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I. INTRODUCTION

The Polluter-Pays Principle has been accepted by the majority of industrialized nations as the mechanism for controlling global pollution.[1] This principle charges the polluter, not society as a whole, for abating the cost of pollution prevention and control.[2]

Last spring, the *Wall Street Journal* published an article titled *GATT*[3] *Report Says Trade Liberalization will Aid Global Environment Protection.*[4] According to this report,[5] further reduction of protectionist measures in all likelihood will lead to "a substantial increase in global environmental quality . . . even if *no* new environmental policies were introduced."[6]

This paper examines the use of proposed GATT rules[7] as a means for reducing global pollution to enhance overall environmental quality. In other words, do the international rules for trade incorporate the Polluter-Pays Principle to reduce environmental degradation? This article begins by giving a general background of both the Polluter-Pays Principle and GATT. A discussion of the role of the Polluter-Pays Principle in international rules of trade follows. The article concludes with recommendations for incorporating the Principle into GATT to achieve its claim that more liberalized trade will lead to an overall increase in global environmental quality.

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1. The Organization for Economic Cooperation and Development (OECD) adopted this Principle for achieving sustainable development without environmental harm. For a discussion of the OECD and the Polluter-Pays Principle, see part II-A of this paper. For an in-depth discussion of how nations have adopted this principle, see Ursula Kettlewell, *The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter-Pays Principle*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 429 (1992).

2. Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 96 (1984).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A12, 55 U.N.T.S. 194 [hereinafter GATT]; see *infra* sec. II-B for a general discussion of GATT.

4. Bob Davis, WALL ST. J., Feb. 12, 1992, at A2, col. 3.

5. This report, titled *Trade and the Environment* is a study conducted by the Secretariat of the Geneva-based GATT, [hereinafter The Study]; *see* 9 INT'L TRADE REP. (BNA) 310 (1992).

6. *Id.* at 34 (emphasis added).

7. Currently the eighth round of trade negotiations called the Uruguay Round is taking place to further liberalize the international rules of trade. See *infra.* part III-B for a discussion of the proposed provisions.

II. THE POLLUTER-PAYS PRINCIPLE AND GATT - BACKGROUND

A. *The Polluter-Pays Principle*

The Polluter-Pays Principle was initially devised by economists to maximize resource allocation.[8] Since then, most industrial nations have recognized the value of the Principle as a pollution abatement device.[9] In 1972, the Organization for Economic Cooperation and Development (OECD)[10] endorsed the use of the Polluter-Pays Principle to further its goals.[11] The OECD defined the Principle as follows:

> The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays-Principle." This Principle means that the *polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state.*[12] In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and or consumption. Such measures should *not be accomplished by subsidies* that would create significant distortions in international trade and investment.[13]

Therefore, the application of the Polluter-Pays Principle requires the internalization of all production costs including external costs,[14] "that is,

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8. *See* STUDIES IN INTERNATIONAL ENVIRONMENTAL ECONOMICS (Ingo Walter ed. 1976).

9. *See* Wetstone & Rosencranz, *supra* note 2, at 96.

10. The OECD was organized in 1960 to promote policies designed:
(1) to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
(2) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
(3) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.
The western industrialized nations, Australia, New Zealand, Japan, and Turkey are members of this organization and they produce the majority of world trade. OECD, COMPENSATION FOR POLLUTION DAMAGE, inside front cover (1981).

11. *Id.*

12. *Note on the Implementation of the Polluter-Pays Principle*, OECD Doc. ENV (73) 32 (Final) of January 21, 1974, *reprinted in* 14 I.L.M. 238, 239 (1975) [hereinafter *Note on the Implementation of the Polluter-Pays Principle*]. The OECD defines an acceptable state as that state decided by the public authorities which "implies that through a collective choice and with respect to the limited information available, the advantage of a further reduction in the residual social damage involved is considered as being smaller than the social cost of further prevention and control." In other words, the "acceptable state" is defined by a government as the level of pollution tolerated as acceptable.

13. OECD, *Guiding Principles Concerning International Economic Aspects of Environmental Policies, reprinted in* 11 I.L.M. 1172 (1972) (emphasis added) [hereinafter *Guiding Principles*].

14. Jean Philippe Barde, *National and International Policy alternatives for Environmental Control and Their Economic Implications*, in Studies In International Environmen-

damage caused by pollution."[15]

However, the OECD recognized that in order for the Principle to work, it must be uniformly applied by all nations. This, in the opinion of the OECD, can only be accomplished "through the adoption of a common basis for Member countries' environmental policies."[16] But, recognizing that such harmonization of policies and standards does not exist, the OECD encouraged its members to strive toward this goal in order "to avoid the unjustified disruption of international trade patterns and of the international allocation of resources which may arise from diversity of national environmental standards."[17]

The OECD recommended the implementation of the Polluter-Pays Principle through a variety of means such as direct or indirect regulation, taxes, permits, product and process standards, and pollution charges.[18] The OECD also recommended the use of economic instruments to add "more flexibility, efficiency and cost-effectiveness in the design and enforcement of pollution control measures"[19] to aid in a more consistent application of the Polluter-Pays Principle.[20]

In summary, the Polluter-Pays Principle as been advanced as the means to abate and control pollution. In other words, if polluters bear the cost of pollution prevention and control, market failure and distortions of trade will be avoided, while at the same time national environmental goals will be realized.[21]

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tal Economics 138 (Ingo Walter ed. 1976). External costs, or externalities, refer to costs associated with the use of a resource that is not reflected in the product price. For example, discharging production waste into a river is an external cost because clean-up of the pollution in the river caused by the waste is not borne by the producer but by future users. This constitutes improper cost allocation which will result in overproduction resulting in a misallocation of resources and - in the opinion of many economists - ultimately will lead to "market failure." *See* ORRIS C. HERFINDAHL & ALLEN V. KNEESE, QUALITY OF THE ENVIRONMENT; AN ECONOMIC APPROACH TO SOME PROBLEMS IN USING LAND, WATER, AND AIR 7 (1965). It is the opinion of these economists that if such "market failure" is not corrected, it will lead to all types of pollution.

15. Pollution is defined by economists as a misallocation of resources due to improper product pricing. *See* Kenneth R. Reed, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 513-14 (1970).

16. *Recommendation on the Implementation of the Polluter-Pays-Principle*, OECD Doc. C (74) 223 (1974), *reprinted in* INT'L PROTECTION ENV'T 313 (1975).

17. *Guiding Principles*, *supra* note 13, at 1173.

18. *Note on the Implementation of the Polluter-Pays Principle*, *supra* note 12, at 239.

19. *OECD Council Regulation on the Use of Economic Instruments in Environmental Policy*, *adopted* Jan. 31, 1991, *reprinted in* 14(2) INT'L ENVTL. REP. (BNA) No. 5, sec. 2, at 23 (1991).

20. *Id.* Examples of such economic instruments are, amongst others, emission charges or taxes, marketable permits, deposit-refund systems, and some forms of financial assistance consistent with the Principle.

21. *See* Kettlewell, *supra* note 1, for an in-depth analysis of the Polluter-Pays Principle and problems associated with its implementation.

B. *GATT*

1. Creation of GATT

Unlike the Polluter-Pays Principle, the international rules of trade were not developed to maximize resource allocation and avoid distortions in trade. Instead, these rules were advanced to maximize the free flow of trade in order to increase the general economic standard of living of the global community.

In 1946, the leaders of the world community determined an international trade organization was needed to oversee international trade and prevent the reoccurrence of conditions,[22] which, in their opinion, were partially responsible for the Second World War.[23] The Economic and Social Council (ECOSOC) of the United Nations met to draft a charter for an international trade organization (ITO).[24] This charter consisted of three parts, the first dealing with the ITO, and the other two parts with the multilateral trade agreements for tariff reductions. However, the U.S. Congress failed to approve the Charter, and as a result the ITO never came into existence.[25] The multilateral trade agreements (part 2 and 3 of the Charter), on the other hand, were adopted under separate trade authority[26] and became known as GATT.[27]

The goals and objectives of these agreements were enunciated in its Preamble:

> Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, . . .[28]

In order to accomplish these goals of economic prosperity and growth, the

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22. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOKLYN J. OF INT'L L. 11, 16 (1992).

23. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 31 (1990)[hereinafter THE WORLD TRADING SYSTEM]. Protectionist measures such as quota-type restrictions adopted by the United States and other industrialized nations prevented the free flow of international trade.

24. 1 UN ESCOR Res. 13, U.N. DOC. E/22 (1946).

25. THE WORLD TRADING SYSTEM, *supra* note 23, at 34.

26. The President of the United States was delegated statutory authority to negotiate multilateral tariff reduction agreements. An Act to Extend the Authority of the President Under sec. 350 of the Tariff Act of 1930 and for Other Purposes, 79th Cong., 1st Sess., 59 Stat. 410, (codified as amended at 19 U.S.C. secs. 1351-1366 (1945).

27. GATT, *supra* note 3. Twenty-four nations initially signed these agreements in 1947. GATT was adopted in the U.S. through the Protocol of Provisional Application PPA. *See* THE WORLD TRADING SYSTEM, *supra* note 23, at 35.

28. GATT, *supra* note 3, Preamble, 55 U.N.T.S. at 194. *reprinted in* INTERNATIONAL TRADE AND INVESTMENT, SELECTED DOCUMENTS 21 (John H. Barton & Bart S. Fisher eds. 1986) [hereinafter TRADE AND INVESTMENT].

parties agreed to enter into "reciprocal and mutually advantageous *arrangements* directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[29] These arrangements became by far the most important multilateral agreements governing international trade.[30]

2. Organization of GATT

GATT is not considered a self-executing treaty,[31] and all multilateral decisions are made by the CONTRACTING PARTIES[32] in accordance with the provisions of Article XXV. However, even though GATT was conceived as an agreement, not an organization, over the years it has taken on the characteristics of both.[33]

The CONTRACTING PARTIES are still the source of the primary decisions made by GATT. Each contracting party is a member of the CONTRACTING PARTIES which meet once a year. Decisions are normally made by consensus, even though each contracting party has one vote.[34] However, since 1960 the majority of the work of the Contracting Parties has been carried out by the GATT Council.[35] It meets monthly and oversees all the work of the various GATT working parties, committees and panels.

3. GATT Rules which Govern Trade

The work which is carried out by these various groups is governed by the rules contained in the original agreements on tariffs and trade, and subsequent rounds of trade negotiations.[36] These rules are based on two

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29. *Id.* (emphasis added).

30. Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. (BNA) 10599 (Oct. 1991).

31. Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C.J. INT'L L. & COM. REG. 497, 500 (1991). However, the author states that two recent judgments from the Court of Justice of the European Community, which first declared GATT not to be a treaty, indicated a change in its position.

32. CONTRACTING PARTIES refers to actions taken by the contracting parties jointly and not by a governing body like the ITO which was never created. *See* GATT, *supra* note 3, art. XXV. 55 U.N.T.S. at 272.

33. Youri Devuyst, *GATT Customs Union Provisions and the Uruguay Round: The European Community Experience*, 26 J. WORLD TRADE 15, 16 (Feb. 1992).

34. *Id.* at 17.

35. *Id.* Council membership consists of those contracting parties who wish to participate. The Council was created in the 16th Session of GATT (1960) GATT Doc. SR. 16/11, at 160 (1960).

36. Seven negotiating rounds have been successfully completed, with the eighth round currently in progress. *See* Jackson, *supra* note 22, at 11. Each round generally lasts four years, except for the last two rounds which have taken longer. The Tokyo Round lasted five years, and the Uruguay Round has been in progress since 1986. *See* Judith H. Bello & Alan F. Holmer, *Recent Developments -U.S. Trade Law and Policy Series No. 19: The Uruguay Round: Where Are We?* 25 INT'L LAW. 723, 724 (1991). GATT is primarily used as a forum for trade negotiations. Over 100 nations are now members and over 200 separate multilat-

primary principles, (1) non-discrimination (MFN)[37] and (2) trade barrier reductions,[38] to further the goals and objectives of GATT. Therefore, by extending like treatment to like products of trading partners and prohibiting import surcharges for the protection of domestic industry,[39] trade is liberalized to the extent of negotiated tariffs.

In addition to these tariff concessions, GATT also tries to eliminate or reduce non-tariff barriers, such as quantitative restrictions,[40] subsidies,[41] and dumping of domestic goods on foreign markets,[42] in order to promote fair trade. The Tokyo Round was most successful in accomplishing some of these reductions.[43]

However, GATT grants a number of exemptions from its provisions to permit a contracting party to protect superior national interests.[44] GATT also provides a waiver procedure where any contracting party can be excused from a GATT obligation if two-thirds of the CONTRACTING PARTIES approve.[45] The question is whether the provisions as a whole or the exemptions advance the goal of the Polluter-Pays Principle - to reduce global pollution?

III. THE POLLUTER-PAYS PRINCIPLE AND GATT - INTERPRETATION

Environmental protection was not an issue when GATT came into

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eral agreements make up the GATT legal system. *See* Hauser, *Proposal for a Multilateral Agreement on Free Market Access (Mafma)*, 25 J. WORLD TRADE 76, 79 (Oct. 1991).

37. GATT, *supra* note 3, art. I, 55 U.N.T.S. at 196. General Most-Favoured-nation Treatment (MFN). This provision requires non-discriminatory treatment of all GATT contracting parties regarding the importation and exportation of all goods and transfer of payments. For example, this would prohibit one nation from giving preferential treatment to one or more of its GATT trading partners without extending that same treatment to all other GATT members.

38. GATT, *supra* note 3, art. II, § 4, 55 U.N.T.S. at 200. This article extends domestic protection of domestic products to imported foreign goods through negotiated tariffs. It requires that "[n]o contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement."

39. Jackson, *supra* note 22, at 40.

40. GATT, *supra* note 3, art. XI, 55 U.N.T.S. at 224.

41. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250.

42. GATT, *supra* note 3, art. VI, 55 U.N.T.S. at 212.

43. The Tokyo Round was opened in September, 1973 at a meeting of the Ministers in Tokyo. The meeting was open to GATT members and non-GATT members. 102 countries participated in the negotiations. The Tokyo Round lasted more than five years with many delays resulting from economic uncertainty, political conditions, and legislative processes. The Round was opened for signature on April 12, 1979. *See* TRADE AND INVESTMENT, *supra* note 28, at 152. During this round not only traditional tariff reductions were negotiated, but codes "on the use of subsidies and countervailing measures, antidumping standards, and government procurement" were adopted. *See* Bello & Holmer, *supra* note 36, at 724.

44. GATT, *supra* note 3, 55 U.N.T.S. art. XII at 228, art. XVIII-B, at 252. Article XII and XVIII-B provide for economic exceptions to safeguard its balance of payments; Article XIX permits a protection against import surges; Article XX permits a nation to uphold its public policies; and Article XXI permits an exception for essential security interests.

45. GATT, *supra* note 3, art. XXV, 55 U.N.T.S. at 272.

being. Rules for trade liberalization were drafted without considering their environmental effects. It was not until the early seventies that the global community became interested in environmental issues. The Declaration on the Human Environment[46] was adopted at the U.N. Conference on the Human Environment held in Stockholm, Sweden, in 1972. It enunciated the principle of state responsibility[47] and liability[48] for extraterritorial environmental harm.

These principles were interpreted by the OECD to mean that each State has a general obligation of diligence to protect the environment.[49] Therefore:

> A State must constantly have available adequate legal and physical means for ensuring normal compliance with its international obligations [and] . . . it must equip itself, *notably where protection of the environment is concerned*, with the laws and administrative regulations, in both the civil and criminal fields, necessary to achieve this end.[50]

Since the Declaration on the Human Environment, many nations, including the U.S., have adopted a variety of environmental regulations to carry out the mandate of the Declaration.[51] Environmental awareness continues to grow, and with such serious threats as global warming and ozone depletion constantly in the public eye, it is no longer possible to negotiate liberalized trade agreements without considering their environmental effects.

A. *Interpretation and Implementation of GATT Rules*

Over the past 45 years many trade disputes have been negotiated. However, only recently have they involved environmental claims. These disputes generally involve Article XX exemptions which permit nations to pursue their own domestic policies relating to safety, health, and the

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46. *Stockholm Declaration on the Human Environment*, at 7, U.N. Doc.A/Conf. 48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972). This Declaration was the product of the U.N. Conference on the Human Environment which convened in Stockholm, Sweden in June, 1972.

47. *Id.* at 1420, Principle 21.

48. *Id.* Principle 22.

49. *Observations on the Concept of the International Responsibility of States in Relation to the Protection of the Environment*, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 380, 382 (1977) [hereinafter LEGAL ASPECTS]. For an in-depth discussion of state responsibility for environmental harm, see Kettlewell, *supra* note 1, at 437-445.

50. LEGAL ASPECTS, *supra* note 49, at 384.

51. For example, some of the environmental laws passed by the United States are: Clean Air Act, 42 U.S.C § 7401 (1970), as amended by 42 U.S.C. § 7612, Pub. L. No. 101-549 (1990); Clean Water Act, 33 U.S.C. § 1251 (1972); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976); Toxic Substances Control Act, 15 U.S.C § 2601 (1976); and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980).

conservation of exhaustible natural resources.[52] The outcome of two of these disputes indicates that GATT not only fails to accept the Principle, but also prevents its application if the result would restrict trade.

1. The Superfund Excise Tax Dispute

In 1988, GATT was given an opportunity to determine whether it recognized the Polluter-Pays Principle in its interpretation of international rules of trade. The dispute involved two excise taxes imposed by the United States.[53] The first involved an 11.7 cents per barrel petroleum tax on foreign oil, as opposed to the 8.2 cents domestic tax. The panel had no difficulty in finding that this differential violated the national treatment provision of Article III(2) and the United States was asked to reduce that tax.[54] The other excise tax imposed a tax on certain "downstream chemicals equivalent to the tax they would have borne had their inputs been sold in the United States."[55] In this case, the panel had a much more difficult time reaching its conclusion.

The EC and Canada objected to the tax arguing that the pollution created in the production of these chemicals occurred in the producing country, not the U.S. Therefore, they should not be taxed upon entry into the U.S. They also argued that chemicals produced in the U.S., but exported, should not be exempt from the tax, since the pollution occurred in the U.S. The EC pointed out that these, "tax adjustments departed from the principles adopted by the OECD Council in 1972 . . . In particular from the Polluter-Pays Principle which meant that the polluter should bear the costs of measures decided by public authorities to ensure that the environment was in an acceptable state."[56]

The EC further argued that the border adjustment was not necessary

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52. GATT, *supra* note 3, art. XX (b) & (g), 55 U.N.T.S. at 262. Article XX more specifically states that:

> nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

53. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Superfund Excise Taxes [adopted June 17, 1987], B.I.S.D., 34th Supp. (Geneva: GATT, June 1988), *reprinted in* 27 I.L.M. 1596 (1988) [hereinafter Superfund Tax]. Disputes are normally resolved through panels. For an in depth discussion of GATT dispute settlement procedures see Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOKLYN J. INT'L L. 32, 52-65 (1992), and Horlick, *The US-Canada FTA and GATT Disputes Settlement Procedures*, 26 J. OF WORLD TRADE 5 (1992).

54. Superfund Tax, *supra* note 53, at 1597. This provision states in part that "[t]he 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."

55. *Id.* at 1596.

56. *Id.* at 1607 (emphasis added).

to offset any unfair advantage of the foreign producer, because, in accordance with the Polluter-Pays Principle, the producer probably would have paid pollution charges or taxes in the producing country.[57] Therefore, the border adjustment actually places the foreign producer at a disadvantage because the producer must pay pollution charges twice. The EC charged that "[w]hat the United States was in fact doing under the label of border tax adjustments was to ask foreign producers to help defray the costs of cleaning up the environment for the United States industries."[58]

The United States, on the other hand, argued "that the Polluter-Pays Principle had not been adopted by the Contracting Parties and it was on the GATT provisions and not on OECD recommendations that the Panel had to base its conclusion."[59] The United States, however, noted that "[e]nvironmental policy principles related to trade could conceivably be incorporated into the GATT legal system, but such a far-reaching step required the cooperation of all contracting parties and could be taken only after considerable study and discussion."[60]

The Panel, after considering all the arguments, recognized that GATT disputes must be resolved "in light of relevant GATT provisions,"[61] and held that GATT had not adopted the Polluter-Pays Principle. The panel did not examine the consistency of the revenue provisions in the Superfund Act with the environmental objectives of that Act or with the Polluter-Pays Principle. Instead, it found "that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served."[62]

2. The Tuna Import Restrictions Dispute[63]

More recently, another GATT panel was given the opportunity to examine the effect of environmental regulations on trade. The United States imposed an embargo on the importation of Mexican tuna because it was harvested with the purse-seine method in the Eastern Tropical Pacific Ocean (ETP) in violation of the United States Marine Mammal Protection Act.[64] Mexico objected to the embargo and after consultations

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1614.
62. *Id.*
63. *GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991) [hereinafter *Mexican Tuna Panel*]. As of this date, the panel report has not been adopted by the Council. Mexico and the United States are in the process of working out the disagreement.
64. Pub. L. No. 92-522, 86 Stat. 1027 (1972), as amended, notably by Pub. L. No. 100-711, 102 Stat. 4755 (1988) and most recently by Pub. L. No. 101-627, 104 Stat. 4467 (1990) codified in part at 16 U.S.C. 1361(f). The Act contains some specific requirements regarding the taking of other marine mammals while harvesting yellowfin tuna in a specific region of

with the United States failed, asked for the establishment of a GATT panel to hear the dispute. A panel was established and approximately twenty other nations reserved the right to be heard.[65]

Both parties and the intervenors presented extensive arguments. Mexico primarily argued that the embargo violated Article XIII, quantitative restrictions, and that none of the measures taken by the United States were in compliance with GATT provisions. It asked that the CONTRACTING PARTIES recommend the United States bring its statutory requirements under the MMPA "into conformity with its obligations under the General Agreement.[66]

The United States, on the other hand, asked the Panel to make the following findings:

> (a) The measures imposed under the MMPA with respect to certain domestic yellowfin tuna from Mexico were internal regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of tuna and tuna products consistent with Article III:4; and
> (b) even if these measures are not consistent with Article III, they were covered by the exceptions in Article XX(b) and XX(g);[67]

and to reject Mexico's claim.[68]

The Panel analyzed at length the exceptions under Article XX (b) and (g) and noted:

> "that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna."[69]

The Panel examined Article III:4, concluding that it "refers solely to laws, regulations and requirements affecting the internal sale, etc. of products . . . that are of the same nature as those applied to the domestic

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the Pacific Ocean called the ETP. They discovered that in that particular area, yellowfin tuna will always be in the same area with dolphins. As a result, if the purse-seine nets are used for harvesting tuna, dolphins will also be killed. To conserve dolphins, the MMPA sets standards for the taking of yellowfin tuna and dolphins, and permits an embargo on imported tuna taken in violation of these standards.

65. The nations that wanted to be heard were Australia, Canada, Chile, Colombia, Costa Rica, the European Communities, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, Singapore, Tanzania, Thailand, Tunisia and Venezuela. *See Mexican Tuna Panel, supra* note 63, at 1598.

66. *Id.* at 1601.

67. *Id.*

68. *Id.*

69. *Id.* at 1617.

products."[70] The Panel then noted that the MMPA applies to the harvesting of tuna in order to avoid the killing of dolphins, and as such does not directly regulate the tuna as a product. Therefore, the Panel concluded that the provisions of the MMPA relating to the harvesting of tuna are not covered by the Note Ad Article III, and thus violate GATT.

The Panel then examined the Article XX(b) and (g) exceptions. First it found the measures under the MMPA did not meet the test of "necessary" under Article XX(b), and that the measures taken under Article XX(g) cannot be applied extraterritorially.[71]

In its concluding comments, the Panel noted that GATT places few restrictions on the enforcement of domestic environmental regulations as long as they do not discriminate against like imported products. But, "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."[72] The panel noted that if such exceptions should be allowed under Article XX(b) and (g), GATT should be amended or a waiver should be granted. It recommended that "the CONTRACTING PARTIES request the United States to bring the above measure into conformity with its obligations under the General Agreement."[73]

In summary, these two panel decisions show that GATT interpretations, so far, do not consider the Polluter-Pays Principle in their analysis and outcome. The Superfund Tax panel clearly acknowledged that the Polluter-Pays Principle has not been adopted by GATT. The Mexican Tuna panel decision, however, implies that even if the Principle were recognized, it could not be applied if it resulted in restrictions on international trade. In other words, the United States cannot prohibit the importation of products which have been produced without the benefit of environmental regulation nor can it add a surcharge on such goods to equalize production costs,[74] a prerequisite for a successful application of the Polluter-Pays Principle.

B. *The Uruguay Round and the Polluter-Pays Principle*

These panel decisions reflect GATT rules currently in force. However, since the *Mexican Tuna* decision became public, much discussion has taken place regarding the interaction of environmental issues and trade. The attention is now focused on the Uruguay Round which is in its

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70. *Id.*

71. *Id.* at 1620-21.

72. *Id.* at 1622. As one author noted, the difference between product and production can by "analyzed as a conflict-of-laws rule intended to allocate jurisdiction between the United States and Mexico. Mexico is accorded exclusive jurisdiction over domestic production processes, while the United States is accorded jurisdiction over products physically brought to the United States." *See* Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142, 150-51 (1992).

73. *Mexican Tuna Panel, supra* note 63, at 1623.

74. *See* discussion *infra* parts III-B(3) and IV.

last stretch of negotiations. This Round started in 1986,[75] with a projected completion date of 1990. However, due to major differences in agricultural reforms in the areas of export subsidies, internal supports, and market access, the negotiations have stalled numerous times and have yet to be completed.[76]

On December 20, 1991, GATT Director-General Arthur Dunkel released, with the intent to move negotiations along, a very lengthy document called the Uruguay Round Final Act.[77] The text was originally labeled "take it or leave it," with an opportunity for comments by member negotiating nations.[78] However, since the release of this document, much criticism has been launched against many of its provisions. For example, a key U.S. labor advisory committee urged the United States to reject the draft because, in the committee's opinion, it would lead to higher unemployment, "undermine U.S. environmental regulations, limit the ability of U.S. lawmakers to promote economic growth, and place U.S. industry and workers at a competitive disadvantage."[79] Environmentalists, in particular, are concerned if the provisions are adopted "as is," since environmental laws will have to be rewritten to meet the lowest common denominator.[80]

1. Environmentalist's Look at *Final Act* Provisions

The environmental implications of various provisions in the Final Act have been analyzed by various groups. One such analysis was prepared by Lori Wallach, an environmental attorney for a health, consumer, and environmental advocate group called Public Citizen in Washington D.C.[81] She argues that two major sections of the Final Act - Sanitary and Phytosanitary Standards (SPS)[82] and Technical Barriers to Trade

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75. Bello & Holmer, *supra* note 36, at 724-25. One of the main U.S. objectives for this Round was to include services under the GATT umbrella. Two negotiating groups were formed. One was charged with negotiating an agreement on services to be included in GATT, since at the present time GATT provisions only cover goods. The second group handled the more traditional negotiating topics such as agricultural subsidies, tariff reductions, and the dispute settlement process.

76. *Id.* at 726.

77. The Dunkel document is G.A.T.T. Doc. MTN.TNC/W/FA, (Dec. 20, 1991) [hereinafter *Final Act*].

78. *Uruguay Round Talks to Last Until Spring as U.S., EC Voice Reservations on Draft*, 9 INT'L TRADE REP. (BNA) No.3 at 98 (Jan. 15, 1992). 108 nations are participating in these negotiations, and they were to report their comments by January 13, 1992.

79. *Key Labor Advisory Group Urges U.S. to Reject Dunkel's Draft GATT Agreement*, 9 INT'L TRADE REP. (BNA) No. 5 at 191 (Jan. 29, 1992). These comments were made in a letter to U.S. Trade Representative Carla A. Hills.

80. Wallach, *Analysis of the "Final Act"*, PUBLIC CITIZEN (Dec. 26, 1991).

81. *Id.* This group was started by consumer advocate, Ralph Nader.

82. *Final Act*, *supra* note 77, at L. 45, Annex A, ¶ 1. These standards are defined as any measure applied:

> - to protect animal or plant life or health *within the territory* of the contracting party from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms:

(TBT),[83] will have a negative effect on our environmental, health and consumer regulations because these provisions "promote downwards harmonization and mandate affirmative preemption."[84]

More specifically, the SPS measures fall under GATT Article XX exceptions which can only be applied to safeguard human, animal, and plant life from specific risks within the territory of the contracting party.[85] The measures include "laws, regulations, requirements and procedures" including "end product criteria, processing and production methods; testing, inspection, certification and approval procedures . . . statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."[86]

These measures cannot be more restrictive than the international standards accepted by GATT[87], which, in the opinion of some environmentalists, promotes "harmonization downward of national standards that are higher than international standards."[88] As pointed out by Ms.

- to protect human or animal life or health *within the territory* of the contracting party from risks arising from additives, contaminants, toxins or disease-causing organisms, in foods, beverages or feedstuffs;
- to protect human life or health *within the territory* of the contracting party from risks arising from diseases carried by animals, plants or products thereof or from the entry, establishment or spread of pests; or
- to prevent or limit other damage *within the territory* of the contracting party from the entry, establishment or spread of pests.

Id. (emphasis added).

83. *Final Act*, *supra* note 77 at G. 20, Annex 1, ¶ 1. A technical regulation is defined as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

A technical standard is defined as a

> document *approved by a recognized body*, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Id. para. 2 (emphasis added).

"For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents." *Id.* para. 2, Explanatory Note.

84. Wallach, *supra* note 80, at 2.

85. *Final Act*, *supra* note 77, at L. 36, ¶ 1 and L. 45, Annex A, ¶ 1. *See Final Act*, *supra* note 82 for the definition of SPS which cites examples of specific risks.

86. *Final Act*, *supra* note 77, at L. 45, Annex A, ¶ 1.

87. *Final Act*, *supra* note 77, at L. 46, Annex 1, ¶ 3. The standards for food safety are established by the Codex Alimentarius Commission; standards for animal health and zoonoses are developed by the International Office of Epizootics; standards for plant health are developed by the International Plant Protection Convention in co-operation with regional organizations; and for other areas standards developed by other relevant international organizations.

88. Wallach, *supra* note 80, at 14-15.

Wallach, many United States standards relating to food, pesticides, additives, and contaminants are more restrictive than these international standards. Therefore, these restrictive standards would constitute an unfair trade barrier under the Final Act.[89]

Furthermore, SPS measures are to be applied "only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained against available scientific evidence."[90] This provision shifts the burden of proof to the contracting party with the more restrictive law to justify its standard, rather than placing the burden upon the contracting party challenging that law.

Technical standards must also comply with GATT acceptable international standards,[91] unless they fit a very narrow exception.[92] These international standards "shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[93] If there are no international standards, then "technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[94] But most important, "technical regulations 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*."[95]

Therefore, if a nation's existing laws are stricter than acceptable GATT standards, the Final Act mandates regulatory compliance.[96] If a

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89. *Id.* at 12-14.

90. *Final Act*, *supra* note 77, at L. 36, ¶ 6.

91. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.4. The provision specifically states that "where technical regulations are required and relevant international standards exist or their completion is imminent, Parties *shall use* them, or the relevant parts of them, as a basis for their technical regulations . . . ." (emphasis added).

92. *Id.* It states as follows: "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

93. *Final Act*, *supra* note 77, at G. 3, art. 2 ¶ 2.5.

94. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.2. Legitimate objectives are defined in this paragraph as: "national security requirements; the prevention of deceptive practices; protection of human health and safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products."

95. *Final Act*, *supra* note 77, at G. 3, art. 2, ¶ 2.3. (emphasis added).

96. *Final Act*, *supra* note 77, at L. 43, ¶ 45. This provision states in pertinent part:

> Contracting parties shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this decision. . . . Contracting parties shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this decision.

Id.

Final Act, G.5, art. 3, ¶ 3.5 contains the same provision regarding technical regulations.

nation were to refuse and its standards were to be challenged, a GATT panel could declare the national law incorporating those standards "to be an unnecessary obstacle to trade."[97]

In summary, the provisions of the Final Act have carved out very narrow exceptions for Article XX. If an environmental law is more restrictive than the GATT accepted international standard, it will be extremely difficult for a nation to meet the requirements of "the extent necessary to protect . . ." and "against available scientific evidence." As a result, the nation must either harmonize "downward" its environmental regulations or be in violation of GATT.

2. GATT's Look at Environment and Trade

GATT, in an attempt to address some of these concerns, published a study[98] conducted by the secretariat dealing with the interaction of trade and the environment. The Study does not directly address the proposed provisions in the Final Act, but instead deals with policy issues in general. The Study points out that GATT provisions do not prevent nations from pursuing their own environmental policies, since GATT provides exemptions from its obligations if the international standards "are inappropriate for the Parties concerned, for *inter alia* such reasons as . . . protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors . . . ."[99]

But, these exemptions, as pointed out in The Study, are narrowly construed in order to prevent contracting parties from imposing "unwarranted, trade-inhibiting restrictions."[100] It argues strongly against the use of "trade policies to influence environmental measures in other countries."[101] As noted in The Study,

> [w]hen the environmental problem is due to production or consumption activities in another country, the GATT rules are more of a constraint, since they prohibit making market access dependent on changes in the domestic policies or practices of the exporting country. The rational for this is that to do otherwise would invite a flood of import restrictions as countries (especially those with large markets) either attempted to impose their own domestic environmental, eco-

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"Parties are fully responsible under this Agreement for the observance of all provisions of Article 2. Parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies." *Id.*

97. Wallach, *supra* note 80, at 22.

98. This report, titled *Trade and the Environment* is a study conducted by the secretariat of the GATT. 9 INT'L TRADE REP. No. 8 at (BNA) 310 (1992) [hereinafter The Study]. This study was released after the *Final Act* was presented to the negotiating countries. But even though there are no direct references to sections within the *Final Act*, one can only assume that the arguments were made keeping in mind the provisions of the Act.

99. *Id.* at 8. Article XX(b) and (g) are considered the environmental exceptions.

100. *Id.* at 9.

101. *Id.* at 1.

> nomic and social policies on other countries, or used such an attempt as a pretext for reducing competition from imports.[102]

The Study recognizes that different environmental standards have industry concerned about its competitiveness. The fear is that lower standards abroad will lead to "ecological dumping."[103] According to The Study, if countries engage in unilateral actions to "offset the competitiveness effects of different environmental standards, or . . . [to] attempt to force other countries to adopt domestically-favoured practices and policies, the trading system would start down a very slippery slope."[104]

Instead of imposing unilateral trade restrictions to enforce environmental policies,[105] The Study urges multilateral environmental agreements to resolve environmental policy issues. Should such agreements be impossible, then the parties should seek an amendment to GATT or obtain a GATT waiver.[106] After all, the purpose of GATT is to prevent discrimination between domestic and foreign products in order to facilitate trade, not to build protectionist walls to keep out trade.

Only in passing does The Study mention how liberalized trade will improve overall environmental quality. The argument is made that a reduction in agricultural subsidies will shift agricultural production to less developed nations which are inclined to use less chemical fertilizers and pesticides. Based on this assumption, The Study concludes that:

> Liberalizing protectionist agricultural policies in the high income countries is therefore likely to (i) cause the world's food to be produced with fewer chemicals, which in turn would reduce chemical residues in food in the natural environment; and (ii) have at most a very modest impact on the rate of deforestation. It would also increase the availability of land for recreational and aesthetic uses - including the replanting of forests - in several high income countries as marginal farm land was taken out of production. Thus, in all likelihood there would be a substantial increase in global environmental quality following agricultural trade liberalization, even if no new environmental

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102. *Id.* at 5.

103. Ecological dumping occurs when goods are produced without the benefit of sufficient environmental controls. The producer will be able to externalize some of his production costs which results in cheaper goods. These goods, if exported to a more environmentally restrictive environment, will be considered "dumped." For a more complete explanation, *see infra* part IV.

104. The Study, *supra* note 98, at 5. However, the article does not explain what is meant by "a very slippery slope."

105. The *Mexican Tuna* decision is an example. The MMPA contains a United States environmental policy on harvesting tuna in the ETP region, and to make sure that other nations comply with the U.S. policy, the Act permits an embargo against imported tuna harvested contrary to the method permitted by statute. Mexico's tuna harvesting methods did not comply, therefore the embargo was imposed.

106. In order to get a GATT waiver, the party needs the support of two-thirds of GATT's membership - or, at the present time, 69 nations out of 103. The Study makes the point that if an issue has wide support, then it should not be difficult to get a waiver. *Id.* at 6.

policies were introduced. . . .[107]

In summary, The Study supports the *Mexican Tuna* panel report by denouncing unilateral actions to enforce environmental policies and goals. It concludes by stating, "non-discriminatory domestic policies offer the most efficient approach to dealing with nearly all environmental problems. Interference with trade is seldom, if ever, the first-best way of achieving a particular domestic environmental objective."[108]

C. *The Conflict between GATT and the Polluter-Pays Principle*

A successful application of the Polluter-Pays Principle relies in part on harmonized environmental policies and standards. If harmonization is lacking, then the imbalance created by one nation permitting externalities in the production process can be offset by a countervailing duty.[109] This practice would serve a dual purpose, (1) eliminate the competitive advantage gained by the producer, and (2) encourage greater environmental harmonization.

This practice is, however, in direct conflict with GATT provisions. In The Study, the author lists three ways in which competitiveness can be regained. First, that the countries with lower environmental standards harmonize up to the higher standards in the importing country. Second, that the imports of foreign products, considered to be produced in "environmentally dirty ways," be subjected to special duties designed to offset the "unfair cost advantage" from the less strict standards.[110] The final suggestion provided that the domestic industries be given subsidies to cover the added costs of meeting the higher standards.[111]

The author is quick to point out that under GATT, only the first option would be acceptable. The other two options would be in conflict with existing GATT rules. A special duty imposed on an import from a country with less stringent environmental laws would, first of all, violate the Most Favored Nation Principle, and secondly, could only be imposed after an extensive re-negotiation process.[112] A subsidy also violates GATT, since subsidies in general are prohibited under rules of international trade.[113] Furthermore, the provisions of the Final Act incorporated the findings of the *Mexican Tuna* panel report, which prevent one nation from imposing its domestic laws on other contracting parties. Therefore, domestic laws which would prohibit the importation of goods produced in an environmentally unsound manner (i.e. *Mexican Tuna* case) could not

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107. *Id.* at 34.

108. *Id.* at 35.

109. *See infra* note 145 and accompanying text.

110. The Study, *supra* note 98, at 17. As the author of The Study points out, this is not a GATT acceptable method.

111. *Id.*

112. *Id.*

113. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250. Article XVI provides an exception for subsidies on agricultural and other primary products.

be enforced against contracting parties. As a result, the contracting party would have a competitive advantage because of the lower product price.

These GATT practices will result in more, not less, pollution because of the improper application of the Polluter-Pays Principle. Unless all polluters internalize the externalities, there will be a misallocation of resources, i.e. pollution, and distortion of trade. The success of the Polluter-Pays Principle depends on proper product pricing, and until GATT adopts the Principle as part of its international trade policy, its claim that trade liberalization will improve environmental quality will fail.

IV. HARMONIZING GATT AND THE POLLUTER-PAYS PRINCIPLE

The conflict between trade and environment has been caused in part by conflicting goals, promoting growth versus saving the environment. The balance between economic growth and environmental enhancement and protection was first addressed by the World Commission on Environment and Development[114] which called for "an historic transition to new modes of environmentally sound or 'sustainable' development."[115] This concept of 'sustainable' development was defined by the Commission as "meeting the needs and aspirations of the present and future generations without compromising the ability of future generations to meet their needs. It requires political reform, access to knowledge and resources, and a more just and equitable distribution of wealth within and between nations."[116]

In 1990, the United States Environmental Protection Agency sponsored a workshop on sustainable development in preparation for a conference on the Action for A Common Future.[117] The participants concluded that *all* assets must be preserved for future generations, and that our "current patterns of population and economic growth are not environmentally sustainable in the long run."[118] However, in order to achieve sustainable development,

> [f]ar-reaching changes in economic incentives are needed to ensure that both consumers and producers face the full environmental consequences of their daily choices. While information, education, and regulations are important, appropriate market signals are also necessary to bring about widespread structural adjustment. *The Polluter Pays Principle underlies correct market signals.*[119]

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114. Strong, *What Place Will the Environment Have in the Next Century - And At What Price?*, 2 INT'L ENVTL. AFF. 208, 209 (1990).

115. *Id.* at 214.

116. Gro Harlem Brundtland, *Global Change and Our Common Future*, *in* GLOBAL CHANGE AND OUR COMMON FUTURE 10, 12 (Ruth S. Defries & Thomas F. Malone eds., 1989).

117. ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES WORKSHOP ON THE ECONOMICS OF SUSTAINABLE DEVELOPMENT: REPORT TO THE 1990 BERGEN CONFERENCE (1990) [hereinafter SUSTAINABLE DEVELOPMENT]. This conference, which was held in Bergen, Norway, involved ECE members (Eastern and Western Europe, the United States, and Canada) only.

118. *Id.* at 3.

119. *Id.* at 4 (emphasis added).

Some of the changes recommended by the participants to achieve sustainable development include the following:[120]
1. Revise national income accounting systems to reflect the actual cost of conversion of natural resources.[121]
2. Eliminate subsidies because they are "typically fiscally burdensome, economically inefficient, and ecologically damaging."[122]
3. Shift the tax burden to activities that deplete natural resources and/or cause environmental harm.
4. Focus public expenditures on preventing environmental harm.[123]
5. Use economic instruments[124] to facilitate rational pricing of resources to shift the burden of paying for environmental protection to producers and consumers, thus eliminating a subsidy.[125]

The participants recognized that these changes not only involve national but also international changes in policy. They recommended the elimination of quantitative restrictions, tariffs, agricultural protectionism, and other trade barriers to avoid market distortions, and the harmonization of environmental regulations to avoid anticompetitive effects.[126] In other words, they recognized that, "the Polluter-Pays Principle must be uniformly implemented in order to achieve sustainable economic and environmental development in both developed and less-developed nations."[127]

The Study accepts the concept of sustainable development and recognizes that its implementation depends on at least two notions, 1) assign "values or prices to natural resources, with a view to identifying and valuing the environmental effects of economic activity,"[128] and 2) to preserve all assets for future generations.[129] However, the author notes that "neither aspect of sustainable development is intrinsically linked to inter-

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120. *Id.* at 5-9.

121. For example, the OECD found that current energy prices do not accurately reflect production costs because the "cost" of climatic change is not included in the price. As a result, the OECD asked that all nations expand their accounting systems to "fully reflect environmental and natural resource conditions and trends." Once the accounting systems reflect the proper price for all resources, a more consistent application of the Polluter-Pays Principle will be possible. *See OECD Urges "Phased Approach" in Introducing Technology to Cut Greenhouse Gas Emissions*, 14 INT'L ENVTL. REP. (BNA) 190 (Apr. 10, 1991).

122. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 6.

123. This can be accomplished by creating and enforcing environmental laws.

124. These economic instruments "include fees levied on emissions and environmentally damaging activities, marketable permit systems, deposit-refund systems, and non-compliance charges linked to emissions standards." SUSTAINABLE DEVELOPMENT, *supra* note 117, at 9.

125. The "subsidy" is created by having the government or society as a whole absorb the cost of pollution abatement and control instead of the producer and consumer. Once the product price reflects the full cost of production, the subsidy is gone.

126. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 16.

127. Kettlewell, *supra* note 1, at 460.

128. The Study, *supra* note 98, at 3.

129. *Id.*

national trade."[130]

The argument in The Study fails to see the link between sustainable development and international trade. In order for producers and consumers "to face the full environmental consequences of their daily choices,"[131] correct market signals, i.e. proper pricing, must be in place. This can only be accomplished through a uniform application of the Polluter-Pays Principle.[132] If product prices do not reflect all costs for pollution abatement and control, then market signals will be incorrect, leading to overproduction, misallocation of resources, i.e. pollution, and distortions of trade. Therefore, liberalized trade will only result in sustainable development, ensuring increased economic growth without environmental degradation, if GATT adopts the Polluter-Pays Principle. As pointed out by one author "whether liberalizing international trade is a means to support sustainable development is dependent on the degree to which degradation of the environment will be reflected in [world] prices."[133]

Incorporating the Polluter-Pays Principle into GATT provisions is not a difficult task. GATT Article VI and the Dumping and Subsidy Codes provide a mechanism for price adjustments, which could be used to insure a more uniform application of the Polluter-Pays Principle. Article VI and the International Dum Dumping Code of 1979[134] define dumping as introducing a product, "into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[135] If such dumping causes or threatens to cause a "material injury to an established domestic industry"[136] then GATT permits the country to impose a countervailing duty equal to the difference in price.[137] The rules for arriving at that difference are very complex,[138] but the Dumping Code provides flexibility to accommodate "differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."[139]

These provisions could easily be applied to environmental dumping, i.e. failing to include pollution abatement and control costs in the product

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130. *Id.*

131. SUSTAINABLE DEVELOPMENT, *supra* note 117, at 4.

132. *Id.*

133. Peter A.G. Van Bergeijk, *International Trade and the Environmental Challenge*, 25 J. WORLD TRADE 105, 109 (1991).

134. *Agreement on the Implementation of Article VI of the General Agreement of Tariffs and Trade*, GATT, 26th Supp. BASIC INSTRUMENTS AND SELECTED DOCUMENTS 171 (1980) [hereinafter Dumping Code]. This Code interprets the provisions of Article VI and provides rules for their application.

135. *Id.* at Part I, art. 2.

136. GATT, *supra* note 3, art. VI(6), 55 U.N.T.S. at 212.

137. GATT, *supra* note 3, art. VI(3), 55 U.N.T.S. at 212.

138. Dumping Code, *supra* note 134, at 171.

139. *Id.*

price. In computing the price difference for environmental dumping, the export price should include:

> (1) the value of the environmental resources used in the production, (2) the cost of the damage caused to the environment by production of the product, and (3) in cases in which the exporter faces less costly environmental requirements, the cost that would have been incurred had the exporter been required to meet environmental requirements prevailing in the importing country.[140]

If the importing country imposes an anti-dumping duty equal to the amount "saved" by the exporter, the Polluter-Pays Principle will be more uniformly applied, leading to sustainable development.

Others have viewed lack of environmental protection as "trade-distorting because it operates as a 'subsidy.' "[141] Such an environmental subsidy could easily be addressed under GATT Article VI and the Subsidies Code.[142] These GATT provisions generally prohibit government subsidies on exported products,[143] and Article VI permits the imposition of a countervailing duty to offset the "bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export" of any merchandise which causes or threatens "material injury to an established domestic industry."[144] Therefore, the counterveiling duty assessed by the importing country would compensate for any financial gains resulting from the government subsidy.[145] This practice would offset the failure of nations to internalize environmental costs, and would lead to a more uniform application of the Polluter-Pays Principle and sustainable development.

However, these tariff barriers to imports are not the only methods

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140. Elize Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. (ENVT'L L. INST.) 10599, 10601-02 (Oct. 1991).

141. AMERICAN SOCIETY OF INTERNATIONAL LAW, ENVIRONMENT AND TRADE 48-49 (Seymour J. Rubin & Thomas R. Graham, eds., 1982). As pointed out by another author, "[t]he environmental burden that is carried by American workers and business is manifest in every single product that we produce." Ebba Dohlman, *The Trade Effects of Environmental Regulation*, OECD OBSERVER 28-29 (Feb.-Mar. 1990).

142. AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI, AND XXIII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE OF 1979, GATT, 26th Supp. BASIC INSTRUMENTS AND SELECTED DOCUMENTS 56 (1980).

143. GATT, *supra* note 3, art. XVI, 55 U.N.T.S. at 250. However, subsidies on agricultural and other primary products are exempt.

144. GATT, *supra* note 3, art. VI(3), 55 U.N.T.S. at 212.

145. The United States has introduced a law titled, "International Pollution Deterrence Act of 1991" which would impose a countervailing duty on goods produced under less stringent standards. The duty will equal the amount of money saved by reduced environmental compliance. S. 984, 102 Cong., 2d Sess. (1991). This bill is based on the assumptions that: "1) American industry pays an enormous cost in compliance with strict environmental laws; 2) to the extent that foreign competitors operate in countries with more lax standards, they are the beneficiaries of a 'significant and unfair subsidy'; and 3) American competitiveness suffers as a result." *See* Kyle E. McSlarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL. L. REP. (ENVTL L. INST.) 10589, 10592 (Oct. 1991).

available under GATT to incorporate the Polluter-Pays Principle into rules of international trade. Article XX exceptions could be expanded to include environmental protection as a legitimate domestic goal. This would permit the application of product and process standards to imported goods, thus nullifying the effect of the *Mexican Tuna* panel report.[146] This practice would subject domestic and foreign producers to the same standards, a pre-requisite for the uniform application of the Polluter-Pays Principle. Furthermore, this expansion of Article XX would permit the implementation of international agreements which utilize trade restrictions to accomplish their goals.[147]

In summary, the conflict between trade policies and environmental protection can be reduced through the use of the Polluter-Pays Principle. Proper product pricing will not only permit nations to reach their environmental goals, but will also help them achieve sustainable development without environmental harm.

V. CONCLUSION

To regard the Polluter-Pays Principle as the panacea to global pollution would be too simplistic. A uniform application of the Principle could reduce global pollution. However, there are so many obstacles to its uniform application, that the Principle, at best, can have only some effect on reducing global pollution. The degree of its effectiveness depends on the accurate reflection of costs in the product price.

Harmonization of standards, enforcement, and liability for resulting harm are all unresolved issues which affect the uniform application of the Principle. GATT can play a unique role in providing a mechanism for harmonization and enforcement of standards. One hundred eight nations are currently negotiating the final provisions for the Uruguay Round. If they carefully consider the role of the Polluter-Pays Principle in achieving sustainable development, and provide for its complete implementation, then trade liberalization will result in greater environmental quality for all mankind.

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146. For example, in the *Mexican Tuna* case, Mexican tuna producers benefitted by harvesting tuna with less expensive methods. If such tuna is banned by the U.S. because of more restrictive U.S. laws, then Mexico has to harvest its tuna using the same method as American producers. This will provide a "level playing field" for the American producer by equalizing production costs.

147. International agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.