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## TRADE AND THE ENVIRONMENT

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# TRADE AND THE ENVIRONMENT

## I. INTRODUCTION

The intersection of trade and environmental issues is increasing steadily, and it is fraught with tension.<sup>1</sup> Historically, trade objectives and environmental objectives have not been perceived as harmonious.<sup>2</sup> “The different perceptions of the two disciplines are summed up in their respective connotations of the word protection. It is a pejorative word in the trade community, an exemplary one in the environmental community.”<sup>3</sup> Choices must sometimes be made between trade objectives and environmental objectives; however, supporting trade and protecting the environment can more often be complementary objectives.<sup>4</sup> Both communities defend principles of prosperity and security while discouraging the reckless shunting of the costs these principles incur to future generations or other countries.<sup>5</sup> Environmental problems are, by their nature, easy to dismiss as remote or speculative; governments are

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1. Kyle E. McSarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,589 (Oct. 1991).

2. Daniel C. Esty, *GATTing the Greens*, *FOREIGN AFFAIRS*, Nov.-Dec. 1993, at 32. “Until recently, trade policymakers and environmental officials worked on separate tracks, rarely perceiving their paths as intersecting. Now that environmental protection has become a central issue on the public agenda, trade and environmental policies seem deeply intertwined and in some cases badly tangled.” *Id.*

“Back in the mid-60s, few people saw any link between international commerce and a clean global environment[, but] . . . the two pursuits have become unmistakably ensnarled.” Michael Arndt, *How Flipper Fans Seek to Net NAFTA*, *CHI. TRIB.*, July 4, 1993, at 1C.

“Although environmental issues are not new to international relations, world leaders increasingly have moved environmental issues from the periphery to the center of their political agendas.” EDITORS OF THE HARVARD LAW REVIEW, *TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW* 10 (1992).

3. Kenneth Berlin & Jeffrey M. Lang, *Trade and the Environment*, *WASH. Q.*, Autumn 1993, at 35.

4. McSarrow, *supra* note 1. Of course, the environmental industry is an exception to this rule. “More regulation, tougher laws, stepped-up enforcement, fines, close government monitoring of industry affairs, surprise visits by government inspectors—all this is music to the ears of these businessmen[, because] ‘[t]he environmental industry is driven by enforcement.’” Lawrence Kootnikoff, *Businesses See Green in Mexico*, *U.S./LATIN TRADE*, Feb. 1994, at 24.

5. Esty, *supra* note 2.

tempted to disregard such problems and let the cost of neglecting them fall to future generations.<sup>6</sup>

Today, tension occurs not so much between members of the trade and environmental communities but between the developed countries of the North and the developing countries of the South.<sup>7</sup> The United States, Canada, and the countries of the European Community, no longer willing to foist environmental woes upon their own citizens, are adopting increasingly strict environmental regulations that apply to the production standards of imported goods and to the importation of fish, wildlife, and plants.<sup>8</sup> While the motivation is admirable, many citizens of the developing world<sup>9</sup> believe that their countries are being asked to forego economic development policies that countries of the developed world are themselves not willing to forego, or that such countries have successfully implemented in the past but no longer need.<sup>10</sup> Moreover, the developing

6. *Id.* at 33. Esty characterizes "generations yet unborn" as "the ultimate inactive and unorganized interest group." *Id.*

7. Berlin & Lang, *supra* note 3, at 37.

8. "[I]n the United States and . . . other postindustrial nations, . . . political energy . . . stimulated organization and mobilization around a wealth of environmental issues." Geoffrey Wandesforde-Smith, *Moral Outrage and the Progress of Environmental Policy: What Do We Tell the Next Generation About How to Care for the Earth?*, in ENVIRONMENTAL POLICY IN THE 1990S: TOWARD A NEW AGENDA 337-38 (Norman J. Vig & Michael E. Kraft eds., 1990) [hereinafter A NEW AGENDA]. See also Michael McCarthy & Michael Hornsby, *Wild Bird Imports to Be Checked*, THE TIMES (London), Feb. 28, 1992, available in LEXIS, Nexis Library, TIMES File; Louise Sweeney, *Limiting Feathered Imports*, CHRISTIAN SCI. MONITOR, July 8, 1992, at 8.

9. "Developing world" and "South" will be used interchangeably to mean "that diverse collection of countries in varying degrees developing, nonaligned, and heretofore peripheral to the centers of world politics." Shahram Chubin, *The South and the New World Order*, WASH. Q., Autumn 1993, at 87. "Developed world" and "North" will be used interchangeably to mean the opposite (i.e., the historical centers of politics and industry).

10. Patrick Low & Alexander Yates, *Do "Dirty" Industries Migrate?*, in INTERNATIONAL TRADE AND THE ENVIRONMENT 89, 103 (Patrick Low ed., 1992). "Many of the dirty industries are basic industries, associated with the early stages of industrialization. The rapid dispersion among developing countries that a number of these industries appear to have experienced may lend some credence to this notion." *Id.*

Growth in developing countries is associated with a shift out of agriculture into industry and with rapid urban growth and heavy investment in urban infrastructure; this is more likely to imply increasing levels of pollution for each unit of output. In developed countries, in contrast, growth is associated with a shift out of industry into services, and thus with decreasing levels of pollution for each unit of output. . . . For these reasons, rising pollution intensity in developing countries could simply reflect differences across

nations argue that decisions concerning trade and the environment, such as whether to allow the overexploitation of their natural resources or higher levels of pollution to gain market advantage,<sup>11</sup> are theirs alone to make.

To understand the historic tension and the cooperative efforts now being made between the North and the South, it is helpful to consider the state of environmental affairs in Europe. There is a North/South tension within the European Community (E.C.) that serves as a blueprint for the global North/South tug-of-war.<sup>12</sup> Trade barriers within the European Community result from the national environmental regulations of member countries<sup>13</sup> and reflect the North/South tension in the global trade arena. This Note examines a selection of European environmental and trade policies and considers two specific situations that have given rise to conflicts between the countries of the North and South: namely, the Mexican tuna debate<sup>14</sup> and Japan's controversial environmental regulations and remedies.<sup>15</sup>

countries in the social cost comparative advantage of different mixes of polluting activities.

Nancy Birdsall & David Wheeler, *Trade Policy and Industrial Pollution in Latin America: Where are the Pollution Havens?*, in *INTERNATIONAL TRADE AND THE ENVIRONMENT* 159 (Patrick Low ed., 1992).

11. Richard J. Tobin, *Environment, Population, and Development in the Third World*, in *A NEW AGENDA*, *supra* note 8, at 279-80. Entirely different problems confront economic decision making in the developing world than in the developed world. The developed world is "responding to the benefits and consequences of development, whereas the Third World must cope with widespread poverty and the relative lack of economic development. . . . [P]ressures for development often force countries to overexploit their base of environmental resources." *Id.* Also, "as many countries view the accessibility to natural resources like oil as a 'security interest' significant to warrant military or economic sanctions, transboundary ecological threats to natural resources like rain forest devastation may give rise to discussion of trade sanctions." Charles E. Di Leva, *Trends in International Environmental Law: A Field With Increasing Influence*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,076, 10,081 (Feb. 1991).

12. Cynthia Pollock Shea, *European Environmental Policy: Effects of the Single Market*, 16 *Int'l Env't Rep. Current Rep. (BNA)* 30 (Jan. 13, 1993). Interestingly, industrialized countries dominate a world bank study of exporters of environmentally dirty products. Low & Yates, *supra* note 10, at 96.

13. Gernot Klepper, *The Political Economy of Trade and the Environment in Western Europe*, in *INTERNATIONAL TRADE AND THE ENVIRONMENT*, *supra* note 10, at 250.

14. A dispute panel formed under the GATT ruled that the United States could not block the import of Mexican tuna caught by methods of which the U.S. disapproved. Arndt, *supra* note 2.

15. Douglas C. McGill, *Japan's Choice—Scour Technology's Stain with Technology*,

## II. EUROPE

On January 1, 1993, the European Community reintroduced itself to the world as a single economic market.<sup>16</sup> The E.C. anticipates that its internal market will solidify the economies of the twelve member nations of the E.C. and encourage economic growth.<sup>17</sup> Although this single economic market is relatively new, the member nations of the E.C. have been drafting common environmental legislation for over twenty years.<sup>18</sup> These laws serve as guidelines for and are binding on member states as far as their purposes; however, because each state adopts these purposes by enacting its own national law, the individual member nations may require a higher level of environmental protection than that required under such E.C. legislation.<sup>19</sup> Due to differences in their environmental laws, E.C. member nations may be divided into two camps, basically split geographically between the North and South. "Spain, Italy, and Greece are generally perceived as having a more lax approach to pollution control, while Germany, the Netherlands, and Denmark are seen as greener."<sup>20</sup>

Of the Northern "green" nations, Germany is the greenest.<sup>21</sup> In 1991, Germany implemented an ambitious recycling scheme with which the other E.C. members seeking to trade with Germany are struggling to comply.<sup>22</sup>

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N.Y. TIMES, Oct. 4, 1992, § 6 (Magazine), at 32.

16. Shea, *supra* note 12. The Single European Act (1987) serves as a pattern for the circumscribed single market. According to the Institute for European Environmental Policy, it established a "firm legal basis for a comprehensive E.C. environmental policy." *Id.*

17. *Id.* The purpose of the E.C.'s single market is to create "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured." *Id.*

18. *Id.* Since 1972, all aspects of environmental protection have been addressed by more than 300 pieces of legislation. *Id.*

19. *Id.* at 31-32. "Rounding out the legal framework are provisions permitting member states to opt out of harmonization activities and adopt stricter environmental measures provided they are not arbitrarily discriminatory or disguised trade restrictions." Laurie Henderson & Patricia Walsh, *Forging a Link: Two Approaches to Integrating Trade and Environment*, ALTERNATIVES, Nov. 1993, available in LEXIS, News Library, ASAPII File.

20. Emma Chynoweth, *Europe's CPI Faces Tougher E.C. Control*, CHEMICAL WK., Mar. 11, 1992, available in LEXIS, News Library, ASAPII File.

21. "Germany has perhaps the world's strictest recycling measures, described as draconian by many in industry." Neville Nankivell, *E.C. Losing Waste-Line Battle: Recycling Plan Near Collapse*, FIN. POST (London), Aug. 18, 1993, at 37.

22. Chynoweth, *supra* note 20. According to Javier de la Peña, president of the

The E.C. and the European Court of Justice have both been asked to void national environmental regulations that impose trade restrictions and discriminate against smaller, poorer nations.<sup>23</sup> In general, “[s]tricter national standards are only permitted if the aim is to protect the environment and trade will not be impeded.”<sup>24</sup> The E.C. Council of Ministers<sup>25</sup> has recognized that the member states have various budgetary constraints and may need funding to implement Community environmental directives.<sup>26</sup> For example, the Council granted Portugal and Spain ten-year exemptions (until December 1999) from the directive regarding air emissions from large power plants.<sup>27</sup> This exemption will provide these member countries with a longer period of time in which to bring their laws into compliance with the directive.

Globally, there is much confusion and debate concerning the enforcement of environmental regulations (national or international) and whether the World Trade Organization<sup>28</sup> or some other organization may

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Spanish corporation Repsol, “[i]t is not easy to harmonize environmental regulations. And we doubt whether the same standards should be applied throughout Europe, since the environmental priorities may differ widely in different parts of the Continent.” *Id.*

23. Shea, *supra* note 12. “The question of how much leeway individual countries retain to impose domestic environmental regulations stricter than those adopted by the Community arises repeatedly. The answer depends in part on which article of the treaty governs a particular policy.” *Id.* at 31-32. A Court of Justice decision, rendered on July 9, 1992, (Case C-2/90) strengthened the ability of member states to keep out unwanted waste. The Court found valid a decree from the Wallonia region of Belgium that banned the storage or dumping of waste from other countries and regions but allowed exemptions to Flanders and Brussels. *Id.* at 30.

24. *Id.* at 32.

25. *Id.* at 33. The Council of Ministers has twelve members, one from each E.C. member state. The voting system of the Council is weighted, assigning ten votes to the largest states and two votes to the smallest, but a requisite majority of 54 of the 76 votes “ensures that neither the German/Dutch/Danish block nor the Spanish/Portuguese/Greek/Irish block can achieve a veto without the support of at least one other country.” *Id.*

26. *Id.* If the costs of implementing a particular directive are deemed disproportionate to the public budget of a member state, the Council may take this into account at the time the measure is passed. Temporary exemptions and financial support from the Cohesion Fund, which was to be set up no later than December 31, 1993, are both possibilities. Greece, Ireland, Portugal, and Spain are the only countries currently eligible to receive these funds. Funds cannot be made available for costs incurred by private industry. *Id.*

27. *Id.*

28. The World Trade Organization (WTO) was created under the Uruguay Round Agreements to oversee the General Agreement on Tariffs and Trade (GATT) and other international economic agreements. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (codified as amended in scattered sections at 19 U.S.C. (1994)).

properly enforce environmental initiatives. In Europe, the Commission of the European Communities is expanding its role in environmental matters;<sup>29</sup> however, "the E.C. has no enforcement body" and environmental directives are "widely ignored by member states."<sup>30</sup> Although Germany and Holland have established strict enforcement mechanisms, other European countries have not.<sup>31</sup> However, because the "environmentally progressive member states [of the North] frequently shape Community policy," the strict enforcement of environmental laws in the North may help to bring other member nations into compliance with E.C. environmental directives and, in the long run, benefit the entire European Community.<sup>32</sup>

### III. THE MEXICAN TUNA/DOLPHIN CONFLICT

In the eastern Pacific Ocean yellowfin tuna and dolphins swim together.<sup>33</sup> Mexican fishermen cast nets to harvest the tuna, but snare and drown tens of thousands of the dolphins each year in the process.<sup>34</sup> The United States has prohibited the importation of tuna caught by such methods since 1988, when Earth Island Institute, an environmental group, successfully sued under the U.S. Marine Mammal Protection Act for the imposition of an embargo of all Mexican tuna.<sup>35</sup> Unhappy with the result of the United States litigation, Mexico appealed the decision to a dispute

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29. Chynoweth, *supra* note 20.

30. Shea, *supra* note 12, at 32.

31. *Lead and Zinc Producers Feel the Pinch as Environmental Standards Tighten in Europe*, METALS WK., Aug. 19, 1991, available in LEXIS, News Library, METLWK File [hereinafter *Lead and Zinc Producers*]. Italy and France have enacted some tough environmental regulations, but enforcement of those regulations remains weak; Spain was not at all concerned with the environment until recently when it became serious about penalizing large-scale polluters. *Id.*

32. Shea, *supra* note 12, at 32. "Progressive member states" in the North, such as Denmark, Germany, and the Netherlands have pushed "the Commission to rule on such controversial issues" as bottle deposit-and-return laws and recycling licensing systems, in an effort to "shape Community policy." *Id.* Although it may be difficult for countries of the South to comply with more uniform environmental standards, as Andreas Bernsdorff of the international environmental group Greenpeace has noted, there is a danger that without urgent efforts to protect the environment throughout the E.C., "Greece, Portugal, and especially Spain 'may become the waste dumps of Europe.'" *Id.* at 30.

33. Arndt, *supra* note 2.

34. Paul Magnusson, Peter Hong & Patrick Oster, *Save the Dolphins—or Free Trade?*, BUS. WK., Feb. 17, 1992, at 130D.

35. See Arndt, *supra* note 2.

panel formed under the General Agreement on Tariffs and Trade (GATT).<sup>36</sup> The panel held that the judicially imposed embargo was an impermissible trade barrier and that the U.S. could not ban a product on the basis of its disapproval of the exporter's production method(s).<sup>37</sup> If there had been any doubt about the connection between the global environment and international commerce, this decision plainly linked the two together.<sup>38</sup> The panel's decision is viewed by environmentalists as a stunning blow to environmental standards and laws, and by trade enthusiasts and developing nations as a triumph over U.S. protectionism.<sup>39</sup>

Mexico is not alone in its belief that environmental standards imposed by the developed industrial nations, especially the United States, are intended to be barriers to trade.<sup>40</sup> At the time Mexico succeeded in

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36. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, as amended by Protocol to the General Agreement on Tariffs and Trade (Geneva 1979) at 3, GATT Doc. L/4875, BISD (26th Supp. 1980). The Uruguay Round revisions to the GATT, made after the writing of this Note, significantly alter the legal system for international trade dispute resolution. See GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125; Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (codified as amended in scattered sections 19 U.S.C. (1994)).

37. Magnusson, *supra* note 34. A GATT member "may not restrict imports of a product merely because it originates in a country with environmental policies differing from its own." *Id.* "But on Jan. 30, [1992,] a U.S. District Court in San Francisco extended the ban to 20 other nations suspected of transshipping Mexican tuna. So other countries are likely to join Mexico's protest." *Id.*

38. Russell Train, Address at the ABA Annual Meeting Program (July 1985), in AMERICAN BAR ASSOCIATION, THE GLOBAL ENVIRONMENT: CHALLENGE, CHOICES AND WILL 2 (Elissa C. Lichtenstein ed., 1986). "When one looks at such major adverse environmental trends as tropical deforestation, soil erosion, spreading desertification, and the extinction of species, one cannot help but be struck by the way these environmental problems are interwoven, and indeed, interlocked with the social, political, and economic facts of global life." *Id.*

39. Alejandro Kirk, *Venezuela: Offensive on All Fronts Against U.S. Tuna Embargo*, Inter Press Service, Jan. 29, 1992, available in LEXIS, Nexis Library, INPRES File [hereinafter *Offensive on All Fronts*]. "Mexico[, however,] froze [its] complaint to allow bilateral talks with the U.S on a solution." *Id.*

40. Eduardo Gudynas, *The Search for an Ethic of Sustainable Development in Latin America*, in ETHICS OF ENVIRONMENT AND DEVELOPMENT: GLOBAL CHALLENGE, INTERNATIONAL RESPONSE 139 (J. Ronald Engel & Joan Gibb Engel eds., 1990). Latin America is a "place where many of the oldest and some of the newest ideas which link ethical and environmental concerns are being developed. [It] is illustrative of the failure of these ideas to take hold in the modern consciousness, but its failures signal the steps which must be taken in order to develop a new ethical understanding of sustainable development."



obtaining its ruling against the U.S. tuna embargo, Venezuela began canvassing other countries to initiate a similar complaint against the United States.<sup>41</sup> Venezuela alleged that the embargo cost its economy over \$100 million (U.S.).<sup>42</sup>

Strict recycling standards also have an impact on international trade and are a concern to the developing nations, which depend on their rich natural resources to produce products such as paper and energy. Brazil, for example, has expressed concern that the E.C.'s new eco-labeling scheme will have a detrimental effect on the international trade efforts of such countries, like Brazil, that support their paper industries with sustainably harvested forests.<sup>43</sup>

Chile is scrambling to prevent U.S. import restrictions on crabs and crab products from Chile that are very similar to the Mexican tuna restrictions.<sup>44</sup> Led by the U.S. environmental group Defenders of Wildlife, environmental interest organizations have charged that Chilean fisheries harpoon thousands of marine mammals, including dolphins, to use as crab bait.<sup>45</sup> Defenders of Wildlife has petitioned the U.S. government to ban the importation of fish and products made with fish caught by methods that kill marine mammals in quantities that exceed the U.S. standards and limits proscribed in the Marine Mammal Protection Act.<sup>46</sup> Defenders argue that "[i]t is hypocrisy for our nation to allow imports of Chilean crab caught in a dolphin-unsafe manner when the United States enforces dolphin-safe rules on its own fisheries."<sup>47</sup> Still, given the decision of the GATT panel in the Mexican tuna case, it is unlikely that any embargo initiated by the U.S. will be enforceable. This

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*Id.*

41. Kirk, *supra* note 39.

42. *Id.*

43. *GATT Committee on Environment Told to Focus on Specifics, Not Theory*, BNA INT'L ENV'T DAILY, Oct. 13, 1993, available in LEXIS, News Library, BNAIED File. The eco-labeling scheme involves the promotion of recycled paper. Brazil avers that the labels will have a discriminatory trade affect on nations who do not follow the eco-labeling system. *Id.*

44. *Chilean Crabs Latest Threat to U.S. Wildlife Laws, Says Defenders of Wildlife; Chilean Minister to Discuss Dolphin Kills, NAFTA Impact*, U.S. Newswire, Oct. 13, 1993, available in LEXIS, Nexis Library, USNWR File [hereinafter *Chilean Crabs*]. Chile is a developing nation open to trade and foreign investment and with few or no environmental barriers to industry. Birdsall & Wheeler, *supra* note 10, at 161-163.

45. *Chilean Crabs*, *supra* note 44.

46. *Id.*

47. *Id.*

situation is one in which trade concerns will probably outweigh concerns about the environment. "Current trade law, including NAFTA [the North American Free Trade Agreement], does not recognize import restrictions based on how a product is produced. . . . Whether thousands of dolphins are killed in the process of producing it is 'trade-irrelevant.'"<sup>48</sup>

#### IV. INTERNATIONAL ENFORCEMENT OF ENVIRONMENTAL REGULATIONS

The lack of global enforcement mechanisms for national and international environmental initiatives is a concern that extends beyond the European Community to the international community as a whole. The GATT Council has recognized that trade and environmental issues are intertwined,<sup>49</sup> and it has agreed that environmental issues should be considered in the course of its work.<sup>50</sup> The GATT, as an international agreement stipulating international trade rules and governing disputes over those rules, has not historically been concerned with the conflicting environmental laws of its member nations.<sup>51</sup> The GATT was created in 1947,<sup>52</sup> when protecting the environment was not a local concern, "let alone a pressing international concern."<sup>53</sup> The conflict between free trade and the environment did not become a "hot" issue until 1990, when plans for the North American Free Trade Agreement (NAFTA) were announced.<sup>54</sup> Environmentalists fear that an absence of trade barriers will undermine the higher U.S. environmental standards and allow Mexico to become a haven for polluters.<sup>55</sup> This fear turned to outrage when the

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48. *Id.*

49. *GATT Council Debates Best Way to Recognize Link Between Trade and Environmental Issues*, 8 Int'l Trade Rep. (BNA), No. 23, at 859 (June 5, 1991) [hereinafter *GATT Council Debates*]. In a debate held on May 29-30, 1991, the Council agreed that "there is a distinct link between the environment and trade policy." *Id.*

50. *Id.*

51. Hilary French, *The GATT: Menace or Ally?*, WORLD WATCH, Sept.-Oct. 1993, at 12.

52. *Id.* at 13. "GATT is a central pillar of the post-World War II international order. Its rules, norms and dispute settlement procedures are designed to prevent governments from adopting shortsighted, 'beggar-thy-neighbor' policies that limit imports and promote exports to establish a competitive advantage at the expense of other countries." Esty, *supra* note 2, at 32-33.

53. French, *supra* note 51, at 13.

54. Esty, *supra* note 2, at 34.

55. *Id.* "The world has changed since GATT was introduced in 1947. Clearly, the devastating effect industrialization has had on virtually every aspect of the natural

GATT panel ruled that Mexico should be allowed to export tuna to the United States regardless of the method by which it was caught.<sup>56</sup>

The GATT Council is not actually hostile to the environment; it simply had not considered the environment until fairly recently and is approaching environmental issues with some skepticism.<sup>57</sup> While the Council realizes that these issues are paramount to a future world trade program, it questions whether environmental issues come within the GATT's competence.<sup>58</sup> The reasoning behind the GATT panel's tuna decision was that nations should not be allowed to use trade devices proscribing practices beyond their borders in order to achieve environmental ends.<sup>59</sup> In response to the environmentalists' criticism of this case, the GATT Council recently published a report defending its environmental stance.<sup>60</sup>

The management of international environmental affairs is confusing and messy, in part because environmental problems are by their nature amorphous, transcending borders and inviting "host" nations to ignore them. Adding to this confusion are the often divergent views of "a dozen different U.N. agencies, the secretariats to various environmental treaties and conventions, the World Bank, regional political groups, and the world's 180 countries acting individually."<sup>61</sup> In the absence of a single organization with the power to coordinate and enforce the policies of these entities and individual countries, the confusion and tension between trade and the environment seem certain to continue.

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environment can no longer be disregarded. . . . Governments have inevitably had to intervene to advance . . . environmental policy objectives." Henderson & Walsh, *supra* note 19.

56. French, *supra* note 51, at 13.

57. "In truth, the GATT is not hostile to the environment but agnostic." Esty, *supra* note 2, at 35.

58. *GATT Council Debates*, *supra* note 49. The E.C. Ambassador to the GATT, Tran Van Tinh, stressed that "the GATT neither could nor should be turned into a forum for the harmonization or development of global environmental policies." *Id.*

59. French, *supra* note 51, at 14. The panel decided that the GATT rules concerning products (countries can apply national laws and standards to them) that apply to imported goods were not pertinent to the tuna because the process rather than the product was not approved of by the U.S., and the process did not take place within the jurisdiction of the U.S. *Id.*

60. Esty, *supra* note 2, at 35. The report proposes that free trade promotes environmental protection "by improving the efficiency of resource use and raising incomes, making possible increased expenditures on the environment." *Id.*

61. *Id.* at 34.

## V. THE NORTH VS. THE SOUTH

From the perspective of the developing world, environmental and conservation groups of the developed world are rather quick to seek to change the lifestyles and necessities of distant countries. "Protection of the environment is a luxury that can be afforded only by nations with enough wealth to ensure that environmental costs do not dissipate their capital."<sup>62</sup> The people in developing nations are usually among the world's poorest;<sup>63</sup> when humans must compete with animals in order to survive, a real issue of priorities emerges.<sup>64</sup> Difficult ethical questions confront policymakers: Whose interests to defend? Whose resources to sacrifice? Do poorer countries not have a moral right to sovereignty and economic development?<sup>65</sup> Very often, it is the answers to these questions reached by countries of the developed world that underlie international environmental policies and direct environmental efforts within the developing world. For example, "the entire debate about banning the ivory trade in order to protect African elephants was and is dominated by non-Africans."<sup>66</sup> Although such a ban may be of the utmost urgency, the lobbying of it into existence by Northern environmentalists represents "the worst kind of colonial manipulation."<sup>67</sup> Indeed, if the conservationists perpetuate this paternalistic attitude, "their hosts are likely to rebel against their efforts and the biggest losers will be African wildlife."<sup>68</sup>

According to one observer, those in the comfort of the North have never considered the needs of the people in the Southern nations that they seem to want to govern.<sup>69</sup> Many African governments, like the governments of other Southern countries, resent Western interference and

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62. McSarrow, *supra* note 1, at 10,591.

63. Chubin, *supra* note 9, at 88.

64. *Dossier: Nature Under Threat; Species Extinction Greenwatch*, UNESCO Courier, May 1993, available in LEXIS, News Library, ASAPII File. "It is all too easy for people in Western countries who are quite happy to shoot the [local pests] that wreak havoc on their [own] fields to insist on protection for animals that cause them no harm." *Id.*

65. David Hanson, *The Ethics of Development and the Dilemmas of Global Environmentalism*, in BUSINESS, ETHICS, AND THE ENVIRONMENT: THE PUBLIC POLICY DEBATE 185 (W. Michael Hoffman et al. eds., 1990) [hereinafter BUSINESS, ETHICS].

66. Raymond Bonner, *Why No Ebony in the Africa Ban? Africans Are Excluded from the Wildlife Groups*, WASH. POST, May 2, 1993, at C4.

67. *Id.*

68. *Id.*

69. Scott LaFee, *Saving Africa's Wildlife Might Begin with Saving Man*, SAN DIEGO UNION-TRIB., May 19, 1993, available in LEXIS, News Library, SDUT File.

have come to resist it. "People need an economic incentive to save wildlife. If these people can't make money from the elephant, they're not going to put up with it trampling their gardens and threatening their children."<sup>70</sup> The problem, in part, is that Americans and Europeans perceive animals like elephants and lions as noble and proud and therefore worth saving at any cost. The African people, on the other hand, see the protection of elephants as a threat to their daily lives.<sup>71</sup>

The architects of environmental policy must recognize that there are critical differences between the North and the South. The developing countries of the South struggle with enormous challenges (other than the protection of the environment) to their economic development.<sup>72</sup> The atmosphere of Southern countries can be described as one of "struggle, war, injustice and poverty,"<sup>73</sup> and the challenges that face these countries can hardly be summed up in this brief writing.<sup>74</sup> The economic relationship between the "powerful, corporate-driven northern hemisphere and the poor southern [hemisphere] . . . has revolved around Third World debt and trade imbalances that strain poor countries and leave them with environmentally harmful choices."<sup>75</sup> This situation is a new and unique one in world history.<sup>76</sup> The countries of the South are being mandated to catch up with those in the North while simultaneously struggling with issues that the North faced long ago and at a leisurely pace.<sup>77</sup> "[P]rogress toward the current level of development [in the developed world] is

70. *Id.*

71. *Id.*

72. Chubin, *supra* note 9, at 88.

73. Its struggle has also been characterized as "pre-historical," juxtaposed with a North that moves ever on in historical development. *Id.*

74. *Id.* "The South faces . . . a daunting set of interconnected problems in the economic, political, social, and security domains. Many Southern countries are also corrupt, unrepresentative, and repressive." *Id.*

75. Henderson & Walsh, *supra* note 19.

76. *Id.* "[I]n some fundamental sense, the circumstances of the South are without precedent." Chubin, *supra* note 9, at 88. "Historically, we have given industry great latitude for its miscalculations because there was no science sufficiently developed to inform society of industrialism's effects." PAUL HAWKEN, *THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY* 7 (1993).

77. Low & Yates, *supra* note 10; Birdsall & Wheeler, *supra* note 10. "A crucial difference between the nation-building of Western Europe and that of Africa and much of Asia was that the processes in Europe occurred well before the rise of popular demands for democratic rights: nations already existed as relatively cohesive citizenries." David Welsh, *Domestic Politics and Ethnic Conflict*, SURVIVAL, Spring 1993, at 63-64.

measured in centuries, not decades,"<sup>78</sup> and less developed countries of the South are clearly fighting more than an environmental struggle when they argue for sovereignty and free trade.

It seems strange to think that in 1995 any nation would worry about a threat to its sovereignty by the countries of the "civilized" North, many of which granted developing countries freedom from colonial status.<sup>79</sup> However, this meddling on the part of the North may be due to an emerging notion of sovereignty. It is thought that "international law now protects 'the people's sovereignty rather than the sovereign's sovereignty' [and that] sovereignty can no longer be considered an exclusively domestic issue, or 'used as an all-purpose excuse or wall by states to exclude external interest' or intervention."<sup>80</sup> Environmental issues certainly exceed artificial borders; however, environmentalists probably did not initiate their efforts to protect the earth's ecology with the aim of threatening individual nations' sovereignty.

It is not a simple situation. The developing world cannot afford the indulgence of focusing on the environment; it is juggling too many other efforts and conflicts. Although developing countries are being asked to satisfy standards beyond their desires or abilities, compliance with the environmental and trade demands of the developed world will, in the long term, result in a cleaner environment and, hopefully, a slowly growing economy boosted by trade with the Northern nations which require such compliance in their trade negotiations.

## VI. ASIA

A Malaysian delegate to the Conference of the Forestry Forum for developing countries voiced the bitterness that many countries of the South feel toward intruding Northern countries: "They push for restrictive and punitive action against deforestation in tropical countries without seeking to tackle the basic problems of poverty and under-development."<sup>81</sup> Even

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78. Chubin, *supra* note 9, at 88.

79. *Id.* at 89. "[T]he South is under siege—from an international community impatient to meddle in its affairs. States of the South are losing their sovereignty, which in many cases was only recently or tentatively acquired." *Id.* at 88.

80. *Id.* at 89 (quoting John Chipman, *The Future of Strategic Studies: Beyond Even Grand Strategy*, SURVIVAL, Spring 1992, at 117-18).

"The fundamental question of values in any culture can be phrased in simple terms: what kind of control over what kind of environment?" ERNEST BECKER, *THE REVOLUTION IN PSYCHIATRY*, *quoted in* LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* 8 (2d ed. 1990).

81. Seema Guha, *Developing Nations Seek Cash to Preserve Forests*, Reuter Libr.

developing countries who are inclined to implement sustainable development criticize this double standard established by the industrialized nations and urge wealthy nations to help them meet the costs of saving the world's animals, forests, oceans, and air.<sup>82</sup>

China, for example, is attempting to balance environmental and economic concerns as it prepares to play a major role in the Pacific as well as the international arena.<sup>83</sup> China is emerging as a political and economic power; however, to succeed in the global community, China must be prepared to participate fully in the international commercial system.<sup>84</sup> In an effort to improve its economic and political standing, China is "tightening up its environment protection measures and cracking down on violations."<sup>85</sup> Pollution and other environmental harms are serious problems in China, as is the illegal killing and smuggling of wild or nearly extinct animals.<sup>86</sup> The Chinese government wants to promote an "awareness of environment and law of the whole nation," but it maintains that environmental protection and economic development can and should coexist.<sup>87</sup> This commitment to the environment has resulted in nationwide stabilized environmental quality, the enactment of four environmental laws and eight natural resource protection laws, and the establishment of more than 260 environmental standards.<sup>88</sup>

China is not the only Asian country setting a good example for other developing nations. Singapore, too, promotes the compatibility of environmental and trade issues. In fact, the U.S./Asia Environment Partnership recently established a program office in Singapore because "Singapore has sophisticated and well-implemented environmental legislation . . . [and its] government [is] going beyond legislation and . . . [is] encouraging environmental auditing as part of its 'green plan.'"<sup>89</sup>

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Rep., Sept. 3, 1993, available in LEXIS, Nexis Library, LBYRPT File.

82. *Id.*

83. Amy Balan, *China Urged to Adopt Policies that Support Peace, Stability*, BUS. TIMES, May 17, 1993 (back page) .

84. Chubin, *supra* note 9, at 92. "Li Peng, the prime minister [of the People's Republic of China], in a visit to India at the end of 1991, referred to the 'emerging international oligarchy,' hinting that no one country should be allowed to be in a position to dictate to others. . . . [He said that the PRC felt] 'excluded from the new world order.'" *Id.*

85. *To Tighten Legal Grip on Environmental Protection*, Xinhua (New China) News Agency, Aug. 20, 1995, available in LEXIS, Nexis Library, XINHUA File.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Trade Counseling Office in Singapore Opens Under U.S. Environment Program*,

Nearby Indonesia, on the other hand, needs to strengthen its ecological protection policy, as its regulatory environment is weak and it has "almost no enforcement ethos."<sup>90</sup>

Although Japan is arguably a Northern country and may be part of the developed world, some feel that its environmental scheme does not operate at the strict level of those of the U.S. and the E.C.<sup>91</sup> This disparity may be due to a cultural difference—that is, historically, the Japanese have described environmental problems as societal rather than ecological conditions.<sup>92</sup> The Japanese word for "pollution" is *kogai*, which is literally translated as "public nuisance."<sup>93</sup> A public nuisance can be "any disruptions to the smooth flow of civic life: traffic jams, drought, vibrations from passing subway trains, or a new skyscraper blocking a neighborhood's sunlight."<sup>94</sup>

The Japanese *appear* to be environmentally advanced. Their recycling and industrial schemes are efficient and, in 1970, Japan passed some of the world's most severe anti-pollution laws.<sup>95</sup> Even with such environmental laws in place, Japan's economic growth continued.<sup>96</sup> Recently, however, Japan has emerged as an "environmental despoiler": only a worldwide whaling ban in 1986 compelled its commercial whaling fleet to stop ravaging the world's oceans; Japan is the world's largest importer of tropical timber; it faces an enormous garbage crisis due to an overwhelming increase in consumer goods in the last twenty years; and there is unchecked development in Japan, from big public works projects to hotels and golf courses.<sup>97</sup> The 1970s anti-pollution laws did not address nature conservation; thus, wildlife and land are not protected in Japan. The environmental groups in Tokyo<sup>98</sup> are thwarted by a dearth of popular interest or understanding of ecological tenets and the stigma that generally attaches to all groups in Japan that encourage "social" change.<sup>99</sup>

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10 Int'l Trade Rep. (BNA) 1494, (Sept. 15, 1993).

90. *Id.*

91. McGill, *supra* note 15.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 33. The antipollution laws were enacted to check the growth of pollution-related diseases that began in the 1950's. *Id.*

96. *Id.*

97. *Id.* at 33-34.

98. *Id.* at 56.

99. *Id.* at 60.



Interestingly, a plea similar to those heard from the developing nations has also been heard from Japan's trade ministry: "We want to free ourselves of the environmental restraints to economic growth."<sup>100</sup> The Japanese believe that environmental problems stem from economic mismanagement: repair the economy and the ecology will mend itself.<sup>101</sup>

This position raises two different issues for consideration. The first issue is whether each country has the right to free itself from the environmental restraints levied on it by other countries (or even self-imposed environmental restraints) in order to propagate trade and economic growth. The second is whether it is reasonable to focus on economics and assume the environment will take care of itself.

### VII. THE ENVIRONMENTAL PERSPECTIVE

Members of environmental organizations are not completely wide-eyed, idealistic nature lovers who take offense if a tree is cut or object to oil and gas exploration.<sup>102</sup> All in all, they are pragmatic, taking umbrage not when natural resources are used wisely, but rather when decisions to exploit natural resources are made without concern for the probable consequences of those decisions.<sup>103</sup> Their overall purpose is, presumably, not to foil the efforts of developing nations to participate in the international trade arena. Instead, the purpose of the regulations environmentalists propose is to allow progress and technology to ensue within a theater of environmental protection. Environmentalists and political scientists alike argue convincingly that regulation is a necessity rather than a preference.<sup>104</sup> If environmental regulation does not achieve its goals, it is due to an absence of strategic planning in the design of the regulation, not in the merits of regulation generally.<sup>105</sup>

The Brundtland Commission was established by the United Nations Environment Programme<sup>106</sup> to explore and assess how growth, trade, and

100. *Id.* at 56.

101. *Id.*

102. Lynn Greenwalt, *An Environmental Agenda for the 1990s*, in BUSINESS, ETHICS, *supra* note 65, at 145.

103. *Id.* at 147.

104. STEVEN COHEN & SHELDON KAMIENIECKI, ENVIRONMENTAL REGULATION THROUGH STRATEGIC PLANNING xiii (1991).

105. *Id.*

106. "The U.N. Environment Programme . . . has limited responsibility, financing and political support. . . ." Esty, *supra* note 2, at 34.

environmental protection interact.<sup>107</sup> It defined "sustainable development" as "meeting the needs of today without compromising the needs of tomorrow."<sup>108</sup> Sustainable development, however, does not per se allay the tension between trade and the environment. It does discourage the application of nonrenewable resources when such application would adversely affect future generations.<sup>109</sup>

It would seem irresponsible for the United States and other Northern nations to stand idly by while developing countries, in the effort to evolve out of their poverty, misuse the air, land, and water, and endanger the health of their own citizens due to a lack of foresight, guidance, or regulation.<sup>110</sup> The U.S. and the E.C. can negotiate and use their trade policies to inspire less environmentally conscientious countries to increase spending in the areas of environmental protection and conservation.<sup>111</sup> Because it is clear that "[t]he environmental standards that a country sets for sale or production of a good within its own borders affect[ ] foreign commerce,"<sup>112</sup> it is in the national interest of the U.S. and any other developed country to help preserve the environment through cooperative efforts between nations of the North and the South.<sup>113</sup>

The essential environmental decisions are not really scientific decisions—they are decisions about "how much risk a community is willing to bear."<sup>114</sup> Such decisions are political and ethical choices that each country has a duty to make. This responsibility cannot be shirked

107. McSlarrow, *supra* note 1, at 10,590.

108. *Id.*; see BRUNDTLAND COMMISSION, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (1987). "The Commission's overall assessment is that the international economy must speed up world growth while respecting the environmental constraints." *Id.* at 89.

109. McSlarrow, *supra* note 1, at 10,590.

110. Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, in BUSINESS, ETHICS, *supra* note 65, at 172.

111. *Id.* at 179.

112. Berlin & Lang, *supra* note 3, at 40. Industrialized and wealthy Japan shows a dismaying lack of responsibility toward setting a good example. *Id.*

113. Train, *supra* note 38, at 7.

The day is long since past when the United States could consider itself isolated and immune from such concerns. The developing countries of the Third World buy [thirty-five] percent of U.S. exports and account for [thirty-seven] percent of our imports. . . . [That is not to] suggest that the United States undertake to solve all these problems on its own. . . . [Its role should] be one of helping, of working in cooperation with others.

*Id.*

114. Berlin & Lang, *supra* note 3, at 41.

and handed over to other countries. Although most countries, in both the North and South, acknowledge the need for environmental protection, conflicts emerge when sovereignties do not agree on the definition of acceptable risk.<sup>115</sup>

### VIII. THE TRADE PERSPECTIVE

The developing nations and Japan aver that trade without environmental restraints will not only allow the environment sufficient room to heal itself, it will also allow countries to finance sound environmental programs in the future.<sup>116</sup> This idea "follows from the fact that trade per se is not a direct cause of environmental problems. Some distortion must be present."<sup>117</sup> Trade alone may therefore not be an appropriate general remedy for environmental concerns.<sup>118</sup>

The business world and the national governments must work together. "The promise of business is to increase the general well-being of humankind through service, a creative invention and ethical philosophy."<sup>119</sup> None of the great empires (Greek, Roman, Byzantine, British or any other) had the strength and reach that the modern multinational corporation has, easily crossing borders and cultures.<sup>120</sup> This concentration of creativity and energy<sup>121</sup> must be applied to global trade and environmental policymaking in order to cure the mistakes of the past while encouraging economic development and environmental preservation in the future.

### IX. CONCLUSION

Basically all governments realize that they must protect their citizens from environmental menaces.<sup>122</sup> The United States is a leader in

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115. *Id.* at 41-42.

116. Esty, *supra* note 2, at 35.

117. Henderson & Walsh, *supra* note 19.

118. Kym Anderson & Richard Blackhurst, *Trade, the Environment and Public Policy*, in *THE GREENING OF WORLD TRADE ISSUES* 19 (Kym Anderson & Richard Blackhurst, eds., 1992). See also Esty, *supra* note 2, at 35 ("GATT officials . . . argue that using trade threats or sanctions is not a cost-effective or 'first best' way to obtain compliance with environmental agreements or promote environmental policy goals.")

119. HAWKEN, *supra* note 76, at 1.

120. *Id.* at 6.

121. *Id.*

122. French, *supra* note 51, at 19.

addressing these environmental problems<sup>123</sup> but is unsure how to proceed towards a solution that would harmonize global environmental policies.<sup>124</sup> It is helpful to look at the environmental struggle within Europe to help determine what may or may not succeed on a global level.<sup>125</sup> It will not be possible for countries to establish environmental policies on their own—environmental problems and their remedies are rarely self-contained. Countries must from now on consider the international impact of their environmental policies.<sup>126</sup> The greatest challenge for the transnational

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With security increasingly defined in economic and environmental rather than military terms, governments are coming to recognize that protecting their citizens from threats as diverse as sea-level rise induced by global warming, and unemployment created by industries migrating in search of pollution havens, will require an unprecedented level of international coordination.

*Id.*

“[D]omestically[,] every country regulates its own markets. . . . As we regulate trade within our borders, how can we insist on free trade internationally—when it is quite clear that unregulated world commerce can be as devastating as unregulated domestic trade [can] be?” Harold Gilliam, *The Real Price of Free Trade*, S.F. CHRON., Jan. 2, 1994, at 13. Interestingly, Canada has somewhat of the opposite dilemma: “it is absurd to continue to have such highly protectionist policies aimed at other provinces while international barriers continue to fall under the Canada-U.S. free trade agreement and the proposed North American Free Trade Agreement.” Shawn McCarthy, *Business Disappointed with Failure of Economic Union*, TORONTO STAR, Aug. 30, 1992, at H1.

Increasing public awareness of environmental concerns essentially guarantees that national and international policymaking will involve environmental problems for at least the foreseeable future. CALDWELL, *supra* note 80, at 333.

123. According to Rufus Yerxa, U.S. Ambassador to GATT, “[t]he United States . . . is well aware of the links between environment and trade.” *GATT Council Debates*, *supra* note 49.

124. *Id.*

125. *Lead and Zinc Producers*, *supra* note 31. “To observers in the U.S., the situation in Europe still seems rather obscure, especially as few analysts are comfortable attempting to untangle what seem to be unwieldy, overlapping clusters of local, national, and E.C. regulations.” *Id.* According to Fern Hurtubise, Chairman of the Environmental Policy Committee (EPOC) of the Paris-based Organization for Economic Cooperation and Development (OECD), the international, transboundary environmental dilemmas may require the application of trade restrictions. Such restrictions are best applied within international environmental agreements, but such agreements can be difficult to reach. *OECD Members See Link of Trade, Environment as a Major Challenge Currently Facing Policy-Makers*, BNA INT’L ENV’T DAILY, Jan. 6, 1994, available in LEXIS, News Library, BNAIED File [hereinafter *OECD Members See Link*].

126. CALDWELL, *supra* note 80, at 336. This global outlook by individual nations is not due to wide-eyed altruism, but rather to “prudence and aversion to failure. Commerce, technology, war, mass human migration, and concepts derived from the sciences have transformed the world of sovereign nations and separate cultures into a complex, dynamic

policymakers will be to promulgate international rules that maintain environmental goals without undermining trade agreements.<sup>127</sup>

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multiethnic world system that is struggling to find appropriate and feasible means for its governance." *Id.*

127. *OECD Members See Link, supra* note 125.