilities should be constitutionally coordinated with the WTO's negotiation process. It is worth keeping in mind that the fierceness of the opposition to allowing the WTO to become a forum for

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import of foreign tuna that were caught in ways that endangered large numbers of dolphins. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991); General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, 848-49 (June 1994). The panel opinions in both the Mexican and EU cases differed only slightly. Both panels concluded that because the dolphins to be protected were outside of U.S. jurisdiction, the restrictions were in conflict with the GATT obligations of the United States. *Id.* Most recently, a WTO panel similarly ruled that U.S. legislation restricting the import of foreign shrimp is contrary to U.S. obligations under the GATT. The shrimp targeted by the challenged U.S. legislation are caught outside U.S. waters in ways that kill a large number of endangered sea turtles. See GATT Dispute Panel Report on U.S. Complaint Concerning Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998).

For other major environmentally unfavorable rulings by WTO dispute resolution bodies, see Report of the 1997 Panel on EC Measures Concerning Meat and Meat Products (*Hormones*), WT/OS26/R/USA, Aug. 18, 1997; and WTO Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, 35 I.L.M. 274. For a more detailed discussion of several of the key GATT decisions relating to environmental measures, see generally, ESTY, *supra* note 6, at 265-74 (providing an overview of GATT cases relating to the environment); Cynthia M. Maas, *Should the WTO Expand GATT Article XX: An Analysis of United States—Standards for Reformulated and Conventional Gasoline*, 5 MINN. J. GLOBAL TRADE 415 (1996).

31. See *supra* note 19.

32. Individuals and environmental groups have advocated U.S. withdrawal from the WTO. See Alan Kovski, *U.S. Appeals WTO Gasoline Ruling; Critics Doubt Prospects*, OIL DAILY, Feb. 22, 1996, at 3. See also *U.S. Coalition Decries WTO Gasoline Finding*, REUTERS FINANCIAL SERVICE, Feb. 21, 1996 (Lori Wallach, of Public Citizen, proclaiming “[w]hat the U.S. needs to do is just get out of the WTO. . .”).

33. Commentators have stated that even if environmentally friendly reforms were instituted, the WTO would still not be an appropriate forum for addressing global environmental issues. See Dunoff, *supra* note 6, at 1066; Peter Gill, *New Green View Needed to Save Trade-Study-Trade and Exporting*, AUSTL. FINANCIAL REV., Dec. 21, 1994, at P23 (reviewing a paper by Jane Drake-Brockman and Professor Kym Anderson that acknowledged the possible need for a global environmental organization); see also Alberto Bernabe-Riefkohl, *To Dream the Impossible Dream: Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT’L L. & COM. REG. 205 (1995).

global environmental regulation is not a function of the organization's limitations as a potential forum for global environmental regulation, but rather it is likely strength. Given the relative influence of both the environmental movement and its adversaries, winning the battle to create globalized environmental production standards will not be easy wherever it is fought. The rewards, however, of winning the WTO prize are likely to be commensurate with the effort.

### III. UTILIZING THE WORLD TRADE ORGANIZATION TO ADMINISTER AND ENFORCE GLOBAL ENVIRONMENTAL AGREEMENTS

In addition to its ability to gain widespread accession to global environmental agreements, the WTO is uniquely capable of ensuring that states comply with any obligations thus incurred. To fully appreciate this advantage requires an understanding of the general limitations of the international system. As David Hodas's contribution to this symposium has made clear, enforcing compliance with domestic environmental law is very problematic and demanding of creative solutions.<sup>34</sup> I am sure he would agree that the difficulties of securing compliance are, if anything, even more daunting internationally.

The classic problem of compelling international compliance centers on the lack of centralized adjudication and enforcement mechanisms similar to those the courts and national regulatory bureaucracies offer within the domestic system. Professor Richard Falk identified the adjudication problem in his classic 1964 article, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*.<sup>35</sup>

Among the most serious deficiencies in international law is the frequent absence of an assured procedure for the identification of a violation . . . . The status of controverted behavior as legal or illegal is quite problematical, . . . because no central institutions exist to make judgments that will be treated as authoritative by states . . . . The consequence is that the international system frequently lacks the means to determine definitely that certain behavior constitutes a violation of the law . . . .

This problem has deep, as well as obvious consequences. The obvious consequence is a conclusion that, since there is no assured way to identify what is forbidden, everything is permitted. For how can international law claim to be a system of restraint if it lacks a means to identify transgressions?<sup>36</sup>

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34. See generally David Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1 (1998).

35. Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249-50 (1964).

36. Falk's indictment of the decentralized nature of the international dispute system is not absolute. *Id.* at 250. He goes onto explain:

While the lack of international adjudicative machinery clearly constitutes a significant impediment to compliance, as Falk implies, the international system does occasionally have limited capabilities to adjudicate select disputes. For example, the International Court of Justice has the capacity to decide certain disputes between states.<sup>37</sup>

Even at those relatively rare times when the system is institutionally

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This question, far from suggesting the irrelevance of international law, points toward a better understanding of its function and purpose. For, although rules of restraint are the core of the system, their influence is often realized by a combination of self-restraint and reconciliation. A state bureaucracy refrains, under routine circumstances, from violating rules and approaches them in a spirit of impartiality. Once it is alleged that restraints have been broken, the extent of adherence to applicable rules has a great bearing upon the response of the complaining party. Therefore, the degree and manner of violation may be more crucial than the fact of violation. The possibility of degrees of violation must be introduced explicitly into international legal theory. There is a need for an image of compliance and violation that draws inspiration from the idea of a spectrum or a prism, rather than insists upon a rigid dichotomy between legal or illegal conduct.

*Id.* (citations omitted).

37. The United Nations Charter describes the International Court of Justice as “the principal judicial organ of the United Nations.” See U.N. CHARTER, art. 92. Under Article 36 of its statute, the International Court of Justice is competent to hear disputes by special *ad hoc* agreement between disputing nations or as mandated by terms in specific treaties referring disputes to the Court. The Court is also empowered under the so-called optional clause of Article 36 to exercise jurisdiction over a state, who pursuant to a declaration delivered to the Court has generally submitted to the jurisdiction of the Court, subject to any limitations included in its declaration as long as the applicant party pursuant to its declaration could itself also be subject to such jurisdiction. See STAT. INT. CT. OF JUST., art. 36 secs 2, 5.

The vast majority of disputes between states never find their way to the International Court of Justice. Most are resolved by diplomatic means. Many are never resolved. Some international disputes are referred to arbitral tribunals that are established by the parties on an *ad hoc* basis to hear particular disputes. Pursuant to various treaties, other disputes are referred to more specialized international tribunals. See, e.g., Convention on the Law of the Sea, Dec. 10, 1982, arts. 186, 187, Annex VI, 21 I.L.M. 1261; Intergovernmental Conference on the Dumping of Wastes at Sea: Final Documents, Nov. 13, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 138 (1977), 11 I.L.M. 1294 (entered into force Aug. 30, 1975); see also Final Act of the European Energy Charter Conference, Dec. 12, 1994, 33 I.L.M. 373, 380 (1995); International Coffee Agreement, June 30, 1983, art. 58, T.I.A.S. NO. 11095, at 62-3 (entered into force Sept. 11, 1985).

In the human rights area specifically, there are important specialized tribunals with the capacity to decide cases. These include the European Court of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 1.; Organization of American States: Statute of Inter-American Court of Human Rights, May 1980, 19 I.L.M. 634.

capable of authoritatively identifying infractions, a secondary hurdle to securing state compliance with international law exists. The international system usually remains incapable of taking remedial action against recalcitrant parties.<sup>38</sup> While the inability of most adjudicative (as well as other international bodies) to directly enforce compliance with their decisions is less detrimental<sup>39</sup> than many people assume,<sup>40</sup> it nevertheless

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38. The International Court, for example, has no mechanism for directly enforcing its decisions. The United Nations Security Council is legally empowered to enforce the Court's decisions under Article 94. See U.N. CHARTER, art. 94. The Council has, however, never utilized this power. See Jonathan I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855, 860 (1987). Other international dispute resolution institutions, likewise have no ability to directly compel parties to comply with their decisions. See *supra* note 37 (discussing other international dispute resolution institutions). For a discussion of enforcement problems typically faced by international tribunals, see generally R.P. ANAND, *STUDIES IN INTERNATIONAL ADJUDICATION* (1969).

39. In actual fact, states quite often do follow international law, despite the frequent absence of the types of formal enforcement mechanisms found in domestic law. This observation was perhaps most famously made by Louis Henkin:

Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*. Every day nations respect the borders of other nations, treat foreign diplomats and citizens and property as required by law, observe thousands of treaties with more than a hundred countries.

LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (1979)(emphasis in original).

The force of international opinion and the natural inclination of state bureaucracies to follow rules are factors often pointed to by international scholars as explaining why states often times do comply with international law.

40. The 19th century thinker John Austin is most often associated with the school of thought that holds that international law's usual lack of traditional enforcement mechanisms is so significant as to be fatal to its status as law:

Laws properly so called are a species of *commands*. But, being a *command*, every law properly so called flows from a *determinate* source . . . . [W]henever a *command* is expressed or intimated, one party signifies a wish that another shall do or forbear: and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded . . . . [E]very sanction properly so called is an eventual evil *annexed to a command* . . . . And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations,

remains a very real limitation of the international system.<sup>41</sup> The WTO, however, is unusual in that it has evolved both highly developed adjudicative and enforcement mechanisms.<sup>42</sup> Resort to this body to ensure compliance with international environmental agreements would, therefore, uniquely allow for both compliance hurdles to be overcome.

The WTO's adjudicative mechanisms are established in several key provisions of the "Dispute Settlement Understanding" that arose out of the *Uruguay Round Agreements*.<sup>43</sup> The Dispute Settlement Understanding

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or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133, 201 (1832) (Berlin et al. eds., 1954).

41. Compliance, for example, with the decisions of the International Court of Justice has been mixed. See Gary L. Scott et al., *Recent Activity Before the International Court of Justice: Trend or Cycle?*, 3 ILSA J. INT'L & COMP. L. 1, 10 (1996) (reporting that of the cases reviewed between 1963 and 1985, a significant number were flaunted by the losing party); and EDWARD MCWHINNEY, *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW* 99 (1987) (observing that the record of the Court in cases where the responding party was compelled to accept its jurisdiction under the optional clause of Article 36 "is a series of denials, revocations, or reservations of jurisdiction, nonappearances before the court, and refusals to comply with court directives."). For a discussion of Article 36, see *supra* note 37. See also Heidi K. Hubbard, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 173-78 (1985); David M. Reilly & Sarita Ordoñez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435, 448 (1996). The most notorious example in recent memory of the inability of the court to enforce compliance with its decisions was the case of *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27, 1986). The United States contested the jurisdiction of the court to adjudicate claims by Nicaragua alleging U.S. responsibility for illegally mining a port as well as engaging in other illicit activities. After the court accepted jurisdiction, the United States refused to appear before it to argue on the merits. See STATEMENT OF LEGAL ADVISOR OF STATE DEPARTMENT, *Abraham D. Sofaer, to Senate Foreign Relations Committee*, Dec. 4, 1985, 86 Dep't. St. Bull. 67, 70-71 (No. 2106, Jan 1986). For other instances of nonappearance, see Stanimir A. Alexandrov, *Non-Appearance Before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41(1995); Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57, 67 (1987).

42. The effectiveness of international adjudicatory institutions other than the International Court of Justice are also limited by compliance problems. See generally CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* (1987) (discussing the development of various international adjudicatory bodies including the European and American courts of human rights, the European Court of Justice, and special tribunals); and COMPLIANCE WITH JUDGEMENTS OF INTERNATIONAL COURTS 87, 110 (M. K. Bulterman & M. Kuijer eds., 1996).

43. Final Act, *supra* note 7, at 1125-26. See generally *supra* note 7 for an explanation of the Uruguay Round.

specifies that parties to a dispute must first attempt to resolve their differences through consultations with each other.<sup>44</sup> If unsuccessful, and if both parties agree, they can request good offices conciliation or mediation from the Director General of the World Trade Organization.<sup>45</sup> If a settlement continues to be illusive, the complainant can request a three member panel to adjudicate the dispute.<sup>46</sup> The losing party may appeal issues of law to a permanent appellate body.<sup>47</sup> Once the adjudication process has run its course, a final decision identifying whether or not an infraction has occurred becomes binding when adopted by the membership of the WTO. This is now automatic unless all members, including the winning party, agree that it should not be adopted (a most unlikely possibility).<sup>48</sup> After a decision, the losing party is required to comply with the decision or, in the alternative, offer compensation.<sup>49</sup>

Once the WTO authoritatively identifies an infraction, the second hurdle to international compliance—the problem of enforcement—is also likely to be overcome by resorting to the WTO's dispute resolution system. In the first place, because the continuing integrity of the international trading order depends upon the willingness of countries to abide by WTO determinations, voluntary compliance is likely to be much higher than if another body was used to adjudicate environmental disputes. Even under the older and much weaker GATT system,<sup>50</sup> the vast majority of panel decisions were honored.<sup>51</sup>

To the extent that a commitment to the multilateral trading system alone, is not sufficient to ensure compliance, the WTO employs a uniquely powerful system of sanctions which could be used to enforce international environmental standards. The Dispute Settlement Understanding provides that if a party is judged not to be in compliance with WTO rules, and does not remedy the situation or pay compensation to the winning party, the winning party can seek permission from the WTO to withdraw trade

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44. *Id.* art. 4.

45. *Id.* art. 5

46. *Id.* art. 6.

47. *Id.* art. 7.

48. Final Act, *supra* note 7, art. 5, para. 4 (relating to DSB reports); *id.* art. 17, para. 14 (pertaining to appellate review).

49. *Id.* art. 21.

50. See *supra* note 7 for an explanation of the distinction between the GATT and WTO systems.

51. See Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 10 (1993). Of 207 "legally valid complaints" arising between 1948 and 1989, 67 resulted in rulings. Of these, 90% "ended with a positive outcome." *Id.* More specifically, "just over half the violation rulings achieved full compliance directly, two-thirds resulted in full compliance somehow, and nine out of ten produced a worthwhile positive result." *Id.*

concessions previously given to the loser.<sup>52</sup> These can be very costly, and can be strategically targeted against specific politically powerful national industries of the recalcitrant parties. Thus, in addition to facing international pressures to comply with environmental treaty obligations, the system is designed so that targeted industries place additional internal pressures on their governments to comply. Because such sanctions are legalized, and therefore deemed legitimate, the loser is unlikely to retaliate in kind, thus averting the potential for a trade war.

One remedial scheme would be to allow countries to pursue claims aimed at redressing the competitive disadvantage that their local industry faces in international trade as a result of lower production costs in countries whose environmental laws do not measure up to WTO requirements.<sup>53</sup> In contrast to most trade disputes where particular tariffs or regulations are alleged to illegally disadvantage a limited number of products from specific countries, failure by a country to adhere to basic international environmental production standards would disadvantage industrial competitors from countries all around the world. Under the present system, each of these countries would have the right to bring an action,<sup>54</sup> and if compliance was not forthcoming, all would have the right to compensation.<sup>55</sup> The force of such broad-based, active, and legally sanctioned opposition would make compliance even more likely than it presently is in traditional trade cases.

#### IV. CONCLUSION

Whether or not the WTO is given primary responsibility for overseeing the negotiation and/or enforcement of global environmental agreements, the inherent connection between many trade and environmental issues is inevitably thrusting the organization into some involvement with the world of international environmental regulation. As I have noted, the need to create a level regulatory playing field upon which international trade can

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52. See Final Act, *supra* note 7, art. 22.

53. For a more complete discussion of the relationship between competitive advantage and lax environmental standards, see *supra* notes 11-14 and accompanying text. Other remedial schemes are also possible. For example, a regulatory approach where a schedule of fines is tied to the severity of the environmental infraction could be implemented.

54. See generally Jackson, *supra* note 12, at 1227, 1253, 1272-73.

55. How compensation should be calculated if such a remedial scheme were to be adopted is a complex and highly technical question that goes beyond the topic of this Article. Many of the same questions that come up in the consideration of implementing countervailing duties in the event of national subsidization currently would have to be considered. See generally JOSEPH E. PATTISON, *ANTIDUMPING AND COUNTERVAILING DUTY LAWS* (1990) (outlining the issues and complexity of determining whether subsidization has occurred and to what extent). For my own discussion of the problem, see generally Strauss, *supra* note 9.

take place converges trade and environmental policy. In addition, as I have also noted, trade rules are also impacted by multilateral environmental agreements as well as unilateral attempts to influence offshore environmental policy.<sup>56</sup> The real question, therefore, is not whether WTO practices must somehow be coordinated with environmental policies, but rather the relative role that the WTO will play in creating and administering environmental policy. My purpose in this Article is to show that there are major advantages to giving the WTO a primary role.

To be clear, I am not proposing precisely how the responsibility for negotiating and enforcing various international environmental agreements should be allocated between the WTO and other international organizations with environmental responsibilities. Nor am I specifying a more general architecture for the structure of the relationship between the WTO and these organizations. I am sure a wide variety of formulas would be workable.<sup>57</sup> My only message is that whatever structure is created, that structure should be designed so that it will take advantage of the WTO's unique negotiating and compliance machinery.

I agree with Alan Miller. We are clearly in a new era, an era where private capital flows are eclipsing government regulation as the dominant force driving the global economy. The challenge for those of us who think about regulatory schemes is, therefore, to creatively engineer our limited regulatory resources so that public benefits may be maximized. In this regard, my intended contribution to this symposium has been to suggest how the very potent resources of the WTO might be channeled so as to help further the well-being of the global environment.

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56. See *supra* text accompanying notes 11-18.

57. As has been suggested, it might even be wise to establish a new global environmental organization with broad oversight powers. See *supra* note 6. My point is that this or any other global environmental organization should be constitutionally connected to the WTO in such a way so as to allow for the WTO's negotiating and enforcement benefits to be taken advantage of.