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Deforestation in Cambodia and Malaysia: The Case for an International Legal Solution

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DEFORESTATION IN CAMBODIA AND MALAYSIA: THE CASE FOR AN INTERNATIONAL LEGAL SOLUTION

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Abstract: The logging of tropical timber for the export market is the primary cause of deforestation in Southeast Asia. The problem of controlling the tropical timber trade has been addressed on both the national and international level. The existing legal mechanisms, however, have proven to be inadequate. A new multilateral agreement based on the import and export permit system of the Basel Agreement is necessary to control the timber trade and to aid in halting deforestation.

I. INTRODUCTION

The depletion of the world's tropical rain forests constitutes one of the greatest crises facing the world today.[1] Deforestation results in massive soil erosion, widespread flooding, climactic changes, disruption to agriculture, loss of wildlife and the displacement of native peoples,[2] and forests are disappearing faster in Southeast Asia than anywhere else.[3] Many factors account for the rapid deforestation including the need for fuel wood, agricultural expansion, shifting cultivation, urbanization, and logging.[4]

Logging is the primary cause of deforestation in Southeast Asia.[5] The main purpose of logging in Southeast Asia is to produce tropical timber for the export market.[6] The Asia-Pacific region exports seventy percent of its industrial wood,[7] half of which goes to Japan and the rest goes to other countries including Korea, Singapore, and Taiwan.[8] These latter countries re-process the logs and re-export them to North America, Africa, and the Middle-East.[9] In order to halt deforestation in Southeast Asia, the trade in timber must be controlled. This Comment explores the ways in which the

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1 Khor Kok Peng, *A Third World Perspective of the Forest Resources Crisis, in* FOREST RESOURCES CRISIS AND MANAGEMENT 11 (Vandana Shiva et al. eds., 1992). *See also* Dennis D. Gray, *New Battlefront Tests Indochina*, AUSTIN-AMERICAN STATESMAN, May 14, 1994, at A25. *See generally* ALAN T DURNING, SAVING THE FORESTS: WHAT WILL IT TAKE? (1993).

2 Peng, *supra* note 1, at 13.

3 Peng, *supra* note 1, at 12.

4 Peng, *supra* note 1, at 12.

5 Peng, *supra* note 1, at 13.

6 Peng, *supra* note 1, at 14.

7 Peng, *supra* note 1, at 14.

8 Peng, *supra* note 1, at 14.

9 Peng, *supra* note 1, at 14.

international community and countries within Southeast Asia have attempted to deal with the regulation of the tropical timber trade.

Cambodia and Malaysia occupy opposite ends of the spectrum in the ways in which Southeast Asian countries have managed their tropical timber resources. Cambodia has sought to ban all exports of tropical timber in an attempt to halt deforestation,[10] but its attempt has failed.[11] Malaysia, on the other hand, has fought to freely export tropical timber in spite of international regulation[12], and has been largely successful in combating regulation efforts.[13]

First, this Comment will consider the problems of deforestation in Cambodia and Malaysia. Next it will discuss the failure of existing legal mechanisms to protect tropical timber. Unilateral efforts on the part of both importing and exporting countries have failed in their efforts to restrict trade. Cambodia's unilateral export ban did not succeed because of the country's civil war and the lack of compliance on the part of importing countries. The unilateral import ban proposals of Austria and the Netherlands have been frustrated by countries such as Malaysia that do not want their timber exports restricted. Additionally, this Comment will discuss the failure of international legal efforts to protect tropical timber including the International Tropical Timber Agreement[14] ("ITTA") and the Convention on International Trade of Endangered Species ("CITES").[15]

Finally, this Comment will propose a new tropical timber convention based on the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[16] A multilateral agreement is necessary because it overcomes obstacles created by the General Agreement on Tariffs and Trade[17] ("GATT") and because

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[10] *Government Announces Ban on Log Exports as Part of Effort to Reduce Deforestation,* BNA INT'L ENVTL. DAILY, May 9, 1995, *available in* WESTLAW, BNA-IED Database.

[11] *See infra* Part III.A.1 discussing the failure of Cambodia's unilateral export ban.

[12] *See* Brian F. Chase, *Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development Under the GATT,* 17 Hastings Int'l & Comp. L. Rev. 349, 376 (1994).

[13] *See, e.g., Malaysia Warns Swiss Not to Ban Tropical Wood Imports,* JAPANECON, Mar. 9, 1993, *available in* WESTLAW, JAPANECON Database.

[14] International Tropical Timber Agreement, Jan. 26, 1994, 33 I.L.M. 1014 [hereinafter ITTA].

[15] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR STAT. 40336 [hereinafter CITES].

[16] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, UN Doc. UNEP/IG.80/3, 28 I.L.M. 649 (1989) [hereinafter Basel Convention].

[17] General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter text referred to as the GATT]. The GATT also refers to the institutional framework that

individual countries cannot control the timber trade on their own. A new multilateral agreement based on the import and export permit system of the Basel Agreement provides a solution to the problem of regulating the tropical timber trade in Southeast Asia.

II. THE PROBLEM OF DEFORESTATION IN CAMBODIA AND MALAYSIA

Deforestation is regarded as one of Southeast Asia's greatest environmental problems.[18] Indochina's tropical forests have been heavily impacted by decades of war and illegal logging.[19] Cambodia's forests once covered seventy-three percent of the country in 1960 but now cover less than forty percent of the country.[20] Environmentalists predict that if logging is not stopped, the country's forests will be completely destroyed within five years.[21]

Deforestation in Cambodia has affected the country's irrigation system, leading to floods, drought, and harvest failure.[22] Many communities are running out of rice and face the threat of starvation.[23] Additionally, Tonle Sap Lake, which supplies most of the country's fish has been adversely affected by logging that has allowed top soil to be washed down into the lake.[24] Silt has reduced the lake's depth, causing it to flood more often and thereby destroying crops.[25] As a result of the logging, the removal of tree roots has reduced the land's capacity to retain water and to sustain crops.[26]

Malaysia, like Cambodia, has suffered intense deforestation.[27] Because industrialized countries such as Japan and South Korea provide ready markets for Malaysian timber, Malaysian tropical forests are an easy

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implements the GATT. GATT/WTO will refer to the Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, *infra* note 220.

18 Gray, *supra* note 1, at A25.

19 *See* Peng, *supra* note 1, at 12.

20 *See* Gray, *supra* note 18.

21 Editorial, *Chain Saw Massacre Levels Cambodia's Forests*, ROCKY MOUNTAIN NEWS, June 18, 1995, at A83.

22 Susan Litherland, *Environment-Cambodia: Forests Threatened by Cash-Seeking Khmer*, INTER PRESS SERV., Apr. 21, 1995, *available in* WESTLAW, ALLNEWS Database.

23 *Id.* According to the United Nations World Food Program, Cambodia can expect a shortage of white rice of 90,000 metric tons for 1995.

24 *Id.*

25 *Id.*

26 *Id.*

27 Harrison Ngau et al., *Malaysian Timber Exploitation for Whom? in* FOREST RESOURCES CRISIS AND MANAGEMENT 40 (Vandana Shiva et al. eds., 1992).

source of wealth for those in power.[28] Malaysian officials grant forest concessions to timber companies that are either owned by politicians or their relatives.[29] The demand for timber resources has been a major impetus towards a massive cutting of the nation's tropical rain forests.[30] Malaysia's remaining timber reserves have been estimated to last only until the end of the 1990s.[31] The promotion of the export-oriented timber business has necessitated the clearing of forests at the expense of cultivation and production of food crops which meet local needs.[32] The continuing destruction of rain forests in Malaysia has adversely affected both the natural environment of the country and the socio-economic development of the indigenous people of Malaysia.[33]

The effect of logging on native lands can be seen in the devastation of the Malaysian timber-producing state of Sarawak,[34] which produces the bulk of Malaysia's timber output.[35] In 1992, eleven million cubic meters of Sarawak's permanent forests were logged.[36] Environmentalists around the world have taken up the plight of the native Penan tribe in Sarawak[37] because rampant logging has been destructive to both the forests and livelihoods of Sarawak's Penan people.[38] Timber extraction has caused extensive and irreparable damage to the natural land surface and vegetation,[39] and logging has threatened the habitat of wild birds and animals, depriving the local people of their hunting grounds.[40] Additionally, the increase in sawmilling activities has caused widespread pollution to rivers as floating logs and sawdust leach water soluble chemical compounds into the water.[41] These chemicals are often toxic and endanger the health of native people who depend on the rivers for their drinking and domestic

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28 *Id.* at 46.
29 *Id.*
30 *Id.* at 40.
31 *Id.*
32 *Id.* at 47.
33 *Id.* at 41.
34 Evelyn Hong, *Forest Destruction and the Plight of Sarawak's Natives in* FOREST RESOURCES CRISIS AND MANAGEMENT 192 (Vandana Shiva et al. eds., 1992).
35 *Id.*
36 *Logging Cuts Cost Malaysian State 50 Million Dollars Yearly*, JAPANECON, May 12, 1993, *available in* WESTLAW, JAPANECON Database.
37 *Malaysia Warns Swiss Not to Ban Tropical Wood Imports*, JAPANECON, Mar. 9, 1993, *available in* WESTLAW, JAPANECON Database.
38 *See Logging Cuts Cost Malaysian State 50 Million Dollars Yearly, supra* note 36.
39 *See* Hong, *supra* note 34, at 199.
40 *See* Hong, *supra* note 34, at 199.
41 *See* Hong, *supra* note 34, at 199.

needs.[42] Logging has also caused severe soil erosion resulting in flooding. Floods have damaged native rice fields, crops, and livestock, resulting in frequent food shortages for native peoples.[43]

III. THE INADEQUACY OF EXISTING LEGAL MECHANISMS TO PROTECT TROPICAL TIMBER

A. National Efforts To Protect Tropical Timber

On the national level, unilateral trade restrictions have proven ineffective in controlling the tropical timber trade. Unilateral export bans have failed, at least in part, because of the lack of compliance on the part of importing countries such as Japan.[44] Unilateral import bans have failed due to challenges by exporting countries, such as Malaysia, under the GATT.[45]

1. The Failure of Unilateral Export Bans in Cambodia

Unilateral export bans have been ineffective in stemming the deforestation in Cambodia and other Southeast Asian countries. Although every country in Southeast Asia has implemented an export ban on tropical timber,[46] as of 1992, more than 700,000 hectares of forests are felled yearly in the region.[47] The failure of export bans in Cambodia demonstrates the inadequacy of unilateral efforts in stemming deforestation.

In November of 1992, the United Nations ("U.N.") Security Council decided to ban all exports of Cambodian timber.[48] The ban was

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42 *See* Hong, *supra* note 34, at 199.

43 Hong, *supra* note 34, at 199-200.

44 *See Boutros-Ghali Says Japan Breaking Cambodian Log Ban*, JAPANECON, Feb. 12 1993, *available in* WESTLAW, JAPANECON Database.

45 *See* Chase, *supra* note 12, at 374-79.

46 Even Malaysia has implemented an export ban. Initially, most of Peninsular Malaysia's trade was in round wood. But, in order to encourage her developing domestic timber industry, Malaysia imposed restraints on the export of round timber in 1977. Since this time, there had been a ban of log exports of certain species and the list had grown to 27 species in 1983. Even with these export restrictions, the volume of logs exported doubled, that of sawn timber and plywood tripled, and veneer exports rose ten fold between 1970 and 1980. On balance, Malaysia's timber market has remained open to timber consuming countries. Malaysia occupies an important place in the world export market for timber. RACHEL BERGER, MALAYSIA'S FORESTS A RESOURCE WITHOUT A FUTURE? 83-91 (1990).

47 Suvendri Kakuchi, *Asia: Illegal Timber Trade Costs Nations Billion-Dollar Losses*, INTER PRESS SERV., Dec. 2, 1992, *available in* WESTLAW, ALLNEWS Database.

48 At this time, the United Nations security council had responsibility for administering Cambodia pursuant to the United Nations Transitional Authority in Cambodia ("UNTAC"). UNTAC took control of

implemented on January 1, 1993, to cut off the Khmer Rouge's main source of income in order to force them to abide by the U.N.-brokered peace accord.[49] The Khmer Rouge had refused to complete the disarmament and demobilization provisions of the U.N-brokered accord and had refused to participate in Cambodia's elections.[50]

The U.N. embargo proved largely ineffective. Both the Cambodian government and the Khmer Rouge depended on money from the timber trade to fund their respective armies in the country's civil war.[51] The Khmer Rouge has been fighting a guerrilla war against the Cambodian government since Pol Pot's ouster from Phnom Penh in January of 1979.[52] After Pol Pot's fall from leadership, the Khmer Rouge retreated to the hills bordering Thailand[53] and has since controlled most of the illegal tropical timber trade.[54] The illegal timber trade includes the smuggling of timber across the border into Thailand[55] and shipment of the illegal timber to Japan.[56] During the first two months of 1993, Japan purchased 8000 cubic meters of Cambodian logs were purchased in violation of the U.N. embargo.[57] This violation by the Japanese trading house, Mitsui and

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the national defense and public security of Cambodia to ensure a neutral electoral environment. *Japan Pledges to Return Any Illegal Cambodian Logs,* JAPANECON, Feb. 17 1993, *available in* WESTLAW, JAPANECON Database.

[49] *Mitsui Violated Cambodian Timber Embargo, says UNTAC,* JAPANECON, Feb. 16, 1993, *available in* WESTLAW, JAPANECON Database.

[50] *Boutros-Ghali Says Japan Breaking Cambodian Log Ban, supra* note 44.

[51] *See* Litherland, *supra* note 22.

[52] KHMER ROUGE ABUSES ALONG THE THAI-CAMBODIAN BORDER 7 (Asia Watch Report 1989). The Khmer Rouge seized power from the American-backed Lon Nol regime in April of 1975. With Pol Pot at the helm of the government called the Democratic Kampuchea, the Khmer Rouge declared a return to "Year Zero" and started a campaign to rid Cambodia of all "corrupting influences." The purge resulted in the execution of hundreds of thousands of civil servants, professionals, teachers, monks, peasants, members of minority groups and others. *Id.* at 5.

[53] In December of 1978, Vietnamese troops swept into Cambodia, driving out the Khmer Rouge and establishing the People's Republic of Kampuchea ("PRK") in January of 1979. One immediate impact of Vietnam's occupation was the large-scale influx of Cambodian refugees into Thailand. Hundreds of thousands of these refugees were massed along the Thai-Cambodian border. By 1988, there were over 300,000 refugees in camps along the border serviced by international aid agencies. *Id.* at 5-7.

The Khmer Rouge has survived its expulsion from Cambodia due to a steady supply of arms from Vietnam's traditional enemy, China. These arms were delivered to the Khmer Rouge by Thai forces who wanted a buffer against the Vietnamese. *Id.*

[54] Gordon Fairclough, *New Frontiers,* FAR E. ECON. REV., Jan. 12, 1995, at 14. Between 1979 and 1991, the Thai army served as the main conduit for covert assistance to the Khmer Rouge. During that time, it forged strong military ties with the Khmer Rouge who came to control valuable territory, including the gem mines around Pailin and rich timber resources in Cambodia's northwest. Personal business deals were struck between Thai army officers and the Khmer Rouge guerrillas to exploit these natural resources.

[55] *See* Litherland, *supra* note 22.

[56] *Boutros-Ghali Says Japan Breaking Cambodian Log Ban, supra* note 44.

[57] *Boutros-Ghali Says Japan Breaking Cambodian Log Ban, supra* note 44.

Company, was responsible for over half of the illegal imports, but was only one of forty-six confirmed violations of the United Nations export ban.[58] Japan was the second largest offender after Thailand in violating the U.N. imposed export ban.[59]

Following the end of the UNTAC administration, Cambodia ended the U.N. ban in order to allow the export of processed timber.[60] By June of 1994, only the ban on the cutting of new timber remained.[61] According to the Cambodian Forestry Department, 300,625 cubic meters of round logs and 166,378 cubic meters of sawn timber were legally exported in 1994.[62] However, these figures do not include the Khmer Rouge's continued illegal trade along the Thai-Cambodian border.[63] Increasing deforestation prompted the Cambodian government to reimpose a ban on all exports of logs and sawn timber on May 1, 1995.[64]

The most recent export ban imposed by the Cambodian government has also proven ineffective because of the ongoing civil war and the ever-present demand for tropical timber.[65] Because wood is the country's most valuable resource, the group who controls the timber trade controls the country's revenue.[66] Sam Rainsy, a former finance minister of the Cambodian government states, "[w]e are no longer fighting a war over ideologies. This is a war over who owns the wood. It is evident that many military operations have been conducted to get control over timber or to prevent the other side getting its hands on it first."[67]

The Khmer Rouge controls ten percent of the country including timber rich land in the northwest.[68] It has been estimated that the Khmer Rouge makes more than ten million dollars a month from the cross-border sale of timber.[69] Although the Thai government has banned all trade with the Khmer Rouge, Thai logging firms have been accused of continuing to

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58 *Mitsui to Investigate Cambodia Timber Charge*, JAPANECON, Feb. 17, 1993, *available in* WESTLAW, JAPANECON Database.

59 *Id.*

60 *See* Litherland, *supra* note 22; for UNTAC, *see supra* note 48.

61 *Id.*

62 *Cambodia Bans Timber Exports*, ASIAN WALL ST. J., May 1, 1995.

63 *Id.*

64 *Id.*

65 *See* Gray, *supra* note 18.

66 *See Chain Saw Massacre Levels Cambodia's Forests*, *supra* note 21.

67 *Chain Saw Massacre Levels Cambodia's Forests*, *supra* note 21.

68 *See Chain Saw Massacre Levels Cambodia's Forests*, *supra* note 21.

69 *Chain Saw Massacre Levels Cambodia's Forests*, *supra* note 21.

work with the guerrillas in the cross-border timber trade.[70] Thai firms help fund the Khmer Rouge by paying "road taxes" to the guerrillas on timber passing through Khmer-controlled areas on the way to Thailand.[71] Additionally, the Khmer Rouge has been granting timber concessions to Thai firms in Cambodia's timber rich northwest.[72] These timber concessions allow Thai firms to log more than fifteen million cubic meters for periods of three to five years.[73] In one instance, documented in 1993, the Khmer Rouge granted a contract to the Thai Government owned Forest Industry Organization ("FIO") which allowed the FIO to extract one million cubic meters of timber in exchange for royalty payments to the Khmer Rouge of 2,500-3,000 Baht.[74] This would yield the Khmer approximately U.S. $100 million dollars in income over the contract's four year life.[75]

Thai officials feel comfortable dealing with the Khmer partly because of the discipline that the guerrillas maintain on the border zones and because many of the guerrillas now speak Thai.[76] Additionally, these concessions replace the slump in timber imports from Laos and Vietnam.[77] The illegal timber imports have also helped the Thai sawmill industry, which is suffering from the Thai government's own logging ban that was imposed in 1989.[78]

The high volume of timber proceeds flowing to the Khmer Rouge has placed the Cambodian government in a difficult position.[79] The government desperately needs foreign currency to fund its civil war and timber is one of the few exports that continues to increase in value.[80] Ironically, the timber companies who purchased government concessions, before the most recent export ban, were granted licenses in Khmer controlled areas.[81] As a result, these firms must also pay a "tax" to the Khmer on each log passing

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70 *Chain Saw Massacre Levels Cambodia's Forests*, *supra* note 21.

71 Susan Litherland, *Thailand-Cambodia: Bangkok Continues to Fund Khmer Rouge, Says NGO*, INTER PRESS SERV., June 8, 1995 , *available in* WESTLAW, ALLNEWS Database.

72 Ken Stier, *Log Rolling, Thai Forestry Contracts Help to fund Khmer Rouge*, FAR E. ECON. REV., Jan. 21, 1993, at 15.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 Andrew Nette, *Environment-Cambodia: Log Export Ban Fails to Stop Forest Plunder*, INTER PRESS SERV., July 21, 1995, at 1, *available in* WESTLAW, ALLNEWS Database.

80 *Id.*

81 *Id.*

through Khmer Rouge territory, earning the guerrillas millions of dollars monthly.[82]

Due to pressure to increase revenues, the Government is considering an exception to its own export ban of May 1, 1995.[83] The Cambodian government is presently negotiating with Indonesia's Panin Group for a logging concession which would give the Indonesian firm the right to log 3.7 million acres of Cambodia's dwindling forest cover.[84]

2. *The Failure of Unilateral Import Bans*

a. *Malaysia's role*

Exporting countries, such as Malaysia, have been critical of unilateral attempts on the part of European countries to ban the import of tropical timber.[85] Timber is Malaysia's second biggest export earner after petroleum.[86] As of 1992, Malaysia accounted for two-thirds of the world export of tropical logs.[87] Like timber from most other Southeast Asian countries,[88] most Malaysian timber is exported to Japan.[89]

Logging in Malaysia is driven by a combination of power and money.[90] Elected leaders in Malaysian provinces have the authority to distribute timber contracts.[91] The distribution of timber contracts has become a crucial part of the local political power base.[92] Officials give logging concessions to loyal supporters who level the forests for a quick profit.[93] These logging firms then give a payback to the official to help him maintain his political office and to increase his wealth.[94] Consequently, logging, which has accounted for massive destruction and depletion of

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82 *Id.*
83 Litherland, *supra* note 71.
84 *Cambodia Negotiating Huge Logging Deal*, S. F. CHRON., Aug. 28, 1995.
85 *See* Chase, *supra* note 12.
86 *Malaysia Wants Market Access As Timber Rule Reward*, JAPANECON, May 11, 1993, *available in* WESTLAW, JAPANECON Database.
87 Kakuchi, *supra* note 47.
88 *Id.*
89 *Malaysia Wants Market Access As Timber Rule Reward*, *supra* note 86.
90 DURNING, *supra* note 1, at 40.
91 DURNING, *supra* note 1, at 40.
92 DURNING, *supra* note 1, at 40.
93 DURNING, *supra* note 1, at 40.
94 DURNING, *supra* note 1, at 40.

Malaysian forests, has mainly benefited those who are in positions of power.[95]

b. Austria's attempt to implement import restrictions on tropical timber

In the fear of losing export revenues, Malaysia has fought efforts to limit the import of Malaysian timber.[96] When Austria tried to implement import restrictions on tropical timber, the legislation was immediately challenged by Malaysia.[97] In 1992, Austria's parliament introduced legislation concerning the importation of tropical timber in reaction to domestic pressure from environmental groups concerning global deforestation.[98] The Austrian legislation that was originally introduced consisted of an import tax on all products made from or containing tropical timber.[99] The legislation also contained a labeling law which would have mandated that all tropical wood imports be labeled as "Made from Tropical Wood" or "Contains Tropical Wood."[100] Additionally, the legislation was to implement an import certification system.[101] The certification system was to distinguish between products made from tropical timber harvested in a sustainable fashion and products made from unsustainably harvested timber.[102]

In reaction to the Austrian legislation, Malaysia threatened to boycott Austrian imports unless Austria revoked its import tariff and labeling scheme.[103] Presumably, Malaysia feared that other European Nations would be prompted by domestic environmental groups to enact similar legislation. Moreover, Malaysia felt that by banning tropical timber imports, Austria was aiding its own market for temperate timber.[104]

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95 DURNING, *supra* note 1, at 90.

96 *See* Chase, *supra* note 12.

97 *See* Chase, *supra* note 12.

98 *See* Chase, *supra* note 12, at 374-75.

99 Chase, *supra* note 12, at 375.

100 Chase, *supra* note 12, at 375. Under the import tax, the Economic Affairs Ministry was to increase the import tax on all tropical wood products from eight percent to seventy percent. The revenue generated from this ecological tax would then be donated to international environmental projects that promote the sustainable harvesting of tropical forests. The Austrian authorities were to determine the definition of "sustainable logging" and to determine which exporting countries complied with this definition. *See* Chase, *supra* note 12, at 375, 376.

101 Chase, *supra* note 12, at 375.

102 Chase, *supra* note 12, at 376.

103 *Malaysia Warns Swiss Not to Ban Tropical Wood Imports*, *supra* note 37.

104 Chase, *supra* note 12, at 376-77. Austria produces 12 million cubic meters of temperate timber products annually. *Id.*

In addition to its threat of retaliation, Malaysia lodged a formal protest with the GATT Committee on Technical Barriers to Trade.[105] Malaysia alleged that the Austrian legislation constituted unfair trade discrimination. Malaysia protested that Austria was attempting to decide unilaterally what constituted a sustainably managed forest when there was no international consensus on the issue.[106] Austria denied that its legislation had a discriminatory intent.[107] However, Austria feared that its regulations did violate the GATT[108] and in December of 1992, the legislature abandoned the import tax.[109] In return for the withdrawal of the import tax, Malaysia withdrew its complaint before the GATT committee.[110] The Austrian government also agreed to further study the import-certification measure in greater detail before implementation. The only piece of Austrian legislation that remains in effect is the labeling law on tropical wood products.[111]

c. *The Netherlands Framework on Tropical Timber*

The Netherlands, like Austria, attempted to implement import restrictions on tropical timber in 1993.[112] The Netherlands is second only to Japan in per capita consumption of tropical hardwood.[113] In reaction to public pressure and the threat of a boycott against tropical timber products, the Netherlands developed a plan to ban imports of timber from nonsustainably managed forests.[114] The Netherlands Framework on Tropical Timber ("NFATT") was signed on June 25, 1993, by the Dutch government, associations, and individual companies representing industry, business, unions, and environmental organizations.[115] The purpose of NFATT was to ensure that all tropical timber imported for the Dutch market would consist of

105 Chase, *supra* note 12, at 376.
106 Chase, *supra* note 12, at 376.
107 Chase, *supra* note 12, at 377.
108 According to Chase, "[h]ence, while Austria's regulations appeared 'on their face' to be nondiscriminatory, in practice they represented a form of 'de facto' discrimination because they did not apply to the 'like temperate timber products' of foreign or domestic producers." Chase, *supra* note 12, at 377.
109 *See* Chase, *supra* note 12, at 378.
110 Chase, *supra* note 12, at 378-79.
111 Chase, *supra* note 12, at 379.
112 *See generally* Netherlands' Framework Agreement on Tropical Timber, 25 June 1993 [hereinafter NFATT].
113 *The Case of Tropical Timber in the Netherlands*, Environmental Perspectives on Trade-Environment Issues, EPOC High-Level Session, at 1, n.1 (Paris, Dec. 7-8, 1993).
114 *Id.* at 2.
115 *Id.* at 3-4.

sustainably produced tropical timber by 1995.[116] Underlying the import ban, "is the premise that trade in tropical timber can provide powerful incentives for the achievement of sustainable forest management."[117]

The NFATT seeks to provide consumers with reasonable guarantees that the tropical timber they purchase comes from sustainably managed forests while also providing producers with a reasonable expectation that their higher-priced timber products will find adequate outlets.[118] Additionally, NFATT allows producers to recover the additional costs incurred through sustainable production.[119] Crucial to the implementation of NFATT was the definition of sustainability and the way in which sustainability would be determined in actual practice.[120] "Sustainable forest management" is defined in article 1 of the NFATT as "the process of managing permanent forest land . . . without undue reduction of its inherent values and future productivity of the forest and without undue undesirable effects on the physical and social environment."[121] A group of experts would be appointed to determine the relevant criteria and indicators that could be tested, and standards and norms developed to further define "sustainable forest management."[122]

The Dutch plan, although intended as a model for the international community,[123] was dropped by the Dutch government in December of 1994.[124] When the government presented the NFATT to the International

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116 *Id.* at 3.

117 *Id.* at 4.

118 *Id.*

119 *Id.*

120 *Id.* at 7.

121 NFATT, *supra* note 112, art. 1.

122 NFATT, *supra* note 112, art. 4(b)(3)(1). The NFATT consists of a three-phased plan of action. The first phase, the Development and Exploration Phase, was instituted in 1993. In this phase, the following issues were addressed: (1) collecting and analyzing all information relevant to the Dutch tropical timber market; (2) developing the method used to measure sustainably produced timber; (3) negotiating bilateral agreements with the timber producing countries on cooperation in the marketing and processing of sustainably produced timber; and (4) developing a blueprint for a certification system to provide consumers with appropriate information about sustainably produced timber. *The Case of Tropical Timber in the Netherlands*, *supra* note 113, at 5.

For the second phase, the Experimental Phase originally projected for 1994, a system was to be created to enable consumers to identify sustainably produced timber. At the Implementation phase, which was scheduled to begin in 1995, the tropical timber trade, processing and retail companies should be in a position to acquire, process, and trade sustainably produced timber. Additionally, consumers should be aware of and be able to identify the benefits of sustainably produced timber. *The Case of Tropical Timber in the Netherlands*, *supra* note 113, at 5.

123 *See The Case of Tropical Timber in the Netherlands*, *supra* note 113, at 6.

124 *Dutch Drop Planned Ban on Nonsustainable Timber Imports*, Environmental Watch Western Europe, Dec. 16, 1994, *available in* WESTLAW, ALLNEWS Database.

Tropical Timber Council during its Fifteenth Session (Yokohama, Japan, November 1993), the Dutch document was sharply criticized.[125] One of the complaints was that the Netherlands was too far ahead of the rest of the international community in determining a target year for "sustainability."[126] Instead of the import ban, the Dutch government now plans to develop, together with producer countries, a voluntary "ecolabel" for sustainably produced timber by the year 2000.[127] The Dutch government felt that it would have had a difficult time implementing its own importation system while other countries lacked similar importation procedures.[128]

d. The Failure of unilateral import and export bans under the General Agreement on Tariffs and Trade

The failure of the Austrian import restrictions demonstrate how unilateral efforts have come into conflict with the GATT. The two GATT articles most often referred to when discussing environmental protection are articles III and XX.[129] Article III, on national treatment, allows countries to establish regulations to protect their environment from damage caused by domestic production activities or the importation of foreign goods.[130] The problem with unilateral import and export restrictions is that although they are implemented for the protection of a nation's environment, they often discriminate against foreign products in contravention of the GATT.[131] For example, timber import bans usually discriminate between tropical and non-tropical timber.[132] Thus, when a country such as Austria implements an import ban, the foreign supplier of tropical timber (e.g., Malaysia) is discriminated against, thus giving the domestic supplier of temperate timber an unfair advantage.[133]

The Dutch Agreement would have had the same conflict with the GATT because the Netherlands, an importer of tropical timber, is also a

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125 *The Case of Tropical Timber in the Netherlands*, *supra* note 113, at 6.

126 *The Case of Tropical Timber in the Netherlands*, *supra* note 113, at 6.

127 *Dutch Drop Planned Ban on Nonsustainable Timber Imports*, *supra* note 124. An ecolabel is used to determine whether the certified timber was harvested in a sustainable manner.

128 *Dutch Drop Planned Ban on Nonsustainable Timber Imports*, *supra* note 124.

129 PÅR HALLSTRÖM, THE GATT PANELS AND THE FORMATION OF INTERNATIONAL TRADE LAW 89 (1994).

130 *Id.* *See* GATT, *supra* note 17, art. 3.

131 *See* Chase, *supra* note 12, at 383.

132 Chase, *supra* note 12, at 383.

133 Chase, *supra* note 12, at 383.

timber producing country.[134] Similar to Austria, the Netherlands produces temperate timber for domestic use.[135] Therefore, the Dutch restrictions would have been seen by a GATT panel as aiding the Dutch domestic timber industry and discriminating against foreign trade. Additionally, import restrictions on tropical timber are generally processed-based, and processed-based distinctions are prohibited under GATT.[136]

Article III also prohibits export restrictions that protect a domestic industry.[137] Because exporting countries do not generally place the same limitations on the domestic consumption of their forests, the export restrictions favor domestic processing of timber products.[138] Cambodia's unilateral export ban is probably inconsistent with the GATT because Cambodia has not enacted a similar restriction on the cutting of tropical timber for domestic use.[139]

Additionally, for unilateral bans to be consistent with the GATT they must be "necessary" as defined in article XX(I)(b).[140] According to recent GATT panels, the relevant inquiry is whether a measure is "necessary to protect human, animal, plant life or health."[141] A measure is "unnecessary" if other means are available which are consistent with the GATT.[142] One GATT panel held that in order for a country to invoke an exception under article XX, it must exhaust all other reasonable alternatives including attempting multilateral negotiations.[143] Scientific authorities often differ as to when a trade ban is necessary to protect the plant life of a country. Thus, it will often be difficult to for a country to show that a measure is necessary under the GATT.

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134 *See* Chase, *supra* note 12, at 383; *see* Judith Perera & David Dahmen, *Environment-Trade: Timber Trade Certificates No Easy Answer*, INTER PRESS SERV., May 26, 1995, *available in* WESTLAW, ALLNEWS Database.

135 *See* Perera & Dahmen, *supra* note 134; Chase, *supra* note 12, at 354.

136 Chase, *supra* note 12, at 383-84. For a discussion of process-based distinctions, see also *id.* at 385-87.

137 Chase, *supra* note 12, at 380. *See* GATT, *supra* note 17, art. 3.

138 *See* Chase, *supra* note 12, at 380.

139 *See* Nette, *supra* note 79.

140 GATT, *supra* note 17, art. XX(I)(b). General Exceptions permits countries to implement measures (b) necessary to protect animal or plant life or health, or (g) measures relating to the conservation of exhaustible natural resources as long as such measures are made effective in conjunction with restrictions on the country's domestic production or consumption

141 Chase, *supra* note 12, at 384.

142 Chase, *supra* note 12, at 384.

143 Chase, *supra* note 12, at 385.

B. International Efforts To Protect Tropical Timber

An international solution to the problem of controlling the tropical timber trade is necessary for two reasons. First, as detailed above, unilateral trade restrictions are often prohibited by the GATT and second, individual countries cannot control trade without help from the international community. However, the existing international conventions that affect the tropical timber trade, the International Tropical Timber Agreement and the Convention on the International Trade in Endangered Species, have failed to adequately monitor the export and import of tropical timber.

1. The International Tropical Timber Organization

In recognition of the need for better conservation and development of tropical timber resources,[144] the United Nations Conference on Tropical Timber concluded the International Tropical Timber Agreement ("ITTA") in 1983.[145] The ITTA was the first international commodity agreement to specifically include provisions addressing conservation.[146] The original 1983 Agreement emphasized the importance of sustainable use of tropical timber[147] resources and sought to foster cooperation in sustainable trade of

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144 International Tropical Timber Agreement, Nov. 25, 1983, U.N. Doc. TD/TIMBER/11 pmbl.

145 U.N. Doc. TD/TIMBER/11, *supra* note 144, art. 1. The ITTA was negotiated and adopted by 36 timber producing countries and by 33 timber consuming countries. The timber-producing countries are Bolivia, Brazil, Cameroon, Colombia, Congo, Costa Rica, Cote d'Ivoire, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Gabon, Ghana, Guyana, Honduras, India, Indonesia, Liberia, Malaysia, Mexico, Myanmar, Panama, Papua New Guinea, Paraguay, Peru, Philippines, United Republic of Tanzania, Thailand, Togo, Trinidad, Tobago, Venezuela, and Zaire. ITTA, *supra* note 14, at 1042 annex A.

The timber-consuming countries are Afghanistan, Algeria, Australia, Austria, Bahrain, Bulgaria, Canada, Chile, China, Egypt, European Community (Belgium, Luxembourg, Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain and, United Kingdom), Finland, Japan, Nepal, New Zealand, Norway, Republic of Korea, Russian Federation, Slovakia, Sweden, Switzerland, and the United States of America. ITTA, *supra* note 14, at 1042 annex B. The ITTA established the International Tropical Timber Organization ("ITTO") to administer the provisions and supervise the operations of the ITTA. In turn, the ITTO answers to the International Tropical Timber Council ("ITTC"), which is comprised of the countries that signed the Agreement. U.N. Doc. TD/TIMBER/11, *supra* note 144, art. 3.

146 Robert M. Hardaway et al., *Tropical Forest Conservation Legislation and Policy: A Global Perspective*, 15 WHITTIER L. REV. 919, 948 (1994).

147 For the purposes of the Agreement, "tropical timber" was defined as "non-coniferous tropical wood for industrial uses, which grows or is produced in the countries situated between the Tropic of Cancer and the Tropic of Capricorn." U.N. Doc. TD/TIMBER/11, *supra* note 144, pmbl. & art. 2.

tropical timber.[148] However, the ITTO has proven completely ineffective in regulating the timber trade.[149]

As to Cambodia, the ITTO has been of little assistance because of its stance on trade restrictions.[150] The ITTO has vigorously argued against unilateral trade bans.[151] According to the ITTO, one main value of tropical forests is as earners of foreign exchange.[152] The ITTO's argument is that as the timber trade in a country is reduced, the international community will have less influence in policies and development regarding tropical forests.[153]

In contrast to the situation in Cambodia, the ITTO has been more willing to address the problem of deforestation in Malaysia.[154] Tropical forest destruction in Sarawak has received worldwide attention and in 1989, the ITTO sent an investigative mission to Sarawak to assess the sustainable use of tropical forests in the region.[155] Although the mission found ample evidence of poor logging management and practice, the ITTO failed to take action against Malaysia.[156] In 1990, Sarawak commissioned the ITTO to draw up recommendations for preserving its remaining forests.[157] The ITTO recommended that the cutting level not exceed nine point two million cubic meters a year.[158] Because Sarawak had failed to bring its logging rate down to the recommended level, the ITTO pledged four million dollars to finance projects which promote sustainable harvesting of timber.[159]

The failure of the ITTO to take stronger action against Malaysia, is partly due to the much criticized way in which votes are designated in the ITTO.[160] Under the ITTA, votes are divided equally between consumers in the developed world and exporters of tropical timber in the developing world.[161] Consumer states receive a certain number of votes based on their

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148 Hardaway et al., *supra* note 146, at 948. For provisions that reflect the importance of sustainable use of tropical timber resources, see U.N. Doc. TD/TIMBER/11, *supra* note 144, art. 1(h).

149 Hardaway et al., *supra* note 146, at 949.

150 Marcus Colchester, *The International Tropical Timber Organization: Kill or Cure for the Rainforests?*, 20 THE ECOLOGIST 166, 170 (1990).

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* at 171.

155 *Id.*

156 *Id.* at 172.

157 *Logging Cuts Cost Malaysian State 50 Million Dollars Yearly*, *supra* note 36.

158 *Id.*

159 *Id.*

160 Colchester, *supra* note 150, at 167.

161 ITTA, *supra* note 14, art. 10 (1).

consumption of tropical timber.[162] For example, Japan has the most votes of any consumer country because it is the largest importer of tropical timber.[163] Similarly, exporter countries receive votes proportional to the amount of timber that they export.[164] On the producer side, Indonesia has the most votes followed by Malaysia and Brazil.[165] The result of this voting system is that the more a country contributes to deforestation, the more votes it receives in the ITTO.[166] This voting structure "ensures that the ITTO's primary role of promoting the timber trade heavily outweighs its secondary conservation role."[167]

The ITTO has the impossible task of both conserving tropical timber resources and promoting the tropical timber trade.[168] The aim of conservation is additionally undermined by the fact that the ITTA does not contain a system to determine whether a country is harvesting tropical timber in a "sustainable" manner.[169] In 1990, at its annual meeting in Bali, the ITTO announced its goal of deriving all tropical timber from sustainable resources by the year 2000.[170] While this is a laudable goal, there is no consensus in the ITTO or the international community as to what "sustainable" means.[171] Moreover, the ITTA has failed to implement regulations on the trade of unsustainably managed timber.[172]

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162 ITTA, *supra* note 14, art. 10 (5).

163 ITTA, *supra* note 14, annex B.

164 ITTA, *supra* note 14, art. 10 (2)(b).

165 ITTA, *supra* note 14, annex A.

166 Colchester, *supra* note 150, at 167.

167 Colchester, *supra* note 150, at 167.

168 Colchester, *supra* note 150, at 166.

169 One of the objectives of the original ITTA is "[t]o encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned." ITTA, *supra* note 14, art. 1(h). However, nowhere does the ITTA define what "sustainable" actually means.

170 The most recent Agreement of January 26, 1994, stresses the importance of meeting the year 2000 goal. *See* ITTA, *supra* note 14, pmbl. Malaysia reacted critically to the goals set by the International Tropical Timber Organization ("ITTO"). ITTO members have set the year 2000 as the deadline for all tropical timber products to be logged on a sustainable basis to prevent further deforestation around the globe. In reaction, the Malaysian Prime Minister declared that producer countries be compensated, in the form of free market access and incentives, for the loss in revenue these environmental protections would create once sustainable logging becomes compulsory. *Malaysia Wants Market Access as Timber Rule Reward*, JAPANECON, May 11, 1993, *available in* WESTLAW, JAPANECON Database.

171 Chase, *supra* note 12, at 371.

172 Colchester, *supra* note 150, at 169.

2. *Convention on International Trade in Endangered Species*

In addition to the ITTA, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[173] also affects the tropical timber trade. The appendices of CITES enumerate threatened species.[174] The most restrictive list is appendix I which covers species that are threatened by extinction and are or may be affected by trade.[175] International trade in appendix I species is forbidden with certain narrow exceptions.[176] International transactions in appendix I species require an export permit from the country where the wildlife originates or a re-export certificate from the re-exporting country.[177] An import permit is also required from the recipient country.[178] In order for a species to be listed under appendix I, two criteria must be met: the species at issue must (1) be threatened with extinction[179] and (2) be potentially affected by international trade.[180]

Appendix II of CITES regulates the trade in wildlife that is not currently threatened with extinction but may become so if trade is not controlled.[181] Commercial trade is permitted in appendix II listed species, provided that the country of origin or country of re-export has issued an export permit or re-export certificate.[182] However, unlike appendix I, an import certificate from the country of origin is not required.[183] Appendix II,

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173 CITES was signed in Washington, D.C., on March 3, 1973, and entered into force in July 1975. CITES is the only global treaty that aims to regulate trade in endangered species of flora and fauna. CITES signatories are obligated to monitor the global wildlife trade and to take action on behalf of species endangered because of international trade. INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK 1 (Ginette Hemley ed., 1994). For a full discussion of all the elements of the treaty, see S. LYSTER, INTERNATIONAL WILDLIFE LAW 239-77 (1985).

174 *See* CITES, *supra* note 15.

175 INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 1.

176 Noncommercial trade in these species is only allowed in exceptional circumstances, such as for scientific or zoological purposes and if such trade will not jeopardize the species chance for survival. INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 3. *See* CITES, *supra* note 15, art. III.

177 CITES, *supra* note 15, art. III(3).

178 CITES, *supra* note 15, art. III(3).

179 The word extinction is commonly referred to as the elimination of all living specimens of a particular species. However, extinction does not necessarily mean the total worldwide elimination of a species. The threat of extinction in a specific geographic location or to a subspecies population is sufficient. DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES 31 (1989).

180 CITES, *supra* note 15, art. II(1).

181 INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 4.

182 CITES, *supra* note 15, art. IV.

183 CITES, *supra* note 15, art. IV. Appendix II also includes look-alike species that are not already threatened with extinction but may become so if trade is not controlled. An entire genus, family, or order

which contains tens of thousands of species, is much larger than appendix I.[184] This is a consequence of the parties' tendency to list individual species in appendix I and whole families in appendix II.[185] Finally, appendix III is for nations to list species endangered within their own borders.[186]

CITES has been praised as the most successful of all international treaties concerned with the conservation of wildlife.[187] However, CITES has not been as successful in protecting plants.[188] This ineffectiveness is due to a number of factors including a lack of interest of most of the parties, for which trade in plants from an economic point of view is less important than trade in animals and their parts and derivatives.[189] Other issues affecting the regulation of the endangered plant trade are more technical in nature.[190] The identification of plant specimens is in most cases even more difficult than for animals and their parts and derivatives.[191] For example, it is difficult to distinguish between some types of tropical trees and to determine whether a plant was artificially propagated.[192]

Currently, CITES lists only three species of tropical timber, the Brazilian rosewood listed under appendix I and the Mexican mahogany and Caribbean mahogany listed under appendix II.[193] One possibility for controlling the tropical timber trade is to include more species of tropical timber in Appendices I and II of CITES.

However, problems exist as to listing tropical timber that is threatened with deforestation in Cambodia and Malaysia. CITES is not a habitat protection treaty. Although important as habitats for both plant and

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may be listed if most species within the group are threatened and if it is difficult to distinguish between threatened and nonthreatened species. INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 4.

184 LYSTER, *supra* note 173, at 245. *See* CITES, *supra* note 15, apps. I, II.

185 LYSTER, *supra* note 173, at 245.

186 INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 4. Appendix III allows parties the option of listing native species that are already protected within their own borders. The objective of appendix III is to provide a mechanism whereby a Party that domestically regulates the export of species not listed in appendix I or II can seek international help in enforcing its legislation. LYSTER, *supra* note 173, at 246.

187 LYSTER, *supra* note 173, at 240.

188 WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES: A REFERENCE TO THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA 233 (1992).

189 *Id.*

190 *Id.*

191 *Id.*

192 *See id.*

193 *See* CITES, *supra* note 15, apps. I, II. The Mexican Mahogany is listed under its scientific name, Swietenia humilis; the Caribbean Mahogany as Swietenia mahagoni; and the Brazilian rosewood as Dalbergia nigra. INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, *supra* note 173, at 83, 103.

animal wildlife, forests are not protected by CITES because they are not considered threatened as a whole. Generally under CITES, the broader a category of plants or animals is, the less likely it is to qualify as being endangered or threatened with extinction.[194] Conversely, the smaller and more localized a population is, the greater chance it will have to qualify as endangered.[195] In regard to tropical forests, CITES protects only individual species that are themselves threatened by trade, such as the Brazilian rosewood.[196]

Although the size of Cambodia's tropical forests has diminished over thirty percent in the last thirty years,[197] the individual species that make up the Cambodian tropical forest are not technically threatened. In order for Cambodian tropical timber to be listed in appendix I, the separate species of tropical trees would have to be threatened with extinction and be potentially affected by trade. The most popular species of tropical timber exported from Southeast Asia comes from the Dipterocarp family which makes up a large portion of forests in the region.[198] Since species from the Dipterocarp family are abundant in Southeast Asia, they are unlikely to be viewed as endangered. Overall, CITES presents an inadequate framework for protecting tropical timber species.

IV. REGULATING THE TROPICAL TIMBER TRADE WITH A NEW TIMBER CONVENTION

Neither CITES nor the ITTA provides an adequate response to the problem of regulating the tropical timber trade nor do these agreements go far enough in monitoring the tropical timber trade. A new agreement is necessary to establish an international framework for countries to truly comply with international restrictions on the tropical timber trade. A new agreement should employ the "prior informed consent" framework of the Basel Convention to create mutually supportive import and export restrictions.

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194 David S. Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L. J. 247, 249 (1987).

195 *Id.*

196 CITES, *supra* note 15, app. I.

197 *Government Announces Ban on Log Exports as Part of Effort to Reduce Deforestation*, *supra* note 10.

198 THE JAPANESE MARKET FOR TROPICAL TIMBER: AN ASSESSMENT FOR THE INTERNATIONAL TROPICAL TIMBER ORGANIZATION X-3 (1990).

A. The Basel Convention

A new regime for the control of the tropical timber trade must establish uniform international obligations and standards. This, in principle, was the approach taken by the Basel Convention in controlling the international hazardous waste trade.[199] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was adopted in 1989 under the auspices of the United Nations Environment Program.[200] The Convention entered into force on May 6, 1992, and constituted the first attempt at global regulation of the international transport of hazardous waste.[201] Importantly, the elaboration of the Basel Convention was seen by many as an opportunity to stop the illegal international waste traffic.[202]

Like CITES, the Basel Convention is based on import and export restrictions.[203] The export of wastes to any developing country is prohibited if the importing party has prohibited all imports by legislation, has not given its prior informed consent, or if the exporting party has reason to believe that the wastes in question will not be managed in an environmentally sound manner.[204] The Convention also places an affirmative duty upon an importing country to prevent the import of hazardous wastes if the waste will not be managed safely.[205] Furthermore, hazardous wastes are required to be accompanied by a document of movement from the point at which transboundary movement begins to the point of disposal.[206] The Basel Convention prohibits parties to the Convention from exporting or

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199 Katharina Kummer, *The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention*, 41 INT'L & COMP. L. Q. 530, 532 (1992).

200 Basel Convention, *supra* note 16, pmbl.

201 Diana L. Godwin, Comment, *The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?*, 22 DENV. J. OF INT'L L. & POL'Y 193, 199 (1993).

202 Kummer, *supra* note 199, at 535. One hundred and five States and the European Union have signed the Final Act of the Basel Convention. The five main goals of the convention are: (1) minimize the generation of hazardous waste; (2) reduce transboundary movements of hazardous waste; (3) achieve national self-sufficiency in waste disposal; (4) create a system of prior notification and informed consent between importing and exporting countries; and (5) ban the movement of hazardous waste between parties and non-parties to the Convention in the absence of some other agreement. Mark E. Allen, Comment, *Slowing Europe's Hazardous Waste Trade: Implementing the Basel Convention into European Union Law*, 6 COLO. J. INT'L & ENVT'L L. & POL'Y 163, 166 (1995).

203 *See* Basel Convention, *supra* note 16, art. 4.

204 Basel Convention, *supra* note 16, art. 4(2)(e).

205 Basel Convention, *supra* note 16, art. 4 (2)(g).

206 Basel Convention, *supra* note 16, art. 4(7)(c).

importing hazardous waste from a nonparty state.[207] However, parties may enter into bilateral, multilateral, or regional agreements regarding the transport of hazardous wastes provided that such agreements do not derogate from the environmentally sound management of hazardous wastes required by the Convention.[208]

In order to implement the import and export restrictions, the Convention has created a system of "prior informed consent"[209] whereby, the state of export must notify the state of import of any intended movement of hazardous waste.[210] The information provided must be sufficiently detailed to enable the importing state to assess the nature and risk of the intended movement of hazardous waste.[211] The state of import must then respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information.[212] The state of export may not allow the transboundary movement to commence until it has received written confirmation[213] of the written consent of the state of import,[214] and confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.[215]

The Basel Convention presents a practical framework for creating a system of export and import restrictions to control the international tropical timber trade. In applying the Basel Convention framework, the import of tropical timber from a developing country would be prohibited if the exporting country had prohibited all exports by legislation or if the importing country had reason to believe that the timber in question was not harvested in a sustainable manner. The definition of "sustainable" would be determined collectively by parties to the Convention at their first meeting.[216] As in the Netherlands Framework on Tropical Timber, an

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207 Basel Convention, *supra* note 16, art. 4(5).

208 Basel Convention, *supra* note 16, art. 11.

209 Kummer, *supra* note 199, at 547. *See* Basel Convention, *supra* note 16, art. 6.

210 Basel Convention, *supra* note 16, art. 6(1).

211 Basel Convention, *supra* note 16, art. 6(1), annex V (lists the information to be specified).

212 Basel Convention, *supra* note 16, art. 6(2).

213 Basel Convention, *supra* note 16, art. 6(3).

214 Basel Convention, *supra* note 16, art. 6(3)(a).

215 Basel Convention, *supra* note 16, art. 6(3)(b).

216 The World Wildlife Fund considers a "sustainably managed" forest to be one that is without "significant ecological impoverishment." Colchester, *supra* note 150, at 167. Another definition made popular by the Brundtland Commission considers "the means by which development is made to meet the needs of the present without compromising the ability of future generations to meet their own needs." *Id.* In terms of tropical forests, sustainability would include not just preserving timber resources, but also

international task force of experts could be assigned the role of determining the criteria necessary to establish that a forest is sustainably managed.

The system of "prior informed consent" would be a necessary part of any scheme to regulate the timber trade. The state of import would have to notify the state of export that it wished to import tropical timber.[217] The state of export would then be required to respond to the importer in writing, indicating whether it granted or denied permission.[218] Furthermore, the state of import would be prohibited from receiving timber until it had received written confirmation of the consent of the state of export.[219] Finally, the timber convention would prohibit parties to the Convention from importing or exporting tropical timber from a non-party.[220]

An affirmative duty must be placed on the exporting country to prevent the illegal export of tropical timber. Nations would have to take the appropriate legal and administrative measures to implement and enforce the provisions of the Convention.[221] This would include enacting measures to prevent and punish the illegal smuggling of timber.

A new timber convention would bolster the sovereignty of exporting countries by banning imports of timber from exporting countries which prohibit the export of tropical timber. In the case of Cambodia, the country would have to make an effort to reduce the illegal smuggling of timber by the Khmer Rouge; and Cambodia would have to take the appropriate legal measures to enforce its prohibition. Under this framework, Japan and Thailand would be prohibited from purchasing any timber that originated in Cambodia. International pressure on consuming countries to abide by the treaty would extinguish the Khmer Rouge's illegal market, and Thailand and Japan would be subject to international scrutiny for any illegal importation of tropical timber. But with international monitoring, the illegal trade should be stopped at the border. Essential for this scheme is that tropical timber be accompanied by a movement document designating the point of origin, as provided for in the Basel Convention.[222]

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maintaining biological diversity and preserving the ecological functions of forests. This includes preserving soil quality, climate and weather cycles, and downstream fisheries. *Id.* at 168.

217 *See* Basel Convention, *supra* note 16, art. 6(1).

218 *See* Basel Convention, *supra* note 16, art. 6(2).

219 *See* Basel Convention, *supra* note 16, art. 6(3).

220 *See* Basel Convention, *supra* note 16, art. 4(5).

221 *See* Basel Convention, *supra* note 16, art. 4(1).

222 *See* Basel Convention, *supra* note 16, art. 4(7)(c).

In order to enforce the convention, the Secretariat must be required to take a more direct role in the monitoring of the tropical timber trade.[223] As it stands now, Cambodia cannot report violations of its export bans to any competent international environmental tribunal. In order to focus on trouble spots, the Secretariat could make an assessment of those tropical countries (such as Cambodia) that required enhanced monitoring on the border of the country. To facilitate the deterrence of illegal trade, all copies of import notifications would be sent to the Secretariat to allow for the centralized monitoring of the tropical timber trade. Additionally, by enacting strong penalties for violators and by monitoring companies involved in the tropical timber trade more closely, better accounting would take place of log exports.[224]

Consequently, if Malaysia wanted to export timber without restrictions, it would be free to do so without fear of international retaliation. However, if Malaysia failed to manage her forests in a sustainable manner, parties to the timber convention would be free to choose not to import timber from Malaysia. A new multilateral timber agreement would allow Malaysia a voice which it might not have if Western European countries enacted their own import bans. As is evidenced from the Austrian and Dutch efforts to limit tropical timber imports, Malaysia has been faced with the trend towards tropical timber regulation. Especially in Southeast Asia, where trade in hardwood timber is an important source of income,[225] an international solution is needed that respects Malaysia's sovereignty yet places equal responsibility on importing and exporting countries to control the tropical timber trade.

The convention will be appealing to the exporting countries which want to limit their exports and to importing countries which want to limit their imports. The convention would prohibit parties from importing or exporting tropical timber from a non-party so that countries party to the agreement, including probably the exporting countries of Southeast Asia and the importing countries of Western Europe, would be forbidden from

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223 David J. Abrams, Note, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution,* 28 COLUM. J. TRANSNAT'L L. 801, 831 (1990). The Secretariat created by the Basel Convention was given primarily information-gathering and transmitting powers. The Convention merely authorizes the Secretariat to provide parties with the names of private consultants with the necessary technical expertise to assist in assessing notification documents, to verify that the waste shipment as received matches its documentation and to determine whether the hazardous waste will be managed in an environmentally sound manner. Basel Convention, *supra* note 16, art. 16(1)(h).

224 Abrams, *supra* note 223, at 834-35.

225 BERGER, *supra* note 46, at 205.

trading timber with a non-party such as Japan. The success of a new timber agreement hinges to a large degree on Japan's willingness to be a party. One way to encourage Japan to sign would be to guarantee to Japan a percentage of sustainably harvested timber imports. Additionally, Japan, as a party to the convention, only has to agree to respect the export bans of countries that enact such legislation.

A scheme based on the Basel Convention would shift the timber trade situation from one involving unilateral export or import bans, to one involving mutually supportive import and export bans. This multilateral scheme creates a plausible compromise between countries such as Cambodia that want to stop the export of its timber and countries such as Malaysia that want to retain sovereignty over their natural resources.

B. The Importance of a Multilateral Solution

In order to solve the problem of the tropical timber trade, a multilateral agreement is essential. The advantages of a multilateral solution are that an international agreement is more effective than unilateral efforts and a multilateral solution is necessary to overcome obstacles created by the GATT and the World Trade Organization ("WTO").[226]

When the WTO and its accompanying agreements came into force on January 2, 1995, it was unclear what effect they would have on international environmental restrictions.[227] The intent behind the establishment of the WTO was further trade liberalization through the removal of remaining barriers to free trade.[228] The structure of the WTO facilitates this goal by extending the institutional capacity of the GATT.[229] This extension of trade liberalization caused concern among environmental groups[230] due to the

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226 GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Apr. 15, 1994, GATT Doc. MTN/FA, 33 I.L.M. 1125, arts. I-III. The WTO was created under The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. The WTO was implemented to develop a more viable international trading system and to overcome the GATT's organizational short comings. The WTO unifies the new and existing GATT obligations under one administrative roof and provides an internationally recognized organizational structure. Under the WTO agreement, the WTO is authorized to implement the Uruguay Round Agreements (the Multilateral and Plurilateral Trade Agreements) and to resolve disputes arising out of the Uruguay Round Agreements.

227 Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995).

228 *Id.* at 424.

229 *Id.* at 425.

230 *Id.*

lack of a serious commitment in the text of the WTO to the goal of environmentally sustainable development.[231] However, there are indications that International Environmental Agreements ("IEAs") may prove an exception in the prohibitions against using trade restrictions for environmental protection.

Clearly, unilateral trade restrictions often come into conflict with the GATT;[232] however, the GATT does not necessarily present an obstacle to internationally agreed trade restrictions on tropical timber.[233] In 1991, the GATT reactivated its Working Group on Environmental Measures and International Trade ("EMIT")[234] to consider whether IEAs violated the GATT.[235] The EMIT did not give a definitive answer because current GATT rules do not explicitly address IEAs.[236] However, commentators have suggested that the GATT should be amended to allow countries to impose trade measures for environmental purposes only when those measures are "related to" an IEA.[237]

Although "related to" has also not been clearly defined,[238] imposing trade restrictions is certainly "related to" and even necessary for an IEA which focuses on controlling the tropical timber trade in order to stem deforestation. The creation of the Committee on Trade and the Environment by the WTO adds support for reconciling GATT restrictions with IEAs.[239] The creation of this committee demonstrates the WTO's commitment to resolving conflicts between environmental regulations and the GATT.[240]

There is no consensus regarding the effects of the GATT/WTO on IEAs. However, multilateral agreements appear to be able to withstand GATT challenges.[241] According to the 1994 report of the Office of the U.S.

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231 *Id.*

232 *See* NFATT discussion *supra* Part III.A.2.c.

233 Office of the U.S. Trade Rep., THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES, August 1994, *available in* WESTLAW, GATT Database, 1994 WL 761804.

234 The purpose of EMIT was to focus on the following three issues: (1) the relationship between trade provisions in existing international environmental agreements ("IEAs") and GATT principles; (2) the "transparency" of national environmental regulations likely to have trade effects; and (3) the trade effects of packaging and labeling requirements aimed at protecting the environment. *Id.* § II(B).

235 *Id.*

236 *Id.* § VI(2)(a).

237 *Id.* § VI(2)(d).

238 *Id.*

239 Schultz, *supra* note 227, at 425-26.

240 Schultz, *supra* note 227, at 425.

241 Office of the U.S. Trade Rep., *supra* note 233, § VI(c).

Trade Representative, the Uruguay Round should not pose a threat to future IEAs:[242]

> [A]s the WTO Committee on Trade and the Environment seeks for ways to ensure that international trade rules do not conflict with international environmental objectives, it is likely that nations will place increased emphasis on international cooperative efforts on the environment as a means of avoiding trade conflicts over these issues.[243]

A final consideration regarding the GATT and IEAs is the last-in-time rule of international law.[244] For example it has been suggested that, when there are parties to both agreements, the Basel Convention of 1989 trumps the GATT of 1947 by virtue of the last-in-time rule.[245] However, it may be that the 1994 GATT/WTO agreement defeats such trumping, because it resets GATT's date to 1994, permitting it to leapfrog over existing environmental treaties that use trade measures.[246] But in the case of a new tropical timber agreement, the GATT would be trumped again by the last-in-time rule.

V. CONCLUSION

The problem of deforestation in Cambodia and Malaysia requires an international legal solution. The existing legal mechanisms have failed on both the national and international level to protect tropical timber. A multilateral trade agreement would provide the necessary trade restrictions at both the place of import and place of export by using the "prior informed consent" framework of the Basel Convention. Deforestation in Southeast Asia is a global problem requiring more effort on the part of importing and exporting countries alike to ensure the future existence of the world's tropical forests.

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242 *Id.*

243 *Id.*

244 Schultz, *supra* note 227, at 434. The last-in-time rule is applied in the following manner: when the provisions of two treaties conflict, the later in time prevails, as between parties to both treaties, unless one treaty expressly specifies otherwise. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

245 Schultz, *supra* note 227, at 434.

246 Schultz, *supra* note 227, at 434.