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Free Trade, Fair Trade, Green Trade: Defogging the Debate

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Introduction

During the past few years the interaction between international trade and the environment has received attention in the GATT,[1] in parliaments,[2] in

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1. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188, *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter B.I.S.D.], 4th Supp. 1 (1969) [hereinafter GATT]. The term GATT may be used to refer both to the General Agreement and to the overseeing and administering organization based in Geneva, Switzerland. For a summary of GATT discussions on the issue of international trade and the environment, see TRADE & ENV'T (GATT, Geneva, Switz.) (a bimonthly newsletter printed in green ink).

2. Both the U.S. and European legislatures have addressed the issue. *See* High Seas Driftnet Fisheries Enforcement Act of 1992, Pub. L. No. 102-582 § 203, 106 Stat.

the press,[3] in new books,[4] in policy conferences,[5] on the Internet,[6] and in rap music.[7] It has been considered by the G-7,[8] the United Nations Conference on Trade and Development (UNCTAD),[9] the World Bank,[10] the Organization for Economic Cooperation and Development (OECD),[11] the GATT Council and Secretariat,[12] the U.N. Conference on Environment and Development,[13] the Sistema Económico Latinoamericano (SELA),[14] and the United Nations Environment Programme (UNEP).[15]

4900, 4905-06 (1992) (codified as amended at 16 U.S.C. § 1826a (Supp. IV 1992)). As to the European Parliament, see *Report of the Committee on External Economic Relations on Environment and Trade*, EUR. PARL. DOC. (A3-0329/92) (1992).

3. *See GATTery v Greenery*, ECONOMIST, May 30, 1992, at 54. Starting in 1994, BNA's International Trade Reporter has added the environment to its weekly topical index. *See* 11 Int'l Trade Rep. (BNA) (Jan. 12, 1994).

4. *See* THE GREENING OF WORLD TRADE ISSUES (Kym Anderson & Richard Blackhurst eds., 1992); TRADE AND THE ENVIRONMENT (Durwood Zaelke et al. eds., 1993); DANIEL C. ESTY, INSTITUTE FOR INT'L ECONOMICS, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994); C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS (1994); DAVID VOGEL, GLOBALIZING REGULATION: ENVIRONMENT AND CONSUMER PROTECTION AND TRADE POLICY (forthcoming Aug. 1995); TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE (James Cameron et al. eds., 1994).

5. *See* INTERNATIONAL TRADE AND THE ENVIRONMENT, WORLD BANK DISCUSSION PAPERS 159 (Patrick Low ed., 1992); ORG. FOR ECONOMIC CO-OPERATION AND DEV. (OECD), ENVIRONMENTAL POLICIES AND INDUSTRIAL COMPETITIVENESS (1993); INTERNATIONAL TRADE, INVESTMENT AND ENVIRONMENT: PROCEEDINGS OF THE 1993 FENNER CONFERENCE ON THE ENVIRONMENT (Ralf Buckley & Clyde Wild eds., Australian Academy of Science 1994).

6. *See, e.g.*, Internet, Trade.strategy and trade.library in conf.iatp.igc.apc.

7. ECOROPA/ANTI-GATT CAMPAIGN, DROP THE GATT (Anti-GATT Campaign) (on file with the *Cornell International Law Journal*).

8. 27 WEEKLY COMP. PRES. DOC, 968, 969 (July 17, 1991). "G-7" is shorthand for the governments of the seven major industrial democracies of the world.

9. *A New Partnership for Development: The Cartagena Commitment*, U.N. Conference on Trade and Development, 8th Sess., U.N. Doc. TD(VIII)/Misc. 4 (1992) [hereinafter *The Cartagena Commitment*].

10. *See* THE WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT 67 (1992).

11. *See OECD Trade and Environment Guidelines*, INSIDE U.S. TRADE, June 11, 1993, at 18; *see also* Ebba Dohlman, *The Trade Effects of Environmental Regulation*, OECD OBSERVER, Feb./Mar. 1990, at 28.

12. GATT SECRETARIAT, 1 INTERNATIONAL TRADE 90-91 19-39 (1992).

13. *See Agenda 21*, U.N. Conference on Environment and Development (UNCED), secs. 2.22, 11.24, 17.118, 39.3(d), U.N. Doc. A/CONF.151/26/Rev.1 (1992) [hereinafter *Agenda 21*].

14. *See* SELA PERMANENT SECRETARIAT, THE NEW TRADE ISSUES: COMPETITION POLICY, TRADE AND ENVIRONMENT (1992).

15. ROBERT REPETTO, TRADE AND SUSTAINABLE DEVELOPMENT (UNEP Environment and Trade Series No. 1, 1994); DAVID HUNTER ET AL., CONCEPTS AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: AN INTRODUCTION (UNEP Environment and Trade Series No. 2, 1994); ROBERT HOUSMAN, RECONCILING TRADE AND THE ENVIRONMENT: LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT (UNEP Environment and Trade Series No. 3, 1994); WILLIAM LESSER, INSTITUTIONAL MECHANISMS SUPPORTING TRADE IN GENETIC MATERIALS: ISSUES UNDER THE BIODIVERSITY CONVENTION AND GATT/TRIPs (UNEP Environment and Trade Series No. 4, 1994); JOHN M. STONEHOUSE & JOHN D. MUMFORD, SCIENCE, RISK ANALYSIS AND ENVIRONMENTAL POLICY DECISIONS (UNEP Environment and Trade Series No. 5, 1994).

Despite this constructive discussion, little progress has been made toward reaching an international consensus on solutions. For that matter, no consensus exists on identifying the problems.

The issue of trade and environment is not really a new one. As one keen analyst of trade policy explained in 1973:

> Environmental issues affect the world economy through the movement of polluted products in international trade, the differences in national rules governing (or ignoring) the pollution content of production processes, and activities of industrial countries which affect other countries through altering the environment itself. All three aspects could prove important to international economic relations.[16]

These three aspects remain important, but it was probably the advent of a fourth aspect—the burgeoning supervisory role of trade agreements—that triggered new interest in the topic and all of its ramifications.

The new interest in the topic may lead to the resolution of tensions between trade and the environment. The GATT has recently embarked on a new work program on the environment which was approved at the Marrakesh Ministerial in April 1994.[17] When U.S. President Bill Clinton signed the North American Free Trade Agreement (NAFTA)[18] implementing legislation, he stated: "Our agenda must, therefore, be far reaching. We are determining that dynamic trade cannot lead to environmental despoliation. We will seek new institutional arrangements to ensure that trade leaves the world cleaner than before."[19] Clinton's agenda is far reaching. It would be hard enough to assure that trade does not make the world less clean, but actually assigning trade a cleansing function is an ambitious goal indeed.[20]

Part I of this article lays out the main issues from environmental and trade perspectives. Part II focuses on several specific topics that have been the source of much confusion in the debate. Part III discusses the trade and environmental policies of the E.U. and the United States. Part IV presents some conclusions.

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16. C. FRED BERGSTEN, THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH 42 (1973).

17. *See [Trade Negotiating Committee] Decision on Trade and Environment*, GATT Doc. MTN.TNC/W/141 (Mar. 29, 1994), *reprinted in* 33 I.L.M. 1267 (1994), INSIDE U.S. TRADE, Apr. 8, 1994, at S-4.

18. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA].

19. Remarks on Signing the North American Free Trade Agreement Implementation Act, 29 WEEKLY COMP. PRES. DOC. 2547, 2550 (Dec. 8, 1993). On signing the NAFTA supplemental agreements, Clinton said that his Administration had "put the environment at the center of this in [sic] future agreements." *See* 29 WEEKLY COMP. PRES. DOC. 1758 (Sept. 14, 1993).

20. The Clinton Administration suggests that trade already does this to some extent. A brochure designed to sell the Uruguay Round to the public states that "by fostering greater efficiency and higher productivity, increased trade can actually reduce pollution by encouraging the growth of less polluting industries and the adoption and diffusion of cleaner technologies." *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, URUGUAY ROUND: JOBS FOR THE UNITED STATES, GROWTH FOR THE WORLD 9 (1994).

I. Overview of the Main Issues

Anyone studying the linkages between the environment and trade must consider two very complex issues: (1) the impact of trade on the environment and (2) the impact of GATT rules on the environment. Part I will deal with these issues on a conceptual, rather than empirical, level.

A. Environmental Effects of Trade

International trade is the exchange of ownership and the relocation of a good across a border. The exchange is motivated by a payment or by a barter. The relocation of the good could have environmental effects, although the payment probably has none.

One direct environmental impact of trade involves the transportation of goods. For example, the energy consumed, preservatives used, the port polluted, and the possibility of some hazardous spill are all potentially adverse environmental effects of transportation. The relocation of a good can also have a direct environmental impact. For example, imported fruit may allow a potentially hazardous animal to enter a country.[21] Hazardous waste may be transferred to a country that does not dispose of it properly.[22] Of course, not all locational effects are negative. Trade in environmental technology may eventuate cleaner production.[23]

Trade may also involve economic changes that have indirect consequences for the environment or human health.[24] These consequences can impact production or disposal of goods and materials. (In some cases, they are "externalities," but they can also be "internalities.")[25] Many of the consequences would happen anyway as a result of domestic production. For example, the purchase of an imported car will lead to the burning of fossil fuels and will cause some auto pollution. But it is inappropriate to attribute these effects to international trade if autos would have otherwise been produced by domestic companies. Thus, if one is to analyze the indirect effects of trade, one must look for effects that would not have occurred from domestic production and commerce.

There are two main types of indirect effects—scale and structural.[26] Scale effects result from the higher level of economic activity induced by trade. In other words, trade can accelerate the existing trends of produc-

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21. For a discussion of the zebra mussel problem, see John Ross, *An Aquatic Invader is Running Amok in U.S. Waterways*, 24 SMITHSONIAN 41 (1994).

22. Daly discusses several reasons why toxins should not be exported. *See* Herman Daly & Robert Goodland, *An Ecological-Economic Assessment of Deregulation of International Commerce Under GATT*, ECOLOGICAL ECON., Jan. 1994, at 73, 80-81.

23. *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INDUSTRY, TECHNOLOGY AND THE ENVIRONMENT: COMPETITIVE CHALLENGES AND BUSINESS OPPORTUNITIES (1994).

24. *See generally* OECD, THE ENVIRONMENTAL EFFECTS OF TRADE (1994).

25. An externality occurs when there are social benefits or costs that are not considered when private individuals in a transaction assess their individual benefits or costs. An internality occurs when private individuals do not assess their individual benefits or costs in a rational way, perhaps because of inadequate information.

26. *See* Candice Stevens, *The Environmental Effects of Trade*, 16 WORLD ECON. 439, 444-45 (1993).

tion.[27] For example, the increased air pollution in Mexico is a scale effect of NAFTA. Structural effects on the other hand result from changes in the patterns of production.[28] In other words, trade can engender production that might not otherwise exist. For example, without the possibility of exporting ivory, less harvesting of African elephants would occur.

In summary, the direct effects of trade involve transportation and location. The indirect effects concern the scale and the structure of the economy. The effects of trade liberalization (or trade restrictions) can also be analyzed in these four categories: scale, structure, direct, and indirect effects.

B. The New Critique

Criticism over the effects of trade and trade liberalization on environmental quality has grown over the past few years. For example, Ravi Batra has written that "[i]nternational trade comes out as the worst villain in the destruction of the environment. It is the most diabolical polluter in the world and offers a precious lesson in the desirability of economic diversification versus specialization."[29] Tim Lang and Colin Hines have written that "trade brings more of the problems the world needs less of: threats to the environment, uneven spread of employment, and widening gaps between rich and poor, both within societies and between societies."[30] Jay Hair has stated, "In short, the current status of what is widely known as free trade, i.e. the 'free' and unregulated movement of goods and services around the globe, is an unacceptable status quo."[31]

When firms compete for trade, those that use cleaner and healthier manufacturing techniques may put themselves at a competitive disadvantage.[32] National environmental regulations establish a "level playing field" within a country. Yet very little international regulation exists. As Herman E. Daly explains:

> Economists rightly urge nations to follow a domestic program of internalizing costs into prices. They also wrongly urge nations to trade freely with

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27. The GATT Secretariat uses the term "magnifier" to describe the scale effects of trade. *See* GATT SECRETARIAT, *supra* note 12. But while trade magnifies, it may also mask. *See* Sandra Postel, *Carrying Capacity: Earth's Bottom Line, in* STATE OF THE WORLD 16-19 (Lester R. Brown ed., 1994).

28. For an example of a structural effect with adverse environmental consequences resulting from the Uruguay Round agriculture agreement, see Jean Anne Casey & Colleen Hobbs, *Look What the GATT Dragged In*, N.Y. TIMES, Mar. 21, 1994, at A17.

29. RAVI BATRA, THE MYTH OF FREE TRADE: A PLAN FOR AMERICA'S ECONOMIC REVIVAL 226 (1993). Batra is a professor of economics at Southern Methodist University.

30. TIM LANG & COLIN HINES, THE NEW PROTECTIONISM 3 (1993).

31. *Trade and Environmental Issues: Hearings Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce*, 103d Cong., 2d Sess. (1994), *available in* LEXIS, News Library, Script File (statement of Jay D. Hair, President, National Wildlife Federation).

32. COMMISSION ON INT'L TRADE AND INV. POLICY (WILLIAMS COMM'N), UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 130-39 (1971). For an earlier discussion of the same problem in labor regulation, see MANLEY O. HUDSON, PROGRESS IN INTERNATIONAL ORGANIZATION 50 (1932).

> other countries that do not internalize their costs (and consequently have lower prices). If a nation tries to follow both those policies, the conflict is clear: free competition between different cost-internalizing regimes is utterly unfair.[33]

Furthermore, trade may entice governments to lower environmental standards (or taxes), or to refrain from raising them, in the presence of less-regulated foreign competition.[34] To deal with this pressure, many commentators suggest the use of trade restrictions. For example, Frances Cairncross writes that "[f]ree-traders will fret. Yet green trade barriers may have a logic of their own. They may be the only way that one country can put real pressure on another to make sure its companies shoulder the costs they would otherwise impose on the environment."[35]

Another concern about trade relates to the paradigm of "sustainable development."[36] According to Daly, "[s]ustainable development means living within environmental constraints of absorptive and regenerative capacities . . . . Trade between nations or regions offers a way of loosening local constraints by importing environmental services (including waste absorption) from elsewhere."[37] It is possible to disagree with Daly's policy conclusions[38] but still recognize the quandary he identifies. Simply put, can a nation really be pursuing sustainable development if it imports environmental services from a nation that does not follow sustainable development?

Several responses have been made to this new critique. First, while countries may need harmonized environmental standards on certain global or regional issues,[39] there are many topics of regulation that do not have significant transborder implications. For those issues, one might anticipate that national regulations would differ and such non-uniformity is proper since it reflects differing national values.[40] Second, international trade could raise product standards as producers meet market demand for

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33. Herman E. Daly, *Perils of Free Trade*, SCI. AM., Nov. 1993, at 50, 52. It should be noted that this fairness problem would exist even if countries had impermeable environmental borders. The fact that borders are permeable adds an environmental dimension to a commercial issue.

34. *See* Bronwen Maddox, *Can Europe Compete?: Black Skies, Red Tape, Green Fields, Grey Area*, FIN. TIMES, Mar. 3, 1994, at 11. It is interesting to note that Martin Wolf agrees that this pressure exists but believes that it "is not generally so high as to eliminate the freedom of action of governments . . . ." *See* MARTIN WOLF, THE RESISTIBLE APPEAL OF FORTRESS EUROPE 62 (1994).

35. FRANCES CAIRNCROSS, COSTING THE EARTH 251 (1991).

36. See the recommendations of the Roots of the Future, Global NGO Conference concerning trade in AGENDA YA WANANCHI: CITIZENS ACTION PLAN FOR THE 1990S 25-27 (1991).

37. Herman E. Daly, *From Adjustment to Sustainable Development*, *in* THE CASE AGAINST FREE TRADE 129 (Earth Island Press ed., 1993).

38. Daly believes that "[t]he default position should favor domestic production for domestic markets." *See* Daly, *supra* note 37, at 50.

39. Sometimes different states want their own environmental policies. *See* D'Vera Cohn, *Md., Va. May Go Separate Ways on Clean Air*, WASH. POST, Sept. 18, 1993, at B3.

40. For an excellent study covering both the theory and the available data, see Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993).

greener products.[41] Third, greater competition could force firms to look for more efficient production methods, which may result in better pollution control technology. Fourth, there is also an "income effect" from economic growth:[42] as countries become richer, citizens may demand more environmental quality. Yet as Gene Grossman notes, "even for those dimensions of environmental quality where growth seems to have been associated with improving conditions, there is no reason to believe that the process has been automatic."[43] Fifth, the relocation of production to countries with lower environmental standards can be viewed as desirable, not undesirable. According to Martin Wolf, "Provided barriers to trade are small, polluting processes will move to the country with the more liberal regulations. In this case, the country that has imposed the tighter regulation loses the processes its people dislikes, while still enjoying, through trade, the products they desire."[44] Sixth, trade and environmental policy concerns should not be mixed.[45] As the *Financial Times* opined: "The environment is important. But this concern should not be allowed to pollute the course of world trade. . . ."[46]

C. Matters of Inquiry

In considering how the GATT might be reformed to respond to the trade and environment problem, it is helpful to consider the approach which the GATT currently takes. The GATT concerns only a narrow slice of trade issues.[47] Imagine that Company XYZ in the United States trades a widget to a company in Japan for $10. There are numerous questions that might be asked about this trade. For example:

- Scale
  1. Did the production of the widget harm the U.S. environment?
- Structure
  2. Should Japan be self-reliant on widgets?
  3. Are widgets made in the United States because of higher environmental standards in Japan?
  4. Is widget production sustainable in the United States; is widget consumption sustainable in Japan?
- Location
  5. Does the widget harm the health of humans or animals in Japan?

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41. *See When Green Is Good*, ECONOMIST, Nov. 20, 1993, at 19.

42. *See* GATT SECRETARIAT, *supra* note 12, at 30. For a critique of this view, see Ralf Buckley, *International Trade, Investment and Environmental Regulation*, J. WORLD TRADE, Aug. 1993, at 101, 120-21.

43. GENE M. GROSSMAN, POLLUTION AND GROWTH: WHAT DO WE KNOW? (Centre for Economic Policy Research Discussion Paper No. 848, 1993).

44. WOLF, *supra* note 34, at 55.

45. For example, John Block (former U.S. Secretary of Agriculture in the Reagan Administration) said at a trade and environment conference, "I do not believe that we need to green the GATT anymore than it is. The GATT is a trade organization." *See* John Block, *Reflections on the Conference Agenda*, *in* AGRICULTURE, THE ENVIRONMENT AND TRADE—CONFLICT OR COOPERATION? 259 (Caroline T. Williamson ed., 1993).

46. *Trade and the Environment*, FIN. TIMES, Feb. 12, 1992, at 16.

47. *See* John Whalley, *The Interface Between Environmental and Trade Policies*, ECON. J., March 1991, at 180, 187-88.

6. If widget use is banned in the United States, has it notified Japan of that fact?

- Transportation
  7. Did any of the widget spill on the way?
- Pricing
  8. Does the $10 include all of the externalities of widget production?
  9. Does the $10 take into account the value of irreplaceable resources consumed to produce widgets?
  10. Could Japan have bought the widget for less than $10 if the United States had adequate antitrust enforcement?
  11. Does the federal or a state government subsidize the production of the widget (including the energy used to ship it to Japan)?
  12. Does XYZ "dump" the widget?
- Legal
  13. Did XYZ have a legal right to sell the widget?
  14. Was the widget production and sale in conformity with relevant treaties?
  15. Is the sale of widgets banned in Japan?
  16. Is exportation of the widget banned in the United States?
- Other
  17. Should Japan buy more widgets?
  18. Does widget production harm the global commons?
  19. Should the United States have retained the widget for domestic use?
  20. Does the United States undercut its national security by giving Japan the widget?
  21. Does the imported widget injure Japanese widget producers?
  22. Will widget workers in Japan be given adjustment assistance?
  23. Does the widget qualify for an ecolabel?
  24. Do U.S. widget producers use internationally recognized labor standards?
  25. Should Japan be buying something more useful than the widget?

The GATT is commonly described as the international agreement and organization that "governs" world trade.[48] Therefore, one might wonder how the GATT would deal with these questions. What do GATT rules say about these twenty-five questions? The answer is simple: there are no GATT disciplines on these issues.

On a few of these questions, such as those relating to certain kinds of unfair trade (e.g., 5, 11, 12, 13, 15, 21 and 24), the GATT allows countries to take unilateral import action depending on the answers. Yet the GATT itself would take no action. This would change under the Uruguay Round, as the GATT would have new disciplines regarding Questions 11[49]

48. *See* GATT, *supra* note 1.

49. *Id.* art. IV; *Agreement on Subsidies and Countervailing Measures*, GATT Doc. MTN/FA II-13 [hereinafter *SCM Agreement*], *in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* [hereinafter *Uruguay Round*], GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994), *reprinted in* OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (VERSION OF 15 DECEMBER 1993) (1993).

and 13.[50] This GATT role would be subject to a complaint; it would not be self-initiated by the GATT Secretariat.

Environmentalists are very interested in Questions 1, 3-9, 14-16, 15, and 23 which relate to health and environmental issues. The Clinton Administration seems most interested in Question 17 and least interested in Question 20. But none of these concerns would resonate in the GATT, even under the Uruguay Round agreement. What might trigger the GATT's interest is the non-occurrence of the widget trade. If this resulted from a Japanese trade restriction, the United States could invoke GATT procedures to help remove the restriction. These dispute resolution procedures would be available without regard to any of the above questions.

The GATT is commonly critiqued because it is not dedicated to the pursuit of sustainable development.[51] Critics say that the GATT is too oriented toward economic concerns; however, as the above list shows, there are many commercial issues that are beyond the scope of the GATT.[52] Asking the GATT to address the sustainability implications of trade is not just a slight broadening of the mandate. It is a transmogrification of the GATT's mission. The confusion results to some extent from the widespread view that the GATT "governs" trade—actually it governs only trade restrictions.[53]

D. The GATT and Environmental Supervision

When environmental standards or taxes are applied to imports, they can be viewed as trade barriers and may potentially violate the GATT, which attempts to achieve "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce."[54] Insofar as standards and taxes also apply to domestic production, they may be GATT-consistent. However, the GATT panel would still review the standards and taxes as to whether they "afford protection to domestic production" and as to whether they are "discriminatory," either

50. GATT, *supra* note 1, art. IV; *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, GATT Doc. MTN/FA II-A1C (Dec. 15, 1993), *in Uruguay Round*, *supra* note 49.

51. For a discussion of the concept of sustainable development, see WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1992-93 2-3 (1992). *See generally* ESTY, *supra* note 4, at n.2 (Sustainable development is economic growth that "meets the needs of the present without compromising the ability of future generations to meet their own needs.") (citations omitted).

52. Questions 2, 10, 14-16, 19, 21, 22.

53. The GATT has no rules about trade itself. For example, it does not say what can be traded and what cannot be. All governments have such rules (e.g., no liquor sales after midnight on Saturday) for individuals and businesses. Instead, the GATT has rules about the utilization of trade restrictions by governments. For example, the GATT does not permit governments to set quotas on the number of automobiles that can be imported.

54. GATT, *supra* note 1, preamble.

in law or in practice.[55] As Thomas J. Schoenbaum noted, "the GATT scheme allows each contracting party only limited freedom to determine its domestic environmental policies."[56]

When environmental restrictions are aimed at imports, such restrictions violate certain GATT rules.[57] Whether a GATT panel will find them in violation depends upon the application of the health and natural resource exceptions in Article XX,[58] which provides exceptions for measures "necessary to protect human, animal or plant life or health" or for measures "relating to the conservation of exhaustible natural resources . . . ."[59] Under these exceptions, the measure must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail and must not be a "disguised restriction" on trade. Several other specific tests have been created by GATT panels in recent years.[60]

This supervisory function of the GATT is controversial because its influence on environmental policy can only be negative.[61] At best, a panel will find that an environmental law is acceptable under GATT principles.[62] The more likely outcome is that a panel will rule against an environmental measure, which will put pressure on the country (particularly small countries) to revise its law. As the chart below shows, the success rate in bringing a GATT "environmental" complaint is high:

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55. *See* GATT, *supra* note 1, arts. I, III, and XX. The semantic similarity of environmental "protection" and "protection" of domestic industries is unfortunate and has hindered mutual understanding between the trade and environment camps.

56. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 713 (1992).

57. Restrictions can violate Article III if they treat an import less favorably than the like domestic product. They can violate Article XI if they impose a quantitative limit on imports.

58. In general, Article XX provides an exception to all other GATT articles. It is unclear whether an Article XXIII:1b complaint (non-violation nullification and impairment) could be invoked against an action justified by Article XX. GATT dispute settlements have not addressed this question.

59. GATT, *supra* note 1, art. XX(b), (g).

60. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 37, 47-54. The measure must use the least-GATT-inconsistent method to qualify under Article XX(b). *See Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT, B.I.S.D., *supra* note 1, 37th Supp. 200, para. 74 (1991). The measure must be "primarily aimed at" conservation to qualify under Article XX(g). *See Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT, B.I.S.D., *supra* note 1, 35th Supp. 98, paras. 4.4-4.7 (1989) [hereinafter *Herring and Salmon Report*].

61. David Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close A Fit?*, 49 WASH. & LEE L. REV., 1389, 1397 (1992) ("From an environmental point of view, the international trade regime as currently structured is a no-win proposition.").

62. Since the GATT has no rules regulating environmental behavior, it cannot recommend that the plaintiff country remedy the environmental harm. All it can do is uphold the right of the defendant country to apply the trade measure.

Year of Panel Report	Case (Defendant listed)	Type	Panel Finding
1981	U.S. Tuna	Import Ban	Illegal[63]
1987	U.S. Superfund	Border Tax Adjustment	Legal[64]
1987	Canada Herring	Export Ban	Illegal[65]
1990	Thailand	Cigarettes Import Ban	Illegal[66]
1991	U.S. Dolphin I	Import Ban	Illegal[67]
1992	Canada Beer[68]	Excise Tax	Legal[69]
1994	U.S. Dolphin II	Import Ban	Illegal[70]
1994	U.S. Gas Guzzler	Excise Tax	Legal[71]
1994	U.S. CAFE	Tax Penalty	Illegal[72]
199?	U.S. Gasoline[73]	Product Standard	Undone Settlement[74]

A country with stringent environmental standards thus faces three different kinds of potential pressure. First, trade can apply competitive pressure to firms to lower their standards and to lobby their government for weakened process regulations.[75] Second, the enforcement of standards may trigger adverse reactions in other countries, leading to environmental retaliation.[76] Third, trade rules, such as the GATT or other international

63. *United States—Prohibitions of Imports of Tuna and Tuna Products from Canada*, GATT, B.I.S.D., *supra* note 1, 29th Supp. 91 (1983) [hereinafter *Tuna Case*].

64. *United States—Taxes on Petroleum and Certain Imported Substances*, GATT, B.I.S.D., *supra* note 1, 34th Supp. 136 (1988) [hereinafter *Superfund Report*]. The U.S. tax on petroleum was found to be GATT illegal as a facially discriminatory measure. The "environmental" part of the case related to the tax on certain imported substances.

65. *Herring and Salmon Report*, *supra* note 60.

66. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, *supra* note 60.

67. *United States—Restrictions on Imports of Tuna*, GATT, B.I.S.D., *supra* note 1, 39th Supp. 155 (1993) [hereinafter *Dolphin I Report*]. This decision has not been adopted by the GATT Council.

68. For a discussion, see *Beer War Grows as USTR Announces 50 Percent Duty on Ontario Imports*, INT'L TRADE REP., July 29, 1992, at 1287; *Canadian Brewers Seek to End Beer Dispute*, J. COM., Nov. 13, 1992, at 4A. *See also Green Groups Letter to Kantor on Beer Dispute*, INSIDE U.S. TRADE, June 4, 1993, at 17.

69. *Canada—Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT, B.I.S.D., *supra* note 1, 39th Supp. 27 (1992).

70. *United States—Restrictions on Imports of Tuna (II)*, GATT Doc. DS29/R (May 20, 1994), 33 I.L.M. 839 (1994) [hereinafter *Dolphin II Report*]. *See* Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 E.L.R. NEWS & ANALYSIS 10,567 (1994). This decision has not been adopted by the GATT Council.

71. Steve Charnovitz, *The GATT Panel Decision on Automobile Taxes*, 17 INT'L ENV'T REP. 921 (1994). This decision has not been adopted by the GATT Council.

72. *Id.* The decision is reprinted in 33 I.L.M. 1397 (1994). This decision has not been adopted by the GATT Council.

73. *See Venezuela Moves Toward GATT Panel Against U.S. Gas Rules*, INSIDE U.S. TRADE, Feb. 4, 1994, at 7; ESTY, *supra* note 4, at 128, 270.

74. This case is rapidly evolving as of this writing. The parties have undone a settlement, and Venezuela has filed a case in the GATT. *See GATT Panel to Hear Venezuelan Complaint Against Clean Air Rules*, INSIDE U.S. TRADE, Oct. 7, 1994, at 4; *Congress Upsets Gasoline Pact Between Venezuela and U.S.*, J. COM., Sept. 16, 1994, at 2A.

75. WILLIAM J. BAUMOL, ENVIRONMENTAL PROTECTION, INTERNATIONAL SPILLOVERS AND TRADE 31-32 (1971).

76. For example, during the Reagan Administration, the EPA argued that it needed to maintain a fairly high tolerance for the pesticide EDB on imported mangos because tightening the standard could damage relations with food-exporting nations and lead to greater risks to American consumers from other pesticides as well as pests or diseases.

agreements or treaties, can result in legal or diplomatic pressure on a government to weaken its product or process regulations.[77]

In addition to the potential threat to national environmental laws, the GATT threatens international environmental agreements. International cooperation of any sort stumbles on the free rider problem.[78] Notwithstanding the free rider problem, the GATT system makes it difficult to use trade measures as a means of enforcement because the GATT is based on the most-favored-nation (MFN) principle which forbids discrimination against member nations.[79] Thus, treaties like the Montreal Protocol,[80] which require trade discrimination against non-members who are not following the Protocol's rules on the phase out of CFCs,[81] may be inconsistent with basic GATT rules.[82]

A final concern about the GATT's environmental supervision is who is doing the supervising. Environmentalists question why national environmental laws should be judged by panelists from countries that may have weaker standards. Furthermore, GATT panelists are generally trade lawyers or diplomats who may lack environmental expertise. For example, in calling for the United States to try cooperative efforts to save marine mammals, the Dolphin I[83] panel seemed blissfully unaware of the long history

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The U.S. Court of Appeals agreed with the EPA, noting that the mango exports generated funds that foreign producers might use for alternatives to EDB. *See* National Coalition Against the Misuses of Pesticides v. EPA, 815 F.2d 1579, 1581-82 (D.C. Cir. 1987).

77. *See* Tim W. Ferguson, *One Entangling Edible in the GATT Fight*, WALL ST. J., Nov. 23, 1993, at A17 (stating that the GATT is one way for knocking U.S. tuna rules out); Federal Appellants' Emergency Motion Under Current Rule 27-3 for Stay of Injunction Pending Appeal at 6, Earth Island Inst. v. Mosbacher (9th Cir.) (No. 92-15126, 92-15387) (Feb. 3, 1992).

78. Free riders are individuals who act rationally, but anti-socially, by accepting the benefit of a collective or public good without paying for it. For example, many European transit systems do not collect tickets (but may conduct spot checks). People who come aboard without buying a ticket are free riders. To take an environmental example, if there is a closed season on hunting and yet a hunter goes out at night to hunt secretly, he is a free rider. He gets the benefit of the wildlife protection without paying any of the costs (i.e., foregoing hunting). The free rider problem is that it is often rational for people to be free riders because their benefits will exceed their costs.

The GATT is not insensitive to the free rider problem. Countries wishing to join the GATT must "pay" certain entry fees by lowering their trade barriers. If a country does not become a member of the GATT, it does not gain the right to receive equivalent favors from GATT members. In other words, the GATT permits discrimination against non-members analogously to the way that the Montreal Protocol requires such discrimination. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1550 (1987) (as amended, London, 1990 and Copenhagen, 1992) [hereinafter Montreal Protocol]. Unlike the Montreal Protocol which any nation can join, however, the GATT is exclusionary in its admissions policy.

79. For the text of the most-favored-nation principle, see GATT, *supra* note 1, art. I.

80. Montreal Protocol, *supra* note 78.

81. *Id.* art. IV.

82. Richard Eglin, Speech, Environmental Protection and International Trade—Genuine Concern or Disguised Protectionism 8 (Aug. 31, 1992) (on file with the *Cornell International Law Journal*).

83. *Dolphin I Report*, *supra* note 67.

of unrequited efforts to achieve such cooperation.[84]

II. Defogging the Debate[85]

Part II consists of ten separate sections which discuss key issues in the debate. There are serious misconceptions surrounding all of these issues, which frustrate a conciliation of trade and environmental concerns.

A. Free Trade and Environmental Policy

It is sometimes suggested that free trade is antithetical to environmental policy because free trade connotes deregulation (or no regulation) of individual actions while environmental policy rests on regulation of individual actions.[86] This suggestion, however, is based on an extremely doctrinaire view of free trade. Originally, free trade meant that trade would not be taxed by tariffs; hence it is free. In typical usage, free trade also means the absence of special border restrictions.

Free trade does not mean the absence of all regulation of commerce.[87] The United States is a common market with internal free trade. However, government regulation—for example, a ban on the possession of machine guns—is not considered a derogation of free trade. In understanding what free trade means, it may be helpful to consider the counterfactual. The opposite of free trade is the protection of domestic commerce, not the non-regulation of domestic commerce. As the German Federal Ministry for Environment, Nature, and Nuclear Safety explains, "[f]ree trade does not mean that foreign products are exempted from the legal provisions that apply for domestic products."[88]

Government regulation may be inconsistent with the ideal of a free market. Nevertheless, one must distinguish between measures that are intended to restrict undesirable market outcomes (e.g., laws against selling babies) and measures that are intended to correct market failures (e.g., antitrust laws). This latter category is not inconsistent with free markets in practice. Indeed, such measures are designed to remove distortions in order to move closer toward ideal free market outcomes. Therefore, even if the term "free trade" is used with a doctrinaire connotation, i.e., viewing

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84. This was one of the goals of the Marine Mammal Protection Act of 1972. *See* Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407, 1378(a) (1988 & Supp. V 1993).

85. In an earlier study, the author attempted to defog several other issues in the trade and environment debate. Those points are not repeated here. *See* Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475 (1993).

86. *See* LANG & HINES, *supra* note 30, at 11.

87. Marina v.N. Whitman, *Environmentalism and the World Economy*, DETROIT NEWS, Apr. 11, 1993, at B3 (stating that the most committed free traders have long recognized the legitimacy of government-imposed quality and safety standards, as long as they are imposed uniformly on domestic and foreign products).

88. BUNDESMINISTERIUM FÜR UMVELT NATURSCHUTZ UND REAKTORSICHERHEIT (FEDERAL MINISTRY FOR ENVIRONMENT, NATURE, AND NUCLEAR SAFETY), THE PACKAGING ORDINANCE AND INTERNATIONAL TRADE 4 (1993).

it synonymously with "free market," measures intended to correct market failure would not contradict free trade.

The argument that environmental regulation is inconsistent with liberal trade is especially ironic because the need for government intervention is very obvious for environmental issues. One may disagree as to how serious certain risks are or as to what instruments should be used (e.g., marketable rights versus process regulations), but there is no serious argument that government intervention is unnecessary. Thus, government policies that refrain from commercial protectionism and that regulate environmental interactions are consistent with each other.

B. Trade Policy and Environmental Policy

It is sometimes suggested that trade policy-makers are predisposed to oppose the use of trade measures for environmental purposes because this contradicts their mission, which is to lower trade barriers.[89] According to one trade expert:

> Trade officials endeavor to achieve a more efficient allocation of their nation's economic resources by expanding opportunities for international specialization in the production of goods and services through trade. They accomplish this by reducing barriers to trade and negotiating international ground rules for policy measures that affect trade. Environmental officials, on the other hand, strive to sustain economic growth over the long term by preserving and improving environmental resources.[90]

Unfortunately, this pristine portrayal of trade policy-making obfuscates reality. To illustrate this point, I will briefly examine the Clinton Administration's trade policy of the past several months.

Consider these points:

• In the final weeks of the Uruguay Round, the Clinton Administration successfully pushed through a change in the subsidies text to expand non-actionable research subsidies.[91] According to U.S. Trade Representative Mickey Kantor, such subsidies "enhance our ability to stay on the leading edge of technology— a step ahead of our competition." Noting that the U.S. government provides more research and development assistance to industry than any other country, Kantor explained that "these programs

89. *See* Daniel Magraw, *Environment and Trade: Talking Across Cultures*, ENV'T, Mar. 1994, at 19 (stating that the concept of comparative advantage dominates the thinking on the trade side); *see also* ESTY, *supra* note 4, at 36.

90. Geza Feketekuty, *The Link Between Trade and Environmental Policy*, 2 MINN. J. GLOBAL TRADE, 171, 172 (1993). Feketekuty is a top career official in the Office of the U.S. Trade Representative and Chairman of the OECD Trade Committee.

91. *SCM Agreement*, *supra* note 49, art. 8, § 2. Non-actionable subsidies are immune from unilateral countervailing duties. The main changes in the text were: (a) to increase the permissible subsidy for basic industrial research from 50% to 75%, (b) to broaden industrial research to include knowledge that may be useful in developing new products, and (c) to increase the permissible subsidy for applied research (renamed "pre-competitive development activity") from 25% to 50% and to clarify that it includes the manufacture of a prototype. For the previous formulation in the 1991 Dunkel Text, see *Agreement on Subsidies and Countervailing Measures*, art. 8, § 2, *in* "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT (Inst. for International Legal Information ed., 1992).

have contributed to the restoration of America's competitiveness."[92]

• According to Under Secretary of Commerce for International Trade Jeffrey E. Garten, the Administration has launched a "Government Advocacy" program to coordinate federal government support on behalf of U.S. companies bidding for major contracts overseas.[93] The program includes a "full-court press involving everything from financing to foreign policy pressure."[94] According to Commerce Secretary Ron Brown, the Clinton Administration has "redefined the relationship between business and government," making government an active partner in the efforts of U.S. companies to export.[95] While the U.S. government has promoted exports for many decades, the new efforts differ considerably from past ones.[96]

• After months of effort by top economic and foreign policy officials of the Administration to convince Saudi Arabia to buy American-built airplanes, President Clinton consummated the $6 billion deal by personally lobbying the King of Saudi Arabia.[97] Such official peddling seems to be inappropriate government behavior, especially for a military superpower.[98] The U.S. Export-Import Bank's financing of the sale further indicates how far the reality of Clinton Administration policy diverges from the textbook perception of trade policy as a deregulatory, market-centric exercise.[99]

• After the Japanese refused to give Motorola greater access to its market, the Clinton Administration took initial steps to threaten Japan with trade sanctions.[100]

• The U.S. concern over the domestic aluminum industry's low-cost competition from Russia spurred the Administration to help engineer an international agreement to limit production of aluminum.[101] This will

92. *See Kantor Letter on Subsidies*, INSIDE U.S. TRADE, Feb. 11, 1994, at 13. For further discussion, see Michael Ebert, *Research Subsidies: Not So Fast*, J. COM., June 9, 1994, at 8A.

93. Under Secretary Jeffrey E. Garten, The Clinton Administration's National Export Strategy, Remarks Before the National Association of Manufacturers 10-11 (Feb. 17, 1994); U.S. DEP'T OF COMMERCE, COMPETING TO WIN IN A GLOBAL ECONOMY 21 (1994).

94. Garten, *supra* note 93, at 11.

95. *See* Nancy Dunne, *Trade Push Pays Off, Says Brown*, FIN. TIMES, Oct. 6, 1994, at 6.

96. For a review of U.S. government programs in 1920 to promote foreign commerce, see A REPORT ON THE FEDERAL GOVERNMENT'S ACTIVITIES IN THE PROMOTION OF FOREIGN COMMERCE, H.R. Doc. No. 650, 66th Cong., 2d Sess. (1920).

97. Thomas L. Friedman, *Saudi Air to Buy $6 Billion in Jets Built in the U.S.*, N.Y. TIMES, Feb. 17, 1994, at A1 (President Clinton sounded like a victorious battle commander just back from the trade wars.); *see also* Peter Behr, *Clinton Helps Raytheon Win Brazilian Contract*, WASH. POST, July 22, 1994, at D1.

98. Arthur Salter, *The Economic Organization of Peace*, 9 FOREIGN AFF. 42, 51 (1930); *Uncle Sam, Salesman*, FIN. TIMES (London), May 16, 1994, at 13.

99. *See* Hobart Rowen, *The Saudi Jet Sale Blurs Lines That Shouldn't Be*, WASH. POST, Feb. 20, 1994, at H1, H4.

100. *See* Richard Lacayo, *Take That! And That!*, TIME, Feb. 28, 1994, at 39; James K. Glassman, *Targeting Japan on Trade Hurts Us—and Misses the Point*, WASH. POST, Feb. 25, 1994, at B1.

101. *See Aluminum Cartel*, J. COM., Feb. 22, 1994, at 8A; *Aluminum Pact Is Set to Curb World Output*, WALL ST. J., Jan. 31, 1994, at A3.

hurt Russia, which already has serious economic woes.

• In August 1994, the Clinton Administration established an informal quota on Canadian wheat.[102] Reportedly, this action resulted from a deal the Administration had made to get Senate votes for the NAFTA.[103]

With the possible exception of the Motorola episode, none of these policies are about liberalizing trade by expanding opportunities for international specialization.[104] Instead they represent the government's efforts to distort or manage trade for commercial purposes.[105] Thus, it is delusional to suggest that trade policy-makers do not see the need for environmental trade measures because of their single-minded focus on lowering trade barriers. In reality, trade policy is at least as much about resisting liberalization as it is about embracing it.[106] If trade policy were only about opening markets, trade barriers would be extinct or at least endangered.[107]

The Clinton Administration is not the first administration to take this approach to trade policy; previous administrations have behaved similarly.[108] American trade policy is regularly aimed at many purposes other than freeing up trade. When trade advocates say trade policy should not be used for environmental purposes as a matter of principle, many environmentalists have assumed that the principle was free trade. Actually, the principle at stake is reserving trade leverage for commercial purposes rather than putting it to use for environmental purposes.

C. Openness

The GATT is based on the long-established doctrine of "national treatment."[109] This means that countries cannot treat imported products any

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102. Helene Cooper, *Canada Agrees to Slash Wheat Exports to U.S. as Nations Avert Trade War*, WALL ST. J., Aug. 2, 1994, at A2.

103. *The Wheat Quota*, J. COM., July 5, 1994, at 6A.

104. For additional examples, see James Bovard, *Silken Import Disport*, WASH. TIMES, Mar. 15, 1994, at A17 (The silk quotas on China symbolize the Clinton Administration's contempt for the American consumer.); John Maggs, *Clinton Team Spells Out Plan to Fund GATT Pact*, J. COM., Apr. 6, 1994, at 1A, 10A ("Clinton Administration officials have bragged to farm state lawmakers that the new trade pact will allow them to subsidize 7.5 million tons more of grain a year.").

105. *See* Michael Prowse, *Prussian in the White House*, FIN. TIMES, Feb. 21, 1994, at 16 ("No true market liberal would brag about winning contracts for businessmen, or set unilateral targets for another nation's imports, or pour taxpayers' funds into a domestic industrial policy."); *see also Mr. Clinton: Defend Your Trade Pledge*, N.Y. TIMES, Aug. 19, 1994, at A26 (In Marrakesh, the Administration stood for open trade and economic growth. At home, it proposes sizable doses of protectionism.).

106. George Melloan, *Business Should Be Wary of Trade Politics*, WALL ST. J., Feb. 28, 1994, at A15 ("[T]he Clintonites, no sticklers for either consistency or logic, simply think they can play the politics of managed trade and free trade simultaneously.").

107. Moreover, if trade officials were single-mindedly trying to lower trade barriers, they would have more credibility with environmentalists. Presently, trade officials preach of the dangers of back door protectionism even while advocating front door protectionism.

108. *See, e.g.*, JAMES BOVARD, THE FAIR TRADE FRAUD (1991).

109. GATT, *supra* note 1, art. III.

less favorably than domestically-made products.[110] Recently, however, the world trading system has been evolving toward a new doctrine of "openness" which seeks to eliminate economic borders.[111] This encompasses national treatment but demands more.[112] Barriers to foreign goods, services, or investment would no longer be justifiable as mere extensions of domestic regulation.

To better understand the doctrine of openness, consider two standards—an eco-label and a requirement that bottles or newsprint have a minimum recycled content. Both standards would probably be deemed consistent with GATT rules so long as they are applied equally to domestic and imported products. However, under the principle of openness, an exporting country could object to an eco-label on the grounds that foreign producers have no role in setting the criteria for the eco-label. Similarly, Country A could object to recycled content requirements in Country B on the grounds that recycling is not the normal practice in Country A. In other words, Country B should be open to foreign bottles and cans no matter how they are produced.

This example leads to the broader question of whether openness conflicts with environmental diversity. Can governments retain their own environmental standards for what may be sold in their country (e.g., dolphin-safe tuna), or will the GATT insist that markets be open to exports from all countries no matter how loosely regulated the production process is? GATT rules seem predicated on safeguarding the diversity of production rather than permitting diversity among consuming nations. A country where public opinion is very concerned about the safety of dolphins may not have the right under GATT rules to close its market to offending products.

The issue of openness also arises with respect to controls on exports.[113] Can a country retain its timber, its fish, or its water for domestic use?[114] This issue was considered in the GATT in 1988 when a panel ruled that Canada could not ban the export of salmon and herring.[115] But when the issue of water transfers between Canada and the United States threatened to become controversial in the NAFTA, the Clinton Administration declared that the NAFTA's rule against export bans did not apply to water sales when the water remained in an unprocessed form.[116]

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110. *Id.*

111. Openness is the disappearance of economic borders. Goods, investment, and services should flow without impedance between countries.

112. *See* John H. Jackson, *"Managing Economic Interdependence"—An Overview*, 24 L. & POL'Y INT'L BUS. 1025, 1029-30 (1993).

113. *See* PATRICIA W. BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 132-33 (1992) (stating that unrestricted free trade in commodities conflicts with environmental protection requirements).

114. *See* CHARLES ARDEN-CLARKE, GREEN PROTECTIONISM 9 (WWF Int'l Discussion Paper, 1994).

115. *Herring and Salmon Report*, *supra* note 60.

116. *See USTR Assures Congress on Water Exports to Gain NAFTA Support*, INSIDE U.S. TRADE, Nov. 19, 1993, at S-12.

Some environmentalists hold that regions ought to be self-sufficient in food and other necessities. From this perspective, international rules requiring all goods to be tradeable can appear to be anti-environment. Other environmentalists deny the significance of self-sufficiency in a global economy and ecosystem that already entails interdependence. From this perspective, international trade can do no harm so long as the underlying production is environmentally sound.

Just as more openness might be better for the world economy, less openness might be better for the world environment. International environmental problems arise because environmental borders are permeable. If the consequences of bad environmental practices were confined to the country which engaged in them, there would be less public concern. Unfortunately, there are no instruments for reducing environmental openness.

If the world economy was matched by a world polity, openness would undoubtedly be a good principle. The problem we have is that economic policy integration is outpacing global environmental policy integration. In the absence of an international institution that mandates sound environmental policies, nations are left to fend for themselves. Thus, it may not be advantageous for nations to forswear certain economic tools (like border controls) that might be useful in securing more necessary environmental cooperation.

D. Discrimination

The GATT is based on the principle of non-discrimination whereas environmental policy relies on discrimination. For example, an environmental trade measure might distinguish between fish caught in a driftnet and fish caught with regular nets, or between chlorofluorocarbons (CFCs) from a Montreal Protocol party and CFCs from a non-party.

This distinction is an important one, but there are several reasons why it should not be carried too far. First, the GATT does allow some discrimination. For instance, countervailing[117] and anti-dumping[118] duties are permitted against "unfair" trade.[119] Second, the GATT has taken action to permit discriminatory preferences for developing countries.[120] Third,

117. Countervailing duties are discriminatory taxes applied to imports for the purpose of offsetting the benefit gained by a foreign good because of a government subsidy. The countervailing duty may not necessarily equalize the cost of production because it is calibrated to the gross foreign subsidy, not to the extent that the foreign subsidy exceeds any domestic subsidy (i.e., the net foreign subsidy).

118. Anti-dumping duties are discriminatory taxes applied to imports for the purpose of offsetting the benefit gained by a foreign producer from underpricing its good.

119. *See* GATT, *supra* note 1, art. VI. It might also be noted that Article VI permits distinctions to be made based on one aspect of the production process of a good, namely its pricing.

120. *Generalized System of Preferences*, GATT Doc. L/3545 (June 25, 1971), B.I.S.D., *supra* note 1, 18th Supp. 24 (1970-71); *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Nov. 28, 1979), B.I.S.D., *supra* note 1, 26th Supp. 203 (1978-79).

Article XX permits discrimination under certain circumstances.[121] Fourth, the GATT's national security exceptions permit discrimination.[122]

In addition, it must be remembered that the GATT's non-discrimination rules are inextricably linked to the concept of "like product."[123] Like product is a variable concept.[124] Driftnet-caught fish could be deemed an "unlike" product to fish caught using benign techniques. Aquiculture fish could be deemed an "unlike" product to fish caught in oceans or rivers. If so, then treating such fish differently is not discrimination.

When products are "like," then taxing or regulating them differently is discrimination. For example, a country might apply a requirement for pesticide-free vegetables to domestic production and to all imported products, but a potential exporter might view it as discriminatory on the grounds that the vegetables are "like" no matter what their pesticide content is. A country might apply a recycled fiber content for newsprint to domestic production and to all imported products, but a potential exporter might view it as discriminatory on the grounds that newsprint is "like" no matter what its recycled content is. A country might allow importation of an endangered species only if it is captive-bred, but a potential exporter might say that "likeness" should not depend on how the species is harvested. Recently, Canada amended a law[125] regulating the retail sale of dogs from wholesale breeding facilities (known as puppy mills) after the Bush and Clinton Administrations complained, in effect, that dogs were dogs no matter how they were raised.[126]

E. Balancing

Not all applications of environmental policy are appropriate. Governments may disguise a trade restriction as a health or environmental measure.[127] Governments may also impose ineffective or unnecessary environmental regulations. Such regulations may result from inadequate risk assessment or public paranoia.

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121. *See Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, GATT Doc. L/6216 (Nov. 10, 1987), B.I.S.D., *supra* note 1, 34th Supp. 83, para. 5.9(d) (1986-87). Parties may not use "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." GATT, *supra* note 1, art. XX.

122. GATT, *supra* note 1, art. XXI.

123. For a discussion, see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 258-63 (1969). This section was written before the GATT Auto Taxes Panel issued its decision. If adopted, this decision would clarify the "like product" concept in some ways.

124. *See* Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 306 (1994).

125. *See* Health of Animals Regulations, 126 C. GAZ. 2931 (1992) (Can.); *see also* Letter from the Humane Society of the United States to Sanford Gaines, Deputy Assistant U.S. Trade Representative (Feb. 23, 1993) (on file with the *Cornell International Law Journal*).

126. *See* Clyde Farnsworth, *Next Trade War Target May Be Dogs*, N.Y. TIMES, Dec. 2, 1992, at D1.

127. *See* Tara Patel, *Deja Vu All Over Again: French Fish Row Evokes Past Battles*, J. COM., Mar. 3, 1994, at 1A.

It will often not be easy to decide when there is an ulterior motive. For example, since 1905, the U.S. government has prohibited the importation of any drug intended for causing abortion.[128] There is now a drug (i.e., RU-486), widely available in Europe, that stimulates a safe abortion. Roussel-Uclaf (which manufactures the drug) might reasonably ask whether the U.S. ban is disguised protectionism in favor of American abortionists.[129]

In considering the problem of inappropriate environmental policies, it may be helpful to start with a hypothetical situation of a sensible environmental regulation (or tax) that applies to a product that is sourced 100% domestically. This presents no trade problems. But loosen either of the assumptions and trade problems may occur. A sensible regulation or tax on products that come seventy-five percent from foreign sources may raise suspicions in foreign countries as to whether there is a hidden commercial motivation. A regulation not fully sensible will inconvenience foreign suppliers if they have to adapt their production process to meet it. The more costly and prescriptive the regulation, the more concerned foreign producers will become. The most difficult trade and environmental conflicts occur when countries impose regulations that are not sensible and that fall totally or nearly totally on foreign suppliers.

The current provisions in the GATT go only part way toward addressing this problem. Article III restricts taxes that "afford protection to domestic production."[130] Article XX disallows "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and disallows any "disguised restriction on international trade."[131] Article XX(b) requires that health measures be "necessary"[132] and Article XX(g) requires a link to restrictions on domestic production or consumption.[133] These same provisions apply when import bans are used rather than domestic standards.

The reason for these provisions was to prevent the misuse of trade measures for protectionist purposes. The authors of the GATT had no intention of using trade rules to review how sensible domestic policies were. Instead, Article XX establishes a strong deference to sovereignty and national decision-making.[134] It was designated as an improvement over earlier trade agreements which provided complete deference. For

128. Act of Feb. 8, 1905, ch. 550, 33 Stat. 705 (1908) (codified as amended at 18 U.S.C. § 1462(c) (1988)) (The original session law, unlike the current codified version, did not use the word "drug." *See* 18 U.S.C. § 1462, historical notes.).

129. In actuality, the company is not anxious to provide it to the American market. *See* Lawrence Lader, *RU-486, Made in America*, N.Y. TIMES, Mar. 17, 1994, at A23.

130. GATT, *supra* note 1, art. III, para. 1.

131. *Id.* art. XX.

132. *Id.* art. XX(b). There are several possible meanings of the term "necessary": (1) necessary in a scientific sense, (2) necessary in a policy choice sense, in that other options will not work, or (3) necessary in the proportionality sense that it is cost effective.

133. *Id.* art. XX(g).

134. *But cf.* Ernst-Ulrich Petersmann, *International Trade Law and International Environment Law—Prevention and Settlement of International Disputes in GATT*, J. WORLD TRADE,

example, the Romania-U.S. Commercial Agreement of 1930 stated that nothing limited the right of either party "to impose, on such terms as it may see fit, prohibitions or restrictions of a sanitary character . . . ."[135]

In recent years, there have been many efforts to develop principles for the GATT to use to determine whether a country can apply its environmental and health measures to imports.[136] Some of these have been accomplished through GATT panel decisions. For example, in the Thailand Cigarette case,[137] the GATT panel put forward the view that for a measure to be deemed "necessary" under Article XX(b), a country had to use the least GATT inconsistent measure available.[138] In the Canada Herring and Salmon case, the GATT panel put forward the view that for a measure to fit under Article XX(g), it had to be "primarily aimed at" conservation.[139]

The Uruguay Round agreements on Sanitary and Phytosanitary Standards (SPS)[140] and on Technical Barriers to Trade (TBT)[141] impose tough new disciplinary measures on national health and environmental measures with trade effects.[142] Under SPS, measures must: (1) be "necessary" to protect life or health,[143] (2) be "based on scientific principles,"[144] (3) not be "maintained without sufficient scientific evidence,"[145] (4) "not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail,"[146] (5) be based on a risk assessment,[147] and (6) not be maintained "if there is another measure, reasonably available

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Feb. 1993, at 43, 72 (suggesting that Article XX would not apply if a dispute can be settled through negotiation and compensation).

135. Provisional Commercial Agreement, Aug. 20, 1930, U.S.-Rom., art. IV(e), 115 L.N.T.S. 115, 119.

136. This effort began over 20 years ago. *See The Restrictive Effect of Industrial Standards on International Commerce*, 4 L. & POL'Y INT'L BUS. 607 (1972).

137. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, *supra* note 60, para. 74.

138. It is not clear how to measure relative GATT inconsistency. Is a law violating Article III more GATT inconsistent than a law violating Article XI?

139. *Herring and Salmon Report*, *supra* note 60, para. 4.7.

140. *Agreement on the Application of Sanitary and Phytosanitary Measures*, GATT Doc. MTN/FA II-A1A-4 (Dec. 15, 1993) [hereinafter *SPS Agreement*], *in Uruguay Round*, *supra* note 49.

141. *Agreement on Technical Barriers to Trade*, GATT Doc. II- A1A-6 (Dec. 15, 1993) [hereinafter *TBT Agreement*], *in Uruguay Round*, *supra* note 49.

142. But if the measure is based on an international standard, these disciplines do not apply. *See SPS Agreement*, *supra* note 140, art. 3(2) (para. 10) (The *SPS Agreement* citations were changed at Marrakesh in April 1994. Hereinafter, the former citations to the *SPS Agreement* will follow the present citations in parentheticals.)

143. *Id.* art. 3(2) (para. 6).

144. *Id.*

145. *Id.* When relevant scientific evidence is insufficient, parties may provisionally adopt SPS measures on the basis of "available pertinent information." But parties shall seek to obtain additional information necessary for a "more objective assessment of risk." *See id.* art. 5(7) (para. 22). It is unclear how an "objective" assessment of risk is to be used to determine the appropriateness of SPS measures.

146. *Id.* art. 2(3) (para. 7). Note that this is more restrictive than the headnote in Article XX which applies only when the "same" conditions prevail.

147. *Id.* art. 5(1) (para. 16).

. . . that achieves the appropriate level of protection and is significantly less restrictive to trade."[148]

Consider an example. Maine prohibits the sale of irradiated food.[149] Even though this measure applies equally to domestic and foreign food, a GATT panel could judge this law by all of the above standards. The panel might question whether there is sufficient scientific evidence. The panel might suggest that a label on the food would be significantly less restrictive to trade than an actual ban. Other difficult health issues that could come before GATT panels involve hormones in beef and milk and genetically engineered food.[150]

Under TBT, national measures[151] must "not be more trade-restrictive than necessary to fulfil a legitimate objective"[152] and "shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner."[153] For example, consider measures specifying recycling content, eco-labels concerning the production process, eco-packaging rules, and corporate performance requirements on electric vehicle sales.[154] GATT panels may determine whether the purpose of the regulation constitutes a "legitimate" objective and may suggest less trade-restrictive alternatives. It is unclear whether the panel may only point to alternatives regulated by TBT (for example, a label rather than a content requirement)[155] or may point to any other alternative, even those not regulated by TBT, such as an international agreement or a domestic taxation.

All of the requirements of SPS and TBT would be new disciplines that have never before been imposed in GATT environmental disputes. These disciplines remove the shield of national treatment for standards, but not for taxes.

Neither the TBT nor the SPS agreements deal with import bans aimed at safeguarding the global commons or a foreign environment. Some commentators believe that such unilateral measures are, and should

148. *Id.* art. 5(6) (para. 21 & n.3). In addition, art. 5(5) (para. 20) applies a consistency discipline to the choice of the level of protection. Under this provision, it might be argued that a country that permits cigarette smoking should not be more protective regarding other risks.

149. Me. Rev. Stat. Ann. tit. 22, § 2155(10) (West 1992).

150. If these issues lie outside the SPS Agreement, they would be regulated by the TBT Agreement. Defendant countries will probably prefer to be judged under the TBT rules.

151. But if the measure is based on an international standard, there is a rebuttable presumption in favor of the measure. *See TBT Agreement, supra* note 141, art. 2.5.

152. *Id.* art. 2.2.

153. *Id.* art. 2.3.

154. For a good discussion of the GATT implications of some of these issues, see Vinod Rege, *GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries*, J. WORLD TRADE, June 1994, at 95, 109-39.

155. In a recent decision, the European Court of Justice (ECJ) found that a Belgian law banning bread with more than a prescribed level of salt violated the Treaty of Rome because a label could have been used instead. *See Restrictions on Imports Lawful*, FIN. TIMES, July 26, 1994, at 12.

remain, GATT-illegal.[156] Others admit that such measures may be needed in some cases and are trying to devise new international rules on when they should be permitted and when they should be prohibited. As typically developed, such rules would include criteria such as trade restrictiveness[157] and scientific evidence,[158] but they would also include other considerations like "proportionality"[159] and "legitimacy."[160]

"Proportionality" means that the trade impact and cost of a measure should bear a reasonable relationship to the importance of the social objective it is designed to achieve.[161] "Legitimacy" means that the purpose of the measure should be widely recognized as a legitimate concern of the government imposing the measure.[162] When a complaint is brought about an environmental measure, all of these considerations (i.e., science,[163] trade-restrictiveness,[164] proportionality, and legitimacy) would be used by a panel to determine whether the environmental measure could be used.

Since trade restrictiveness, proportionality, and legitimacy[165] are considered in adjudication in the European Union (to determine when national measures can be used) and in the United States (to determine when state measures can be used),[166] many commentators and governments[167] have suggested that the same sort of balancing can be performed

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156. *See, e.g.*, Schoenbaum, *supra* note 56, at 723.

157. The same requirement appears in U.S. adjudication over the Commerce Clause. *See, e.g.*, Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

158. It is interesting to note that one of the earliest treaties providing for an environmental dispute tribunal allowed each nation to designate a scientist to help the tribunal. *See* Convention Between the United States and Canada, Apr. 15, 1935, U.S.-Can., art. 2, 49 Stat. 3245, 3246.

159. Feketekuty, *supra* note 90, at 201.

160. *See* ESTY, *supra* note 4, at 115, 220-21. *See generally* RUNGE, *supra* note 4.

161. *See* Feketekuty, *supra* note 90, at 201.

162. *Id.*

163. For a discussion of the role of science in the U.S. reciprocal trade agreements program, see *Extending Reciprocal Trade Agreement Act: Hearings before the Committee on Finance, United States Senate*, 75th Cong., 1st Sess. 496-97 (letter from H.A. Wallace, Secretary of Agriculture).

164. Numerous problems with the trade restrictiveness test have been discussed elsewhere, so they will not be repeated here. *See* Steve Charnovitz, *GATT and the Environment: Examining the Issues*, INT'L ENVTL. AFF., Summer 1992, at 203, 212-15. But it might be noted that the test is even more problematic with respect to taxes. *See* Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 143 (1993).

165. The role of science will be discussed *infra* part II.F.

166. For example, see Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality of Oregon, 114 S. Ct. 1345 (1944). For a comparison of the E.U. and U.S. practice, see Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 141, 197 (1993).

167. It is interesting to note that Canada advocates this rule for international trade, even though it does not follow such a rule for domestic commerce. *See* Charles Trueheart, *Trade Barriers Still Hogtie Canada—Those Between Provinces*, WASH. POST, Jan. 7, 1994, at A12. For a statement by the Canadian government that Article XX(b) requires a least trade restrictive test, see *Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*, 5 WORLD TRADE MATERIALS 53, 86 (1993).

at the international level, perhaps by the GATT.[168] There would be many problems, however, with grafting such procedures onto the GATT in order to create an "international commerce clause."[169]

First, the fact that federal governments use this approach for sub-national laws does not mean that they would want a supra-national institution to use it for national laws. The United States can impose such restraints because its political union was, as the Supreme Court noted, "framed upon the theory that the peoples of the several states must sink or swim together . . . ."[170] For better or worse, this level of consciousness has not yet overtaken all nations. There is no world political union.

If the Supreme Court disallows a state environmental measure, the state can go to Congress and attempt to enact the measure nationwide. Similarly, in the European Union, countries may seek a Commission regulation or directive to achieve upward harmonization. But a country losing a GATT environmental dispute cannot go to the GATT Council and ask for parliamentary action to raise world environmental standards. The GATT consists of only negative disciplines; it has no competence for positive rule-making. Moreover, unlike the U.S. Supreme Court or the European Court of Justice, the GATT is not linked to any parallel institution with legislative power.

It should also be noted that although the United States applies this rule to the states and the E.U. applies it to member nations, such a rule is not applied to actions by Congress or the European Commission.[171] In other words, Congress does not impose a proportionality rule as a self-discipline on its actions. While some federal laws mandate a cost-benefit test, many others do not.[172]

A second reason why this adjudicative approach is not transferable to the GATT is that the Supreme Court and the European Court of Justice

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168. *See, e.g.*, Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992); Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, WASH. & LEE L. REV. 1407 (1992). For an earlier discussion of the problem, see Ralph C. d'Arge & Allen V. Kneese, *Environmental Quality and International Trade*, 26 INT'L ORG., 419, 438-39 (1972).

169. It is sometimes said that since the GATT already looks at whether national environmental standards are too high, the GATT could be improved by empowering it also to look at whether standards are too low. This might be an improvement. But the premise is wrong. The GATT's role is to determine whether environmental standards are protectionist, not whether they are unwise regulation.

170. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

171. In addition, the United States does not apply its interstate commerce rules to imports, and the European Union does not apply its analogous rules to trade from outside the Union. *See* Geradin, *supra* note 166. Since the European Commission seems to believe that the GATT should require proportionality, one wonders why the Commission does not impose this discipline on its own import policies.

172. For example, under the Federal Insecticide, Fungicide, and Rodenticide Act, the EPA must register a pesticide if it will not generally cause "unreasonable adverse effects on the environment." *See* 7 U.S.C. § 136a(c)(5)(D) (1988). An example of a statute that does not permit the consideration of economic factors is the Delaney clause of the Federal Food, Drug, and Cosmetic Act. *See* 21 U.S.C. §§ 348(c)(3)(A), 376(b)(5)(B) (1988).

are highly respected institutions. It is hard to imagine how public esteem could similarly exist for GATT panels. It barely exists for the International Court of Justice, which is an independent body of respected jurists. Why then could one expect the U.S. public (or the Indian or French public) to accept a decision regarding an environmental matter by a largely unknown GATT panel?

Furthermore, if the Supreme Court issues a very unpopular opinion, it can be changed either by Congress, constitutional amendment, or future appointees to the Court. But if a GATT panel issues an opinion unpopular with the world citizenry, there is no direct way for a sovereign nation to change it. Under the new Uruguay Round rules, panel decisions (or appeals from these decisions), *shall* be adopted unless the Dispute Settlement Body decides by consensus not to adopt it.[173] Consensus would be a formidable requirement even in a world of democracies. But the GATT has no requirement that its members be democracies.

Third, the E.U. and U.S. judicial tests continue to evolve and are very complicated.[174] Therefore, it is hard to imagine how inserting a version of these tests into the GATT would lead to predictable dispute settlement. While the lack of predictability is acceptable in a national system, it may undermine an international system quickly. The objectivity of ad hoc panelists, as opposed to full-time judges, will also lead to suspicion in controversial cases.

Fourth, a proportionality criterion is especially troublesome because it necessitates a comparison of costs to benefits.[175] For example, assume that the United States bans tuna from Mexico because such tuna is not dolphin-safe. A GATT panel, guided by proportionality, would want to weigh the commercial costs to Mexico against the environmental benefits to the United States. Are the costs to Mexico the gross costs (i.e., the value of the potential U.S. trade) or the net costs (i.e., subtracting what Mexico received when it sold the tuna elsewhere)? Are these costs recurring, or should Mexico be able to adapt after the first year?[176] How does one calculate the benefits of saving some dolphins?

Even if one could get objective numbers for costs and benefits, there is a difficulty in weighing them because one must compare utilities across countries. Suppose, for example, that the panel concluded that the cost to Mexico was $50,000 and the benefit to the United States was $75,000. From that, it might be concluded that the U.S. import ban should be permitted. But it could be argued that the size of the country matters; in

173. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, GATT Doc. II-A2, §§ 16.4, 17.14 (Dec. 15, 1993), *in Uruguay Round*, *supra* note 49.

174. *See* Geradin, *supra* note 166; Daniel Farber & Robert Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND L. REV. 1401 (1994).

175. For a discussion of the need for weighing and balancing, see RUNGE, *supra* note 4, at 15, 85; *see also* ESTY, *supra* note 4, at 57, 71, 110, 241.

176. The same issue arises with regard to compensation. If Mexico wins its GATT complaint and the GATT allows it to retaliate against the United States, should the retaliation be allowed to continue longer than one year?

other words, the panel should look at cost per capita. It could also be argued that the wealth of the country matters; perhaps $50,000 to Mexico means more than $75,000 to the United States. Doing inter-country comparisons of utility would be difficult.

A further problem concerns the preferences of parties not in the dispute. For example, other countries might also place a value on the dolphins. As the dolphins live in the global commons, it would seem impossible to ignore these countries' preferences. Moreover, how are the views of future generations to be counted, particularly in cases leading to irreversible changes? The discount rate applied to future benefits will strongly influence the result of any cost-benefit analysis.

Even a brief review of these methodological problems demonstrates that a proportionality test will not lead to unequivocal results regarding costs and benefits. Of course, national policy-makers make laws all the time based on close judgments. But it seems doubtful that national policy-makers will want an international panel to second-guess such judgments using methods that perforce are subjective.[177]

Two approaches have been put forward to deal with this problem. One is the mindreading method used by the Canada-U.S. Salmon and Herring panel which avoids inter-country balancing.[178] The case (under the Free Trade Agreement) involved a Canadian requirement that fish caught in Canadian waters be off-landed for biological counting.[179] The United States argued that the additional costs of landing discouraged exports.[180] Canada responded that the landing requirement was non-discriminatory as it applied to Canadian as well as foreign fishermen.[181] In deciding the case, the panel disavowed an effort to weigh the trade versus the environmental interests of each country.[182] Instead, the panel tried to decide whether the measure would be rational from the Canadian perspective if none of the fish were harvested by foreigners.[183] Inserting themselves into the minds of Canadian policy-makers, the panel concluded that such a Canadian requirement would not have been logical.[184]

The other method is to maintain inter-country balancing but to move the fulcrum away from the country defending its environmental law. The

177. It is interesting to note that Canada argued against balancing in the Beer I case. "The General Agreement was not designed to protect the commercial considerations that led foreign brewers not to establish collection systems; nor should cost be cited to prevent a government from implementing environmental measures pursuant to Article XX(b)." *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, supra* note 69, para. 4.73.

178. *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, WORLD TRADE MATERIALS, Mar. 1990, at 78 [hereinafter *Canada's Landing Requirement*].

179. *Id.* ¶ 2.03.

180. *Id.* ¶ 5.01.

181. *Id.* ¶ 5.02.

182. *Id.* ¶¶ 7.05-7.06.

183. *Id.* ¶¶ 7.07-7.10, 7.35. For a Supreme Court case considering whether a state was making other states bear the full costs, see Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

184. *Canada's Landing Requirement, supra* note 178, ¶ 7.38.

panel would still weigh costs and benefits but would give a great degree of deference to the environmental standard. This might be called a "disproportionality"[185] standard. Daniel Esty, one of the proponents of this approach, explains that there would be no close calls.[186]

Either of these methods would be better than absolute proportionality. But there is an even better option, which is to eschew an international balancing test.[187] Industrial countries' governments are already suffering because the public thinks that decision-makers are too distant and unaccountable. Yielding more power to the GATT would seem the very opposite of subsidiarity. The dissatisfaction of the citizens of a country losing a case in the GATT is likely to be greater than the satisfaction of the citizens of a winning country.

This is not to suggest that the GATT has no role in environmental trade disputes. The GATT has a very important role. Its job is to examine a measure to determine whether it constitutes protectionism. One way to perform this function is to consider where the burden of a measure falls.[188] If the products affected by the measure are 100% imported, the measure should be rebuttably presumed to be disguised protectionism.[189] For example, the European Court of Justice invalidated a French tax on autos based on horsepower for just that reason.[190] (On the other hand, an asbestos ban in a country that produces none might rise above suspicion because of the harmfulness of asbestos.) If the products affected by the measure are ninety-nine percent domestic and one percent imported, then an inconvenience to the foreign producer would not seem to be the motive.[191]

Of course, it will be the in-between cases that are the most difficult. Case law in the European Union suggests a useful principle. So long as a significant proportion of domestic production falls within each of the "tax categories," then applying such objective categories to foreign products should not constitute disguised discrimination.[192] The same principle

185. This term was used by the European Court of Justice in the Danish Bottles case. *See* Case 302/86, Commission v. Kingdom of Denmark, 1988 E.C.R. 4607. It is unclear whether it is being used in contradistinction to the opinion of the Advocate General who supported "balancing." *See* Geradin, *supra* note 166, at 183-85.

186. *See* ESTY, *supra* note 4, at 117, 129.

187. Steve Charnovitz, *Trade and Environment: Four Schools of Thought*, ECODECISION, Jan. 1994, at 23.

188. *See* RUNGE, *supra* note 4, at 15-19.

189. But see the ECJ decision in Vinal SpA. v. Orbat SpA., where the Court held that differential taxes on two types of alcohol were not invalid even though the product subject to the heavier taxation is exclusively imported. Case 46/80, Vinal SpA. v. Orbat SpA., 32 C.M.L.R. 524, para. 18 (1981).

190. Case 112/84, Michel Humblot v. Directeur, 2 C.M.L.R. 338 (1986).

191. As the Canada's Landing Requirement Panel noted, it may not be easy to determine the approximate percentages. *See Canada's Landing Requirement*, *supra* note 178, ¶ 7.36.

192. Case 243/84, John Walker & Sons, Ltd. v. Ministeriet, 2 C.M.L.R. 278, 330-31 (1986). This seems consistent with the negotiating history for GATT Article III. *See* Rex J. Zeddalis, *A Theory of GATT "Like" Product Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33, 67-68 & n.93.

could be used in examining regulations for disguised protectionism.

The GATT's job also includes examining measures to assure that they are not arbitrary or unjustifiable discrimination under Article XX.[193] In doing so, the GATT can consider whether a regulation is too tightly written. In other words, if there is an alternative regulation that would: (1) provide equivalent impact, or be equally effective at meeting the defendant country's environmental goals, (2) be politically feasible and reasonably available to the defendant country,[194] and (3) be less trade restrictive, then a GATT panel could suggest that the alternative regulation be applied to imports. The plaintiff country should have the burden of suggesting the alternative regulation that it would prefer and showing how it meets the three points above.

The GATT should also enforce the Article XX headnote which includes a soft national treatment test. This is a powerful discipline that has been underutilized by the GATT. Many of the trade/environment conflicts have involved measures that seemed to fail this test in that the discipline being applied to foreign producers was not the same as that being applied to domestic producers. For example, the U.S. Marine Mammal Protection Act does not apply numerical dolphin mortality limits to American producers the same way it does to foreign producers.[195] The Dolphin panel noted this,[196] but it did not connect the omission to the requirements in the Article XX headnote.[197] Had the panel issued a far narrower decision using the soft national treatment test, it would not have brought such opproprium to the GATT.

The GATT should supervise the means used to achieve ends, but it should not supervise the ends themselves.[198] Most commentators who favor introducing a proportionality test into the GATT (or who think the GATT already has one) want to weigh commercial and environmental factors against each other.[199] By contrast, this article takes the position that the GATT should not attempt to judge ends. Issues such as legitimacy (i.e., whether the goal of the measure is appropriate) or proportionality (whether the benefits exceed the costs), should not be put into GATT's tool kit. Having the GATT judge the merit of environmental laws will distract it from its mission, which is to eradicate protectionism.

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193. *See* GATT, *supra* note 1, art. XX headnote. This applies to measures that violate Article XI or III. Any de jure discrimination would be a violation of Article III.

194. It is interesting to note that in the Dolphin II case, the European Union argued that the GATT already predicated its Article XX discipline on what a reasonable defendant government could do. *See Dolphin II Report*, *supra* note 70, para. 3.73.

195. 16 U.S.C. § 1371(a)(2)(B) (1988).

196. *See Dolphin I Report*, *supra* note 67, paras. 5.16, 5.29.

197. *Id.* paras. 5.23, 5.29.

198. Of course, a GATT panel would have to determine that the end being pursued was covered under GATT Article XX. If a country tried to ban imports to protect local culture, the panel could declare that this purpose was not covered by Article XX.

199. *See* Charnovitz, *supra* note 164, at 215 (distinguishing "relative" from "absolute" proportionality tests).

Certainly, trade would be easier if countries adhered to similar standards. But the proper path to that is negotiated harmonization, not adjudication.[200] The Uruguay Round moves in this direction by committing parties to basing their SPS measures on international standards.[201] Many commentators have focused on whether the GATT will impose downward harmonization,[202] but it will also be interesting to see if the new Committee on Sanitary and Phytosanitary Measures fulfils the opposite function—that is, monitoring whether low-standard countries raise their standards to international levels.[203]

There is no doubt that the world would be a better place if countries did not enact unnecessary or inefficient laws. Yet it is a giant leap to the conclusion that we ought to authorize GATT panels to dictate changes in unwise environmental measures. Given that the author is American and that most GATT environmental complaints are against the United States, this statement may seem self-serving. But meddlesome GATT panels are not that much of a threat to the United States, which still has the economic and political power to ignore them. Their real threat is to smaller countries that may feel great pressure to implement an adverse GATT panel ruling.

In summary, the GATT should police environmental measures for hidden protectionism, but it should not decide whether such measures are sensible on economic or environmental grounds. Nevertheless, it may be appropriate to set up a mechanism for GATT panels to offer advisory opinions.[204] For example, a GATT panel might opine that the dolphin safety standard being imposed by the United States is too rigorous. Mexico could use that advisory opinion in negotiating with the United States or in pursuing arbitration. But there would be no GATT obligation that the United States change its law or accept retaliation by Mexico.

F. Science and Values

It is sometimes suggested that the trading system needs to separate true

200. The first step to such harmonization might be to set minimum and maximum standards. *See* Steve Charnovitz, *Environmental Harmonization and Trade Policy, in* TRADE AND THE ENVIRONMENT, *supra* note 4, at 283.

201. *SPS Agreement, supra* note 140, arts. 3(1), 3(3) (paras. 9, 11). The European Commission has already complained that certain U.S. sanitary standards for meat are "an unjustified restriction on trade" because they go beyond the recommendations of the International Office of Epizootics. *See* 1994 REPORT ON U.S. BARRIERS TO TRADE AND INVESTMENT 78, Doc. No. I/194/94 (Services of the European Commission ed., 1994).

202. Robert E. Hudec noted: "An international negotiation that goes after the bad laws cannot help but expose the good laws to downward pressure as well." *See* Robert E. Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311, 320 (1993).

203. *SPS Agreement, supra* note 140, arts. 10, 12(1) (paras. 31-34, 38).

204. This would be a different mechanism than the current GATT panel process and the new process in the Uruguay Round. It is interesting to note that the Office of the U.S. Trade Representative characterizes anticipated SPS panel reports as advisory only. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES 49 (1994).

environmental issues from governmental choices reflecting values.[205] From this perspective, an environmental issue is something dictated by science,[206] like the preservation of a species. Values, by contrast, are not based on science. They are based on moral concerns[207] or emotions (for example, for marine mammals).[208] Trade measures should be available for the former, but not the latter, it is said.

This view seems ill-considered. A desire to save a cetacean species from extinction is based on a value judgment that the species should be saved. Science does not supply values, and therefore it cannot tell us what species to save.[209] There may be medical or religious reasons to safeguard cetaceans but not scientific ones.

A desire to save a particular cetacean is also based on values. This value may be less widely shared than the value of saving a cetacean as a species, but they are both still values. Science can perhaps tell us with some range of confidence whether killing x cetaceans will threaten the species or severely deplete its population, but science offers no guidance on whether a cetacean, as an individual, should be saved.

If the value endorsed by the GATT was to preserve all species, then science could be used by a GATT panel. For example, the spotted dolphin population has been depleted to twenty-three percent of its original size.[210] If tuna fishing by Mexico were known to kill numerous spotted dolphins, a panel might be able to make a judgment that the value of preserving the spotted dolphin species was being threatened.

As it is, the GATT has not endorsed the value of saving all species. Consequently, both Mexico and the United States could bring totally different values into dispute settlement. For example, Mexico might not care

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205. *See, e.g., The Greening of Protectionism*, 27 ECONOMIST, Feb. 27, 1993, at 25 ("[N]ice as dolphins may be, is killing them an environmental issue?"). This commentator does not know whether dolphin killing is an environmental issue, but he believes it is covered by GATT Article XX(b), which includes the protection of animal life. *See also* ESTY, *supra* note 4, at 118-20.

206. For a discussion of the meaning and implications of ecology, see ANNA BRAMWELL, ECOLOGY IN THE 20TH CENTURY (1989).

207. During the dispute on fur seals of 1890, U.S. Secretary of State Blaine wrote that the harvesting of the fur seals was so destructive as to be *contra bonos mores* (i.e., against good public morals). *See* THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 412 (8th ed. 1969).

208. For example, in 1993, some members of the British Parliament urged a ban on imports of foie gras because it was a "loathsome" product. They noted that national laws ban force feeding of ducks and geese yet permit imports of foie gras from France. *Laborites Brand Pate A "Loathsome Product"*, J. COM., Dec. 6, 1993, at 5A.

209. Science does tell us that humans need to eat organic material to survive. Nevertheless that alone is not an argument for eating whales. However, some Norweigan officials argue that catching fish and marine mammals may be the most environmentally sound way of producing food for human consumption. *See* Clay Eric Hawes, Note, *Norwegian Whaling and the Pelly Amendment: A Misguided Attempt at Conservation*, 3 MINN. J. GLOBAL TRADE 97 (1994).

210. Taking and Importing of Marine Mammals: Listing of the Northeastern Offshore Spotted Dolphins as Depleted, 58 Fed. Reg. 58,285 (1993). The spinner dolphin population is 44% of its original size. *See* Taking and Importing of Marine Mammals: Listing of the Eastern Spinner Dolphin as Depleted, 58 Fed. Reg. 45,066 (1993).

whether the dolphin became extinct. The United States might not want to kill any dolphins. Thus, the application of science by the panel might be of little help to either country because they do not share the same values.[211]

It is not the case that all countries share the value of preserving all species.[212] About 140 species (mainly insects) become extinct every day.[213] Certainly the existence of and broad membership in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[214] shows that there is widespread interest in saving endangered species. But if all countries adhered to this goal, trade controls would not be needed. CITES came into being and is applied to non-parties because some countries were (and still are) willing to permit harvesting of such species. It should also be noted that CITES has no rules against harvesting per se.

Trade measures have long been used to pursue goals not involving the survival of a species. For example, import and export bans are used for sanitary reasons to maintain herds or crops. New Zealand bans driftnet-caught fish, although it allows the same fish to be imported if caught with a regular net.[215] The European Union has enacted a ban on fur caught in countries that allow leg-hold traps.[216] The International Convention Concerning the Transit of Animals of 1938 commits exporting nations to "see[ing] that the animals are properly loaded and suitably fed and that they receive all necessary attention, in order to avoid unnecessary suffering."[217] Under the U.S. Marine Mammal Protection Act, it is illegal to import a marine mammal "taken in a manner deemed inhumane."[218]

None of these measures are aimed at the survival of a species. Indeed, none of them are aimed at the survival of individual animals. They do not question the taking of the animal, only the manner that is treated in harvesting or transportation. As Robert F. Housman has

211. For a discussion of "preservationism," see Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 45-49 (1991).

212. CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA 110-11 (1993).

213. ESTY, *supra* note 4, at 18 (citing Harvard biologist Edward O. Wilson).

214. Convention of International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 93 U.N.T.S. 243 (1976) [hereinafter CITES].

215. *See* Act to Prohibit Driftnet Fishing Activities and to Implement the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Apr. 14, 1991, 31 I.L.M. 218 § 8 (1992). Driftnets have been banned because they cause indiscriminate damage to the marine environment. Thus, indiscriminate, unnecessary killing is viewed differently from killing an animal to eat it.

216. For a discussion of this ban and of the Clinton Administration's concerns over the matter, see OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1993 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 82-83 (1993). *See also* John Maggs, *U.S. to Protest EU Fur Ban Involving Use of Leg-Hold Traps*, J. COM., June 22, 1994, at 3A (noting complaint by U.S. officials that the ban is merely intended to reduce the suffering of wildlife rather than preserve a species).

217. Dec. 6, 1938, art. 5, 193 L.N.T.S. 39, 45.

218. 16 U.S.C. § 1372(b)(4) (1988).

pointed out, it is quite consistent with the Western philosophical tradition for societies to make value judgments of this sort.[219]

It might be noted that GATT Article XX(b) is not narrowly based. The exception applies not only to species preservation but also to animal life or health. Thus, if one interprets the term "environment" as applying just to species preservation,[220] then the GATT's Article XX(b) and (g) exceptions are broader than the environment.

GATT panels considering SPS cases can make good use of scientific input.[221] Nevertheless, that input may not be dispositive. Although science can provide an estimate of the risk from a substance, it cannot tell the panel whether a country should bear (or should want to bear) that risk.

If a country believes that any risk of cancer is too great, then such a standard should survive scrutiny under the Uruguay Round SPS Agreement, which purports not to supervise a country's level of protection.[222] A more difficult case will occur when, notwithstanding a risk that is extremely small or zero, a country wants to ban a substance anyway. For example, a country may not want any artificial hormones in meat. Trade conflicts will occur when countries that put hormones in meat want to penetrate foreign markets with exports.

In theory, scientific studies could be used to show whether such a ban is necessary.[223] However, the GATT should be very careful in going down that road, because the use of science in judicial review is a rapidly evolving field[224]—one that ad hoc GATT panels would seem ill-equipped to handle. Of course, if a country banned the importation of meat with hormones but still tolerated the use of hormones domestically (even though officially banned), that should be considered arbitrary discrimination.

Science can also be useful in conservation cases. If nations agreed that sustainable harvests should be permitted, such as for whales, then the GATT could examine an import restriction to see if it is restrictive of practices that are consistent with a sustainable harvest. But if the nation with the trade restriction does not accept the concept of a sustainable harvest,

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219. Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1388 (1992).

220. This is a very narrow view of the animal environment. It is inconsistent with the use of the term regarding humans, as environmentalists are concerned with many issues that do not involve the destruction of humanity.

221. *See The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the Committee on Science, Space and Technology, U.S. House of Representatives*, 102d Cong., 2d Sess. 159 (1992).

222. *SPS Agreement*, *supra* note 140, arts. 3-5 (paras. 11-21). Nevertheless, article 5(5) (para. 20) does require internal consistency in the level of protection.

223. The idea of using science to resolve sanitary trade disputes has been discussed frequently. *See, e.g.*, COMMISSION OF INQUIRY INTO NATIONAL POLICY IN INTERNATIONAL ECONOMIC RELATIONS, INTERNATIONAL ECONOMIC RELATIONS: REPORT OF THE COMMISSION 85-86 (1934).

224. *See* Steven G. Gallagher & Jeffrey I. Butvinik, *Judges as Gatekeepers*, ENVTL. F., Jan./Feb. 1994, at 14; *see also* George J. Annas, *Scientific Evidence in the Courtroom—The Death of the Frye Rule*, 330 NEW ENG. J. MED. 1018 (1994).

then scientific considerations cannot show that an import restriction is unnecessary.[225]

While science cannot dictate a value, it can be used to determine whether the same value can be achieved by alternative methods. U.S. law now prohibits the sale or shipment of tuna that is not caught in a "dolphin-safe" way.[226] This provision applies to fish from U.S. and foreign fishermen. The law has several criteria for determining when tuna are to be considered dolphin-safe, but the main requirement is that the shipment be accompanied by certifications from the vessel's captain and an official observer that "no purse seine net was intentionally deployed on or to encircle dolphins during the particular voyage on which the tuna was harvested."[227]

Suppose that the United States bans tuna from Panama, who then complains to the GATT. Suppose further that Panama argues that its fishermen use such skillful techniques that they can deploy purse seine nets without hurting dolphins. If Panama argues that its techniques lead to a high level of serenity for the dolphin even though they do not meet the U.S. standard, the panel could make a judgment on that point based on the testimony of the observers and other experts. The issue before the panel would be a scientific one: whether the Panamanian process methods are equivalent in result to the U.S. methods.

The fishing industry has argued that with current techniques, sets on dolphins can be done without high mortality.[228] Indeed, if fishermen do not set on dolphins, the alternative methods may be more lethal to sharks, rays, and other fish.[229] According to experts at the Inter-American Tropical Tuna Commission, the alternative methods can also lead to undesirable trapping of baby tuna that are discarded and wasted.[230] Thus, a country that used fishing methods that met the U.S. goal of dolphin-safety would have a good case that a U.S. standard requiring a particular harvesting practice violates the GATT. This is a different objection from the one put forward by the GATT Dolphin panel, namely that the United States must accept imported tuna "whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels."[231] The panel was generally viewed as suggesting that GATT rules cannot take into account whether dolphins were killed or not.

In summary, many trade/environment conflicts arise from differences in values. Such conflicts cannot be refereed by science or defined away by saying that they are motivated by moral rather than environmental

225. For further discussion, see Ethan Mollick, *Whale of a Dilemma: Science, Politics and the IWC Ban*, HARV. INT'L REV., Summer 1994, at 58.

226. 16 U.S.C. § 1417 (Supp. V 1993).

227. 16 U.S.C. § 1417(d)(4) (Supp. V 1993).

228. *See Pacific Tuna Fishermen Take on Greenpeace*, EIR SCIENCE & TECHNOLOGY, Oct. 1, 1993, at 18, 20.

229. Brad Warren, *The Downside of Dolphin Safe*, AUDUBON, Nov.-Dec. 1993, at 20.

230. (U.S.) MARINE MAMMAL COMM'N, ANNUAL REPORT TO CONGRESS 121-23 (1993) [hereinafter MARINE MAMMAL COMMISSION REPORT].

231. *Dolphin I Report*, *supra* note 67, para. 5.15.

concerns.[232] As the Clinton Administration's environmental review of NAFTA correctly pointed out, "the choice of the appropriate level of protection is a social value judgment. There is no requirement for a scientific basis for the level of protection, because it is not a scientific judgment."[233]

G. Eco-Imperialism

It is sometimes suggested that international trade rules prevent nations from implementing import restrictions based on the policies or practices in the country of production.[234] Arthur Dunkel, as GATT Director General, expressed concern that nations were trying "to impose domestic environmental or labour standards on other countries through trade measures . . . ."[235] Many commentators have characterized such unilateral environmental trade measures as "eco-imperialism."[236] Deepak Lal, alluding to Kipling, sees a "green variant of the nineteenth-century's white-man's burden . . . ."[237]

These concerns are exaggerated. First, enacting environmental regulations is not imperialism (although it may constitute paternalism). Imperialism is dependent on the use of force or coercion.[238]

Second, the setting of environmental product or process standards does not impose anything on a foreign producer.[239] For example, New York prohibits the sale of any live bird not born and raised in captivity.[240] Such a standard is not imperialism.[241] The producer may adapt to meet the buyer's specifications or sell to someone else.

Third, in many cases, the motivation for environmental trade measures has not been the "export" of values. Rather, it has been the recognition that foreign conservation practices can affect one's own environment.[242] Another motivation is to avoid purchasing products

232. *See generally* MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT ch. 4-5 (1988).

233. OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE NAFTA: EXPANDING U.S. EXPORTS, JOBS AND GROWTH: REPORT ON ENVIRONMENTAL ISSUES 8 (1993). The point is made with respect to sanitary measures but has broader application.

234. GATT SECRETARIAT, *supra* note 12, at 23.

235. *Dunkel Warns on Protectionism*, FIN. TIMES, May 24, 1993, at 6.

236. For example, see Gijs M. DeVries, *How to Banish Eco-Imperialism*, J. COM., Apr. 30, 1992, at 8A. *See also* Christopher Chivvis, *A Troublesome Attack on GATT*, J. COM., Mar. 1, 1994, at 8A.

237. Deepak Lal, *Trade Blocs and Multilateral Free Trade*, 31 J. COMMON MARKET STUD. 356-57 (1993).

238. *See* NEW PALGRAVE DICTIONARY OF ECONOMICS 728 (John Eatwell et al. eds., 1987).

239. Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 432-33 (1993).

240. N.Y. ENVTL. CONSERV. LAW § 11-1728 (McKinney 1994).

241. *See* WILLIAM DIEBOLD, JR., INDUSTRIAL POLICY AS AN INTERNATIONAL ISSUE 241 (1980) ("A country that bans certain products as noxious can hardly be thought to throw a serious burden on the rest of the world because it refuses to import these substances.").

242. As Lynton K. Caldwell points out, "as ecological interrelationships are better understood . . . peoples will increasingly become aware that they may be suffering environmental damage originating on the territory of other nations . . . ." Lynton K. Cald-

whose production has bad environmental side effects.

Fourth, a "free trade" philosophy does not imply a tolerance for killing animals (e.g., tiger hunting). A libertarian might argue that the government should not interfere with voluntary transactions among humans, but tigers in no way consent to being hunted. Thus, paternalism about the treatment of animals (particularly when the animals, such as whales, reside in the global commons) is on firmer philosophical ground than paternalism about the pollution control or occupational health laws chosen in foreign countries.

Actually, the real danger of eco-imperialism comes not from passive unilateral trade measures but from World Trade Organization (WTO) dispute settlement.[243] Under the new SPS agreement, a WTO panel would be able to rule against a health requirement.[244] If the defending country refuses to change its health law as it applies to imports, the WTO would permit the complaining country to levy trade sanctions against such country.[245] Such sanctions would be active measures aimed solely at forcing the other country to change its law.

H. Unilateralism

More serious than eco-imperialism is the concern that unilateral measures may be used in place of multilateral ones or that unilateral actions may impede multilateral cooperation. Although this is theoretically possible, a review of past practice indicates that unilateralism has been rather a critical step for securing multilateralism. Indeed, one could offer a hypothesis that unilateralism may be a precondition for multilateralism.[246]

Many of the most important health and environmental treaties were preceded by unilateral trade measures.[247] For example, the International

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well, *Concepts in Development of International Environmental Policies*, *in* INT'L UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES (IUCN), TWELFTH TECHNICAL MEETING, PAPERS AND PROCEEDINGS 98 (No. 28, 1972).

243. *See Agreement Establishing the World Trade Organization*, GATT Doc. MTN/FA II (Dec. 15, 1993) [hereinafter *World Trade Organization*], *in Uruguay Round*, *supra* note 49. The World Trade Organization is a successor organization to the Interim Commission for the International Trade Organization. The GATT itself has no legal institutional basis. Once the Uruguay Round agreements are approved by a sufficient number of countries, the GATT will become one of many agreements administered by the WTO.

244. *SPS Agreement*, *supra* note 140, art. 11(1) (para. 35).

245. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *supra* note 173, § 22.

246. As Bilder notes, the choice is often not unilateralism versus multilateralism, but rather unilateralism versus inaction. This article presents a very thoughtful, conceptual, and empirical treatment of the role of unilateralism in environmental policy. *See* Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51 (1981).

247. The same pattern occurred in the outlawing of the slave trade. Several nations such as Denmark in 1804, Great Britain in 1807 (47 Geo. 3, ch. 36 (Eng.)), and the United States in 1808 (2 Stat. 426 (1807)), banned the importation of slaves before slavery itself was abolished in 1848, 1833, and 1865 respectively. *See* 21 COLLIER'S ENCYCLOPEDIA, 75 (1993); ENCYCLOPEDIA AMERICANA 24 (Int'l ed. 1990). These unilateral import bans also preceded international treaties to ban the slave trade in the late 19th century and early 20th century. *See* Treaty Between Great Britain, Austria, France, Prus-

Sanitary Conventions of the nineteenth century were in part motivated by tight quarantines and transportation restrictions.[248] While the U.S. legislation of 1897 to ban pelagic sealing and seal skin imports[249] was ineffective as a unilateral measure,[250] it served as a model for the Fur Seals Convention of 1911,[251] which was successful in saving the fur seal.[252]

Although the International Union for the Conservation of Nature began to discuss the need for an international treaty on endangered species in the early 1960s, it was recognized that national import restrictions were the most realistic first step.[253] The United Kingdom passed the first such law in 1964,[254] and the United States followed in 1969.[255] The U.S. law also called upon the Secretary of the Interior to seek an international meeting to agree on a binding treaty regarding endangered species.[256] This meeting, held in Washington in 1973, produced CITES.[257]

Even with this international agreement, national action can be useful in spurring CITES to act. For example, because of concerns about the destruction of African elephants, many countries began to ban certain ivory imports. The United States acted first with the African Elephant Conservation Act of 1988,[258] and the United Kingdom, the Netherlands, Germany, the European Community, and Japan followed in 1989.[259] Later that year, CITES finally banned all international commercial traffic

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sia, and Russia, for the Suppression of the African Slave Trade, Dec. 20, 1841, 30 B.F.S.P. 269, 298; Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, July 2, 1890, Gr.Brit.-Spain, 173 Consol. T.S. 285-292; Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253, 256.

248. *See* Richard N. Cooper, *International Cooperation in Public Health as Prologue to Macroeconomic Cooperation, in* CAN NATIONS AGREE? 193, 210 (Richard N. Cooper et al. eds., 1989).

249. Act of Dec. 29, 1897, ch. 3, 30 Stat. 226, 227.

250. The potential ineffectiveness was recognized, but the measure was enacted as an expression of good faith. *See The Fur Seals Convention*, H.R. REP. No. 295, 62d Cong., 2d Sess. 6 (1897).

251. Convention Between Great Britain, Japan, Russia, and the United States Respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, Dec. 12, 1911, art. I, III, 214 Consol. T.S. 80 [hereinafter Fur Seals Convention of 1911]. Article I bans pelagic sealing and Article III bans the landing of sealskins unlawfully taken.

252. SHERMAN STRONG HAYDEN, THE INTERNATIONAL PROTECTION OF WILDLIFE 131 (1942).

253. ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION AND THE CONSERVATION OF NATURE 88-90 (1981).

254. Animals (Restriction of Importation) Act, 1964, ch. 61 (Eng.) (repealed).

255. Pub. L. No. 91-135, § 2, 83 Stat. 275 (1969).

256. Pub. L. No. 91-135, § 5(b), 83 Stat. 275, 278 (1969). The intended purpose of the treaty, according to Congress, was to "assure the worldwide conservation of endangered species and to prevent competitive harm to affected United States industries . . . ." *Id.*

257. CITES, *supra* note 214.

258. 16 U.S.C. §§ 4201-4205 (1988 & Supp. V 1993).

259. Meena Alagappan, Comment, *The United States' Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 10 NW. J. INT'L L. & BUS. 541, 543 (1990); L. Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV., 111, 137 n.81 (1993).

in ivory.[260]

The United States and the European Union maintain separate endangered species registers that permit them to enact stronger controls than CITES.[261] Since CITES requires a two-thirds vote to grant protection to a species,[262] the possibility always exists that biological considerations may be overridden by international politics. The ability of nations (particularly large nations) to backstop CITES by being more strict may help prevent political squabbles in the CITES listing process.

In recent years, unilateral trade measures have preceded international environmental agreements in areas such as whaling, hazardous waste, and driftnet fishing. For example, in 1981, the European Community banned the importation of whale products for commercial purposes.[263] In 1982, the International Whaling Commission voted to ban commercial whaling.[264] In 1983, CITES added seven more species of whales to Appendix I, thus banning commercial trade in those species.[265]

In 1984, the U.S. Congress prohibited the exportation of hazardous waste without the consent of the importing country.[266] Two years later, the European Community passed a similar directive.[267] In 1988, the Economic Community of West African States agreed to enact criminal laws regarding the importation of hazardous waste.[268] It is unclear whether these measures were important factors leading to the consummation of the Basel Convention in the following year,[269] but it seems plausible that the willingness of nations to act alone stimulated international agreement.

In 1989, the U.N. General Assembly approved a resolution on large-scale pelagic driftnet fishing that recommended, but did not require, a cessation of such fishing in the South Pacific by July 1, 1991.[270] To promote this goal, the U.S. Congress banned the importation of fish caught using a driftnet after that date[271] and authorized trade sanctions against

260. Jane Perlez, *Global Trade in Ivory is Banned to Protect the African Elephant*, N.Y. TIMES, Oct. 17, 1989, at C13.

261. 16 U.S.C. §§ 1531-44 (1988 & Supp. V 1993); EC Regulation 3626/82, 1982 O.J. (L 384) 1.

262. CITES, *supra* note 214, art. XV(1)(b).

263. Council Regulation 348/81, 1981 O.J. (L 39) 1.

264. Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 305, 326 (Marc Maresceau ed., 1993).

265. D'Amato & Chopra, *supra* note 211, at 47.

266. 42 U.S.C. § 6938 (1988).

267. Council Directive 86/279, 1986 O.J. (L 181) 13.

268. Barbara D. Huntoon, *Emerging Controls on Transfer of Hazardous Waste to Developing Countries*, 21 LAW & POL'Y INT'L BUS. 247, 250 (1989). *See also* Mark A. Montgomery, *Traveling Toxic Trash: An Analysis of the 1989 Basel Convention*, 14 FLETCHER F. WORLD AFF. 313, 326 (1990) (noting that 40 countries had already instituted a ban of transboundary movements of hazardous waste by March 1989).

269. Final Act and Text of Basel Convention, 28 I.L.M. 649 (1989).

270. G.A. Res. 225, U.N. GAOR, 44th Sess., 85th plen. mtg., Supp. No. 49, at 147, para. 4b, U.N. Doc. A/RES/44/225 (1989) [hereinafter Resolution 225].

271. 16 U.S.C. § 1371(a)(2)(E)(i) (1988 & Supp. V 1993).

nations that continued certain types of driftnet fishing.[272] These actions, including a threat of U.S. trade sanctions under the Pelly amendment,[273] seemed to play a role[274] in gaining the acquiescence of Japan, Korea, and Taiwan to a more definitive U.N. Resolution calling for a global moratorium on large-scale driftnet fishing by the end of 1992.[275]

The killing of dolphins in tuna fishing has now been drastically reduced.[276] According to the U.S. Marine Mammal Commission, this reduction resulted from the U.S. import bans, the decision of major tuna canneries in 1990 to buy only dolphin-safe tuna, and the multilateral efforts taken by the Inter-American Tropical Tuna Commission.[277] In 1992, the Tuna Commission adopted a regulatory program that provided a dolphin kill quota for each year and apportioned it to each fishing vessel.[278] It is possible that this program would have been agreed to without the U.S. import ban but that seems unlikely.[279]

Even when unilateral action does not engender multilateral agreements, it may be constructive in promoting other unilateral action. For example, in 1908, the British Parliament considered a law to ban the sale of imported birds or their plumage.[280] This bill was objected to, and did not pass, because other countries would have continued to import such birds.[281] But in commenting on the attempt, one supporter pointed out that "[r]epresentations to foreign countries are much more likely to be effectual if made by a Government which has had the courage of its convictions, and has already put its principles into practice."[282] Two years later, Australia banned such imports.[283] The United States and Canada

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272. 16 U.S.C. § 1826(f) (Supp. V 1993).

273. The U.S. Pelly amendment is a 1971 law authorizing the President to impose sanctions against countries who permit their nationals to diminish the effectiveness of an environmental treaty. *See* 22 U.S.C. § 1978 (1988). For a discussion of the history and use of the Pelly amendment, see Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751 (1994).

274. *See, e.g.*, Tom Kenworthy, *Japan to End Drift Net Fishing In Bow to Worldwide Pressure*, WASH. POST, Nov. 27, 1991, at A3; Jessica Mathews, *State of the Planet*, WASH. POST, Jan. 2, 1992, at A23.

275. *Large-Scale Palagic Drift-Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas*, G.A. Res. 215, U.N. GAOR, 46th Sess., at 147, para. 3(c), U.N. Doc. A/RES/46/215 (1992).

276. In 1972, when the Marine Mammal Protection Act was enacted, U.S. vessels killed 368,600 dolphins and foreign vessels killed 55,078. *See* MARINE MAMMAL COMMISSION REPORT, *supra* note 230, at 116. In 1993, U.S. fishing vessels killed 115 dolphins while foreign vessels killed about 3,900. *See id.* at 117.

277. *Id.* at 115.

278. *Id.* at 121-22.

279. Wirth, *supra* note 61, at 1398.

280. A. HOLTE MACPHERSON, COMPARATIVE LEGISLATION FOR THE PROTECTION OF BIRDS 28 (1909).

281. *Id.*

282. *Id.* at 29.

283. Proclamation, 20 Gaz. 882 (1911) (Austl.).

soon followed.[284] Great Britain finally acted in 1921.[285]

During the 1930s, trade measures were instrumental in saving certain quails from extinction. Egypt passed a law to ban the export of live quail; Great Britain supported this action with a law banning the importation of quail in 1937.[286] France acted in the same year to ban the importation of quail.[287]

In the early 1980s, Italy and the Netherlands banned the importation of products derived from baby seals that were being killed off of the Canadian coast.[288] Partly because of these unilateral actions, the European Commission approved a directive to forbid the importation of seal pups and related products.[289] This directive was intended to convince Canada to cease commercial hunting of seal pups.[290]

Although some commentators might view trade measures imposed pursuant to any treaty as non-unilateral, whenever such measures are imposed on a non-party, that country is likely to view the measure as unilateral.[291] The application of environmental treaties to non-parties has been an important element in the success of many treaties. For example, the Fur Seals Convention of 1911[292] permitted importation of seal skins only from parties (when lawfully taken).[293] This provision may have prevented the reflagging of fishing ships.[294] CITES also requires the imposition of the same rules to non-parties,[295] which may be one reason why CITES has so many parties.[296] There is no advantage in staying out. Moreover, by joining, parties can participate in CITES decision-making.

Those who argue against unilateral environmental trade measures must take one of two positions. The first is that no trade measure should be applied on a non-consensual basis. The second is that trade measures can be applied non-consensually only if 1 + N countries agree. The first position would be a formula for gridlock. The second position is worka-

284. Pub. L. No. 16, § 347, 38 Stat. 114, 148 (1913); Customs Tariff, 1914, 4 & 5 Geo. 5, ch. 26, § 5 (Eng.). *See generally* ROBIN W. DOUGHTY, FEATHER FASHIONS AND BIRD PRESERVATION (1975).

285. Act to Consolidate the Customs Laws, 1876, 39 & 40 Vict., ch. 36 (Eng.).

286. Jean Delacour, *On the Conservation of Bird Resources, in* VII PROCEEDINGS OF THE UNITED NATIONS SCIENTIFIC CONFERENCE ON THE CONSERVATION AND UTILIZATION OF RESOURCES 228-29 (1951). The conference was held in 1949, shortly after the writing of the ITO charter. The timing is significant because some commentators have doubted that the international community was aware at the time the GATT was written that trade measures might be used to protect the natural resources of other countries.

287. *Id.*

288. Demaret, *supra* note 264, at 328 n.57.

289. Council Directive 83/129, 1983 O.J. (L 91) 30.

290. Demaret, *supra* note 264, at 329.

291. *See* Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1, 7 (1993).

292. *See* Fur Seals Convention of 1911, *supra* note 251.

293. *Id.* art. III.

294. HAYDEN, *supra* note 252, at 127-28.

295. CITES, *supra* note 214, art. X.

296. John Temple Lang, *Commentary, in* ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 179, 183 (Winfried Lang et al. eds., 1991).

ble, but has the same problems of GATT legality and "eco-imperialism"[297] as single-nation unilateralism. Given the recent history of voluntary export restraints and the longtime managed trade regime on textiles and apparel,[298] one would have difficulty arguing that a requirement for collective action mitigates against the danger of protectionism. There would also be the problem of determining the right value for N. Whatever number is chosen, there would surely be heavy dickering at N-2.

In reviewing the history of environmental cooperation, there clearly has been a fruitful interplay between unilateral and multilateral action.[299] There could be danger in giving up such options.[300] As Jessica Mathews has noted, "Outlawing such [unilateral] steps would harness the pace of international progress to that of the slowest marcher."[301] Some commentators object to unilateralism on the grounds that only large nations can act unilaterally. But that manifestation of largeness is not necessarily bad. Large nations may feel a greater responsibility to prevent the consumption of goods causing environmental damage than might smaller nations.

I. Border Tax Adjustments

The issue of border tax adjustments is a central one for trade policy.[302] It has received less attention than it deserves, perhaps because of its complexity.[303] This section seeks to introduce the issue in the context of the trade and environment debate.

The purpose of a border tax adjustment is to load an internal tax onto an imported product or to unload an internal tax from an exported product. The motivation in both instances is commercial parity, i.e., to provide a "level playing field."[304] For example, imported products would have an advantage in domestic markets if a domestic sales tax were not

297. This is a fairly new term, with pejorative connotations, meant to describe environmental trade measures aimed at least partly at changing environmental policies in other countries.

298. *See generally* WILLIAM R. CLINE, INST. FOR INT'L ECON., THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL (1990).

299. Harold K. Jacobson & David A. Kay, *Conclusions and Policy, in* ENVIRONMENTAL PROTECTION: THE INTERNATIONAL DIMENSION 325 (Harold K. Jacobson & David A. Kay eds., 1983) ("By taking or just threatening unilateral action [, the United States] has prodded the reluctant to act."). *See also* Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 85 (1992).

300. Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229, 248 (1992) ("[A] country must be able to act unilaterally when progressive multilateral agreements are simply not viable.").

301. Jessica Mathews, *The Great Greenless GATT*, WASH. POST, Apr. 11, 1994, at A19.

302. For further discussion, see GARY CLYDE HUFBAUER & JOANNA SHELTON ERB, SUBSIDIES IN INTERNATIONAL TRADE 51-57 (1984).

303. *See generally* Paul Demaret & Raoul Stewardson, *Border Tax Adjustments Under GATT and EC Law and General Implications for Environmental Taxes*, J. WORLD TRADE, Aug. 1994, at 5.

304. The GATT permits other tax adjustments under Article VI, known as countervailing and anti-dumping duties. These are not border adjustments but rather discriminatory penalties on foreign imports. They do not purport to mirror domestic taxes.

applied.[305] Similarly, exported products could be disadvantaged in foreign markets if they carried sales taxes.

If all countries levied identical taxes at identical rates, the border tax adjustment problem would be enormously simplified. One would need only a consistent rule on imports and exports, and no traded products would be disadvantaged by the tax. However, countries do not maintain similar tax systems.

Producers are mercantilist. Therefore, they prefer to unload all internal taxes from exported products and to load as many internal taxes as possible on competing imported products. Since governments often demonstrate mercantilist values, there have been laws on border tax adjustments for hundreds of years.[306]

Given these inconsistent laws and practices, the GATT tries to create some order.[307] Its rule comes in three parts. First, GATT Article III:2 states that: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products . . . ."[308]

Second, GATT Article II:2 states that

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part . . . .[309]

Third, GATT Article VI:4 states that

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.[310]

These rules are not perfectly clear. For example, what does "directly or indirectly" mean? What does "borne" mean?

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305. This refers to a tax on a product being imported by the final user. If an imported product is sold in a grocery store, the store collects the sales tax as it would on a domestic product. In that case, customs officials would not impose a border tax adjustment.

306. *See, e.g.*, Whiskey Act, ch. 15, 1 Stat. 199 (1791).

307. The word "order" is not used to imply that the GATT has a full regime. As Robert H. Floyd has noted, "[T]here exist no internationally accepted regulations designed for the treatment in international transactions of domestic tax systems. . . ." Robert H. Floyd, *GATT Provisions on Border Tax Adjustments*, 7 J. WORLD TRADE L. 489, 499 (1973).

308. GATT, *supra* note 1, art. III, § 2.

309. *Id.* art. II, § 2.

310. *See also id.* Ad art. XVI headnote.

One student of the GATT, Kenneth W. Dam, offers this somewhat confusing clarification:

> [T]he terms "directly" and "indirectly" do not refer to "direct" and "indirect" taxes. On the contrary, a tax applying "directly" to "products" is an indirect tax, while a tax applying "indirectly" to "products" is a direct tax. This terminological anomaly can be resolved by switching one's perspective.[311]

The concept of "borne" was based on traditional practice and theories of incidence from public finance.[312] To wit, sales taxes are borne by the product, reflected in the price, and paid by the consumer, while corporate income taxes are not borne by the product, but rather paid by stockholders. Thus, an export rebate on a sales tax would be allowable, while an export rebate on an income tax would not be allowable.[313] If a tax is rebated on exports contrary to these rules, the importing country can impose a countervailing duty.[314]

The issue of border taxes becomes significant for the environment when internal taxes are levied for environmental purposes. For simple product taxes, these border adjustment rules are relatively straightforward. For example, if Country A imposes a bottle tax of ten cents per bottle, it can load the tax on imports from Country B and unload it from exports to Country C. Country C could not seek to countervail the rebate. Country B could not complain about the border adjustment. But if Country A produces cans rather than bottles, Country B might complain that the tax violates another requirement in Article III—namely, that internal taxes not be used so as "to afford protection to domestic production."[315] If Country B prevails, then Country A's environmental aims might be frustrated.

A far greater complication occurs when countries base their internal taxes not on weight, volume, or value, but on the ingredients used in making a product, the performance of the product (e.g., fuel efficiency), or the method of production. This causes two environmental problems. One is that the permissibility of border adjustments for certain environmental taxes remains uncertain. The inability to do a border adjustment may make it harder (for political reasons) to levy the tax in the first place. The other problem is that unloading such internalization taxes from exports might be viewed as antithetical to the environment.

Most of the analysis done by the GATT on border taxes involved efforts by European nations to permit border adjustments on various forms of turnover and value-added taxes. Unlike sales taxes, which are levied on the product, value-added taxes reflect taxes levied at each stage

311. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 124 (1970).

312. *Id.* at 210-16.

313. *Id.* at 139.

314. GATT, *supra* note 1, art. VI, § 1.

315. *Id.* art. III, § 1.

of production.[316] In spite of this "process" component of the tax, European nations won the right to rebate their taxes on export.[317] Thus, GATT rules are reasonably clear on two points. First, corporate income taxes do not qualify for border adjustments.[318] Second, sales taxes and value-added taxes do qualify.[319] In addition, the GATT adopted a working party report in 1960 which stated that "social welfare charges" were not eligible for an export rebate.[320] Social welfare charges would include social security or payroll taxes.

For other excise (or extractive) taxes, GATT rules are not clear. These are sometimes called "taxes occultes."[321] To make them seem less sinister, they will be called "factor taxes" here.[322] Some examples of factor taxes are taxes on energy, transportation, and equipment used in production.[323] For factor taxes designed to internalize the costs of production, a good case can be made that such taxes are "borne" by the product. A pure effluent tax, that is a tax on pollution emitted in production, is not a factor tax. Pollution is an externality. The legal argument for allowing a border tax adjustment on a pollution tax may be even stronger than for a factor tax, because it is generally agreed that taxes on the labor factor cannot be adjusted.[324] Pollution might also be viewed as a dis-

316. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 298 n.19 (1969); *see also* Rob Norton, *The Tax Idea That Won't Go Away*, FORTUNE, May 17, 1993, at 77 (Value added taxes are embedded in the prices consumers pay rather than tacked on at the point of sale.).

317. In the early years of the GATT, its rules evolved in a very Europe-friendly way. The United States went along to promote the achievement of the Common Market. *See* DAM, *supra* note 311, at 291; JACKSON, *supra* note 316, at 297-98; *see also* Pub. L. No. 80-472, § 102(a), 62 Stat. 137 (1948) ("Mindful of the advantages which the United States has enjoyed through the existence of a large domestic market with no internal trade barriers . . . it is declared to be the policy of the people of the United States to encourage . . . economic cooperation in Europe. . . .").

318. *See* DAM, *supra* note 311, at 211. *Reports of Committees and Principal Sub-Committees*, U.N. Conference on Trade and Employment, para. 44, U.N. Doc. ICITO I/8 (1948).

319. GATT Ad Article XVI permits exemption of exports from taxes that "have accrued." This embraces turnover taxes, but other taxes may also accrue. GATT, *supra* note 1, Ad art. XVI.

320. *Subsidies: Provisions of Article XVI:4*, GATT Doc. L/1381 (Nov. 19, 1960), B.I.S.D., *supra* note 1, 9th Supp. 185, para. 5(c) (1961). This report did not address the border adjustability of imports.

321. For a good discussion, see Roger W. Rosendahl, *Border Tax Adjustments: Problems and Proposals*, LAW & POL'Y INT'L BUS. 85, 113-16 (1970).

322. This term relates to the factors of production, such as labor, capital, land (natural resources), and management.

323. Factor taxes would also include taxes on materials consumed in the production process (e.g., catalysts) and thus not incorporated into the final product.

324. *See* Charles Pearson, *Environmental Control Costs and Border Adjustments*, 27 NAT'L TAX J. 599, 604 (1974). Pearson notes that

> [a] contrary argument could be made persuasively that [an] effluent tax [is] not a tax, but the pricing of an input into production (environmental services) which previously had been supplied at less than cost. From that perspective, the effluent tax would be viewed as simply another payment to a factor of production.

Id.

incorporated material output, in contradistinction to an non-incorporated material input like energy.

The rationale for the GATT provision can also be deduced by studying earlier international approaches to the concept of national treatment. The issue of fiscal charges on imported goods was discussed extensively by the World Economic Conference of 1927, which recommended "that all international taxes of consumption, excise, *octroi*, circulation, manipulation, etc., which are applied to the products of any foreign country should be applied in the same manner and in the same degree to the products of all foreign countries and to identical and similar home products."[325] The aim of this provision was that imported goods "must be regarded as duly nationalised and should be entitled after their importation to claim equal treatment with home products."[326] There was no intent to distinguish between internal "product" taxes and internal "process" taxes. The purpose of the discipline was to reflag imported products as domestic ones.

Many pre-GATT treaties addressed border adjustments on process taxes in their provisions on national treatment. For example, the Treaty of Commerce and Navigation between Italy and the Kingdom of the Serbs, Croats and Slovenes of 1924 provided that "internal duties in respect of production, *manufacture*, or consumption . . . may not on any pretext whatsoever be levied on like products coming from the territory of the other High Contracting Party at a higher rate or in a more burdensome manner."[327] The French-German Commercial Agreement of 1927 provided that

> [t]he internal duties . . . in respect of the production, movement, *making-up* or consumption of a natural or manufactured product must not under any pretext constitute a heavier charge on the products of the other Party or be composed under more onerous conditions than the internal taxes on like native products.[328]

The Netherlands-United States trade agreement of 1935 required that internal taxes applied to imports "be not more than fairly equivalent or compensatory to the internal tax or other exaction imposed on or with respect to the *processing* of domestic articles."[329] In all three cases, the agreements seem to permit border adjustments on processing as long as they do not unfairly burden imports. The GATT provisions are less clear, but there is no evidence that they were meant to preclude border adjustments on processing.

The GATT has discussed factor taxes several times, but it has never

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325. *Report and Proceedings of the World Economic Conference* 42, League of Nations Doc. C.356 M.129 1927 II (1927).

326. *Id.*

327. Treaty of Commerce and Navigation Between the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, July 14, 1924, art. 8, 82 L.N.T.S. 259 (emphasis added).

328. Commercial Agreement Between Germany and France, Aug. 17, 1927, art. 15, 76 L.N.T.S. 345, 349 (emphasis added).

329. Proclamation No. 100, art. IV, 50 Stat. 1504, 1510 (1935) (emphasis added).

made a definitive ruling.[330] In 1955, Germany attempted to gain an interpretive note to Article III:2 that would allow the loading of factor taxes on imports but was unsuccessful.[331] In 1970, the report of the GATT Working Party on Border Tax Adjustments was adopted. It stated that there was a "divergence of views" as to the border adjustability of factor taxes.[332] Because of the "scarcity of complaints,"[333] the working party did not draw any conclusion. The issue of factor taxes on imports has not come up since then.

In the Subsidies Code of the Tokyo Round, factor tax rebates were included in the illustrative list of export subsidies which the signatories agreed not to grant.[334] Specifically, taxes on services used in the production of goods are not border-adjustable, and taxes on goods used are border-adjustable only when the goods are physically incorporated into the exported product.[335] These rules apply only to GATT parties who are members of the Code; they are not GATT rules. The United States is a member and applies this physical incorporation practice in its countervailing duty law.[336]

The Subsidies Code refers only to export rebates. Even countries that have adopted the Code have no obligations for border adjustments on imports. One might assume that the GATT's stance should be symmetric, but, as Robert Pelikan has noted, the GATT does not require this.[337] The

330. According to Robert Pelikan, some countries have used border adjustments for such taxes. The U.S. response has been to countervail. Robert Pelikan, *Border Taxes and the GATT*, *in* 1 UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 765, 770 (Papers Submitted to the Commission on International Trade and Investment Policy and published in conjunction with the Commission's Report to the President, 1971). Pelikan was a Treasury Department official during the Nixon Administration.

331. *See* DAM, *supra* note 311, at 122; *see also Tariffs, Schedules and Customs Administration*, GATT, B.I.S.D., *supra* note 1, 3d Supp. 205, para. 10 (1955). It is interesting to note that the United States opposed the German interpretation arguing that only internal taxes levied on the final product could be levied on imports. In the Superfund case of 1987, the United States took the opposite position. *See Superfund Report*, *supra* note 64, para. 3.2.5.

332. *Border Tax Adjustments*, GATT Doc. L/3464 (Dec. 2, 1970) B.I.S.D., *supra* note 1, 18th Supp. 97, para. 15 (1972) [hereinafter *Border Tax Adjustments*].

333. *Id.*

334. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, GATT, B.I.S.D., *supra* note 1, 26th Supp. 56, art. 9.2 (1980). The Code defines "direct" taxes to include taxes on wages, profits and other forms of income. Presumably taxes on wages means either income taxes on wages or social security taxes paid by the employee. It can not mean payroll taxes paid by the employer because those are not direct taxes. *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 227-28 (1976).

335. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, *supra* note 334, Annex, para. h.

336. *See* HUFBAUER & ERB, *supra* note 302, at 56-57.

337. Pelikan, *supra* note 330, at 766 ("In view of the symmetry implied in the views of some on border tax adjustments, an interesting piece of history is that the provisions on the compensatory tax on imports and the rebate on exports developed quite separately."); *see also* Gary C. Hufbauer, The Evolution of Border Tax Adjustments 21 (Report prepared for Center for Strategic Tax Reform, 1993) (A careful reading of

GATT Working Party of 1970 on Border Tax Adjustments stated that the "GATT provisions on tax adjustment applied the principle of destination identically to imports and exports," but this statement is too ambiguous to deduce any GATT ruling.[338]

The Uruguay Round Agreement on Subsidies and Countervailing Measures would apply the 1979 Code rule to all members of the WTO.[339] This new rule permits export tax adjustments on physically incorporated inputs (as did the 1979 Code), but it goes beyond that.[340] In addition to physically incorporated inputs, export rebates are permitted on "energy, fuels and oil used in the production process . . . ."[341] Apparently, the negotiators did not realize the implications of this action.[342] It is one thing to allow rebates for taxes on oil used in a production method (for example, to make plastics) or on electricity used in specialized processes (like electrolysis). It is quite another to allow rebates for taxes on all electricity used in production or for a carbon tax on a manufacturer. The U.S. government and several other countries have stated that the new rule will not open the door to new border tax adjustments on energy.[343]

Allowing rebates on exports of energy taxes would have little pro-environmental effect. Indeed, one could argue that these rebates would be anti-environmental (see section below) because they disinternalize environmental costs. But allowing border adjustments on imports could have an environmental impact. In the absence of a border adjustment for factor taxes, a country that imposes energy taxes will feel that similar, but untaxed, imports have an unfair advantage. Less expensive imports have no direct impact on the environment, of course. But if a country is politically unable to levy appropriate taxes on domestic production because of the competitive effects of untaxed imports, that inability can have environmental significance.[344]

Disallowing factor tax adjustments on exports, as the Uruguay Round does, might be viewed as being pro-environmental since exported products should bear their full costs. But if one assumes that the GATT requires symmetry and thus the new rule disallows factor border adjustments on imports, that rule could be viewed as being anti-environmental. Of course, some commentators already think that the GATT disallows

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these various GATT provisions reveals an asymmetry between permitted adjustments on imports and exports.).

338. *Border Tax Adjustments, supra* note 332, para. 10.

339. *SCM Agreement, supra* note 49, art. III, § 1(a).

340. *Id.* Annex I, para. h. This paragraph only applies to prior-stage cumulative indirect taxes and thus may not apply to energy taxes which are indirect, non-cumulative, specific taxes that fall under paragraph g.

341. *Id.* Annex II, n.59.

342. *See GATT Environmental Subsidy Provision Angers U.S. Manufacturers*, INSIDE U.S. TRADE, Jan. 7, 1994, at 8.

343. *See U.S. Secures Agreement Not to Use GATT To Allow Energy Tax Rebate*, INSIDE U.S. TRADE, Jan. 28, 1994, at 19.

344. *See* J. Andrew Hoerner & Frank Muller, *The Impact of a Broad-Based Energy Tax on the Competitiveness of U.S. Industry*, TAX NOTES, June 21, 1993, at 1663, 1663-64.

such border adjustments on imports.[345] Had the new interpretation on energy inputs been kept and applied also to imports, it might have been a potentially useful rule from an environmental perspective.

Finally, the contribution of the GATT Dolphin I panel to this debate should be noted. In considering whether the U.S. import prohibition on tuna violated Article III, the panel declared that border adjustments were permitted on taxes borne by products but not on taxes *not* borne by products, like social security charges.[346] The panel made no reference to the fact that the GATT has no rule on factor taxes. This omission is significant because the panel determined that the U.S. measure violated Article III by analogizing from the GATT's rules on border tax adjustments. The panel likened a regulation against dolphin-unsafe tuna to a social security tax. This is clearly an inapt analogy. If the panel had used an appropriate analogy, such as likening the tuna import ban to a tax on the dolphins consumed in tuna production, the panel would have had to conclude that the GATT had no clear rule on that issue. The panel would also have had to address the fact that there is some authority in the GATT drafting history for the interpretation of "indirectly" in Article III as applying not to a product as such but to the making of the product.[347] Thus, the Dolphin I panel's decision on Article III relies on the same kinds of distortions as its decision on Article XX.[348]

J. Polluter-Pays Principle[349]

There is a tension in environmentalism regarding subsidies. On the one hand, a core tenet of environmental economics is that a pricing system reflective of social costs will produce more efficient and ecologically-sound outcomes. Therefore, tax and regulatory policies that lead to internalization of true environmental costs are desirable because they reflect prices correctly. Conversely, subsidies, which pay certain costs, are undesirable because they do not send the proper signal to producers (to use cleaner methods) or to consumers (to conserve).[350]

On the other hand, subsidies are a direct way to finance environmental improvements. They are particularly well-suited to deal with past environmental degradation. Subsidies may also have a useful role in instances

345. *See, e.g.*, ESTY, *supra* note 4, at 168.

346. *Dolphin I Report*, *supra* note 67, para. 5.13.

347. *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 132 (6th ed. 1994); *see also* Demaret & Stewardson, *supra* note 303, at 18-19.

348. *See* Eric Christensen & Samantha Geffin, *GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569, 583-85 (1991-92).

349. *See* Charles S. Pearson, *Testing the System: GATT + PPP = ?*, 27 CORNELL INT'L L.J. 553 (1994); Candice Stevens, *Interpreting the Polluter Pays Principle in the Trade and Environment Context*, 27 CORNELL INT'L L.J. 577 (1994).

350. *See* CAROL NELDER-CORVARI, THE GREENING OF THE GATT: TRADE AND THE ENVIRONMENT 19-20 (Canada Department of Finance Working Paper, 1989).

of market failure.[351] For example, environmental subsidies may be justified in promoting new pollution control technologies because the private sector is not making a sufficient investment for society's future needs.[352]

One "environmental" subsidy for which this tension does not exist is the issue of governmental *underpricing* of natural resource inputs.[353] This is not a subsidy in the usual sense, that is, for improving the environment. Instead, this kind of subsidy is designed to protect domestic markets and promote exports. Its effects are likely to be anti-environmental by encouraging an excessive use of natural resources such as lumber, water, range land, minerals, or energy. Government logging incentives in the United States have been criticized for encouraging the overuse of land and thus harming endangered species.

When the issue of pollution control subsidies first came to international attention two decades ago, the Organization for Economic Co-operation and Development (OECD) recommended that nations follow a cost allocation rule known as the "Polluter-Pays Principle" (PPP).[354] Because it was badly (or cleverly) named, the PPP is sometimes misunderstood. The PPP says the following: "The polluter should bear the expenses of carrying out . . . measures decided by public authorities to ensure that the environment is in an acceptable state."[355] The PPP also states that public measures should not include "subsidies that would create significant distortions in international trade and investment."[356]

Despite its name, the PPP does not really call for polluters to pay anything.[357] It is a procedural injunction to governments.[358] It prescribes no specific attainment level for pollution control.[359] It does not state how

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351. *See* Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507, 523 (1990).

352. Since the demand for pollution control technology is a function of public regulation, a government may have better information about future demand than private technologists do. In addition, companies may underinvest in new technology if they believe that their inventions will be copied before they can gain an adequate financial return.

353. Undercharging for a natural resource is not typically viewed as being environmentally motivated.

354. *See Guiding Principles Concerning International Economic Aspects of Environmental Policies*, OECD Doc. C(72)128 (May 26, 1972) [hereinafter *OECD Guiding Principles*], *in* OECD AND THE ENVIRONMENT 23-25 (OECD ed., 1986).

355. *Id.*, Annex, para. 4.

356. *Id.*

357. Judith Marquand, *A Note on Some Problems of Transfrontier Pollution*, *in* ECONOMICS OF TRANSFRONTIER POLLUTION 11, 14 (OECD ed., 1976) ("[A] major advantage of the [PPP] is that it allows individual countries to make their own valuations (including nil valuations).").

358. Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, TEX. INT'L L.J., 463, 468 (1991).

359. OECD Environment Committee, *Note on the Implementation of the Polluter-Pays Principle in* THE POLLUTER-PAYS PRINCIPLE 25, para. 2 (OECD ed., 1992) ("[The PPP] does not involve bringing pollution down to an optimum level of any type.").

much polluters should pay.[360] Nor does the PPP recommend the principle of full internalization of environmental costs.[361] If a public authority mandates a certain standard for pollution control, the PPP says that given the choice between the polluter paying to meet the standard and the government paying, the polluter should pay.[362] Given the choice between polluters paying and consumers paying, however, the PPP says nothing.

From the PPP perspective, "it does not matter whether the polluter passes on to his prices some or all of the environment costs or absorbs them."[363] If the polluter has to pay, then it will look for less polluting techniques. If consumers pay, then they will buy less of the product and will switch to manufacturers who find less expensive ways to comply with government pollution rules. There may be differing implications for equity between polluter-pays and consumer-pays. But these are not addressed by the PPP, which is aimed only at avoiding government subsidization of pollution control.[364]

The PPP offers no guidance for circumstances when environmental damage spills outside the country responsible.[365] One approach would be the "mutual compensation" principle, under which the polluting country makes its polluters pay for the damage outside its borders, while the receiving country makes its *consumers* pay the foreign abatement costs.[366]

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360. Thus, the notion of establishing import standards to require other nations to adhere to the PPP is vacuous because, under the PPP, the only requirement of an exporting government is that it carry out any measures "decided by public authorities." *See OECD Guiding Principles, supra* note 354, Annex, para. 4.

361. *See* OECD Environment Committee, *Foreword, in* THE POLLUTER-PAYS PRINCIPLE, *supra* note 359, at 5, para. 1.1 (In other words, the Polluter-Pays Principle is not in itself a principle intended to internalize fully the costs of pollution.). But the PPP moves toward internalization. *See OECD Guiding Principles, supra* note 354, Annex, para. 2 (Prices of goods should more closely reflect their relative scarcity.), para. 4 (The cost of these measures should be reflected in the cost of goods and services.).

362. The general concept of making polluters pay has been adopted in other fora. In the Single European Act of 1986 (amending the Treaty of Rome), the European Community stated that action by the Community relating to the environment should be based on certain principles including that "the polluter should pay." *See* Single European Act, art. 25, 1987 O.J. (L 169) 1, 11. In the Rio Declaration on Environment and Development, Principle 16 calls for national authorities "to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution . . . ." *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Principle 16, U.N. Doc. A/CONF.151/PC/WG.III/L.33/Rev.1. (1992), 31 I.L.M. 876 (1992) [hereinafter *Rio Declaration*].

363. OECD Environment Committee, *supra* note 361, para. 3.

364. The Principle was written under the assumption that the cost of pollution control would be large relative to the price of the good. Charles Pearson, *Environmental Control Costs and Border Adjustments*, 27 NAT'L TAX J. 599 (1974). Studies since the early 1970s have invalidated this assumption. ESTY, *supra* note 4, at 158-60. Thus, there may be far less need for the PPP.

365. *OECD Guiding Principles, supra* note 354, Annex, para. 1 ("These principles do not cover . . . trans-frontier pollution . . . .").

366. *See* Jon Nicolaisen et al., *Economics and the Environment: A Survey of Issues and Policy Options, in* OECD ECONOMIC STUDIES 31, 37 (1991); *see also* OECD Secretariat, *Transfrontier Pollution Cost-Sharing, in* ECONOMICS OF TRANSFRONTIER POLLUTION, *supra* note 357, at 87, 88-89.

This may also be called the "victim pays" approach. The receiving country suffers any pollution not bad enough to engender a willingness to pay the polluter to rectify.

The PPP was designed to ward off a specific problem of trade unfairness, namely, firms in non-subsidizing countries competing against firms in subsidizing countries. Another potential problem of trade unfairness is different levels of environmental regulation between countries. The PPP was not intended as a response to that problem. According to the OECD Guiding Principles, the solution to the unfairness arising from different levels of environmental regulation, when valid reasons for such regulatory differences do not exist, is "harmonization."[367]

Some have suggested that the solution to the problem of any trade "unfairness" stemming from different environmental standards is for all countries to follow the PPP.[368] But universal application of the PPP would do little to address such "unfairness," because the level of pollution control would still be up to each government. A country can meet its PPP responsibilities without providing a full internalization of environmental costs.

The PPP has arisen only once in GATT dispute settlement. In the Superfund dispute of 1987, the EC offered a novel argument about the GATT consistency of certain border tax adjustments. The case involved a U.S. law that imposed a tax on certain imported substances (e.g., styrene).[369] Under GATT Article III, a country can levy a tax "directly or indirectly" on an imported product equal to a tax "directly or indirectly" imposed on a like or substitutable domestic product.[370]

However, the meaning of "indirectly" in this context was not completely clear. The United States imposed no domestic tax on such *substances.* Instead, its tax was on the chemical constituents (e.g., nickel) of these substances (such as nickel oxide).[371] The United States defended its tax by pointing to GATT Article II, section 2(a) which allows import charges (equivalent to an internal tax) "in respect of the like domestic product *or in respect of an article from which the imported product has been manufactured or produced in whole or in part.*"[372]

The EC maintained that not all taxes were eligible for border adjustment. "A tax levied on the sale of a product to finance a specific service,"

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367. *See OECD Guiding Principles, supra* note 354, Annex, paras. 6-8; *see also* U.N. Conference on the Human Environment, Recommendation 103(e), 11 I.L.M. 1416, 1462 (1972).

368. *See, e.g.*, Feketekuty, *supra* note 90, at 189.

369. Superfund Revenue Act of 1986, § 515(a) (current version codified at 26 U.S.C. §§ 4671-72 (1988)). The substances are those in which certain taxed chemicals constitute over one-half of either the weight or the volume. Exports of such chemicals are exempt from taxation. *See* 26 U.S.C. § 4662(e) (1988).

370. GATT, *supra* note 1, art. III, § 2, Ad art. III, § 2.

371. *See* 26 U.S.C. § 4661 (1988). In effect, the United States looked inside the imported products and then collected the amount of tax that would have been imposed on the feedstock chemicals used in producing the import if these chemicals had been bought in the United States.

372. *See Superfund Report, supra* note 64, para. 3.2.5.

according to the EC, was not eligible for border tax adjustment.[373] The EC stated that the U.S. tax was used to finance measures to clean up the hazardous waste created by the use of such substances in the process of production in the United States.[374] Furthermore, it was "equally inappropriate to exempt export sales from the tax . . . ."[375] In addition, the EC complained that such a tax adjustment departed from the Polluter-Pays Principle.[376]

The GATT panel determined that the U.S. tax, in principle, was eligible for a border adjustment regardless of the policy purpose of the tax.[377] After examining the specifics of the U.S. tax, the panel concluded that it met the requirement of GATT Article II, section 2(a), i.e., that the import charge be *equivalent* to the internal tax.[378] The panel did not directly address the question of whether the U.S. tax was consistent with the PPP,[379] but instead dismissed the EC's argument, deciding that the PPP was not a GATT obligation.[380]

Several points about the Superfund case should be noted. The GATT decision makes clear that tax adjustments at the border can be used to match not only taxes expressly levied on a domestic product but also upstream taxes levied on ingredients embodied in the product. For example, the United States imposes a domestic tax on ozone-depleting chemicals coupled with a tax on imported products composed of such chemicals.[381] This import tax is equivalent to the tax "borne" by domestic chemicals and, therefore, it would seem in accord with national treatment.[382]

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373. *Id.* para. 3.2.7.

374. *Id.*

375. *Id.*

376. *Id.* Actually, the PPP relates only to cost allocation. The OECD principle noted by the EC is technically not part of the PPP. More important is the fact that the EC took this principle out of context. The OECD recommendation relates to regulatory equilibration, not tax equalization. *See OECD Guiding Principles, supra* note 354, Annex, para. 13 (Differences in environmental policies should not lead to the introduction of compensating import levies or export rebates designed to offset the consequences of these differences in prices.).

377. *Superfund Report, supra* note 64, para. 5.2.4.

378. *Id.* paras. 5.2.7-5.2.10. According to the panel, "The tax is imposed on the imported substances because they are produced from chemicals subject to an excise tax in the United States and the tax rate is determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance." *Id.* para. 5.2.8.

379. *See id.* para. 5.2.6. Perhaps the United States could have argued that the Superfund law conformed to the PPP by making foreign producers of polluting substances pay. In line with the PPP, the public authority (the United States) determines what measures are needed to assure that the *global* environment is in an acceptable state.

380. *Id.*

381. Omnibus Budget Reconciliation Act of 1989, § 7506(a) (current version codified at 26 U.S.C. §§ 4681-82 (1988). For a discussion of the impact of this tax on the use of CFCs in Southeast Asia, see *GATTery v Greenery, supra* note 3, Survey 14.

382. Exported chemicals are exempt from the U.S. tax in certain instances. Such an exemption is in accord with Article III.

The Superfund case also raises the problem of double taxation. The European Commission argued that even if the U.S. excise tax on imported substances was equivalent to the domestic tax, it would be unfair to make European industries "bear the costs of environmental protection *twice*: once in the exporting country in accordance with the Polluter-Pays Principle, again upon importation into the United States under the Superfund Act."[383] The Commission did not claim that it actually imposed such pollution taxes on its producers. Rather, the Commission stated that under the PPP, it "could be assumed" by the GATT that the EC had paid for the pollution at home.[384] The Commission did not explain why the GATT should assume the best about EC environmental policies.

Unlike some of the bilateral trade agreements that preceded it,[385] the GATT has no provisions dealing specifically with double taxation. Yet under GATT rules, double taxation can easily be avoided.[386] If the EU actually imposes a domestic excise tax on such substances, it may rebate such taxes upon exportation.

The U.S. Superfund law takes no account of whether foreign countries impose excise taxes that are similar to the American tax. If, on grounds of fairness, the United States sought to give "credit" to foreign countries that imposed a similar domestic excise tax on harmful chemicals, that would raise Most Favored Nation (MFN) trading status problems (and would be "extrajurisdictional"[387]). Thus, the GATT system may have no way to assure that at least one country (the exporter or the importer) loads the environmental tax onto the product.

Another aspect of the Superfund decision is that it makes no difference under GATT what a government does with its environmental tax revenues.[388] Spending it for a domestic environmental purpose does not, *ipso facto*, render the tax illegal (or legal). Of course, governments would not be free to spend the funds in ways that violate the GATT, for instance, by rebating exporters for their costs of meeting environmental regulations.

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383. *Superfund Report*, *supra* note 64, para. 3.2.8 (emphasis added).

384. *Id.*

385. *See, e.g.*, RICHARD C. SNYDER, THE MOST-FAVORED-NATION CLAUSE 181 (1948).

386. The panel also noted that the United States has the right not to tax products from foreign countries. In other words, the GATT permits governments to provide differentially better treatment to imports. *See Superfund Report*, *supra* note 64, para. 5.2.5.

387. Extrajurisdictional trade measures aim to promote environmental goals outside of the country taking the measure. The Dolphin I panel held that Article XX did not permit extrajurisdictionality. *Dolphin I Report*, *supra* note 67. *See* Jan McDonald, *Legal Framework and Critical Issues*, *in* INTERNATIONAL TRADE, INVESTMENT AND ENVIRONMENT: PROCEEDINGS OF THE 1993 FENNER CONFERENCE ON THE ENVIRONMENT, *supra* note 5, at 69-70.

388. *Superfund Report*, *supra* note 64, para. 5.2.4. The EC had argued that taxes for specific purposes, like the environment, were not eligible for border adjustments. *See id.* para. 3.2.7. The United States argued that the primary motivation behind the Superfund tax was to raise revenue, not to get consumers or producers to internalize their environmental costs. *Id.* para. 3.2.9.

The Uruguay Round retreats from the concept of PPP by removing the right to impose countervailing duties against certain pollution control and research subsidies unless there are "serious adverse effects" and then only with WTO approval.[389] These "green box" provisions may not violate the letter of the PPP recommendation, however, because they generally fit the exceptions authored by the OECD.[390]

In recent years, the term "polluter pays" has taken on a somewhat different meaning than its original usage.[391] The PPP is now often used to imply that a producer should fully internalize its environmental costs.[392] Thus, the idea that the polluter should pay the costs of government-mandated pollution control has evolved into the idea that the polluter should pay the social costs of the pollution.

Some have suggested that this broader view of PPP be incorporated as a GATT principle both on environmental grounds and to provide trade fairness.[393] However, it is unclear what such full-cost internalization would mean. In the Superfund case, the EC raised the point of whether exported products should be exempt from environmental taxes.[394] Since there is no environmental reason to allow such an exemption,[395] the GATT's border adjustment rules might be changed to disallow it.[396] Alternatively, the GATT might permit the exemption only if the importing country imposes a commensurate internal tax.

A more radical reform would allow countries that fully internalize their environmental costs to countervail imports of countries that do not.[397] In other words, if the exporting country does not ensure that all environmental costs are loaded into the product's costs, the importing country will do it for them via a tariff.[398] The rationale could be fairer

389. *SCM Agreement, supra* note 49, arts. VIII-IX.

390. *See* Pearson, *supra* note 349.

391. The EU Maastricht Treaty states that Community policy on the environment shall be based on certain principles including the principle that "environmental damage should as a priority be rectified at source and that the polluter should pay." *See* Maastricht Treaty on Political Union, Feb. 7, 1992, art. 130r(2), 31 I.L.M. 247, 255 (entered into force Nov. 1, 1993). This may have a different meaning than the OECD principle.

392. *See, e.g.*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, TRADE AND SUSTAINABLE DEVELOPMENT PRINCIPLES 19-20 (1994); *Rio Declaration, supra* note 362, Principle 16 ("[T]he polluter should, in principle, bear the cost of the pollution . . . .").

393. *See, e.g.*, NELDER-CORVARI, *supra* note 350, at 14-15. As far as this author can determine, Nelder-Corvari is the first commentator to use the greening of the GATT metaphor. *See also* Ursula Kettlewell, *GATT—Will Liberalized Trade Aid Global Environmental Protection?*, DENV. J. INT'L L. & POL'Y 55, 72 (1992).

394. *Superfund Report, supra* note 64, para. 3.2.8.

395. The OECD Principles concerning transfrontier pollution state that the PPP should be applied to all polluters within a country without regard to whether the pollution is internal or transfrontier. *See* OECD AND THE ENVIRONMENT, *supra* note 354, at 144-45 (C.4.d).

396. *See* GATT, *supra* note 1, Ad art. XVI headnote. The Williams Commission recommended that such taxes be rebated. *See* COMMISSION ON INT'L TRADE AND INV. POLICY, *supra* note 32, at 130-39.

397. *See* ESTY, *supra* note 4, at 177-78.

398. *See* Wirth, *supra* note 61, at 1399-1400.

competition, environmentally-sound pricing, or both. The main problem with this option is that there is no way to operationalize it.[399] Even for identical production processes, each countries' "costs" will be different owing to variations in national characteristics and preferences.[400] There is no consistent way that an importing country can make this determination for the exporting country.[401]

Permitting countries to impose taxes on imports according to the pollution emitted in producing that import would raise very difficult GATT conundrums. On the one hand, distinguishing between countries would seem to violate MFN. On the other hand, tailoring an adjustment to each product would raise a subtle problem of national treatment. The principle of giving foreign products credit for actions taken at home is well-established in the regulatory rules of GATT Article III. For instance, while the United States requires that domestic cheeses be pasteurized, it does not require that already pasteurized imported cheeses be re-pasteurized at the border. Rather, it recognizes (or gives credit to) foreign pasteurization. Requiring re-pasteurization would seem like a violation of national treatment. But if, under Article III, a foreign process (test or inspection) does not have to be repeated at the border, why should a foreign environmental tax have to be repeated on an import at the border?[402] Thus, if the U.S. tax is levied as an environmental internalization requirement, why should it be treated differently than any other "quality" requirement?[403]

In trying to rewrite GATT disciplines for border adjustments, one might return to the point raised by the EC that hazardous waste sites are a U.S. domestic problem.[404] The strongest policy case for border tax adjustments regarding the production process of imported products would be when the externalities of production cross borders. Thus, one could envision a regime that would allow import border adjustments for taxes on chloroflourocarbons (CFCs) used in the production process[405] but disallow import border adjustments for taxes on solar energy used in the production process. In other words, the importing country could apply its CFC tax to imported goods because CFCs cause transborder harm, but it could not apply its solar energy tax to imported goods because solar panels do not cause transborder harm.

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399. The traditional argument made against such eco-duties is that they would be unnecessary if governments followed the Polluter-Pays Principle and pursued harmonization. *See OECD Guiding Principles, supra* note 354, Annex, para. 13. But this argument does not deal with competitiveness concerns arising from different environmental laws.

400. Stewart, *supra* note 40, at 2103 (stating that there is no objective or uniform "cost" of pollution).

401. For a detailed discussion, see Gerald Brooks, *Environmental Economics and International Trade: An Adaptive Approach*, 5 GEO. INT'L ENVTL. L. REV. 277, 295-303 (1993).

402. The situation would be clearer if many countries agreed to impose a harmonized environmental tax.

403. If the U.S. tax is levied simply as a revenue raiser, then there would be no reason to give credit for foreign taxes paid.

404. *Superfund Report, supra* note 64, para. 3.2.7.

405. *See, e.g.*, 19 U.S.C. § 4681(b)(2) (1988 & Supp. V 1993).

In conclusion, the PPP was designed to harmonize government policies (i.e., the policy of inaction) regarding subsidies for pollution control. It is unclear whether the PPP should be credited for heading off such subsidies, or whether budget deficits, the threat of countervailing duties, and the unpopularity of polluters were more important factors. Regardless of the reason, the absence of conflict in this area is noteworthy.

III. National Policies

Part III critiques the policies on the environment/trade linkage by the European Commission, the Reagan and Bush Administrations, and the Clinton Administration. It does not attempt a comprehensive assessment of these policies, but rather it examines those elements that have been least conducive to achieving progress in the overall debate.

A. European Commission

The Commission's policy is characterized by hypocrisy. On the one hand, the EU is a user of unilateral, extrajurisdictional environmental trade measures. Some are product-oriented, such as the ban on baby seals and whale products discussed above. Some are process-oriented, such as the ban on fur caught in countries that allow leg-hold traps and the ban on cosmetics containing ingredients tested on animals.[406] On the other hand, the Commission regularly deplores the use of unilateral and extrajurisdictional measures.[407]

The Commission has strongly endorsed and called for the adoption of the GATT Dolphin I report.[408] According to the Commission, "the report sent an overall positive message about the possibility of reconciling trade and environment policies"[409] and "was also a necessary first step in clarifying the relationship between environmental policies and GATT provisions."[410] The Commission seemed unworried about any dangers to the world environment or to the GATT as an institution from the immediate adoption of the report. The Commission seemed unconcerned that the European Parliament had called for the Commission to ban the importation of tuna caught by purse seine nets.[411] According to a committee of the European Parliament, "regular attempts have been made to persuade the Commission that it is taking a short-sighted and legalistic stance at

406. Council Regulation 3254/91, 1991 O.J. (L 308) 1; Council Directive 93/35, 1993 O.J. (L 151) 32. Both of these process bans were adopted after the GATT Dolphin I report was released, but they are not yet in force.

407. *See, e.g.*, SERVICES OF THE EUROPEAN COMMISSION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 19-21 (1993).

408. *Minutes of Meeting of the GATT Council on 18 February 1992*, 22-23, GATT Doc. C/M/254 (Mar. 10, 1992).

409. *Id.* at 22.

410. *Id.* at 23. The official minutes of GATT Council meetings are not verbatim transcripts.

411. *See EC Parliamentarian's Letter on Tuna Case*, INSIDE U.S. TRADE, Mar. 20, 1992, at S-22.

variance with its rhetoric on the environment."[412]

The Commission also argues that the GATT contains a least trade restrictive requirement for environmental measures.[413] The Commission may be confusing its own case law, which does contain such a requirement,[414] with the GATT case law, which does not.[415] Perhaps the Commission is attempting to apply its own law extraterritorially through the GATT.

Although the Commission has not argued that the Basel Convention and the Montreal Protocol should be ruled GATT-illegal, it has argued for GATT disciplines on environmental treaties using trade measures. For example, the Commission opposes the use of trade sanctions (i.e., against unrelated products) in such treaties.[416] Moreover, a Commission official has declared that the trade provisions in the Montreal Protocol are "regrettable."[417]

The Commission has also complained about California's recycling content requirements for glass containers. This law applies equally to domestic- and foreign-made containers. According to the Commission, "the application of such a domestic environmental requirement to imported products is not in conformity with GATT rules."[418]

Finally, although the North-South tension in the trade and environment debate is a sensitive issue, the Commission seems intent on aggravating it. For example, in December 1992, the World Wide Fund for Nature wrote to the EC's ambassador to the GATT to express concerns about creating a powerful Multilateral Trade Organization (MTO)[419] that might prevent developing countries from following sustainable development. In response, the EC's ambassador explained the benefits of the MTO but also declared that "[t]hat the MTO is unpopular in some industrialized countries, notably in the United States of America, is one more indication that it will benefit developing countries."[420] The Commission is also hostile to efforts by the United States to improve the transparency of the GATT as an institution. When the Clinton Administration recently proposed that representatives from non-governmental organizations be permitted to

412. Report of the Committee on External Economic Relations on Environment and Trade, EUR. PARL. DOC. (PE 201.431/fin.) 10 (1992).

413. *See, e.g., EC Proposal on Trade and Environment*, INSIDE U.S. TRADE, Nov. 27, 1992, at S-2, S-3, S-5.

414. *See* Geradin, *supra* note 166.

415. For a review of the concepts of "least trade restrictive" and "proportionality" in GATT instruments and jurisprudence, see *Agenda Item I: Trade Provisions Contained in Existing Multilateral Environmental Agreements Vis-A-Vis GATT Principles and Provisions*, GATT Doc. TRE/W/16/Rev. 1 (Oct. 14, 1993).

416. *EC Proposal on Trade and Environment*, INSIDE U.S. TRADE, Nov. 27, 1992, at S-2, S-5.

417. *Uruguay Round Negotiations Face Range of Difficulties, EC Official Says*, INT'L TRADE REP., Apr. 1993, at 661-62.

418. SERVICES OF THE EUROPEAN COMMISSION, *supra* note 407, at 62-63.

419. At the end of the Uruguay Round, the MTO was renamed the WTO.

420. Letter from Tran Van-Thinh, Ambassador to the GATT for the European Union, to Charles Arden-Clarke, World-Wide Fund for Nature (Apr. 3, 1993) (on file with the *Cornell International Law Journal*).

observe the GATT's Committee on trade and environment, the delegate from the European Union sarcastically asked whether "farm animals" should be brought into meetings on agricultural issues.[421]

B. The Reagan and Bush Administrations

For many years, U.S. policy was tolerant of foreign decision-making about health. Consider, for example, the law of 1916, stating that

> [w]henever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit . . . the importation into the United States of similar articles. . . .[422]

The Congress authorizes retaliation but not when the foreign trade barrier is related to health. Such deference to foreign choices about health was not included in Section 301 of the Trade Act of 1974,[423] which gave the President broad authority to retaliate against foreign trade practices.

Much of U.S. policy on trade and environment (indeed much of the shape of the entire trade and environment debate) was formed in the mid-1980s during the meat hormone dispute. To simplify the facts of this very complex dispute, the European Commission banned the use of growth hormones in European meat and applied a similar rule to imports.[424] The Reagan Administration took great offense at this and imposed trade sanctions under Section 301,[425] despite the fact that such sanctions were GATT-illegal.[426] When Texas Agriculture Commissioner Jim Hightower offered to defuse the situation by working out a plan to provide hormone-free meat,[427] U.S. Secretary of Agriculture Clayton Yeutter went so far as to threaten him with prosecution under the Logan Act[428] because Hightower was cooperating with EC officials.[429] Had Yeutter been primarily concerned about the loss of U.S. exports, he would have applauded Hightower's action. The fact that Yeutter responded in such a pugnacious manner showed that the concern was instead that if the U.S. government cooperated in supplying hormone-free meat to the Community, American consumers might also ask for hormone-free meat.

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421. *See U.S. To Call for NGO Observers in WTO Environment Committee*, INSIDE U.S. TRADE, Sept. 16, 1994, at 13.

422. 15 U.S.C. § 75 (1988).

423. 19 U.S.C. § 2411 (1988).

424. For a discussion, see Adrián Rafael Halpern, *The U.S.-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N.C. J. INT'L L. & COM. REG. 135 (1989).

425. *See* Office of the U.S. Trade Representative: Unfair Trade Practices; European Community Hormones Directive, 52 Fed. Reg. 45304 (1987).

426. The trade sanctions violated GATT Articles I and II.

427. *See EC's Andriessen to Meet with USTR Hills Over Hormone Dispute, EC Spokeswoman Says*, INT'L TRADE REP., Feb. 8, 1989, at 171, 172.

428. 18 U.S.C. § 953 (1988).

429. *See* Nelson Graves, *Texan Draws Ire of Washington in EC Hormone Ban Sideshow*, REUTER BUS. REP., Feb. 8, 1989.

There is no compelling evidence that feeding hormones to livestock is unsafe to consumers. Nevertheless, the Community banned them because of public concern.[430] The U.S. government might have shown tolerance to such a foreign government decision but did not.[431]

During the same period, American negotiators sought a strong agreement in the Uruguay Round to harmonize and supervise sanitary and phytosanitary standards.[432] Moreover, the Bush Administration went so far as to seek an amendment to GATT Article XX(b) to require consistency with "sound scientific evidence and recognition of equivalency."[433] Indeed, it was the SPS issue that sparked the trade and environment debate in the early 1990s as food safety groups and environmentalists began to discover the latent and potential role of the GATT in health and environmental supervision.

The first invocation of Article XX(g) as a defense in a GATT dispute came in 1981 in the U.S. Tuna case.[434] The dispute had nothing to do with the environment.[435] Canada seized U.S. fishing vessels in a fisheries dispute, and the U.S. retaliated by banning tuna imports from Canada.[436] Nevertheless, the U.S. Trade Representative unwisely sought to defend the action by claiming that it was related to conservation.[437] The GATT panel ruled against the United States.[438] In doing so, it suggested that the import ban was not inconsistent with the disciplines of the Article XX headnote.[439] Because this was the first Article XX environmental case, it established an unfortunate precedent of diluting the headnote. As a result, subsequent adjudication has gone askew in insinuating disciplines into subsections (b) and (g) rather than invoking the ones already in the headnote.[440]

It is not clear whether the Bush Administration ever had a policy on

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430. *See European Officials Emphasize Hormone Ban Is A Consumer Issue, Not a Trade Barrier*, INT'L TRADE REP., Feb. 15, 1989, at 196.

431. The Congress recommended that the Reagan Administration take action. *See generally* 21 U.S.C. § 620(h) (1988).

432. Maury E. Bredahl & Kenneth W. Forsythe, *Harmonizing Phyto-sanitary and Sanitary Regulations*, 12 WORLD ECON. 189 (1989).

433. *Synoptic Table of Negotiating Proposals Submitted Pursuant to Paragrapah 11 of the Mid-Term Review Agreement on Agriculture*, GATT Doc. MTN.GNG/NG5/W/150/Rev.1 (1990).

434. *Tuna Case*, *supra* note 63.

435. *See* Thomas E. Skilton, Note, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 475-76 (1993) (The United States imposed an import ban on Canadian tuna and tuna products because of a Canadian seizure of U.S. fishing vessels during a fishing rights dispute.).

436. *Tuna Case*, *supra* note 63, para. 2.1.

437. *Id.* para. 3.5. It is unclear to what extent the Carter Administration also played a role in devising the U.S. legal strategy.

438. *Id.* para. 4.12.

439. *Id.* para. 4.8.

440. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 37, 47-55.

trade and the environment.[441] It never publicly articulated one, and most of its efforts seemed passive. However, inaction can also count as a policy, and much of what the Administration did falls into that category. Despite a specific statutory mandate in the Clean Air Act,[442] the Bush Administration failed to submit the study on the impact of differing air quality standards on U.S. competitiveness.

Although the initial position of the Bush Administration had been that the NAFTA was a trade agreement and thus had little to do with the environment,[443] by the end of the negotiation, in the summer of 1992, the Administration decided to play up the environmental aspects of the NAFTA and pronounce the trade agreement as the "greenest" ever.[444]

It is sometimes suggested that the absence of support in the GATT for the U.S. Marine Mammal Protection Act[445] (MMPA) shows that the U.S position is wrong. But the absence of support may also indicate that the Bush Administration did not seek any support. Recall that the import ban against Mexico was implemented by the Bush Administration only upon court order.[446] When the panel report was discussed in the GATT Council, the U.S. ambassador to the GATT (Rufus Yerxa) made no attempt to explain why the import ban was needed and why GATT Article XX permitted such actions. Instead, he said that "certain U.S. Congressmen" thought that the panel's report conflicted with environmental policy.[447] He also reminded the Council that the Bush Administration was acting pursuant to court order.[448] He seemed to be signaling to other countries not to take the official U.S. position seriously.

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441. This is not to suggest that the Bush Administration did not work hard at it. Indeed, they may have worked too hard. In March 1992, the Assistant U.S. Trade Representative for Intellectual Property and the Environment (Carmen Suro-Bredie) explained at a Congressional hearing that

> [w]e now have constituted a Trade and Environment Subcommittee that consists both of trade officials and wide participation by EPA, the Council on Environmental Quality, and other agencies, Interior, that have responsibility for the environmental side of our legislation. And this group has been meeting, basically, non-stop. We are talking about people closed in a room hour after hour working on position papers that we have presented to the OECD and on positions that we are presenting to the GATT.

Review of the Administration's Proposal to Promote Dolphin Protection, Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 102nd Cong., 2nd Sess., 17 (1992) (statement of Carmen Suro-Bredie, Asst. U.S. Trade Representative for Intellectual Property and the Environment).

442. *See* 42 U.S.C. § 7612 and notes (1988 & Supp. V 1993).

443. *See, e.g.*, Evelyn Iritani, *Social Issues Pact Doesn't Belong in Trade Agreement, Hills Argues*, SEATTLE POST-INTELLIGENCER, Aug. 21, 1991.

444. *See* Steve Charnovitz, *NAFTA's Social Dimension: Lessons from the Past and Framework for the Future*, INT'L TRADE J., Spring 1994, at 39, 50-53.

445. 16 U.S.C. § 1361 (1988).

446. Recently, the U.S. Court of Appeals determined that these orders were improper because the lawsuits should have been filed in the U.S. Court of International Trade. *See Earth Island Asks CA 9 Panel to Rehear Tuna-Dolphin Case*, INT'L TRADE REP., Mar. 23, 1994, at 473.

447. GATT Doc. C/M/254, *supra* note 408, at 34.

448. *Id.*

When the U.N Conference on Trade and Development approved the Cartagena Resolution in February 1992,[449] the Bush Administration apparently did not protest. This resolution stated that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[450] This same provision was included in the Rio Declaration later that year.[451] The fact that this statement has been blessed by the UNCED has handicapped efforts to make progress in the GATT.[452] The Bush Administration also agreed to the provision in Agenda 21 that certain principles should apply to the use of trade measures for the enforcement of environmental policies, including "the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives."[453]

To the surprise of many observers, the Bush Administration approved the GATT's adoption of the U.S. Alcoholic Beverages panel report in 1992 even though it had significant potential ramifications for government regulations.[454] First, the decision states that the GATT "is superior to GATT-inconsistent state law" in the United States.[455] Second, the panel suggests that executive action, such as the acceptance of the GATT by the President, could change or overrule state laws.[456] Third, the panel found that the state tax credits based on the size of a brewery violate the GATT national treatment requirement even if the credit were available identically to foreign and domestic breweries.[457] On the other hand, the decision is useful in clarifying that the "like product" concept in the GATT was not meant to preclude legitimate product differentiation.[458]

C. The Clinton Administration

It is unclear to what extent the Clinton Administration is filling the leadership void on this issue. One troublesome development is the recent articulation of principles by State Department Counselor Tim Wirth concerning extrajurisdictional environmental trade measures.[459] Wirth identifies four criteria that justify the *consideration* of trade measures in support of environmental objectives:

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449. *The Cartagena Commitment*, *supra* note 9.

450. *Id.* para. 152.

451. *Rio Declaration*, *supra* note 362, Principle 12.

452. *See, e.g.*, *GATT Environment Work Delayed By Dispute Over Unilateral Action*, INSIDE U.S. TRADE, Nov. 13, 1992, at S-1.

453. *Agenda 21*, *supra* note 13, ch. 2, sec. 2.22(i), ch. 39, sec. 39.3(d).

454. *Measures Affecting Alcoholic and Malt Beverages*, GATT, B.I.S.D., *supra* note 1, 39th Supp. 206 (1993).

455. *Id.* para 5.80.

456. *Id.* para. 5.48.

457. *Id.* para. 5.19.

458. *Id.* para. 5.25.

459. *Hearing Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 4 (1994) (testimony of Timothy E. Wirth, Counselor, Dept. of State), *available in* LEXIS, Legis Library, Cngtst File.

> 1. when trade measures are an obligation under an international environmental agreement to which we are a party, assuming non-discriminatory treatment of non-parties;
>
> 2. when the environmental effect of an activity is partially within our jurisdiction;
>
> 3. when a plant or animal species is endangered or threatened, or where a particular practice will likely cause a species to become endangered or threatened;
>
> 4. where the effectiveness of a scientifically-based international environmental or conservation standard is being diminished, provided the standard is specific enough that the judgment as to whether it has been "diminished" can be made objectively.

The consideration, as well as the use, of trade measures in these circumstances seems warranted. Yet what is most interesting is what these carefully drawn criteria seem to exclude.[460] For example, trade restrictions under the Montreal Protocol and the Basel Convention are excluded from the first criterion because they rely on discriminatory treatment of non-parties.[461] The application of recycling content standards to imports is excluded from the second criterion.[462] The tuna import bans under the MMPA are probably excluded from the third criterion because dolphins are not endangered or threatened.[463] The import bans under the Wild Bird Conservation Act of 1992[464] that apply to species not covered by CITES may also be excluded from the third criterion. The use of the "scientifically-based" criterion in the fourth criterion is designed to reduce pressure on the Administration for using the Pelly Amendment, which does not require that environmental treaties be science-based.[465] For example, the continuing ban on commercial whaling by the International Whaling Commission has been criticized as being grounded in a moral rather than a scientific judgment.[466] Moreover, it is unclear whether the fourth criterion would have permitted the U.S. ban on the importation of driftnet-caught fish from the South Pacific Ocean after July 1, 1991.[467] There was a related U.N. Resolution, but it does not countenance import actions.[468]

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460. For simplicity, the following cases do not go through each of the four criteria but look only at the particular criteria that might support use of the measure.

461. *See* Montreal Protocol, *supra* note 78.

462. Recycling content standards relate to the externalities of production. There is no environmental difference to the consuming nation whether the bottle is recycled or brand new glass. Therefore, the environmental effect of the glassmaking activity is not even partially within the U.S. jurisdiction.

463. ESTY, *supra* note 4, at 188.

464. 16 U.S.C. § 4907 (1988).

465. *See* Charnovitz, *supra* note 273.

466. *See generally* Cathy Roheim Wessells & Peter Wallstrōm, *New Dimensions in World Fisheries: Implications for U.S. and E.C. Trade in Seafood, in* AGRICULTURAL TRADE CONFLICTS AND GATT: NEW DIMENSIONS IN NORTH AMERICAN-EUROPEAN AGRICULTURAL TRADE RELATIONS 515, 532 (Giovanni Anania et al. eds., 1994).

467. 16 U.S.C. § 1371(a)(2)(E) (1988 & Supp. V 1993).

468. Resolution 225, *supra* note 270.

The interpretations offered here are subject to debate. However, the Administration has done little to clarify these criteria. If the Administration is going to propose such a new policy, it would be helpful to the public if it would simultaneously give its interpretation of how these criteria relate to existing U.S. laws utilizing environmental trade measures.

The other troublesome point about these principles is that they fail to make use of many important analytical distinctions in the trade and environment debate. For example, there is no distinction between standards and sanctions, even though countries presumably should have GATT greater rights to do the former. There is also no distinction as to the degree of intrusiveness of the environmental measure. Finally, there is no distinction between environmental activities in the global commons and such activities in a foreign country.

Clinton Administration officials regularly declare their interest in reconciling trade and the environment. For instance, in announcing new office space for the Environmental Protection Agency (EPA) in Washington's new international trade center, Vice President Gore explained that "it is important that EPA be consolidated into a prominent location that demonstrates the importance that this nation places on linking sound trade policy with sound environmental policy."[469] But the Administration resisted calls to link the lifting of the trade embargo against Vietnam to environmental improvements.[470] In the three Pelly certifications[471] that came to President Clinton, he announced sanctions in only one of them.[472] The U.S. Department of Commerce also seems to be avoiding implementation of trade sanctions against nations permitting driftnet fishing as required by U.S. law.[473]

One of the most significant actions in 1993 was that the Clinton Administration consented to new Uruguay Round agreements on SPS and TBT which will significantly tighten the current GATT.[474] Of course, these agreements were inherited from the Bush Administration.[475] Moreover, the Clinton Administration succeeded in making a few last-minute changes to slightly water down the new disciplines.[476] Nevertheless, the

469. Linda Langhorst Raclin, *Clean Trade*, GOV'T EXEC., Jan. 1994, at 36.

470. *See Green Groups Call for Administration to Maintain Vietnam Embargo*, INSIDE U.S. TRADE, Sept. 10, 1993, at 14.

471. 22 U.S.C. § 1978. For a discussion, see Steve Charnovitz, *Encouraging Environmental Cooperation Through the Pelly Amendment*, J. ENV'T & DEV., Winter 1994, at 3.

472. Thomas L. Friedman, *U.S. Puts Sanctions on Taiwan*, N.Y. TIMES, Apr. 12, 1994, at D1; Charnovitz, *supra* note 273, at 769-72.

473. *See House Members Call for Sanctions Against France in Fish Dispute*, INSIDE U.S. TRADE, Feb. 18, 1994, at 17-18; *see* 16 U.S.C. § 1826a.

474. *See* Steve Charnovitz, *The World Trade Organization and Environmental Supervision*, INT'L ENV'T REP., Jan. 26, 1994, at 89; *see also* Frances Williams, *Trade Accord Boost for Global Standardisation*, FIN. TIMES, Feb. 4, 1994, at 3.

475. *See* Steve Charnovitz, *Trade Negotiations and the Environment*, INT'L ENV'T REP., Mar. 11, 1992, at 144. This discusses the provisions in the Dunkel Text, which some environmentalists called the Draft Dunkel Text (DDT).

476. *The Uruguay Round: Growth for the World, Jobs for the U.S.: Hearings Before the House Ways and Means Comm.*, 103d Cong., 2d Sess. (1994) (testimony of Michael Kantor, U.S. Trade Representative), *available in* LEXIS, Legis Library, Cngtst File.

agreements remain much tighter than the current GATT. (Ironically, the room where heads of GATT delegations meet to settle key issues is called the "Green Room.") The most troublesome feature of the Clinton Administration's policy is its denial that the SPS and TBT agreements potentially threaten U.S. environmental standards. For example, U.S. Trade Representative Mickey Kantor testified to Congress that the Uruguay Round will not "limit the ability of the United States to set its own environmental or health standards."[477] He based this conclusion on his view that the TBT agreement "provides that each country may determine its appropriate level of protection and ensures that the encouragement to use international standards will not result in downward harmonization."[478] Unfortunately, it is difficult to find support for this view in the actual text of the Uruguay Round.

The Uruguay Round may also facilitate international pressure against the United States for using trade measures to safeguard the extrajurisdictional environment.[479] If the United States loses a challenge, the winning country will be able to impose trade sanctions against the United States until Congress changes the law.[480] The Administration recognizes this, but it prefers to accentuate the positive. According to President Clinton, the new GATT agreements "preserve the ability of the United States to impose measures necessary to protect the health and safety of *our* citizens and *our* environment . . . ."[481]

That statement is debatable even in its geographically limited form. Consider Venezuela's complaint against EPA's reformulated gasoline regulations (noted above).[482] The Clean Air Act requires a reduction of olefins in gasoline from 1995-1997.[483] U.S. refiners are allowed to phase in reductions from their own 1990 baselines, while foreign refiners must use the U.S. average baseline.[484] This may violate GATT Article III (although it might be argued that Venezuelan gasoline, which has three times the amount of olefins, is not a "like" product), but a reasonable defense could be made by the United States under GATT Article XX.[485] In early 1994, Venezuela filed a complaint in the GATT.[486] Instead of defending the United States at the GATT, however, the Clinton Administration agreed to change the regulation in return for an agreement by Venezuela to drop the GATT case.[487]

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477. *Id.*
478. *Id.*
479. Charnovitz, *supra* note 474, at 91.
480. *Id.*
481. Letter to Congressional Leaders on the General Agreement on Tariffs and Trade, 29 WEEKLY COMP. PRES. DOC. 2601 (Dec. 15, 1993) (emphasis added).
482. *See Clean Air and Venezuela*, J. COM., Mar. 29, 1994, at 6A.
483. 42 U.S.C. § 7545(k) (1988 & Supp. V 1993).
484. 59 Fed. Reg. 7716 (1994). An amendment was proposed on May 3, 1994. 59 Fed. Reg. 22,800 (1994).
485. *See* S. Res. 197, 103d Cong., 2d Sess., 140 CONG. REC. 3987 (1994).
486. *See EPA Announces Fuel Plan for Venezuela; Threatened GATT Complaint Is Shelved*, INT'L TRADE REP., Mar. 30, 1994, at 504.
487. *Id.*

This decision highlights several troubling aspects of the Clinton Administration's policy on trade and environment. First, the decision will mean dirtier air for the United States. EPA itself called it the "least environmentally desirable outcome."[488] Second, to limit the environmental damage, the Administration got Venezuela to agree to a quota on gasoline imports at the current level.[489] Import quotas are a form of managed trade and are almost always bad.[490] Third, the Administration worked out the arrangement with Venezuela secretly without regard to normal U.S. rule-making procedures.[491] The episode gives credence to the complaints of many environmentalists that GATT rules will shape environmental laws in a secretive, anti-democratic way.[492]

Although the SPS and TBT Uruguay Round agreements do tighten the current GATT, their anti-environmental effects remain to be seen. But it is clear that the Uruguay Round does nothing positive about the trade and environment linkage. Unfortunately, the Clinton Administration is trying to claim more: "The Uruguay Round marks a first step toward recognizing the interdependence of economic and environmental goals in world trade rules. The preamble to the new World Trade Organization establishes sustainable development as a goal and recommends a work program to begin to deal with these issues."[493] By relying upon a preamble to demonstrate principles that are not present (and one can argue are even thwarted) in the agreement itself, the Administration befogs public debate. The Uruguay Round does not mark a first step. This tactic of inferring progress from preambles (also followed by the Administration with regard to the NAFTA) should be stopped. One way to do so would be to eliminate preambles from trade agreements.

On the plus side, the Administration did secure GATT agreement on a new trade and environment committee.[494] But a large amount of effort had to be expended for a fairly minor goal.[495] One reason why the United States found it so difficult to secure the new GATT trade and environment committee is that the Clinton Administration has given credence

488. *EPA to Change Clean Air Rule to Ward Off Threatened GATT Challenge*, INSIDE U.S. TRADE, Mar. 25, 1994, at 1, 13-14.

489. *Id.* The quota applies to dirty gasoline. Venezuela may send in additional gasoline if it meets average U.S. standards.

490. *See generally* DOUGLAS A. IRWIN, MANAGED TRADE: THE CASE AGAINST IMPORT TARGETS (1994).

491. *See Congress Questions Legality of Gasoline Compromise with Venezuela*, INSIDE U.S. TRADE, Apr. 1, 1994, at 9.

492. *See* Lori Wallach, *Hidden Dangers of GATT and NAFTA*, *in* THE CASE AGAINST FREE TRADE, *supra* note 37, at 23. For a good discussion of the interaction of the GATT and environmental measures, see Kurt C. Hofgard, *Is this Land Really Our Land? Impacts of Free Trade Agreements on U.S. Environmental Protection*, 23 ENVTL. L. 635, 660 (1993).

493. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 20, at 9.

494. *See TNC Decision on Trade and Environment*, INSIDE U.S. TRADE, Apr. 8, 1994, at S-4.

495. The Clinton Administration claims that the Committee "will assist efforts to reach international agreement on environmental issues that affect the entire world, such as ozone depletion, global climate change, and biodiversity." *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 20, at 19.

to the view that the U.S. interest in trade and environment is as much about maintaining competitiveness as it is about safeguarding the environment. For example, during the NAFTA debate, President Clinton suggested that the side agreement would raise Mexico's production costs, and that this outcome would be good for the United States.[496] U.S. Trade Representative Mickey Kantor has explained that other countries must meet tough U.S. pollution laws in order for U.S. companies to remain competitive.[497] It is no wonder, therefore, that developing countries have been doubtful of the Clinton Administration's motives for more environmental work in the GATT.

In addition, President Clinton announced the creation of a Trade and Environment Policy Advisory Committee at the end of March 1994.[498] Although a seemingly small step, this action is significant because the Bush Administration had refused to do it,[499] but President Clinton has failed to convene the Committee during 1994.

Finally, another important missed opportunity should be noted. During the budget debate in 1993, the Clinton Administration sought to impose a new "British Thermal Unit" (BTU) tax to conserve energy and raise revenue. When concerns were raised about the effects on domestic competitiveness, the Administration agreed to provide a border adjustment for the tax. The border adjustments, as enacted by the House,[500] were criticized as GATT-illegal by the European Commission.[501] Eventually, the tax was dropped.[502]

This episode was disappointing for many reasons. Had the Administration tried to negotiate a common BTU or energy tax with the European Commission, it might have been able to overcome the competitiveness fears. The European Commission had put forward proposals for a carbon tax but had predicated it on similar action in the United States and Japan.[503] Thus, effective leadership by the Clinton Administration at the

496. *See* Remarks and a Question-and-Answer Session on the North American Free Trade Agreement in New Orleans, Louisiana, 29 WEEKLY COMP. PRES. DOC. 1766 (Sept. 15, 1993).

497. Bob Davis, *U.S. Is Hoping to Blend Environmental, World Trade Issues at Morocco Meeting*, WALL ST. J., Jan. 10, 1994, at A9; *see also* Hobart Rowen, *New Trade Buzzword*, WASH. POST, Dec. 31, 1993, at A21 (Kantor says the United States must insist that its trading partners follow the same environmental rules that we do.).

498. Executive Order 12905—Trade and Environmental Policy Committee, 30 WEEKLY COMP. PRES. DOC. 639 (Mar. 25, 1994).

499. Conversation with Joshua Bolten, General Counsel of the U.S. Trade Representative (Spring, 1991).

500. *See* Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, 107 Stat. 312 (1993).

501. *See* Letter from Ambassador Andreas van Agt to Majority Leader Richard Gephardt (May 26, 1993) (on file with the *Cornell International Law Journal*); *see also* Richard Lawrence, *Proposed Energy Tax on Imports Stirs Debate on U.S. Trade Policy*, J. COM., May 18, 1994, at 10A; Karl D. Jackson, *'Green' Protectionism, Clinton's Hidden Tariff*, WALL ST. J., May 25, 1993, at A10.

502. David S. Cloud et al., *Deal on Deficit Sets Stage for Senate Floor Fight*, 51 CONG. Q. 1542 (1993).

503. ESTY, *supra* note 4, at 174.

right moment might have facilitated an energy tax.

Conclusion

The GATT has fairly narrow responsibilities. It does not govern international trade. It does not regulate private behavior.[504] Its role is to supervise governments in their use of trade restrictions and domestic subsidies.

With regard to any particular transaction crossing international borders, there are a lot of questions one might ask. This article noted twenty-five questions and found that the GATT would be interested in only about three. Environmentalists want to interest the GATT in more of these questions.

Trade benefits participants; otherwise, they would not do it. But one can raise important questions about such mutually satisfying trade. For example, would a particular trade have occurred if the prices had better reflected social costs? Does trade engender production that has negative externalities that exceed the utility added from the trade? Does society want to use coercive power to prohibit certain trades, notwithstanding their enjoyability (or perhaps because of this)?

One of the earliest trade theorists, Sir Dudley North, once wrote "[t]hat there can be no Trade unprofitable to the Publick; for if any prove so, men leave it off; and whereever the Traders thrive, the Publick, of which they are a part, thrives also."[505] North's insight is a keen one, particularly for the seventeenth century. But a profitable trade among individuals does not necessarily lead to a more thriving public. Because of indirect scale or structural effects of trade, such thriving could be more apparent than real.

Yet the fact that trade can have negative social effects is not a strong argument for inhibiting trade. Many (and perhaps even more) of these negative social effects will occur following domestic production and domestic commerce. Thus, while Sir Dudley was basically right, the story is a bit more complex than as he explained it.

President Clinton has suggested the need for new institutional arrangements to ensure that trade leaves the world cleaner than before. The current institutional arrangement is the GATT (soon to be the WTO), which supervises the trade restrictions imposed by governments. If the GATT is very successful at its mission, then it might make customs stations cleaner, since no one will use them. But the GATT has no rules regulating private behavior, nor does it supervise the regulation of production practices by governments. So the GATT is two steps removed from the market decisions being made every moment that dirty (or cleanse) the world.

The use of trade measures for environmental purposes has been sharply criticized in recent years by the GATT Secretariat and many GATT

504. But Article VI suggests that injurious dumping is to be condemned. *See* GATT, *supra* note 1, art. VI.

505. DUDLEY NORTH, DISCOURSES UPON TRADE 13 (Jacob B. Hollander ed., 1907) (1691).

members. This practice has been decried as extrajurisdictional, eco-imperialist, protectionist, and unilateralist.

The charge of extrajurisdictionality is warranted. The trade measures in question have cosmopolitan objectives. They see the world environment as an ecosystem that does not stop at political boundaries.

The charge of eco-imperialism is unjustified. Imposing product standards or banning imports is not coercion. It is not an effort to make other countries dependent. Of course, environmental trade measures may seek to influence the actions of other countries, but there is nothing wrong with that. Indeed, it is virtuous for a nation to help others avoid its own mistakes.

The charge of protectionism is also unjustified. Environmentalists want to "protect" human health, but that is not the same thing as protectionism, which is a policy to prevent imports in order to preserve domestic production. It is not the fault of the environmentalists that "protectionism" has such a negative connotation within the trade community. Still, they would be wiser to select a different word. Environmentalists should also stop borrowing trade jargon, such as "eco-dumping" and "green 301," in the hopes of showing how their goals fit into trade policy frameworks.

The charge of unilateralism is also unjustified. Indeed, of all these charges, it is the most inapposite. It is true that many environmental trade measures are unilateral. But the actions that necessitate such measures are also unilateral. When governments pollute the global commons, when governments declare that their right to export products (e.g., dolphin-unsafe tuna) must not be questioned, when governments dodge intergovernmental conservation efforts by asserting a right not to participate, when governments deny that beggar-thy-environment practices can lead to unfair trade, or when governments rely upon outdated concepts of sovereignty, then such governments deserve blame for the continuing intractability of global environmental problems. They are the true unilateralists.