Achieving Environmental Goals Under International Rules

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Introduction

Imagine commerce between Earth and Mars. Imagine each planet free to regulate such commerce by means of its own trade policies. In the absence of dictates of celestial law, there could be no objection to unilateral trade regulation on earth.

The issues get harder when nations share an ecosystem and participate in an interdependent world economy. Production practices in one country have environmental implications for other countries. To deal with these overlaps of interest, participating nations have formulated treaties prescribing environmental policies and governing trade restrictions (the General Agreement on Tariffs and Trade, or GATT). These international disciplines are relatively clear in some areas, but murky in others.

Environmental Trade Measures

One area of murkiness that has become increasingly contentious in recent years is the use of environmental trade measures (ETMs). The core of the issue is: 'How should national environmental policies be applied to foreign products?'. Leaving aside for the moment unilateral regulation, there are three other approaches.

Multilateralism

The first is exclusive multilateralism. When an international environmental treaty compels an ETM – for example, a restriction on the importation of an endangered species – then a multilateral approach is being applied to restrict foreign products. However, when the environmental treaty obligation interferes with another trade treaty obligation, as it does in this example since GATT Article XI prohibits embargoes, there are two possibilities for resolving the conflict. Either one treaty supersedes the other (e.g. under the Vienna Convention on the Law of Treaties) or some preference ordering of the two treaties must be worked out (e.g. a GATT waiver under Article XXV:5).[1]

The 'flip-side' of exclusive multilateralism is that countries cannot apply their environmental policies to imports in the absence of a multilaterally-agreed formula. For example, a country would set any maximum pollution levels it wants for domestically-made automobiles and ban commerce in those exceeding such levels, but it could not apply this ban to non-complying imported automobiles – at least, not unless it has an explicit multilateral agreement authorising it to do so.

National Treatment

The second approach is national treatment. Countries could unilaterally adopt whatever environmental standards they wish, and could apply the same standards to imports. But they would be prohibited from applying more stringent standards to imports than to domestic production. For example, the United States can ban the sale or import of foreign automobiles not meeting domestic Clean Air standards, provided that those standards for foreign automobiles apply similarly to domestically produced ones.

The GATT embraces this national treatment principle only with respect to trade in products.[2] In the notorious 'Tuna-Dolphin' decision of 1991, a GATT

panel concluded that the national treatment approach does not cover production processes.[3] In other words, the United States can unilaterally prohibit the sale of dolphin-unsafe tuna by domestic producers, but cannot apply the same ban to foreign tuna caught by processes which are not dolphin-safe.

Balance of Interests

The third approach is a balancing of the interests of environment protection and trading freedom. The balancing will need to draw upon a framework of principles expressing these interests and a procedure to weigh and assess them in each case of conflict. One widely accepted principle of environment protection provides that:

> States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[4]

Another widely accepted principle relating environment protection to trading freedom provides that:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.[5]

Moreover, in relation to development protection and trading of freedom, industrial countries shall to the fullest extent possible:

> refrain from introducing, or increasing the incidence of, customs duties or non-tariff barriers on products currently or potentially of particular export interest to less developed contracting parties.[6]

They should also:

> refrain from exercising political coercion through the application of economic instruments with the purpose of inducing changes in the economic or social systems . . . of other countries.[7]

In view of the vague and general nature of these principles, the proper balance between interests would have to be determined on a case-by-case basis. Since trade measures are involved, the obvious forum for resolving conflicts of interest is the GATT's dispute settlement mechanism. Yet the GATT lacks any positive norms regarding the environment which it might draw upon.[8] Its orientation is exclusively negative – in other words, preventing rather than promoting trade restrictive measures. Specifically, the GATT prevents trade measures in pursuit of environmental policy goals. Reformers have suggested either 'greening the GATT', or moving trade and environment disputes to another venue for resolution – for example, the new UN Commission on Sustainable Development.[9] Concerning the former, in January 1993 the European Parliament called for a 'two-year moratorium on all GATT panel judgements concerning the environment, pending the strengthening of GATT articles and practices'.[10] Notwithstanding this call, the European Commission has pressed ahead with its pending GATT complaint about the U.S. tuna-dolphin law. As a Parliamentary committee noted, the Commission finds the tuna-dolphin issue 'a convenient stick with which to beat the Americans in the margin of the Uruguay Round'.[11]

■ Instruments and GATT Implications

So long as GATT rules govern, it is important to understand their operation. This section discusses the use of various trade policy instruments to achieve environmental objectives and considers the GATT implications of these instruments. The unadopted Tuna-Dolphin report will be presumed to represent the law of the GATT, although this author believes that the report's analysis is incorrect.[12]

While trying to maintain its competitive edge in the global market, it may be hard for a nation to pursue 'good' environmental policies where other nations do not pursue similar policies. To deal with this problem, four instruments are available.

Tax or Regulatory Equalisation

The simplest way for a country to deal with the inconsistency between products produced under its environmental regimes and those products produced under other countries' regimes is to apply its domestic regime to imported goods. The application of a domestic product tax (e.g. on energy-inefficient appliances) or a domestic regulation (e.g. mandatory catalytic converters) to an imported product is relatively uncontroversial. Under GATT Article III, taxes on domestic production, or on ingredients embodied in domestic products, can be applied to 'like' imported products.[13] This form of tax equalisation is known as a border tax adjustment. Similarly, mandatory regulations on the domestic product as such can be applied to like imported products.

Distinguishing Products and Processes

What would be controversial, however, is the application to imports of a domestic environmental tax or regulation linked to the foreign production pro-

cess. For example, a tax on energy involved in making a product cannot be applied to imported products. Furthermore, GATT Article XX, which allows certain exemptions to free trade principles in order to protect plant and animal health and life, cannot be used to justify the application of such taxes or regulations to imports because that would involve 'extrajurisdictionality'.[14]

The distinction between products and processes can be critiqued on both economic and environmental grounds. The economic problem is that GATT's border adjustment rule is biased against a more efficient tax on the environmental externality (e.g. a tax on the amount of effluent discharged during the production process) in favour of a less efficient tax on the product itself. The environmental problem, as Robert F. Housman has noted, is that the term 'product' must be re-thought to include the product's full life cycle.[15]

Competitive Disadvantages of Domestic Standards

In addition, an inability to apply a domestic regulation to imports may vitiate the effectiveness of such a regulation. For instance, when the United States began imposing dolphin-safety standards on its fishing vessels, the fishing industry sought to escape regulation by reflagging. If tuna caught by foreign vessels is necessarily immune from U.S. regulation, then the United States cannot control its own market to achieve its dolphin protection goals. Although *The Economist* magazine has arrogantly suggested that killing dolphins is not an environmental issue because 'they are in no danger of extinction', what is at stake is the ability of society to regulate itself so as to protect living organisms and natural resources.[16]

In November 1992, the EC Commission submitted a GATT paper stating its understanding that

> . . . a country may not be required by the GATT to lower its level of environmental protection and that the GATT is not therefore an obstacle for the adoption by countries of appropriate environmental policies.[17]

While it is true that GATT does not require a country to lower its standards, the EC statement elides the fact that a country which shields foreign products from domestic taxes and regulations may place itself at a competitive disadvantage. Obviously, the Commission understands this point, as is evident from its proposal for conditioning the carbon tax on similar action by Japan and the United States. So it is rather surprising to see the Commission ignore the obstacles erected by GATT rules to the adoption of appropriate environmental policies.

Regulatory Neutralisation

Another instrument to deal with cost inconsistencies between products produced under strict domestic and lax foreign environmental regimes is a tax on imports commensurate to the difference in levels between domestic and foreign environmental regulation. For example in 1991, U.S. Senator David Boren offered a proposal to Congress to amend countervailing duty (CVD) law to neutralise the advantage enjoyed by lax regulation countries. A growing number of analysts agree with the proposition that 'Just as government subsidies of a particular industry are sometimes considered unfair under the trade laws, weak and ineffectual enforcement of pollution control measures should also be included in the definition of unfair trading practices'.[18] While social dumping duties were used many years ago in response to lower foreign labour regulations, no 'eco-dumping' or green CVDs have yet been employed.[19]

Converting an environmental regulation to an equivalent tax is easier said than done, however.[20] There is no obvious way to determine the cost that would have been incurred by foreign manufacturers to comply with U.S. regulations. It would be unfair simply to project U.S. costs on other countries since their price levels are often lower. Moreover, even if one uses U.S. costs, there is no agreed upon method for calculating them. Another problem is whether to use gross or net costs, as well-designed environmental regulations can provide long-term benefits to an industry.[21]

Aside from these practical concerns, there are serious conceptual problems with environmental CVDs. There is little reason to think that U.S. regulations are appropriate for other countries. But if the United States enacts Senator Boren's bill, why shouldn't every country follow suit? Would 150 different environmental CVD laws around the world lead to a more coherent and healthy ecosystem? Certainly not. The only practical way to apply environmental CVDs is to base them on international environmental standards for production processes. Yet few such standards exist.

Using CVDs or other taxes to neutralise lax foreign regulatory policies may be inconsistent with GATT Articles I, II, III, VI and XX. The most serious problem arises with Article I (Most-Favoured-Nation Treatment) because calibrating a tax based on the differences in foreign environmental policies constitutes a direct assault on the Most-Favoured-Nation principle. Some analysts believe that a lax environmental standard should be countervailable

even under present GATT rules. A reasonable case could be made for this were a government to adopt differentially lower environmental standards for export industries. This would meet the specificity test for CVDs.[22] Such a situation occurs with respect to labour regulation in export processing zones, but has not been alleged for environmental regulation.

Subsidies

Domestic subsidies can be used to cover a portion of the costs of new environmental technologies required by regulation. Unlike the equalisation and neutralisation instruments above, this instrument can assist exports as well as shield out problematic imports. As the Organisation for Economic Co-Operation and Development (OECD) has noted, 'Aid given for the purpose of stimulating experimentation with new pollution-control technologies and development of new pollution-abatement equipment is not necessarily incompatible with the Polluter-Pays Principle'.[23]

An attempt was made in the GATT Uruguay Round to treat certain domestic environmental subsidies as non-actionable, but this was dropped in the current text at the behest of the U.S. Bush Administration. With the Clinton Administration now in office, this issue is sure to resurface, if not in the Uruguay Round, then afterward. The first step will necessarily be to obtain international agreement on the principle that 'good' environmental subsidies should not be actionable by GATT rules. The second step will be harder – devising a list of acceptable environmental subsidies. Since there is little consensus even within countries as to what kind of 'industrial policy' is environmentally appropriate, gaining international agreement will be a challenge.

Harmonization

There are at least three types of harmonization:

- **Uniform** allowable pollution levels of uniform pollution control measures.
- **Minimum** international environmental standards, which all countries must meet but are permitted to exceed.
- **Policy convergence** whereby countries agree to specific common domestic policies (e.g. higher energy taxes) or to a set of common principles (e.g. the precautionary principle).

Most environmental agreements involve the harmonization of domestic environmental policies. For example, in the Montreal Protocol, the parties agree to reduce their production of chlorofluorocarbons. Such agreements do not conflict with the GATT.

When harmonization agreements involve also the co-ordination of foreign trade policies, the commitments made in such agreements may be GATT-illegal. But so long as the harmonization agreement applies only to parties, it would probably supersede GATT obligations under the principles of international law.[24] Nevertheless, a country that is not a party to the environmental agreement could lodge a complaint under the rules of the GATT if the harmonized trade policies detrimentally affect it.

Some recent environmental agreements (e.g. the Montreal Protocol) raise potential GATT difficulties because they regulate trade not only among parties, but between a party and a non-party. When such treaties require discrimination against non-parties (e.g. to deal with a free rider problem), they violate GATT Article I.[25] When actions taken under such a treaty are extrajurisdictional, they would also fail to qualify as exemptions under GATT Article XX to the fundamental principles of non-discriminatory free trade. So far, no such dispute has been brought to the GATT.

Is harmonization, then, the only way to deal with the interface of national regulatory regimes? Three harmonization alternatives have been suggested, but one more, rather Utopian, model should be mentioned. If all countries had perfect pricing systems in which environmental costs were properly internalised, then process standards would not be needed in the first place. If the property rights to natural resources were clearly assigned and transaction costs were low, then the correct environmental outcomes could be achieved by market-based voluntary exchanges, rather than by government regulation. If all products had informative 'ecolabels', including information about the production process, then fully-informed consumers would not need government paternalism. While this model is ideal, it is not very practical at this time.

■ New Rulemaking

New rules on trade and the environment are pending in both the GATT Uruguay Round and the North American Free Trade Agreement (NAFTA).[26] This section discusses these agreements, briefly looking

at the latest key developments from an environmental perspective.

Uruguay Round

The Uruguay Round contains two agreements that involve health and the environment. One is the *Agreement on Technical Barriers to Trade*, known as the 'Standards Code'. The other is the *Decision on the Application of Sanitary and Phytosanitary Measures*, known as the 'S&P Code'.[27] Both of these Codes are supplemental to the existing rules in the GATT, i.e., they add disciplines on national trade policy-making, they do not confer any environmental rights.

There are differing opinions as to how disruptive these new disciplines may be for environmental protection.[28] But given the perception among environmentalists, particularly in the United States, that the new Codes might hinder protection of public health, it seems unlikely that the Uruguay Round current text will be approved by the U.S. Congress.[29] One should also recall that President Bill Clinton and Vice President Albert Gore Jr. campaigned on the promise that 'We will not allow the Uruguay Round to alter U.S. laws and regulations through the back door'.[30]

Standards Code

The two Codes call for a 'harmonization' of national standards in the direction of international standards regardless of whether a particular international standard is less protective.[31] While there is no obligation to use international standards, the right to use one's own national standard is conditioned upon several requirements.[32] The main discipline in the Standards Code would be a new 'least trade restrictive' test. Although this test had its origins in an international trade treaty of 1927, it did not enter into GATT jurisprudence until 1992.[33] Under this test, national regulations 'shall not be more trade-restrictive than necessary to fulfil a legitimate objective . . . '[34] This test has been sharply criticised by public interest groups.[35]

S&P Code

There are two main disciplines in the S&P Code. First, S&P measures must be 'based on scientific principles', and must not be 'maintained against available scientific evidence'.[6] Second, each government must avoid

> arbitrary or unjustifiable distinctions in the levels (of environment protection) it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.[37]

This discipline would be particularly onerous for the United States which, as a result of *ad hoc* responses to lobby group pressure, has widely inconsistent risk standards across the full range of its environment protection regulations.

Transparency

Although there are a great number of environmental issues omitted in the Uruguay Round, the one which may trouble environmentalists the most is the failure to increase the 'transparency' of GATT as an institution. Secrecy is viewed as a virtue in the GATT system. For example, GATT Article Ad XVIII directs parties to 'preserve the utmost secrecy' regarding government assistance to economic development. GATT Article Ad XXVIII calls on parties to maintain 'the greatest possible secrecy' regarding the modification of tariff schedules. The GATT Group on Environmental Measures and International Trade, convened in late 1991, has never met publicly.

NAFTA

The NAFTA embodies no harmonization requirement in its sanitary and phytosanitary ('S&P') and technical barriers ('Standards') provisions.[38] The Parties agree to use international standards, but 'without reducing the level of protection . . . '[39] NAFTA also omits the least trade restrictive test for its standards provisions. While the NAFTA imposes virtually no discipline on product standards, there are some disciplines on measures employed to achieve S&P protection. First, each measure must be 'based on scientific principles', and not be 'maintained where there is no longer a scientific basis for it'.[40] Second, each measure must be 'necessary' for the protection of human, animal or plant life or health and must be applied only to the extent 'necessary' to achieve the Party's chosen level of protection.[41]

Although the NAFTA is, on the whole, 'greener' than the GATT, there is one way in which the NAFTA could put greater pressure on a country to lower its environmental standards. Take the Mexican–U.S. tuna-dolphin dispute (discussed above) as an example. Assume that Mexico brings a similar complaint under the NAFTA. The U.S. law would probably be found to violate Article 309 (Import and Export Restrictions) and not meet the 'life or health' exception in Article 2101 (General Exceptions), since both of these NAFTA Articles are based on GATT rules.[42] If it loses the case, the U.S. would be expected to conform its law to the rec-

ommendations of the panel.[43] Should the U.S. government fail to do so within 30 days, Mexico would be entitled to retaliate against U.S. exports.[44] By making the United States 'pay' for its tuna ban, NAFTA can facilitate Mexico's efforts to weaken U.S. conservation laws. It should be observed that trade retaliation by Mexico would be far more difficult under GATT's dispute settlement because prior approval by the GATT Council would be required.

■ Protectionism and Anti-Unilateralism

Is there a Trade-Environment Conflict?

The most common viewpoint among economists is that there is no conflict between environment protection and free trade. From a theoretical economics perspective, this is correct. In a world of perfect markets where prices reflect true social costs (including costs to future generations), perfect governments that produce no economic distortions, and perfect consumers who make rational and informed choices, free trade would yield the optimal level of environmental protection. The theoretical viewpoint is not very useful in this imperfect world.

The presumed conflict between trade and environment interests is only one subset of a more fundamental conflict between environment protection and economic growth. If one believes that economic growth is necessarily bad for the environment, then trade will always be bad because trade stimulates growth. Or, if one adopts the more moderate view that the compatibility of economic growth and environment protection depends upon the type of growth, then the environmental consequences of trade will not necessarily be detrimental.

Former United States President George Bush went too far when he claimed that 'economic growth goes hand-in-hand with environmental protection'.[45] Just as there is no good reason to believe that trade must degrade the environment, there is no reason to believe that trade must enhance it either. There can be circumstances where economic growth not only fails to help the environment, but where indiscriminate growth, as fuelled by trade, can actually harm the environment and waste irreplaceable resources.

Although free trade is essentially neutral toward the environment, trade protectionism is not. Since free trade stimulates economic efficiency, it can boost a society's economic opportunities to restore the environment. Yet trade protectionism boosts nothing (but economic inefficiency) and thus cannot lead to a better environment. While there may be special instances where trade protectionism could forestall environmentally sensitive trade, virtually any assault on the environment that can be accomplished through international commerce can be carried out just as invidiously through domestic commerce.

Accommodating Unilateralism

The role of the GATT is to reduce protectionism. This role is essential to free trade and the health of the world economy. It is a very difficult job as, unlike some international problems such as smallpox, which can be solved definitively, protectionism cannot be cured. Each generation must be re-inoculated.

When ETMs are protectionist (i.e. designed to protect domestic industries), the GATT system has a responsibility to address them. But when ETMs are abnegatory rather than protectionist – for example, a refusal to consume tuna that is dolphin-unsafe – the GATT should not override unilaterally-determined values.

Everyone agrees that multilateral solutions are preferable to unilateral ones. But treaties do not appear like magic spirits. They must be laboriously negotiated. The key issue for free trade policy-makers now is whether withdrawing the right of unilateral trade action for environmental protection would be a useful or counterproductive move toward achieving a multilateral consensus.[46] An ability to undertake unilateral action has long been a sovereign right of nations. Thus, those arguing that unilateral action is inappropriate have the burden of demonstrating the feasibility of an alternative new dynamic of spontaneous co-operation.

It is now fashionable to deny the importance of leadership and to forget that the present multilateral institutions, like the GATT and the UN, were built by the actions of a few hegemonic nations. The role of GATT rules, it is argued, is to protect small nations from bullying by larger nations.[47] It is suggested here that the evidence is not yet in on whether bullying is good or bad for trade liberalisation[48] but for the environment, this line of enquiry seems unimportant, since the roadblock to treaties is bluffing rather than bullying. Consider a decision rule specifying that no government should act on the environment (when that may affect international trade) until all other governments are pre-

pared to take action jointly. Is that a prescription for progress or for environmental gridlock? Twenty-one years ago, the Stockholm Declaration averred that 'International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing'.[49] Today, it seems that this hopelessly romantic view is being taken seriously.

The underlying motive for many of those individuals and countries urging universal co-operation and opposing unilateral ETMs is to require that industrial countries which want to improve the environment should compensate the developing countries in order to obtain their co-operation. For example, Arthur Dunkel, GATT's Director-General, explained that instead of a U.S. embargo against tuna caught in a dolphin-unsafe way, 'it would have been preferable to perhaps give some development aid to these countries so that the fishermen in these countries could afford to buy new nets and adopt new fishing policy'.[50] The GATT Secretariat's 1992 report on 'Trade and the Environment' suggests that countries with large tropical forests be 'offered compensation for reducing the rate of exploitation, rather than be threatened with restrictions on their exports'.[51]

Certainly, the industrial nations of the world should provide more development aid to the poor countries. It is in the economic interest of the industrial countries to do so. There are also good moral reasons for such assistance. Admittedly, the tactic of using GATT rules to euchre more funds from the rich countries is clever but it will be self-defeating if it undermines political support for the GATT among those wishing to take unilateral action. It may thereby even diminish the GATT's effectiveness in combatting Japanese protectionism. The foes of unilateralism play a dangerous game.

Notes

1. See J. Cameron, and J. Robinson, 'The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT', in 2 *Yearbook of International Environmental Law*, pp 15–18 (1991).
2. The national standard must not 'afford protection to domestic production' (GATT Art. III.1) and the national standard must be applied on a non-discriminatory basis (GATT Art. I.1).
3. United States – Restrictions on Imports of Tuna', GATT Doc.DS21/R, paras. 5.8–5.16. reprinted in 30 I.L.M. 1594. This decision has not been adopted by the GATT Council and therefore has no official standing. For a discussion of the Article III issue, see E.U. Petersmann, 'International Trade Law and International Environmental Law', 27 *Journal of World Trade*, 43, 68–69 (February 1993).
4. Stockholm Declaration, UN Conference on the Human Environment, Principle 21, reprinted in 11 I.L.M. 1416.
5. Rio Declaration on Environment and Development, Principle 21, reprinted in 31 I.L.M. 874 (emphasis added).
6. GATT BISD (IV/1), art. XXXVII:1b.
7. UN G.A. Res.44/215, 12 February 1990.
8. See P. Sands, 'Danish Bottles and Mexican Tuna', 1 *RECIEL* 28 (1992).
9. For example, see *Trade and Sustainable Development* (Winnipeg: International Institute for Sustainable Development, 1992), pp 53–61.
10. Parliament Resolution A3-0329/92. See 'EC Parliament Proposes Two-Year Moratorium on GATT Panel Environmental Decisions', 10 *International Trade Reporter* 136 (1993).
11. European Parliament, Report of the Committee on External Economic Relations on Environment and Trade, 3 November 1992, p 10.
12. This author believes that the analysis in the Tuna-Dolphin report is incorrect. See S. Charnovitz, 'Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities', 27 *Journal of World Trade* (April 1993).
13. Article XX of the GATT provides that, provided such measures are not applied in a manner which would amount to arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or to a disguised restriction on international trade, measures may be adopted where they are 'necessary to protect human, animal or plant life or health' or where they relate to 'the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.
14. The Tuna-Dolphin panel invented this term to describe ETMs that safeguard life or health outside the geographical boundaries of the country employing the measures. For a critique of the new 'theory' of extrajurisdictionality, see S. Charnovitz, 'GATT and the Environment: Examining the Issues', 4 *International Environmental Affairs* 203, 208-11 (Summer 1992).
15. See R.F. Housman, 'A Kantian Approach to Trade and the Environment', 49 *Washington and Lee Law Review* 1373, 1386–87 (1992).
16. The Greening of Protectionism', *The Economist*, 27 February 1993, p 25.
17. EC Proposal on Trade and Environment', reprinted in *Inside U.S. Trade*, 27 November 1992, p S-2.
18. A. Gore, *Earth in the Balance* (New York: Houghton Mifflin, 1992), p 343.
19. S. Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A historical overview', 126 *International Labour Review* 565, 576–77 (1987).

20. See J. Bhagwati, 'Environmentalists Against GATT', *The Wall Street Journal*, 19 March 1993, p A10.
21. R. Carbaugh and D. Wassink, 'Environmental Standards and International Competitiveness', 16 *World Competition* 81 (September 1992).
22. It might not meet the financial contribution test. But it would seem to be close to the case of countervailing against low pricing for natural resources.
23. OECD, 'The Implementation of the Polluter-Pays Principle', para.II.3, (1974).
24. Vienna Convention on the Law of Treaties, 1969, Article 30, 8 I.L.M. 679, 691.
25. In a recent speech, the head of the EC's GATT and OECD division of DG I (Roderick Abbott) stated that the trade enforcement provisions in the Montreal Protocol were 'regrettable.' See 'Uruguay Round Negotiations Face Range of Difficulties, EC Official Says,' 10 *International Trade Reporter*, 21 April 1993, p 661.
26. The Uruguay Round is still underway and the provisions discussed here may change. The NAFTA has been signed, but a supplemental agreement on the environment is currently under negotiation.
27. Both Codes are to be found in GATT, 'Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations', GATT Doc. MTN.TNC/W/FA, 20 December 1991. The Standards Code is Section G. The S&P Code is Section L, Part C.
28. For a good analysis of the proposed disciplines, see WWF, 'The Uruguay Round's Technical Barriers to Trade Agreement', January 1993.
29. See R. Nader, 'Approving NAFTA and GATT Means Giving Up Our Sovereignty to Foreign Nations', *Roll Call*, 29 March 1993, p 22.
30. B. Clinton and A. Gore, *Putting People First* (New York: Times Books, 1992), p 157.
31. Standards Code, Art. 2.4 S&P Code, para. 9.
32. S&P Code, paras. 9, 11.
33. International Convention for the Abolition of Import and Export Prohibitions and Restrictions (1927), 97 L.N.T.S. 393, Art. 7.
34. Standards Code, Art. 2.2.
35. For example, see P.A. Goldman, 'Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles', 49 *Washington and Lee Law Review* 1279, 1296 (1992) (as a general rule, the most effective solutions to environmental problems will be more restrictive to trade than the less effective alternatives).
36. S&P Code, para. 6.
37. S&P Code, para. 20. There are no hard definitions of 'discrimination' or 'disguised restrictions'. A country keeping out wine containing procymidone might be said to be guilty of both. Discrimination could be said to occur because 'like' products – that is, wine with and without procymidone – are being treated differently.
38. For a detailed review of the environmental provisions in NAFTA, see S. Charnovitz, 'NAFTA: An Analysis of its Environmental Provisions', 23 *Environmental Law Reporter* 10067 (1993).
39. North American Free Trade Agreement (NAFTA), December 1992, Arts. 713.1, 714.1. See also Art. 906.2.
40. NAFTA, Art. 712.3. Note that this test is viewed as less strict than the 'available' scientific evidence test in the Uruguay Round.
41. NAFTA, Arts. 709, 712.1 and 712.5.
42. This analysis assumes that a NAFTA dispute resolution panel would reach the same conclusion as the GATT panel did. It should be noted that Canada supported Mexico in the tuna-dolphin dispute.
43. NAFTA, Art. 2018.1.
44. NAFTA, Art. 2019.1.
45. Meeting of the Society of Business Editors and Writers, *Weekly Compilation of Presidential Documents*, 3 May 1991, p 540.
46. See D.A. Wirth, 'The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?', 49 *Washington and Lee Law Review*, pp 1389, 1398 (1992).
47. For example, in the GATT Council debate on the environment of May 1991, the delegate from Sweden (speaking for the Nordic countries) stated that GATT members had given up their right to seek to influence conditions in other member countries. Moreover, Sweden said, Contracting Parties 'retained a basic right to remain free from such pressures'. See GATT Doc. C/M/250, p 13.
48. For some preliminary evidence of the efficacy of bullying, see T.O. Bayard, and K.A. Elliott, "'Aggressive Unilateralism' and Section 301: Market Opening or Market Closing?", 15 *The World Economy* 685–706 (1992).
49. Declaration of the United Nations Conference on the Human Environment, Principle 24, reprinted in 11 I.L.M. 1416.
50. Analysis. Greening World Trade', British Broadcasting Corporation, 25 February 1993, p 3.
51. GATT, *International Trade 90-91*, Volume I, 1992, p 35.

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