This article analyzes the politics of supranational dispute resolution, focusing on trade-environment disputes in the context of the European Union (EU) and General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO). The author analyzes how the interaction of political and legal pressures has influenced decision making by the European Court of Justice (ECJ) and by GATT/WTO panels in trade-environment disputes.

THE LIMITS OF JUDICIAL POWER
Trade-Environment Disputes in the GATT/WTO and the EU

R. DANIEL KELEMEN
Rutgers University

Critics of globalization from across the political spectrum are concerned about the impact that supranational institutions will have on national sovereignty. In recent years, most notably at the 1999 WTO conference in Seattle, environmental and consumer advocates have expressed concern that the dispute-resolution bodies associated with regional or global trade institutions such as the GATT, the WTO, the EU, or NAFTA (North American Free Trade Agreement) may strike down important domestic environmental or consumer protection legislation. These critics pose the threat as follows: Nameless, unaccountable international bureaucrats will strike down duly enacted domestic laws in the name of free trade, ruling them to be protectionist nontariff barriers to trade.

This vision of all-powerful supranational courts overturning popular national laws with impunity suggests that supranational courts make rulings with little or no regard for the preferences of national governments. However, a large body of research on the relationship between courts and political officials contravenes this view, suggesting instead that courts are strategic actors

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that may adjust their jurisprudence in reaction to political pressures. Scholars of American courts working from a "positive political theory" perspective pioneered this approach (Eskridge & Ferejohn, 1994; Ferejohn, 1995; Ferejohn & Weingast, 1992a, 1992b; McCubbins, Noll, & Weingast, 1995; Spiller & Gely, 1992). Recently scholars have extended this approach to the ECJ (Cooter & Drexel, 1994; Garrett & Weingast, 1993; Garrett, Kelemen, & Schulz, 1998) and the WTO (Garrett & Smith, 1999).

These scholars' arguments build on variations of the following logic: Courts wish to maintain their legitimacy, a legitimacy founded on their status as the authoritative and independent adjudicators of disputes concerning the law. If elected officials frequently reject or overturn a court's rulings, the court's status as the authoritative adjudicator of disputes is called into question. Therefore courts will avoid making rulings that elected officials frequently reject. However to maintain their reputation for independence, courts must seek to make consistent rulings that uphold the law as established in treaties, constitutions, legislation, or earlier case law. To maintain its legitimacy, a court must seek both to maintain legal consistency and avoid making rulings that elected officials will reject.

The central aim of this article is to analyze how supranational courts attempt to maintain their legitimacy in the face of these two sometimes-conflicting imperatives. In other words, to what extent do political pressures influence the decision making of supranational courts? Under what conditions should we expect supranational courts to bow to political pressures? Under what conditions will they make rulings that go against the interests of powerful states? What strategies do supranational courts use to mitigate the political fallout from controversial rulings?

In the next section, building on a rationalist view of international institutions (Milner, 1998), I derive two hypotheses concerning the politics of supranational dispute resolution and present a framework for analyzing decision making by supranational courts. In the third and fourth sections, I assess these hypotheses by tracing the dynamics of trade-environment dispute resolution in the context of the GATT/WTO and the EU. I examine all the trade-environment cases decided by the GATT/WTO through 1998 and by the ECJ through 1997. By limiting the analysis to lines of cases that focus on trade-environment conflicts, I can hold constant most of the legal principles at issue in the disputes. Meanwhile, the power and interests of the parties involved and the weight of precedents vary between individual cases. Although not every case conforms to the expectations set out in the hypotheses, analysis of the development of trade-environment case law in the GATT/WTO and the EU generally supports the hypotheses.

THE LIMITS OF JUDICIAL POWER

All courts must take into account the political repercussions of their decisions. In the extreme, a court whose jurisprudence grows too far out of step with the preferences of powerful political actors may be abolished. Although such a drastic reaction is highly unlikely, political opponents of a court may react in more tempered ways, for instance, by ignoring, defying, or evading court decisions or by proposing or adopting institutional reforms that weaken a court's position.[1] All such actions reduce a court's legitimacy, as they impugn its status as an authoritative resolver of disputes. Courts face a second threat to their legitimacy. If a court bows to political pressure to avoid sparking an act of political defiance, it may lose legitimacy as a neutral, independent arbiter of disputes. Considering these two sets of pressures suggests two hypotheses regarding judicial decision making.

Politicized adjudication. When states reach an international agreement and establish a supranational court to police compliance with and adjudicate disputes concerning the agreement, they share a common interest in the maintenance of the "rule of law" norm that the court's rulings should be obeyed (Garrett & Weingast, 1993). Although all states benefit from the existence of this "collective good," they may face individual incentives to violate and thus undermine the norm in specific cases. I assume that the more politically costly a particular court ruling is to a government, the more likely the government will defy the ruling in some manner.[2]

When states defy or ignore the judgments of a supranational court, they undermine the court's status as the authoritative voice of the law and resolver of disputes. However, not all potential acts of defiance are equally threatening to a court's legitimacy. The threat posed by a potential act of defiance is a function of the number of defiant states, their economic and political power, and the timing of the defiance. Ceteris paribus, an act of defiance by an economically and politically powerful state poses a greater threat to a supranational court than does a similar act by a weaker state. However, when a disgruntled state, even a very powerful one, is isolated, the threat that its

1. On the use of such tactics against the U.S. Supreme Court, see Gely and Spiller (1992), Rosenberg (1992), and McCloskey (1960). On the European Court of Justice (ECJ), see Garrett, Kelemen, and Schulz (1998).

2. I present this proposition as an assumption rather than a hypothesis because I will not test it in the empirical section of the article. This hypothesis would be difficult to assess empirically because we would be unlikely to observe cases on one range of the independent variable. As I argue below, courts will most often exercise self-restraint and avoid making rulings that would impose costs on states great enough to cause them to disobey the rulings. Also see Garrett and Weingast (1993).

defiance poses to a court's legitimacy is likely to be limited because most significant court-curbing measures require cooperation between states. As the number of states that are likely to oppose a ruling increases, the threat posed by the potential defiance increases. Finally the timing of the potential defiance influences the effects of the first two factors. Specifically if a case is adjudicated at a time when the supranational court is particularly vulnerable, such as when the treaties on which it is based are under renegotiation, then the threat posed by potential defiance is greater. Such occasions give disgruntled states the greatest opportunity to retaliate against courts. Taking these factors together, I derive a hypothesis concerning the impact of political pressures on court rulings.

> *Hypothesis 1 (H1):* The greater the political threat posed by a state's or a group of states' potential defiance, the more likely the court is to adjust its jurisprudence to suit the state's or states' preferred outcome.

Legal consistency. One central element in the legitimacy of a court is its status as an independent arbiter and voice of the law (Burley & Mattli, 1993; Garrett et al., 1998; Stone Sweet, 1999). To maintain its legitimacy as a neutral adjudicator, a court must attempt to maintain legal consistency in its rulings and avoid the appearance of succumbing to political pressure. The constraints imposed by the need to maintain legal consistency will be greatest where treaty requirements, established case law, and general legal norms point clearly in one direction. By contrast, where treaties or legal norms are vague or where precedents are absent or contradictory, the desire to maintain legal consistency imposes less of a constraint. More generally,

> *Hypothesis 2 (H2):* The greater the clarity of treaty requirements, precedents, or legal norms in support of a particular judgment, the greater the likelihood that the court will make that judgment, regardless of political costs.

A framework for analysis. By combining these two hypotheses, I generate a framework with which to analyze likely rulings by supranational courts in trade-environment disputes. Trade-environment disputes typically follow a similar pattern: One or more plaintiffs bring a case before a supranational court arguing that an environmental measure maintained by a state (the defendant) is an illegal nontariff barrier to trade and should be struck down. The defendant argues that its environmental measure does not constitute a nontariff barrier in violation of the relevant trade law and should be allowed to remain in place. The supranational court will consider both political (H1)

Table 1
Predicted Court Rulings in Trade-Environment Disputes

Political Pressure to Uphold (Hypothesis 1)	Legal Pressure to Invalidate (Hypothesis 2)	
	High	Low
High	Not clear. However if court invalidates, then it attempts to appease defendant.	Uphold
Low	Invalidate	Not clear. Court has great latitude.

and legal (H2) pressures in deciding whether to invalidate or uphold the defendant's environmental measure (see Table 1).

Where political pressure on a court to allow the defendant's measure to remain in place (H1) is high and where treaty requirements and precedents (H2) are unclear on the subject (upper right quadrant), a court is likely to uphold the national measure. Conversely where political pressure on a court is low and where treaty requirements and precedents clearly call for invalidating the environmental measure (lower left quadrant), the court is likely to invalidate it. Predicting a court decision in the other two cells is more difficult. Where political pressure is low and the law is unclear (lower right quadrant), courts have the greatest latitude to interpret the treaties and construct new legal principles in accord with their own preferences. Finally cases in which high political pressure to uphold an environmental measure conflicts with high legal pressure to invalidate the measure (upper left quadrant) create the greatest problems for the courts. It is difficult to predict how courts will rule in such cases as they attempt to balance political and legal considerations. However, it is likely that where the courts choose to invalidate a defendant government's environmental measure, the courts will issue a ruling that aims to appease the defendant and thereby mitigate political backlash. Two well-known strategies to appease losers are making rulings that grant partial victories to each side in the dispute and avoiding ruling on particularly controversial issues where possible.

One obvious objection to this schema is that in the absence of a more specific operationalization of the variables driving H1 and H2, my categorization and interpretation of cases may be arbitrary and prone to post hoc rationalization. One might address this concern by developing a quantitative measure of the independent variables. However some of the central variables, such as legal pressure, do not lend themselves to this sort of operation-

alization. Nevertheless in a larger study dealing with more cases, it might be necessary to develop some such measures. In the area of trade-environment disputes, however, the universe of cases is small enough that I can detail the circumstances surrounding each case and let readers assess for themselves whether mine is an accurate categorization.

TRADE-ENVIRONMENT CONFLICTS IN THE GATT/ WTO

This section analyzes the politics of trade-environment dispute resolution in the context of the GATT and the more recent WTO. Established in 1947 and expanded through a number of rounds of negotiation, the GATT has become the world's most important trade agreement, with 133 signatory countries today. The GATT's primary aim is to promote trade liberalization and, to this end, Article III of GATT (known as the "national treatment" requirement) forbids signatories from discriminating against each other's products on the basis of their national origin. However the GATT provides for exceptions to this requirement. Measures that have a discriminatory impact on trade can be justified on a variety of public policy–related grounds, including the protection of human, animal, or plant life and health (Article XX[b]) and the conservation of exhaustible natural resources (Article XX[g]). Such measures can be justified only if they do not constitute arbitrary or unjustifiable discrimination and do not amount to disguised trade barriers.

This brief review of the most pertinent GATT articles makes it clear how trade disputes could arise concerning environmental regulations. A government may enact an environmental regulation that in some way distorts trade to the disadvantage of one or more other GATT signatories but claim that the distortion is justified under Article XX. A disadvantaged government may, however, claim that the "environmental" regulation in question actually serves as a protectionist, nontariff barrier to trade and should not be justified under the Article XX exemption. The GATT and subsequently the WTO provided for systems of dispute resolution to settle such disagreements.

The systems of dispute resolution have become increasingly rigid over time. In the 1950s, a GATT panel system emerged in which dispute settlement panels, composed of 3 to 5 people, could be formed with the agreement of both parties to a dispute. During the 1970s and 1980s, this panel system underwent a process of "judicialization" in which lawyers replaced diplomats, the language used by disputants and panels became more legalistic, and panels established a consistent case law (Hudec, 1992, 1993; Stone Sweet, 1997). Whereas dispute settlement under GATT-1947 became increasingly

judicialized, defendants maintained the right to block the establishment of a dispute settlement panel or the adoption of a panel report.

The 1994 final act of the Uruguay round of negotiations established the WTO, which superseded the existing GATT structure. The WTO provided for a new set of compulsory dispute resolution procedures to be supervised by a new dispute settlement body (Hoekman & Kostecki, 1995). Under the new procedures, panels are formed immediately upon the receipt of a complaint from an aggrieved government and defendant governments can no longer block the establishment of a dispute settlement panel or the adoption of a panel report. The new system also provides for a standing, seven-member appellate body before which states can appeal panel decisions. Thus under WTO dispute settlement procedure, the appellate body is the ultimate arbiter of disputes. Finally the new system establishes a number of new rules concerning deadlines for the legal procedures and tools that may be used to enforce panel decisions (Hoekman & Kostecki, 1995; Jackson, 1994; Stone Sweet, 1997).

EARLY CASES

The potential impact of the GATT on domestic environmental regulations attracted almost no attention from the public or policy makers during the first four decades of the GATT's existence. During this period, GATT dispute resolution panels decided only three cases that involved trade-environment conflicts, one in 1982, one in 1987, and one in 1988 (Vogel, 1995). Two of the cases involved disputes between Canada and the United States over fisheries, and the third involved a challenge brought by Canada, the European Community, and Mexico against excise provisions of U.S. superfund legislation. In each instance, the panel's ruling followed a similar set of principles: States could maintain any environmental regulations they chose as long as they applied equally to imported and domestic goods. These cases were important in that they established legal principles that could be referred to in later decisions. However because they attracted so little attention, they did not test the willingness of GATT panels to make highly unpopular rulings.

Tuna-Dolphin I. The relationship between free trade and environmental protection came into the spotlight in 1991 with the tuna-dolphin controversy between Mexico and the United States. The origins of this dispute dated back to the early 1970s when there was a public outcry in the United States over the millions of dolphins suffocating in the purse seine nets used by U.S. tuna fishing fleets. Public outrage encouraged the passage of the Marine Mammal

Protection Act (MMPA) in 1972, which included provisions establishing annual limits on the number of incidental dolphin killings by tuna fishermen.

In the 1970s and 1980s, as U.S. fleets improved their fishing practices or relocated to waters where dolphins were not at risk, Mexican tuna fleets, which did not employ the same dolphin protection techniques, emerged as the primary killers of dolphins in the Eastern Tropical Pacific (Vogel, 1995). When Congress reauthorized the MMPA in 1988, it added a specific limit on foreign tuna fleets: If dolphin fatalities caused by a country's tuna fleet exceeded 1.25 times the rate of the U.S. fleet, that country's tuna exports would be banned from the United States. The U.S. government did not move to enforce this provision immediately, but U.S. officials did urge the Mexican government to reduce dolphin fatalities. The Mexican government altered its tuna regulations and significantly reduced dolphin fatalities in the ensuing years.

However, Mexican efforts did not satisfy U.S. environmentalists. The Earth Island Institute and other environmental organizations organized a boycott of canned tuna in 1988. In response, major U.S. canned tuna producers announced that they would no longer sell tuna caught using techniques hazardous to dolphins. Congress enacted tuna-labeling legislation to ensure that producers using "dolphin-safe" labels could actually demonstrate that their tuna was dolphin safe. Environmentalists did not stop with these legislative victories. In 1990, the Earth Island Institute brought a case before a U.S. district court demanding that the Department of Commerce enforce the MMPA's restrictions on tuna imports. The court ruled in favor of Earth Island. The decision had huge repercussions on the tuna industry. First it led to a ban on imports of tuna from Mexico, Venezuela, and Vanuatu because their fishing practices violated the MMPA. Next it led to a secondary ban on imports from Costa Rica, France, Italy, Japan, and Panama because they imported tuna from the three countries that were directly banned.

Mexico initiated a case against the United States before the GATT in February 1991, charging that the U.S. embargo and labeling law violated the GATT. Australia, Canada, the EU, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela supported the Mexican case. The Mexican government argued first that the embargo violated GATT's national treatment provisions by discriminating against Mexican tuna exports and second that it could not be justified under the Article XX exceptions. Also Mexico charged that the U.S. dolphin-safe labeling requirement violated GATT rules concerning national marks of origin.

In legal terms, this case differed from the previous trade-environment cases in a few important respects. First whereas previous cases had focused

on attempts to conserve national resources, this case concerned an attempt to preserve a species globally. Second it was the first case to question the legality of a state's use of trade restrictions to influence the environmental policies of other states. Third and most important, unlike previous cases the *Tuna-Dolphin I* case attracted a great deal of public attention because of the popularity of dolphins (Vogel, 1995).

In August 1991, the panel issued its decision.[3] The panel upheld the dolphin-safe labeling regulation but ruled that the U.S. trade embargo violated the GATT. The panel reasoned as follows: First the embargo violated the equal national treatment provision of GATT, Article III, because it restricted imports on the basis of how they were produced, even if there was no discernable difference in the end product (the tuna). Second the embargo could not be justified under the Article XX exceptions because of its "extrajurisdictional" focus. A national measure that violated Article III could be justified under Article XX only if it targeted domestic production and consumption patterns. The U.S. tuna embargo regulation, by contrast, aimed at regulating practices outside the United States (Vogel, 1995).

The decision attracted widespread attention in the United States, where environmentalists pointed to the decision as evidence that the GATT would imperil efforts to protect the environment. Congress denounced the ruling and made it clear that the GATT should be changed to accommodate U.S. environmental laws rather than vice versa. The administration realized that the public outcry regarding the decision might lead Congress to vote against ratification of both NAFTA and the latest round of the GATT. The administration pressured the Mexican government not to request the GATT General Council to officially adopt the panel ruling, because without official adoption, the United States would not be obliged to enforce the decision. Fearful of jeopardizing the chances that the U.S. Congress would ratify NAFTA, the Mexican government conceded to U.S. pressure and dropped the case. In 1992 the United States, Mexico, and eight other nations signed an agreement to end the use of net fishing techniques that threatened dolphins by 1994. Congress also passed the International Dolphin Conservation Act, which called on the Secretary of State to negotiate an international agreement to end the use of purse seine nets. This move to a multilateral approach was consistent with the suggestions made by the GATT panel on how to approach dolphin conservation in a manner consistent with free trade principles.

I categorize the *Tuna-Dolphin I* case in the lower right-hand quadrant of Table 1. Because the case addressed new, untested legal issues, legal pres-

3. *United States—Restrictions on Imports of Tuna*, DS21/R, circulated on September 3, 1991.

sures (H2) to invalidate were low and do not explain why the panel chose to invalidate the U.S. law. Given the strong political backlash that followed the decision in the United States, one might argue that political pressure on the panel to uphold the law (H1) was high and that the case should be categorized in the upper-right hand quadrant of Table 1. From this perspective, it would appear that the panel made an impolitic decision that contradicts the predictions of the analytic schema presented in Table 1. However, there are two reasons to believe that, ex ante, the political pressures on the panel to uphold the U.S. law appeared low. First, given that previous trade-environment dispute rulings had attracted so little public attention, it is likely that the GATT panel underestimated the political consequences its decision would have in the United States. Had the GATT panel anticipated the full extent of the U.S. political backlash, it might have moderated its decision in some way so as to appease U.S. environmentalists. Second the United States was completely isolated on the tuna-dolphin issue. No other GATT signatory supported the U.S. position. Many governments, including powerful GATT signatories such as Japan and the EU, actively announced their support of the Mexican position. Thus even to the extent the panel could have anticipated backlash by the United States, the panel could rest assured that a disgruntled United States would not be able to mount a multilateral attack.

Tuna-Dolphin II. Although the United States and Mexico would have been happy to see the tuna-dolphin issue sink out of public view, the Europeans put this issue back before GATT in June 1992. Because the *Tuna-Dolphin I* decision was never formally adopted by the GATT council, the United States was not required to repeal its tuna embargo. Although the United States, Mexico, and other states had agreed to phase out the use of purse seine nets gradually, in the interim, the U.S. embargo remained in place. The embargo blocked tuna imports not only from states that failed to meet U.S. dolphin protection standards but also from states that imported tuna from such states. As a result of this "secondary embargo," tuna from Spain and Italy continued to be banned in the United States.

In response, the EU brought a second case, *Tuna-Dolphin II*, against the United States. The *Tuna-Dolphin II* case put the GATT panel in a difficult position. On one hand, the political pressure to uphold the U.S. law was high. The panel was aware of the anti-GATT sentiment that the *Tuna-Dolphin I* decision had sparked in the United States and recognized that ruling against the United States again might attract renewed attacks on the GATT. On the other hand, the clear and recent precedent established in *Tuna-Dolphin I* called for a second ruling against the United States. The case brought by the Europeans was nearly identical to that brought a year before by the Mexican

government. Had the second panel rejected the EU's complaint and ruled in favor of the United States, it would have been viewed as succumbing to the public outcry in the United States. Such a clear instance of politically motivated jurisprudence would have damaged the legitimacy of GATT panels as independent arbiters of the law. Recalling the hypotheses presented above, the *Tuna-Dolphin II* case presented the GATT panel with a conflict of H1 and H2 (upper left quadrant of Table 1).

The *Tuna-Dolphin II* panel issued its decision in June 1994.[4] On balance, the panel sided with the weight of the clear precedent established in *Tuna-Dolphin I* and ruled, once again, against the United States regarding the tuna embargo. However the panel in *Tuna-Dolphin II* did make an effort to appease U.S. environmentalists by making an important concession to environmental interests on a point of principle. The *Tuna-Dolphin I* panel had held that trade restrictions with an extrajurisdictional focus could not be justified under the GATT. In other words, states could not use trade restrictions in an effort to influence environmental policies outside their borders. By contrast, the *Tuna-Dolphin II* panel held that states could use trade restrictions to pursue environmental goals outside of their jurisdiction if this were done pursuant to an international environmental agreement (Vogel, 1995). Later the United States blocked adoption of the panel report, and the decision, like the decision in *Tuna-Dolphin I*, never went into force.

U.S. Automobile Taxes. In 1993, the EU brought a legal challenge against the United States before the GATT, arguing that three U.S. automobile tax schemes discriminated against European automobile manufacturers. The first was a tax on "gas guzzlers," the second was a tax levied on luxury cars, and the third and most significant were the Corporate Average Fuel Economy (CAFE) standards. Under the CAFE policy, the sales-weighted average of an auto manufacturer's entire line of passenger cars must meet or surpass a federally established fuel economy standard or the manufacturer is subject to penalties. The CAFE policy distinguishes between domestic fleets, defined as vehicles with 75% or more U.S. and/or Canadian content, and import fleets, defined as those that fall below the 75% threshold. If the same manufacturer has both domestic and import fleets, each fleet must comply with the CAFE standard separately.

The EU argued that all three of these measures had discriminatory effects and could not be justified under GATT's environmental exceptions clauses (Articles XX[g] or [d]). First the EU pointed out that whereas European carmakers made up only 4% of the U.S. car market, they had been forced to

4. *United States—Restrictions on Imports of Tuna*, DS29/R, circulated on June 16, 1994.

pay 80% of both the gas guzzler and luxury taxes because they exported only top-of-the-line cars to the United States. Similarly the EU noted that European carmakers had been forced to pay 100% of the CAFE penalties.

U.S. carmakers were able to avoid CAFE penalties because they sold full lines of passenger cars. Under the CAFE approach, large fuel-inefficient U.S. cars were averaged with smaller, more efficient models in a manufacturer's fleet, bringing the fleet average below the federal standard. By contrast, European carmakers, such as Mercedes and BMW, exported only luxury cars to the United States and had no small, fuel-efficient cars to bring down their fleet's average fuel efficiency for CAFE purposes. As a result, European carmakers were forced to pay substantial fines, whereas U.S. manufacturers paid none. These taxes and penalties led to increases in prices of European cars on the American market and thus gave an unfair advantage to U.S.-made automobiles.

The threat posed by the potential political backlash in the United States was particularly high in this case. The GATT panel considered the case during a pivotal period for world trade. The Uruguay round of GATT negotiations was underway, and the need for U.S. Congressional ratification of any resulting amendments to the GATT loomed in the near future. Environmentalists were among the most vocal opponents of ratification. The GATT panel understood that ruling the United States' CAFE legislation to be illegal would easily stir up a public outcry that could jeopardize Congressional ratification of the Uruguay round agreement. In an article published in June, while the case was pending, *The Washington Post* reported that "defeat would have a jarring, double-barreled political impact in Washington" and would provide "potent ammunition for a political attack on the global trading system itself" ("Trade case could endanger," 1994, p. F1). Following the logic of H1, in these circumstances, the panel's judgment would be likely to be swayed by fear of sparking a backlash in the United States.

Moreover, in the *U.S. Automobile Taxes* case, the Europeans were alone in their opposition to the U.S. regulation. Whereas GATT signatories were nearly unanimous in their opposition to the U.S. position in *Tuna-Dolphin I* and *Tuna-Dolphin II*, in this case, the Europeans had little support. The other major player in the automobile trade, Japan, did not oppose U.S. CAFE standards because it had no difficulties in meeting them (Vogel, 1995). Rather, like the American carmakers, they benefited to the extent that European carmakers were disadvantaged in the U.S. market by the law.

Most observers expected the panel to rule against the United States given the legal merits of the case (Vogel, 1995). Luxury car taxes, gas guzzler taxes, and CAFE standards certainly had a discriminatory impact on European automobile exports, and there were arguably less trade-restrictive means by

which the United States might have pursued its regulatory objectives. Nonetheless, given that the case raised new legal questions differing from those that had been addressed in earlier trade-environment cases, the panel was not highly constrained by precedent. Legal pressures (H2) on the GATT panel were not particularly high in this case. Given the high political pressure to uphold the law and the low legal pressure to invalidate, the case falls in the upper right quadrant of Table 1.

The *U.S. Automobile Taxes* panel issued its ruling on September 29, 1994, just before the U.S. Congress was to vote on the Uruguay round agreement.[5] The panel ruled in favor of the United States on most aspects of the case. The panel ruled that the luxury tax and the gas-guzzler tax were consistent with the GATT (Article III:2) and could remain in place because they did not discriminate between products on the basis of their country of origin. However the panel's ruling regarding CAFE standards was more nuanced. The panel distinguished between two aspects of the CAFE regulation. First it ruled that CAFE's separate foreign fleet accounting requirement discriminated against foreign cars (violating GATT's Article III:4 national treatment provision) and could not be justified under the Article XX(g) environmental exception clause. The panel noted that "separate foreign fleet accounting primarily served to inhibit imports of small cars. This did not contribute directly to fuel conservation in the United States" (*U.S. Automobile Taxes*, para. 5.60). The panel also ruled that the fleet-averaging approach relied on in CAFE violated the national treatment requirement. However the panel did not make a ruling on whether the fleet-averaging method might nonetheless be justified under the Article XX(g) environmental exception clause. The panel stepped delicately around this sensitive question, implying that the fleet-averaging method might be justified on environmental grounds but stopping short of actually ruling one way or another (see, in particular, paragraphs 5.63-5.66).

Because it upheld U.S. environmental regulations in nearly all respects, the panel decision had the effect of silencing environmental critics of the GATT in the United States. Public Citizen, a well-known nongovernmental organization (NGO) critical of the GATT made an initial statement denouncing the ruling but withdrew the statement after staff attorneys had read the decision in its entirety ("Trade panel upholds U.S.," 1994). *The Washington Post* called the ruling "a badly needed boost for the administration's trade policy" ("Trade panel upholds U.S.," 1994, p. D1). U.S. trade representative Mickey Kantor immediately proclaimed the ruling a victory for the United States, stating, "This decision is a recognition that our government—and

5. *United States—Taxes on Automobiles*, DS31/R, circulated November 10, 1994 (unadopted).

those of other countries—have latitude to legislate and regulate in these crucial areas [of environmental and consumer safety] as long as they are not discriminating between domestic and imported products" ("Trade panel upholds U.S.," 1994, p. D1; See also "GATT panel supports U.S.," 1994).

By ruling for the United States on most aspects of the case, the GATT panel avoided a potential catastrophe in the U.S. Senate. Coming on the heels of the two tuna-dolphin cases, another attack on a U.S. environmental law, particularly one so significant as the Clean Air Act, might have put ratification of the Uruguay round agreements at risk. Instead, by ruling for the United States on most aspects of the *U.S. Automobile Taxes* case, the GATT gained at least a temporary reprieve from its critics.

U.S. Gasoline. In the *U.S. Gasoline* case, Venezuela (later joined by Brazil) argued that a U.S. regulation concerning reformulated gasoline discriminated against their refiners. The Environmental Protection Agency (EPA) issued the regulation, commonly referred to as the gas rule, in December 1993 to implement portions of the 1990 Clean Air Act Amendments. The regulations mandated the sale of special, cleaner, "reformulated" gasoline in designated cities. Venezuela's complaint concerned the fact that the regulations placed different requirements on U.S. and foreign refiners and that these differences disadvantaged Venezuelan refiners.

In essence the regulations required refiners to gradually decrease the level of certain pollutants in their gasoline. U.S. refiners were allowed to use their actual 1990 level as a baseline and to make reductions on a percentage basis. Foreign refiners were required to use a baseline tied to the U.S. average level from 1990. By requiring foreign refiners to use the U.S. average rather than their own 1990 levels as a baseline, the regulations set a higher baseline for foreign refiners than the one that many U.S. refiners had to employ. The EPA justified this approach on the grounds that few foreign refiners had collected the data necessary to establish their own 1990 baselines.

Venezuela filed a complaint with the GATT in 1993, arguing that the U.S. law violated the GATT's national treatment provision. The White House recognized that if the case came before a dispute resolution panel and was decided against the United States, it could put the prospects for ratification of the Uruguay round at risk. The White House arranged for changes to be made to the rule to eliminate the discriminatory aspects and address Venezuela's complaint. In response, Venezuela withdrew its complaint. However the following year, the U.S. Congress blocked the implementation of the revised rule in an appropriations bill, forcing the EPA to revert to the old rule.

Venezuela resubmitted its complaint to the GATT in August 1994. When the WTO agreement entered into force, Venezuela withdrew its complaint

and resubmitted the case under the new treaty, making it the first case to come before the WTO's Dispute Settlement Body. The Dispute Settlement Body established a new panel to adjudicate the dispute. The panel issued its ruling on January 17, 1996.[6] The United States then appealed the decision to the WTO's Appellate Body.

The political circumstances that prevailed while the WTO Appellate Body considered the *U.S. Gasoline* case differed significantly from those the GATT panel had faced in the *U.S. Automobile Taxes* case. By the time the *U.S. Gasoline* case finally reached the WTO Appellate Body, GATT 1994 had been ratified and the WTO was up and running. The political threat (H1) posed by U.S. defiance was therefore lessened. Second, in *U.S. Gasoline* as in the tuna-dolphin cases, the United States was isolated. In addition to Brazil and Venezuela, the EU and Norway also opposed the U.S. position. The EU and Norway joined the case at the appellate stage, supporting Venezuela and arguing that the U.S. rule was applied as a "disguised restriction on international trade."[7] Legal pressures (H2) on the Appellate Body to rule against the United States were substantial. The U.S. gas rule clearly discriminated against foreign products on the basis of their country of origin, and the U.S. justifications for the rule were tenuous.

The Appellate Body issued its decision on April 22, 1996.[8] First it determined that the U.S. gasoline rule was discriminatory and violated GATT's national treatment provision. Next the Appellate Body held that the gasoline rule did fall within the general scope of the Article XX(g) environmental exception and thus might be permissible. Finally, however, the panel found that the gasoline rule could not be justified because it failed the tests contained in the opening paragraph of Article XX. To qualify as an exemption under Article XX, a regulation could not constitute arbitrary or unjustifiable discrimination and could not serve as a disguised restriction on international trade. The panel deemed the U.S. gas rule failed on both counts: It constituted unjustified discrimination and served as a disguised trade barrier that could not be justified under Article XX. In June 1996, the U.S. government announced that it would propose changes to the regulations to comply with the WTO ruling. In August 1997, the United States announced implementation of the WTO's recommendations.

6. *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, January 29, 1996.

7. World Trade Organization (WTO) Appellate Body, WT/DS2/AB/R, April 29, 1996.

8. *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, April 29, 1996.

Shrimp-Turtle. The shrimp-turtle dispute was remarkably similar to the two tuna-dolphin cases. Just as dolphins were killed during the process of fishing for tuna, so too were sea turtles killed during the harvesting of shrimp. In 1988, acting under the Endangered Species Act, the United States required all U.S. shrimp boats to install turtle exclusion devices (TEDs) to prevent the incidental killing of turtles. In 1989, Congress enacted legislation calling for a ban on shrimp imports from countries that did not make efforts at protecting turtles similar to those made by the United States. There were obvious similarities between the United States' approach to turtle conservation policy and its approach to dolphin protection, which the GATT had ruled illegal. In both cases, the United States attempted to use the threat of a unilateral import ban to pressure other states to protect a valued species. One important difference in the two cases was that sea turtles, unlike dolphins, have long been recognized internationally as an endangered species under the Convention on International Trade in Endangered Species of Wild Flora and Fauna.

India, Malaysia, Pakistan, and Thailand brought a joint case against the United States before the WTO in May 1998. They argued that the U.S. law was discriminatory and could not be justified under the GATT's Article XX(g) exemption. The appellees noted that whereas 14 countries of the western Caribbean–western Atlantic region had been given 3 years to phase in the use of TEDs (1991-1993), they had been given only 4 months. Also they complained that the United States had acted unilaterally in its effort to protect turtles by requiring potential exporters to adopt a U.S. policy on turtle protection rather than attempting to negotiate an international agreement. They pointed to *Tuna-Dolphin I* and *U.S. Gasoline* as precedents that supported a ruling against the United States. The United States argued that its law was justifiable on environmental grounds.

In adjudicating this dispute, the WTO Appellate Body faced another potential maelstrom. Sea turtle protection was being championed by a number of environmental organizations in the United States. Ruling against the turtle protection law threatened to rekindle public opposition to the GATT/WTO on environmental grounds. On the other hand, the case brought by India, Malaysia, Pakistan, and Thailand had clear legal merit. Previous case law, namely *Tuna-Dolphin I*, *Tuna-Dolphin II*, and *U.S. Gasoline*, suggested that the use of unilateral trade sanctions in the pursuit of environmental goals, in the absence of efforts to pursue bilateral or multilateral solutions, violated the GATT. Political considerations (H1) pointed in one direction, whereas legal principles (H2) pointed in another.

The Appellate Body issued its decision on October 12, 1998.[9] The WTO addressed the conflict between H1 and H2 much the way it had in the *Tuna-Dolphin II* decision: It ruled against the U.S. measure in the case at hand but

granted a victory to environmental interests on important points of principle. This approach allowed it to maintain legal consistency while mitigating criticism from environmentalists to some degree.

The Appellate Body found the United States at fault on two points. First, although the United States might be justified in demanding that other states adopt conservation policies "comparable" to its own, the United States went too far in its application of the TED requirement because it forced other states to adopt a policy that was essentially the same as the U.S. policy. Second, the Appellate Body ruled that the United States had not done enough to pursue bilateral or multilateral approaches to shrimp conservation with the appellees before it applied its own unilateral sanctions. Based on these two failures, the Appellate Body concluded that the U.S. requirement constituted unjustifiable and arbitrary discrimination and thus violated the conditions of the opening paragraph of Article XX.

Whereas the Appellate Body ruled against the United States in regard to the specifics of the TED requirement, it ruled for U.S. environmental interests in regard to three important points of legal principle ("The World Trade Organization," 1999). First the Appellate Body indicated that trade restrictions based on production process methods could be used for environmental protection purposes. This determination directly contradicted the position established by the panels in the two tuna-dolphin cases. Second the Appellate Body ruling suggested that trade barriers could be applied to protect natural resources (including species) outside a state's own borders. Third it ruled that WTO panels could consider briefs voluntarily submitted by interested groups. This determination addressed long-standing complaints by environmental NGOs that the dispute resolution process was closed to input from civil society.

The new principles established in the *Shrimp-Turtle* case were considerably more proenvironment than those that had been established by GATT panels in the earlier tuna-dolphin cases. Thus, although environmental interests were handed a defeat on the issue at hand in the case, they were granted important victories on points of legal principle that will influence future cases.

By granting partial victories to environmentalists, the WTO helped the U.S. government deflect criticism from environmentalists in the wake of the decision. Most environmentalists focused on the immediate defeat concerning the turtle protection measures and said that the decision demonstrated once again that the WTO was antienvironmental and could ride roughshod over U.S. environmental laws. A spokesman for a coalition of U.S. environ-

9. *United States—Import Prohibition of Shrimp and Certain Shrimp Products*, WT/DS58/AB/R, October 12, 1998.

mental NGOs was quoted as saying, "This decision proves once and for all that the WTO is broken and must be fixed" (Knight, 1998). However, the U.S. government seized on the principles enunciated in the ruling and portrayed it as a victory for U.S. environmental interests. U.S. trade representative Charlene Barshefsky stated that the decision "does not suggest that we weaken our environmental laws in any respect, and we do not intend to do so" ("Turtle-protection law overturned," 1998, p. C2). Such comments belied the fact that the United States had already acted to amend the offending law after the initial panel decision. In August 1998, the U.S. Department of State amended U.S. regulations, eliminating the blanket ban on shrimp from foreign countries that had not been certified by the United States. Rather shipments of shrimp would be judged individually; those that had been caught by boats using TEDs would be permitted, regardless of whether the country they came from had been approved by the United States (Knight, 1998). On November 26, 1998, the United States informed the WTO that it would comply with the Appellate Body ruling.

TRADE-ENVIRONMENT CONFLICTS IN THE EU

Trade-environment conflicts in the EU have revolved around essentially the same legal principles as those that occurred in the context of the GATT/WTO. The ECJ is the final adjudicator of disputes concerning the interpretation of EU treaties and EU secondary legislation. The legal core of trade-environment tensions can be found in Treaty Articles 30 to 36. Trade liberalization was one of the paramount aims of the Treaty of Rome. Accordingly, Article 30 prohibits member states from imposing "quantitative restrictions on imports and all measures having equivalent effect."[10] Article 34 establishes the same principle for exports. Because these articles bar "all measures having equivalent effect" to quantitative restrictions, they can provide grounds for the ECJ to strike down national environmental regulations that have a discriminatory impact on trade. However the treaty also provided for an exception to these free trade rules in Article 36. That article allowed trade-restrictive measures to remain in place if they served the ends of "public morality, public policy, public security or the protection of health and life of humans, animals, or plants." The ECJ later extended the scope of Article 36 in *Cassis* (1979).[11] Although *Cassis* is best known for establishing the principle of mutual recognition of regulatory standards, the ruling also expanded

10. The ECJ expanded the scope of Article 30 in its Dassonville (1974) decision by providing for a broad interpretation of the phrase, "Measures having equivalent effect [to quantitative restrictions]" (C-8/74 *Procureur du Roi v. Benoit and Dassonville*, 1974, ECR 837).

the grounds for exceptions to free trade requirements beyond those listed in Article 36. The ECJ explained that exemptions to the mutual recognition principle could be granted whenever regulatory policies met certain "mandatory requirements," which the court left open-ended.

In addition to the trade-environment tensions inherent in Articles 30 to 36, the EU's progress in enacting harmonized environmental legislation at the EU level introduced new tensions. Essentially the new question that emerged was whether and under what conditions individual member states might be allowed to maintain standards stricter than those required under EU law, even where such standards distorted intracommunity trade. Revisions made to the Treaty of Rome with the Single European Act and the Maastricht Treaty (in Articles 100a[4] and 130[s-t]) addressed these questions but also generated new conflicts for the ECJ to resolve.

ECJ decisions that generate political opposition can threaten the court in several ways. Individually member states may openly defy an ECJ ruling or covertly fail to implement it. Collectively states may act to rewrite EU legislation or amend the treaties to trump unwanted decisions, with the hurdles for treaty revision being much higher.[12] Finally states can, and do, threaten the ECJ's institutional foundations by threatening to make fundamental structural changes to weaken the court (Garrett et al., 1998). Although such actions are the least likely to be taken, they present the most serious threats to the ECJ's legitimacy.

Preliminary cases. In 1983 and 1985, the ECJ decided two trade-environment disputes concerning trade in waste oils in France. Both cases concerned the interpretation and implementation of a community directive on waste oils.[13] In the first case,[14] the ECJ was asked to determine whether an export ban on waste oils that France had enacted in implementing the community directive violated Article 34, which prohibits export bans or measures that have an equivalent effect. The ECJ ruled that the French measure violated Article 34 and could not be justified by the community directive on waste oils. In the second case,[15] the question before the ECJ was whether the community directive itself, by calling on member states to restrict the collection and disposal of waste oils, violated treaty provisions concerning free movement of goods. In its decision, the ECJ upheld the community directive,

11. C-120/78 *Rewe-Zentral A.G. v. Bundesmonopolverwaltung* (*Cassis de Dijon*) (1979) ECR 649.

12. Most trade-environment cases revolve around interpretation of treaty requirements. Revising the treaties requires unanimity among member states.

13. Council Directive 75/439/EEC. See Koppen (1993).

14. C-172/82 *Fabricants raffineurs d'huile de graissage v. "Inter-huiles"* (1983) ECR 555.

asserting that environmental protection was one of the community's "essential objectives" and explaining that environmental measures that restricted trade could be maintained so long as they were neither discriminatory nor disproportionate. Although these cases established some of the basic principles of trade-environment case law, their impact on subsequent trade-environment case law was limited as they concerned export restrictions (prohibited under Article 34) rather than import restrictions (prohibited under Article 30) that were at issue in the subsequent cases.

Danish bottles. The *Danish Bottles*[16] case marked the first time that the ECJ had been asked whether a member state could justify a violation of Article 30 on environmental grounds. The case centered on a Danish law on the recycling and reuse of beer and soft drink containers. The law gave manufacturers a choice: They could either market beer and soft drinks in containers that were preapproved by the Danish government, in which case the containers would be recycled by the national recycling program, or they could market their beverages in nonapproved containers, in which case the producer had to establish a collection and recycling system of its own. The Danish law also limited the quantity of nonapproved containers that any manufacturer could market and banned metal containers.

The European Commission viewed the Danish law as a violation of the community's free trade principles. In December 1986, the Commission, with the support of the United Kingdom, brought a case against Denmark charging that the recycling law violated Article 30 in that it discriminated against producers in other member states by making it more difficult for them to sell their beverages in the Danish market. Denmark countered that its recycling law was justified under Article 36 as an environmental protection measure.

The ECJ's ruling upheld most aspects of the Danish recycling law, including the mandatory collection and recycling requirements. The ECJ found only one element of the Danish law to be inconsistent with the treaty, the quantitative restriction that the law placed on the volume of nonapproved containers a manufacturer could sell. In upholding the recycling law, the ECJ established firmly for the first time that environmental protection concerns constituted one of the "mandatory requirements" referred to in *Cassis* that could justify restrictions on intracommunity trade. Whereas restrictions on trade with a more direct bearing on human health had been upheld previously, this decision marked the first time that an environmental provision with less direct relevance to human health was upheld. Along with its decision, the

15. C 240/83 *Procureur de la Republique v. l'Association de Défense des Bruleurs d'Huiles Usagées* (1985) ECR 531.

16. C-302/86 *Commission v. Denmark* (1988) ECR 5365.

ECJ set out a list of conditions that such environmental barriers to trade must meet: They must not serve as disguised protectionism, must not discriminate against foreign goods or producers, and may impede trade only as much as is necessary to achieve the environmental objective in question.

One major influence on the ECJ in its deliberations over the *Danish Bottles* case was the Single European Act (SEA). The SEA, which would amend the Treaty of Rome, had not yet been ratified when the ECJ decided the *Danish Bottles* case, but the ECJ was well aware of its provisions.[17] Amendments made in the SEA concerning environmental issues clearly demonstrated to the ECJ the power of green states and the importance they placed on being allowed to maintain their strict environmental standards. The SEA introduced an environmental chapter into the treaty, demonstrating that member states generally agreed that environmental protection was one of the community's essential objectives. More important for the *Danish Bottles* case, one provision of the environmental chapter (Article 130t) and another relating to harmonization measures (Article 100a([4]), demonstrated the demand of green states such as Denmark that they be allowed to maintain their standards.

Article 130t in the environment chapter specifically allows states to maintain or introduce more stringent regulations than those adopted at the EU level, as long as those do not constitute a disguised restriction of trade. Similarly Article 100a(4) allows states to maintain higher national standards when environmental harmonization measures relating to the functioning of the internal market are taken. In addition, it allows for a "fast-track" complaint procedure whereby the Commission or any member state can protest directly to the ECJ regarding a measure it suspects to be a disguised trade restriction. These provisions parallel Treaty of Rome Article 36 in that they allow states to take measures for purposes of environmental protection, even where such measures impede intracommunity trade.

The two articles (130t and 100a[4]) clearly establish that more stringent measures can be taken even where community harmonization has already occurred. These provisions were included in the SEA at the insistence of high-standard states like Denmark. The safeguards provided by these "upward escape clauses" were important to winning the support of Denmark and other high-standard states for the SEA. The clauses provided a clear demonstration of the weight accorded to the interests of high standard states in the SEA negotiations. The ECJ must have realized that had it ruled against Denmark in the *Danish Bottles* case, it would have been viewed as violating the new, "greener" spirit of the SEA. Most likely it would have sparked an

17. The ECJ alluded to the SEA in paragraph 8 of its judgment. See Krämer (1993).

intense political backlash by Denmark and other high-standard states. Following the logic of H1, the presence of this threat made the option of ruling for Denmark more attractive. By ruling for Denmark, the ECJ attracted the praise of environmentalists throughout Europe at a time when they had clearly demonstrated their political power.

Dead Red Grouse. In 1990, the ECJ ruled on a trade-environment case, *Gourmetterie van den Bourg*,[18] that had been referred to it by the *Hoge Raad* of the Netherlands. The case concerned a Dutch ban on the marketing of red grouse, a wild bird native to the United Kingdom. Wild birds were subject to protection across the community under the Wild Birds Directive.[19] Although the Wild Birds Directive generally prohibits the hunting and marketing of wild birds, it allows for the hunting and marketing of specific wild birds in specific member states. Under the directive, the hunting and marketing of red grouse was legal in the United Kingdom. However a Dutch bird conservation law (the 1936 *Vogelwet*) prohibited the sale of red grouse in the Netherlands, and as a result, Dutch authorities prosecuted and convicted a merchant for marketing red grouse, which he had imported from the United Kingdom. The Dutch law clearly constituted a restriction on trade, and the question put before the ECJ was whether this violation of Article 30 could be justified on the basis of Article 36 on the grounds that it served to protect the life and health of animals.

Political pressures (H1) on the ECJ concerning *Gourmetterie* were not intense. Unlike *Danish Bottles*, the case attracted little attention. Although the protection of birds was certainly a policy area that could have attracted attention, the species in question was not endangered. Certainly there was no indication that other states would rally with the Dutch in defense of the red grouse. Legal pressures (H2) were also weak. Whereas *Danish Bottles* had established relevant principles concerning nondiscrimination and proportionality, *Gourmetterie* introduced novel, unanswered questions regarding the extraterritorial focus of a conservation measure.

In its decision, the ECJ largely dismissed the relevance of Article 36 and based its decision on its interpretation of the Wild Birds Directive. The ECJ spelled out three conditions under which member states could take measures stricter than those required under the directive: (a) to protect species occurring within their territory, (b) to protect migratory species, and (c) to protect birds listed as endangered under the directive. With conditions b and c, the ECJ left open the possibility that member states might enact conservation

18. C-169/89 *Gourmetterie van den Bourg* (1990) ECR I-2143. See Krämer (1993) and Scott (1999).

19. Directive 79/409/EEC OJ 1979 L 103/1.

laws that aimed to protect species that occurred outside their borders. The ECJ ruled that the Dutch ban on marketing of the red grouse was unjustified as it failed on all three counts: It was a law with an extraterritorial focus aimed at protecting a species that was neither migratory nor endangered.

Given the weak political and legal pressures at work, the ECJ had ample room for maneuver. Unlike *Danish Bottles*, *Gourmetterie* concerned an issue, protection of wild birds, for which community-wide legislation had been enacted. The ECJ chose to base its decision on the community consensus, as expressed in the Wild Birds Directive. Although the decision did declare the Dutch law invalid, it appealed to environmental advocates by expressly leaving open the door for member states to protect endangered species outside their borders.

Walloon Waste. In 1992, the ECJ ruled on the *Walloon Waste*[20] case concerning a 1987 Wallonian decree banning the import of waste intended for disposal into the province of Wallonia. The legislation banned waste imports into Wallonia both from other regions within Belgium and from other countries. The Commission challenged the law as an unjustifiable violation of Article 30. Given that the law explicitly barred imports, the Commission's case seemed strong. The Belgian government countered that waste, given its distinctive environmental impact, should not be treated as a "good" under Article 30.

The ECJ upheld the Walloon waste ban as it applied to nonhazardous waste.[21] In an impressive display of legal acrobatics, the ECJ held that whereas waste was indeed a good under Article 30, local waste and foreign waste were actually two different goods (Jupille, 1997). Environmental principles, such as the need to rectify environmental damage at its source, meant that local waste was inherently different than foreign waste.

The ECJ made this decision at a time when member states were divided on how to deal with the controversial issue of trade in waste. Member states had been trying to negotiate a regulation on trade in waste for 2 years. Britain and France favored allowing states to ban imports of waste intended for final disposal, whereas most other states opposed allowing such bans. The French government was particularly adamant, declaring that it would not compromise on the issue of waste bans (Jupille, 1997). Although the French stance may have had some influence on the ECJ, with member states so clearly divided on the issue, the likelihood of any collective backlash against the ECJ

20. C-2/90 *Commission v. Belgium* (1992) ECR I-4431.

21. The Commission had also argued that the Belgian law violated a Community Directive (84/631) on transfrontier shipments of hazardous waste. The ECJ agreed with the Commission on this point.

was minimal. The political pressures on the ECJ (H1) were not pronounced. Pressures created by legal precedents (H2) did not point clearly toward any particular ruling in this case either because the question at issue—how waste should be viewed as a tradable good—had not been addressed before. Free from extreme pressures, the ECJ had ample room for maneuver in adjudicating the dispute. The ECJ's decision can best be understood as a continuation of the proenvironmental stance it had established in *Danish Bottles*.

Pentachlorophenol (PCP). The *PCP*[22] case was the first to test the use of the Article 100a(4) "opt-up" provision that allowed member states to maintain stricter national standards even where community standards had been established. The case concerned regulation of PCP, a chemical used as a wood, leather, and textile preservative that releases dioxins. German law placed strict limits on PCPs that amounted to nearly an outright ban. Germany and three other member states advocated enacting such strict standards at the EU level as well but were outvoted by states that favored less stringent restrictions. As a result of this vote, in 1991, the community enacted a regulation (91/173/EEC) limiting the use of PCP. Germany notified the Commission of its intention to maintain its existing national ban on PCPs, and the Commission gave its approval in December 1992.

France, supported by Belgium, Italy, and Greece, brought a complaint before the ECJ against the Commission's decision to approve the German measure. France viewed the regulation as a disguised trade barrier, particularly against leather goods. France argued that the Commission had not provided sufficient scientific justification for the German ban and had not examined alternatives to a ban suggested by France.

In a May 1994 ruling, the ECJ sided with France, agreeing that the Commission had violated procedural rules in allowing Germany to maintain its ban under Article 100a(4). The Commission had failed to demand sufficient justification for the German rule and had failed to examine other, less trade-restrictive alternatives (*The Reuter European Community Report*, 1994a). Germany might indeed be justified in maintaining a stricter law, in accord with the Article 100a(4) exemption, but the Commission had failed to follow the procedures necessary to ensure that the German measure was justified. In response to the ruling, the Commission conducted a more thorough investigation of the ban. After concluding the investigation 4 months later, the Commission reapproved the German ban. In reapproving the German ban, the Commission was careful to offer more thorough scientific justifications for allowing Germany to maintain a stricter standard (*The Reuter European*

22. C-41/93 *France v. Commission* (1994) ECR I-1829.

Community Report, 1994b). Denmark later applied for a similar exemption. After concluding a second investigation, the Commission also concluded that Denmark could continue banning PCPs (*The Reuter European Community Report*, 1996).

The *PCP* case was particularly sensitive because it was the first case to question the application of the Article 100a(4) environmental exemption that permitted states to maintain higher national standards, even where these impeded trade. The case set an initial precedent concerning the interpretation of the article. Because it was the first case to examine this issue, case law precedents most likely had little influence on the ECJ. Although the German electorate and government might resist an adverse ruling, it was very unlikely that Germany would successfully mount any collective action because the vast majority of member states had voted for the more lax community standard that Germany was seeking to exceed. In short the constraints placed on the ECJ in the *PCP* case by politics and legal precedent were not particularly tight. As previously noted above the ECJ ended up basing its ruling on a procedural violation, holding that the Commission had not followed requisite procedures in approving the German exemption. This decision established the precedent that strict procedural rules had to be followed while leaving open the possibility that the German ban might eventually be approved. Subsequently after conducting an investigation in adherence with the procedural requirements set out by the ECJ, the Commission reapproved the ban. The episode demonstrated that states could gain environmental exemptions under Article 100a(4) when they could provide adequate justification.

CONCLUSION

The analysis of trade-environment disputes in the GATT/WTO and EU presented in this article highlights the impact of political and legal pressures on adjudication by supranational courts. Table 1 presented a framework that combined H1 and H2 to make predictions regarding supranational court rulings in trade-environment disputes. Table 2 classifies the case studies within this framework. Although the small universe of cases available for analysis makes it difficult to draw firm conclusions, the findings provide initial support to H1, H2, and the predictions presented in Table 1.

Where political pressures to uphold were high and legal pressures to invalidate were low, as in the *U.S. Automobile Taxes* and the *Danish Bottles* cases, WTO and ECJ decisions appeared to accommodate political demands by upholding the national environmental measures in question. In *U.S. Gasoline*, the one case in which political pressure to uphold was low while legal

Table 2
Classification of GATT/WTO and ECJ Trade-Environment Cases

Political Pressure to Uphold (Hypothesis 1)	Legal Pressure to Invalidate (Hypothesis 2)	
	High	Low
High	• *Tuna-Dolphin II* (invalidated but appeased) • *Shrimp-Turtle* (invalidated but appeased)	• *U.S. Automobile Taxes* (upheld) • *Danish Bottles* (upheld)
Low	• *U.S. Gasoline* (invalidated)	• *Tuna-Dolphin I* (invalidated) • *Gourmetterie* (invalidated) • *Walloon Waste* (upheld) • *PCP* (invalidated)

Note: GATT = General Agreement on Tariffs and Trade; EJC = European Court of Justice; WTO = World Trade Organization.

pressures to invalidate were high, the WTO invalidated the measure. In the two cases in which political and legal pressures were significant and contradictory, *Tuna-Dolphin II* and *Shrimp-Turtle*, the GATT and WTO invalidated the environmental measures in question but qualified their rulings so as to appease environmental interests in the defendant state. The rulings in cases in which political pressures and legal pressures were low were mixed and are the most difficult to interpret. In *Tuna-Dolphin I*, U.S. pressure to uphold the environmental measure in question was counterbalanced by the nearly unanimous opposition of other GATT members to the U.S. position. Moreover because previous trade-environment disputes had attracted so little attention, it is likely that the GATT underestimated the potential political repercussions of its decision in the U.S. The GATT panel invalidated the U.S. embargo on Mexican tuna and established legal principles that were widely viewed as putting free trade concerns ahead of environmental protection. In *Gourmetterie*, *Walloon Waste*, and *PCP*, the ECJ had ample room for maneuver given the vagueness of legal precedents and the weakness of political pressures. The ECJ's decisions were mixed: It struck down the Dutch ban on marketing red grouse, upheld the Walloon waste ban, and overturned the Commission's decision on German PCP regulation. In these cases, the ECJ generally adhered to the proenvironment position it had established in *Danish Bottles*. However the ECJ reaffirmed that environmental exceptions to Article 30 would have to respect the principle of proportionality and emphasized that proper procedures would have to be followed when granting environmental opt-ups under Article 100a(4).

Neither GATT/WTO panels nor the ECJ have routinely ruled against national environmental standards in trade-environment disputes. Rather both political and legal pressures have influenced the decisions of these supranational courts on trade-environment disputes. In the wake of the WTO decision on the *Shrimp-Turtle* dispute, the *Financial Times* reported that "some trade lawyers think the tribunal has deliberately left its decisions open to flexible interpretation, because it fears that backing bigger WTO members into a corner could prompt them to disregard rulings and undermine the entire system" (Balls, 1998, p. 7). The quoted trade lawyers highlight one of the basic insights of this article. Supranational courts do fear making decisions that will "back states into a corner" and prompt them to defy or disregard a ruling. However adjudication by supranational courts does not simply bend with the political winds. Rather because of the need to maintain their status as neutral, independent arbiters, supranational courts also strive to make decisions that are consistent with well-established legal norms and case-law precedents. The interaction of these political and legal pressures has had a powerful influence on ECJ and GATT/WTO decisions in trade-environment disputes.

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R. Daniel Kelemen is an assistant professor in the Department of Political Science at Rutgers University. His research focuses on institutional analysis of the European Union, comparative federalism, and comparative political economy. His recent publications have appeared in the Journal of Public Policy *(2000) and* International Organization *(1998).*