

## Interpreting the Polluter Pays Principle in the Trade and Environment Context

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# Interpreting the Polluter Pays Principle in the Trade and Environment Context

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## **Introduction**

The Polluter Pays Principle has come to mean all things to all people, and, in this, it has been rendered somewhat meaningless. In the trade and environment debate, the Polluter Pays Principle has become the slogan of environmentalists, as much as the Free Trade Principle has been the slogan of the trade liberalizers. These slogans are fine as general principles, but they have no content outside specific real world situations. Most people advocate free trade as an objective, while recognizing that world trade is far from free and is in fact restricted by government intervention (e.g., tariffs, non-tariff barriers, and subsidies). Most people advocate that polluters should pay for their pollution, while recognizing that most polluters do not pay unless forced to by government intervention (e.g., regulations or taxes).

The implementation of both the Polluter Pays Principle and the Free Trade Principle depend on government policies. In the trade and environment context, these are national government policies which must be agreed upon at the international level. Both principles will only take on meaning for the trade and environment debate through the collective agreement of governments regarding the interpretation of the principles in the context of specific problems. The rules and decisions of the Gen-

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eral Agreement on Tariffs and Trade<sup>1</sup> (GATT) define "Free Trade" through a continuous process of negotiation and dispute settlement. The Free Trade Principle only takes on meaning when governments agree on the specific government intervention they will allow or prohibit in the trading system. The goal is to continue reducing government intervention.<sup>2</sup>

The Polluter Pays Principle remains a much more abstract principle than the Free Trade Principle. The Polluter Pays Principle has not benefitted, as has the Free Trade Principle, from forty or more years of negotiation on what it means. More attention has been paid to defining this principle in the last few years of trade and environment discussions than in the twenty years since its adoption by the Organization for Economic Cooperation and Development<sup>3</sup> (OECD). The Polluter Pays Principle has a very specific definition in the OECD context, including directions for its implementation. The OECD interpretation of the Polluter Pays Principle was agreed upon after long negotiation by the twenty-four OECD Member countries. In the OECD context, the Polluter Pays Principle is a cost allocation or non-subsidization principle intended to guide governments in addressing domestic pollution.

Some groups are now trying to extend the interpretation of the Polluter Pays Principle, often generating conflicting ideas on how it should be applied to trade and environment issues. Both environmentalists and trade liberalizers interpret the Polluter Pays Principle as a principle of cost internalization rather than cost allocation. As applied by environmentalists, the principle means that polluters (and countries) who do not pay for the costs of their domestic pollution (i.e., those who do not internalize these costs) should be liable for trade penalties. As applied by trade liberalizers, the principle means that polluters (and countries) should pay for the costs of domestic pollution as dictated by national environmental regulations and not by the trading system.

Broad and idealized interpretations of the Polluter Pays Principle will relegate it to the same status as other general slogans. To truly advance its value to the trade and environment debate, both environmentalists and trade liberalizers must discuss the Polluter Pays Principle as it might apply to the thorny issues now confronting governments. The most difficult of these issues is the internalization and allocation of the costs of addressing pollution and degradation in environments which are shared among countries, namely transboundary and global environmental problems. What is needed is an interpretation of the Polluter Pays Principle to guide

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1. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188, *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 4th Supp. 1 (1969).

2. No one seriously believes government intervention will one day reduce to zero, thereby creating an international system of absolutely free trade. It is questionable whether this is even desirable.

3. *Guiding Principles Concerning International Economic Aspects of Environmental Policies*, annex, Organization for Economic Cooperation and Development (OECD) Doc. C(72)128 (May 26, 1972) [hereinafter *Guiding Principles*].

cost internalization and cost allocation for protecting shared environments. This article will discuss the Polluter Pays Principle as a principle for: 1) cost allocation for domestic environments; 2) cost internalization for domestic environments; and 3) cost internalization for shared environments.

### I. Cost Allocation for Domestic Environments

The Polluter Pays Principle in the OECD context is a non-subsidization principle, meaning that governments should not as a general rule give subsidies to their industries for pollution control.<sup>4</sup> Its intent is to guide the cost allocation between the government and the private sector in paying for domestic pollution abatement or protecting their national environments.<sup>5</sup> It concerns who should pay, not how much should be paid. The text of the OECD Polluter Pays Principle reads:

*Cost allocation: the Polluter-Pays Principle*

...

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". [sic] 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. In other worlds [sic], 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 accompanied by subsidies that would create significant distortions in international trade and investment.<sup>6</sup>

This principle was the centerpiece of the OECD Council Recommendation on *Guiding Principles Concerning International Economic Aspects of Environmental Policies* adopted on May 26, 1972.<sup>7</sup> Guidelines for implementing the principle, which provide exceptions where governments might extend pollution control subsidies, were specified in a follow-up recommendation adopted by the OECD Council on November 14, 1974.<sup>8</sup> One other OECD Council Recommendation in 1989 asserted that the private sector should bear the costs of accidental pollution, but it also specified when governments might assist industry in the prevention and clean-up of environmental accidents.<sup>9</sup>

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4. *Id.* para. 4.

5. *Id.*

6. *Id.*

7. *Id.* For a discussion of these principles, see ORGANIZATION FOR ECONOMIC COOPERATION DEVELOPMENT, *THE POLLUTER PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION* (1975) and Candice Stevens, *The OECD Guiding Principles Revisited*, 23 ENVTL. L. 607 (1993).

8. *The Implementation of the Polluter-Pays Principle*, OECD Doc. C(74)223 (Nov. 14, 1974). See also ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE POLLUTER PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION* (1975).

9. *The Application of the Polluter-Pays Principle to Accidental Pollution*, OECD Doc. C(89)99 (Final) (July 7, 1989). For a discussion of the 1989 Council Recommendation

Why was a principle on environmental cost allocation needed? The early 1970s marked the advent of strict environmental regulations in OECD countries, and complaints about high costs and negative effects on competitiveness began to emanate from industry. The OECD governments were pressured either to help industry cover the costs of complying with these new regulations or to impose similar costs on imports through tariffs. There was widespread concern that both environmental subsidies and environmental tariffs would proliferate and cause severe trade system problems. Thus, the 1972 OECD Guiding Principles were born, which included an agreement not to subsidize the environmental costs of industry (the Polluter Pays Principle) and not to use trade remedies to compensate for these costs (the Compensating Import Levies and Export Rebates Principle).<sup>10</sup> Polluting firms should bear the costs of pollution control and should not benefit from environmental subsidies or import duties which might distort trade.

In the OECD, the Polluter Pays Principle mirrors the Free Trade Principle—government interventions that might affect trade should be minimized.<sup>11</sup> It is, in effect, an efficiency principle for allocating costs for domestic pollution and does not involve reducing pollution. The private sector should bear the expense of preventing and controlling pollution to ensure that the environment is in an acceptable state. Public authorities, through national environmental regulations, decide the notion of what constitutes an acceptable state.<sup>12</sup> In other words, the private sector should bear the costs of measures that it is legally bound to take to protect the environment. The type and amount of costs that are actually borne or internalized in these environmental regulations are national government decisions.

At the same time, governments recognized that the costs of environmental regulations imposed severe burdens on certain industries and firms which, for economic and political reasons, could not be allowed to contract or to disappear. Adjustments were needed to fine-tune the Free Trade Principle and the Polluter Pays Principle to fit real-life problems. Negotiations among governments revealed that environmental subsidies were preferable to import duties in aiding troubled industries. Limited use of government subsidies to help underwrite environmental costs could help mitigate demands for trade protection. In addition, government assistance might be needed to realize domestic environmental policy objectives within a prescribed period of time.

The 1974 OECD Council Recommendation on *The Implementation of the Polluter-Pays Principle* gave this principle its most concrete interpretation.<sup>13</sup> The 1972 text of the Polluter Pays Principle had stated that "there

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and other OECD work on applying the Polluter Pays Principle, see *The Polluter-Pays Principle: OECD Analyses and Recommendations*, OECD Doc. OCDE/GD(92)81 (1992).

10. *Guiding Principles*, *supra* note 3, para. 13.

11. *Id.* para. 4.

12. *Id.*

13. *The Implementation of the Polluter Pays Principle*, *supra* note 8.

may be exceptions or special arrangements, particularly for transitional periods” to the non-subsidization mandate.<sup>14</sup> In 1974, the OECD went further in specifying the situations where governments could give subsidies to industry to help them comply with environmental regulations. According to the OECD, government assistance for pollution control might be given: 1) to ease transitional periods when especially stringent pollution control regimes begin; 2) to stimulate the development of new pollution control technologies; and 3) in the context of measures to achieve specific socio-economic objectives, such as the reduction of serious interregional imbalances.<sup>15</sup>

To avoid the abuse of these government subsidies, it was further specified that any assistance granted under the OECD exceptions should be given for a fixed amount of time in a clearly defined program and should not create significant distortions in international trade and investment. Specifically:

- a) it should be selective and restricted to those parts of the economy, such as industries, areas or plants, where severe difficulties would otherwise occur;
- b) it should be limited to well-defined transitional periods, laid down in advance and adapted to the specific socio-economic problems associated with the implementation of a country’s environmental programme;
- c) it should not create significant distortions in international trade and investment.<sup>16</sup>

This OECD interpretation of the Polluter Pays Principle was later adopted by the European Community, which laid out even more specific directions on the percentage of costs and length of time for environmental subsidies.<sup>17</sup>

## II. Environmental Subsidies: The Neglected Issue

Twenty years later, the issue of environmental subsidies was revisited in the context of the Uruguay Round of the GATT. The negotiating group on subsidies and countervailing measures debated the advantages and disadvantages of environmental subsidies as part of a general attempt to impose more discipline on the use of government subsidies. Some governments proposed that environmental subsidies be included in that category of government supports that are generally acceptable (or non-actionable in trade terms) under conditions similar to the OECD interpretation of the Polluter Pays Principle. Other governments were concerned that this treatment would allow environmental supports to be used as disguised aids to industry and might act as a cover to support less competitive sectors.

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14. *Guiding Principles*, *supra* note 3.

15. *The Implementation of the Polluter-Pays Principle*, *supra* note 8, para. II.2-4.

16. *Id.* para. III.2.

17. The Single European Act mentions the Polluter Pays Principle. Single European Act, art. 25, 1987 O.J. (L 169) 1, 11.

It was finally agreed, in the last days of the Uruguay Round negotiations, that environmental subsidies would be placed in the non-actionable category along with subsidies for research activities and subsidies to disadvantaged regions. Under these rules, environmental subsidies are to be used only for the adaptation of existing facilities (i.e., those having been in operation for at least two years) to new environmental regulations.<sup>18</sup> Any environmental support is to be for one time only, limited to 20% of the cost of adaptation, strictly for pollution control, and available to all firms which can adopt new equipment or processes.<sup>19</sup>

As in the case of the OECD Polluter Pays Principle, these provisions cover only industrial sector environmental subsidies and not those in the agriculture and natural resource sectors. In the GATT, the Uruguay Round Agreement on Agriculture covers agricultural sector environmental subsidies.<sup>20</sup> The agreement provides that environmental subsidies in agriculture are exempt from the subsidy reduction commitment in the remainder of the agreement.<sup>21</sup> The exemption applies if such payments are part of a clearly defined government environmental or conservation program, and the amount of the payment is limited to the extra costs or loss of income involved in complying with the program.<sup>22</sup>

Some governments, industries, and theorists object to the use of environmental subsidies, preferring instead a strict interpretation of the Polluter Pays Principle that disallows such supports.<sup>23</sup> They believe that environmental costs should be considered as one cost of doing business and the ability to cover these costs as a factor in industry competitiveness. They fear that government assistance for pollution control will give an unfair advantage to certain firms and sectors in international trade. In general, multilateral trade negotiations have been aimed at removing or rolling back government subsidies, such as export credits and agricultural supports, which are extremely difficult to phase-out once they take root. Government subsidies have been shown to increase in time and in breadth, making them true threats to both trade and the environment. At present, the OECD is trying to identify and measure all types of government subsidies to industrial sectors. This endeavor may prove to be more

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

19. *See id.*

20. *See Agreement on Agriculture*, GATT Doc. MTN/FA II-A1A-3 (Dec. 15, 1993), in *Uruguay Round*, *supra* note 18.

21. *See id.*

22. *Id.* para. 12.

23. *See, e.g.*, Robert Morris, *A Business Perspective on the Competitiveness Effects of Environmental Policies*, in ENVIRONMENTAL POLICIES AND INDUSTRIAL COMPETITIVENESS 168 (Organization for Economic Cooperation and Development ed., 1993).

complex and difficult than identifying supports to agriculture.<sup>24</sup>

Part of the problem is the lack of data on the assistance governments are extending to industry for environmental and other purposes. Environmental subsidies might be more generally accepted if it were easier to monitor their use and to ensure that they were not violating the exceptions to the OECD Polluter Pays Principle. Establishing such a monitoring system might ensure that environmental subsidies do not go beyond the new rules set by the GATT; otherwise, they will be subject to countervailing duties if the subsidized exports cause injury to competing industries in other countries.

The OECD has had limited success in monitoring environmental subsidies in conjunction with the implementation of the Polluter Pays Principle.<sup>25</sup> A notification and consultation system regarding financial assistance for pollution prevention and control was set up in the mid-1970s.<sup>26</sup> Four surveys were carried out under the procedure for Notification of Assistance Schemes in 1975, 1978-79, 1981-82 and 1987-88.<sup>27</sup> According to these surveys, governments are not giving extensive environmental subsidies (either as a percentage of overall subsidies or as a percentage of overall environmental costs), and the impact on international trade is small or negligible overall.<sup>28</sup> It is believed, however, that these surveys do not capture a large share of environmental subsidies, as they are often categorized under different types of government supports, such as assistance to regions, employment, or research.<sup>29</sup> In general, available data is sketchy and incomplete.

High levels of government environmental aid to a specific firm or sector could no doubt have trade implications. Certain polluting sectors could receive unfair trade benefits. According to the OECD surveys, some OECD countries give no environmental assistance at all, whereas others give a substantial amount.<sup>30</sup> It is unclear how this assistance is spread over different firms and sectors. Most subsidies in the 1970s were for air and water pollution control, while assistance in the 1980s shifted to focus on the development and testing of new technologies.<sup>31</sup> The surveys indicate that government environmental subsidies peaked in the mid-1970s; no

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24. *Industrial Support Policies in OECD Countries*, OECD Doc. OCDE/GD(92)126 (1992).

25. *Financial Assistance Systems for Pollution Prevention and Control in OECD Countries* 5-6, OECD Environment Monographs No. 33 (June 1990).

26. *Id.*

27. *Id.*

28. *Id.* at 13.

29. *Id.*

30. *Id.* at 8-9 (Survey data concentrating on assistance given from 1973-1987 reveals that the United States has provided the greatest assistance, with the Netherlands, Belgium, Germany, and Japan also providing significant assistance. Although France, Finland, and Denmark have provided considerably smaller amounts, toward the end of the period the values greatly increased, demonstrating an increased concern with providing assistance for research and the development and testing of new technology.)

31. *Id.* at 9.

data is available after 1988.<sup>32</sup> Future OECD surveys of industrial subsidies will attempt to capture supports given for environmental purposes.

Looking to the future, environmental subsidies might be expected to increase in the 1990s due to several factors, including: 1) more stringent and widespread environmental regulations in most OECD countries; 2) continued economic and structural adjustment problems in many industries; and 3) a new emphasis on the production of environmental goods and services as an industry in its own right.<sup>33</sup> There are indications that governments are increasing their assistance to industry for the development and implementation of new environmental technologies as the environment industry comes to be viewed as a strategic sector. OECD estimates show that the world market for environmental goods and services (primarily end-of-pipe rather than pollution prevention or clean technologies) is \$200 billion a year and is growing at a rate of 5.5% each year.<sup>34</sup> Helping industry develop and deploy environmental technologies is increasingly seen by OECD governments as good for the environment and good for trade.<sup>35</sup>

A recent OECD study focused on government subsidies to clean technologies, which are processes aimed at pollution prevention rather than clean-up at the end of the production line.<sup>36</sup> It is estimated that governments are giving \$1.5 to \$2 billion annually for both the development and implementation of clean technologies.<sup>37</sup> Most assistance is in the form of grants and low-interest loans which cover 20% to 50% of project costs.<sup>38</sup> Given the prospect of increasing amounts of environmental subsidies, more attention should be paid to ensuring their efficient use as well as preventing their abuse for protectionist purposes. More work is needed on interpreting the Polluter Pays Principle as a cost allocation or non-subsidization principle for domestic pollution as well as on applying it to the natural resource and agricultural sectors.

### III. Cost Internalization for Domestic Environments

Many circles interpret the Polluter Pays Principle as a general cost internalization principle, with scarce mention of the subsidy aspect. The emphasis is on the wording in the text of the OECD Polluter Pays Principle, which states that polluting firms should bear the costs of pollution control and "the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consump-

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32. *Id.* at 8-9.

33. See *The OECD Environment Industry: Situation, Prospects and Government Policies 4*, OECD Doc. OCDE/GD(92)1 (1992).

34. *Id.*

35. *Id.*

36. *Supply Side Policies to Augment Government Support for Promoting Cleaner Technologies*, OECD Doc. OCDE/GD/(94)31 (1994).

37. *Id.*

38. *Id.*

tion."<sup>39</sup> Under this view, the Polluter Pays Principle means that governments should ensure that environmental costs are assumed by and passed on to consumers through product prices. The focus is on how much should be paid, not on who should pay. Trade liberalizers emphasize the importance of internalizing environmental costs through domestic environmental policies so that prices of traded products can reflect these costs. Environmentalists take this one step further in advocating that the trading system itself should encourage governments to ensure that environmental costs are internalized. In the view of environmentalists, the competitive conditions of the international trading system prevent full cost internalization because of the fear of lost market share.

In some respects, the current debate about the Polluter Pays Principle as a cost internalization principle is not that different from the original discussions in 1972. The emphasis has switched, however, to the advantages and disadvantages of using compensating import levies (or countervailing duties) to help industry remain competitive while simultaneously dealing with domestic pollution. In 1972, discussions were about the advantages and disadvantages of using environmental subsidies for the same reason. In the intervening twenty years, the debate shifted from the Polluter Pays Principle as a guide to allocating costs for domestic pollution between the government and the private sector, to the Polluter Pays Principle as a guide to internalizing costs for domestic pollution by countries engaged in international trade. The tool in the first instance is government subsidies while the tools in the second case are countervailing duties and other trade actions.

OECD governments considered and decided against these second tools in the OECD Principle on Compensating Import Levies and Export Rebates.<sup>40</sup> The text of this principle reads as follows:

In accordance with the provisions of the GATT, differences in environmental policies should not lead to the introduction of compensating import levies or export rebates, or measures having an equivalent effect, designed to offset the consequences of these differences on prices. Effective implementation of the guiding principles set forth herewith will make it unnecessary and undesirable to resort to such measures.

Despite proposals from different quarters, there has been no indication that governments have any intention of modifying the prohibition on the use of countervailing duties to force foreign polluters to pay the costs of their pollution. Although such proposals have been made since at least the early 1970s, environmental countervailing duties have never been seriously considered by OECD governments and have never been used. Hence the governmental view on the use of countervailing duties is far different from the governmental view on the use of environmental subsidies. Yet both tools are aimed at the same goal: to reduce the negative

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39. *Guiding Principles*, *supra* note 3, para. 4.

40. *Id.* para. 13.

competitive impacts of the high cost of environmental regulations on domestic industries.

It is doubtful that governments will agree to a principle that, as a general rule, legitimizes countervailing duties on imports that do not simultaneously internalize their environmental costs. In other words, these imports are alleged to be subsidized by their governments through a lack of environmental regulations. The theoretical, practical, and moral problems with this proposal have been explained and reiterated many times over. In sum, countries should be allowed to have different environmental regulations to deal with domestic pollution depending on their ecological conditions, their preferences, and their priorities. Giving other countries free reign to determine what constitutes appropriate environmental regulations in exporting countries does not make sense.

More likely, governments will continue to interpret the OECD Principle on Compensating Import Levies and Export Rebates<sup>41</sup> as a non-countervailing duty principle for domestic pollution. Promoting cost internalization in cases of domestic pollution will continue to be the job of national environmental regulations and not of international trade rules. It is conceivable, however, that some type of accord on domestic environmental standards might accompany trade liberalization agreements. There are indications that governments will trade absolute sovereignty over their internal environmental regulations in exchange for trade benefits. For example, accompanying the North American Free Trade Agreement<sup>42</sup> (NAFTA) is an environmental agreement, largely to prevent industry migration, aimed at ensuring the enforcement of the three parties' existing environmental laws.<sup>43</sup> A NAFTA-type side agreement, or a code of minimum environmental standards for domestic pollution, could accompany future GATT agreements, but experience suggests it would take far longer to devise such a code than to conclude most GATT rounds. Such a code is probably better formulated by an environmental organization which is then given the power to monitor and to enforce it.

#### IV. Cost Internalization for Shared Environments

The debate for and against countervailing duties tends to detract attention from trade tools which may be needed to protect the world's environment. Discussions on how to interpret the Polluter Pays Principle as a cost internalization principle for domestic pollution do not help devise solutions to real trade and environment dilemmas. The actual issue is who should pay for the costs of preventing and cleaning up environmental degradation in those environments that are shared among countries. The solutions to global problems such as climate change, ozone layer depletion, loss of

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41. *Id.*

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

43. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480.

biodiversity, and endangered species, as well as transboundary problems such as acid rain, river pollution, and management of migratory species, may partly depend on the trading system. Free trade may have to be limited as a means of encouraging or coercing governments to pay for the costs of protecting shared environments. This is probably more a case of interpreting the Free Trade Principle than the Polluter Pays Principle, as it consists of agreeing on when government intervention into free trade is needed to internalize costs for shared environmental degradation.

The cost internalization rules for permissible trade actions for shared environments have to be agreed upon internationally. Countries must first agree that there is a shared environmental problem and that this problem might be severe enough to warrant trade actions before any intervention into free trade for environmental purposes joins an international environmental agreement. The problem with international environmental agreements is that they are difficult to negotiate. Furthermore, it is usually impossible to secure full participation by the countries concerned. Unlike trade agreements which are about allocating profits among countries and industries, environmental agreements are about spending those profits. Few governments, industries, or people will voluntarily spend their profits to clean up the environment. Environmental problems stem from market failures and, at both the national and international levels, they require government intervention to correct.

The other problem with international environmental agreements is that they are difficult to enforce. Most of the major international environmental agreements—such as the Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>44</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora,<sup>45</sup> and the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal<sup>46</sup>—do not contain either enforcement mechanisms or dispute settlement mechanisms. The parties may violate these agreements when they can do so without being discovered. More seriously, non-parties can easily violate and even undermine these agreements. Thus, without specific trade controls, free-riders can produce and trade ozone-depleting substances, exploit and trade endangered species, and generate and trade hazardous wastes. These violations can cancel out the environmental actions and costs being borne by the parties abiding by the agreements.

When countries agree on steps to address a shared environmental problem, they should have available all the tools needed to mount, implement, and enforce the agreement. Because shared environmental problems often stem from international market failures, negotiating countries may need to utilize trade tools. Because government trade interven-

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44. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1550.

45. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085, 1088.

46. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, UNEP/IG.80/3, 28 I.L.M. 649, 657.

tion can easily be protectionist and can also seriously disadvantage the weaker and poorer members of the trading system, there needs to be criteria to guide the use of trade measures relating to international environmental agreements.

First, there must be a definition of what constitutes an international environmental agreement, i.e., just how many countries must agree on the shared environmental problem. One proposed definition is an agreement which includes the countries accounting for a substantial proportion of the activity concerned. Another definition is based on the number of countries needed to address effectively the environmental problem. Thus, if countries responsible for a large share of the production and consumption of ozone-depleting substances agree to phase out these substances, any one of them might use trade restrictions to implement and/or enforce the agreement. The same understanding would apply to countries representing a large share of tuna fished in specific regions using purse-seine nets which kill dolphins, or countries representing a substantial proportion of those taking a threatened species in a high-seas fishery. If most of the major actors can agree on a problem and a solution, they should not be prevented from protecting shared environments because of the lack of effective tools to prevent free-riders from undermining their actions.

Second, the rules must not ignore that trade interventions are not to be taken lightly and should ensure that alternative options for achieving the environmental objective are explored. There are often good reasons why countries do not participate in international environmental agreements. They may not agree on the severity of the shared environmental problem, which is not unusual given the limitations on scientific proof. They may not agree that the environmental problem is shared; they may believe it is their own domestic problem (e.g., tropical timber) or it is a problem they have not contributed to at all (e.g., climate change). They may not agree on the recommended solutions to the problem, or they may believe the steps to be taken and costs to be internalized are not equitably shared among countries. From their perspective, the environmental problem may not be a priority for government action, or they may simply not have the money or the technical capacity to address the problem.

This is why effective international environmental agreements are hard to come by. But the use of trade tools should not be at the cost of overriding the legitimate concerns and limitations of different countries. Thus, trade restrictions should be a last resort option for international environmental agreements. They should only be used after negotiation, diplomacy, and offers of technical and financial assistance to the hold-out countries have failed.

Third, whether trade tools are used or not, many countries are too poor to comply with international environmental agreements. They will be made poorer by restrictions on their imports and exports. The use of trade restrictions relating to international environmental agreements should be accompanied by technical and financial assistance for develop-

ing countries. The OECD countries can generally afford to internalize the costs of protecting shared environments, but many non-OECD countries often cannot.

These types of criteria still will not cover all situations, and in any case, objections and disputes are likely to arise. Jagdish Bhagwati, a former adviser to the GATT, has suggested criteria that could be employed to assess the legitimacy of trade restrictions that address situations of environmental spillover.<sup>47</sup> These criteria are, in essence:

- 1) *Intent*—the intent of the trade measure is environmental rather than protectionist.
- 2) *Alternative Measures*—effective alternatives to the trade measure have been explored and rejected.
- 3) *Science*—there is some hard scientific evidence as to the existence of the environmental problem, although the precautionary principle can be invoked.
- 4) *Equity*—the solution to the environmental problem is equitable among the countries concerned.

The United States Council on International Business has also proposed a list of criteria governing the use of trade measures relative to international environmental agreements based largely on notions of multilateralism and intent.<sup>48</sup> Theorists, industrialists, and politicians are now starting to debate criteria for trade restrictions for shared environments, which is a sign that a new principle may be born.

## Conclusion

This paper suggests a framework for a new principle aimed at internalizing costs in order to protect shared environments. The best approach would be to adopt a new principle rather than build upon existing principles. The Polluter Pays Principle as a cost allocation principle for domestic environments still requires interpretation with respect to the use of environmental subsidies in different economic sectors. The Principle on Compensating Import Levies and Export Rebates<sup>49</sup> effectively deals with cost internalization for domestic environments by prohibiting countervailing duties. The trade and environment debate must focus on both cost internalization for shared environments and the role of the trading system in creating and correcting environmental problems that spill over national borders. A considerable amount of time and negotiation will be needed to decide on such a principle and to agree on its implementation in specific situations. Its interpretation will evolve over time as disputes arise and are resolved through dispute settlement mechanisms. This new prin-

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47. Jagdish Bhagwati, *Trade and the Environment: The False Conflict?*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY* 159, 178-83 (Dunwood Zaelke et al. eds., 1993).

48. UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, *STATEMENT ON INTERNATIONAL ENVIRONMENTAL AGREEMENTS AND THE USE OF TRADE MEASURES TO ACHIEVE THEIR OBJECTIVES* 4-7 (1993).

49. *Guiding Principles*, *supra* note 3, para. 13.

ciple should be part of both international trade law and international environmental law as an example of the true integration of the two policy areas.