Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade

Carmen G Gonzalez, Seattle University
BEYOND ECO-IMPERIALISM: AN ENVIRONMENTAL JUSTICE CRITIQUE OF FREE TRADE

CARMEN G. GONZALEZ *

As trade ministers from 135 nations gathered in Seattle for the Third Ministerial Conference of the World Trade Organization (WTO) in late November 1999, over 50,000 protesters, including farmers, trade unionists, and environmentalists, joined forces in a raucous demonstration of opposition to the current organization of the global economy. The massive protests, which quickly became known as the “Battle in Seattle,” featured teach-ins, rallies, marches and other events designed to draw attention to the WTO’s impact on labor, environmental, food safety, human rights and consumer protection measures.

Media coverage of the issues underlying the protests emphasized the WTO’s threat to U.S. environmental and labor laws, and posited a conflict between developed countries’ concerns for workers’ rights and environmental protection on the one hand, and developing countries’ needs for unfettered economic growth on the other. In so doing, the media

*Assistant Professor of Law, Seattle University School of Law. The author would like to thank Janet Ainsworth, Keith Aoki, Sumi Cho, Maggie Chon, Eileen Gauna, Mary Lyndon, Kenneth Manaster, Henry McGee, Catherine O’Neill, David Skover, Ronald Slye and Kellye Testy for helpful comments on earlier drafts of this article.


2. See WTO Protesters Have Cause Worth Hearing, supra note 1, at A12.

3. Much of the media attention focused on the protesters’ expressed concern that the WTO would promote the downward harmonization of environmental and labor standards by allowing WTO member nations to challenge each other’s environmental, worker safety, and consumer protection laws as nontariff barriers to trade. See THE PROGRESSIVE, Jan 1, 2000, at 8 (describing successful WTO challenges to U.S. pollution standards for reformulated gasoline imports, U.S. bans on shrimp harvested in nets that jeopardize endangered sea turtles, and the European Union’s ban on hormone-treated beef); Lenora Todaro, Attack of the Killer Kapitalists, THE VILLAGE VOICE, Nov. 30, 1999 (describing the shrimp/turtle and reformulated gasoline cases); David Postman, Caught in a Tangled Net, SEATTLE TIMES, Nov. 16, 1999, at A12 (describing the shrimp/turtle dispute); see generally Ralph Nader and Lori Wallach, GATT, NAFTA, and the Subversion of the Democratic Process, in THE CASE AGAINST THE GLOBAL ECONOMY: AND FOR A TURN TOWARD THE LOCAL 92-107 (Jerry Mander & Edward Goldsmith, eds., 1996) [hereinafter GLOBAL ECONOMY] (explaining how any WTO member may challenge U.S. laws under the WTO and describing the WTO dispute resolution mechanism).

4. See Senseless in Seattle, BOSTON GLOBE, Dec. 2, 1999, at A26 (stating “[t]he United States cannot impose its environmental or labor standards on the world by diktat. The developing countries see their low wages as giving them a competitive edge and a way out of poverty.”); Helene Cooper, Clash in Seattle: Poorer Countries are Demonstrators’ Strongest Critics, WALL STREET JOURNAL, Dec. 2, 1999, at A2 (describing the opposition of delegates from developing countries to proposals to link trade liberalization to environmental and labor standards); David Postman,
portrayed environmentalism as a new form of imperialism, whereby the wealthy, developed countries of the North⁵ impose their environmental preferences and priorities on the poor, developing countries of the South.⁶ While this carefully constructed media image contains a kernel of truth,⁷ it also perpetuates two powerful myths that obscure the relationship among free trade, environmental protection and social justice. The first myth is that environmental protection is a luxury that developing countries can ill afford. The second myth is that industrialized countries have generally played a leadership role in the protection of the global environment.⁸ This article attempts to deconstruct these myths in

Everyone Has an Agenda Including the Turtles, SEATTLE TIMES, Nov. 28, 1999, at E1 (describing the desire of U.S. environmentalists and trade unionists to extend Western-style labor and environmental protections to countries that trade with the United States, and quoting WTO director general Mike Moore’s concern that this would not be acceptable to developing countries).

5. The terms North and South are used in this article as convenient shorthand for wealthy industrialized countries and poor developing countries, respectively. However, these terms are ultimately unsatisfactory because they obscure the substantial common interests between Southern elites and their Northern counterparts, and the significant conflicts between Southern elites and the Southern poor. Indeed, as the process of globalization increases income disparities both within and between nations, “North” and “South” are increasingly socioeconomic rather than geographic categories. See WOLFGANG SACHS, PLANET DIALECTICS: EXPLORATIONS IN ENVIRONMENT AND DEVELOPMENT 73-74 (1999) [hereinafter PLANET DIALECTICS]. Furthermore, the terms North and South suggest homogeneous blocs and thereby obscure the significant differences between the interests and priorities of large industrialized Southern nations, such as Brazil, India and China, and small developing states such as Bangladesh and the Maldives. See Benjamin J. Richardson, Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum, 11 COLO. J. INT’L ENVTL. L. & POL’Y 1, 7-9 (2000); Karin Michelson, Rhetoric and Rage: Third World Voices in International Legal Discourse, 16 WIS. INT’L L.J. 353, 355-62 (1998). Nevertheless, the countries of the South do have some significant common ground. First, nearly all Southern states (with some notable exceptions, such as China, Thailand, and Iran) are former colonies, with Westernized ruling elites who see themselves as heirs to colonial overlords and are often perceived as corrupt and illegitimate. Second, nearly all countries of the South are burdened by debt service to the North, and have export-oriented economies that are highly dependent on the ever-decreasing prices of primary commodities. The need to maximize foreign exchange earnings in order to pay off the debt often leads to overexploitation of natural resources. Third, the pervasive poverty of many Southern nations makes them more vulnerable to the consequences of environmental degradation, such as floods, drought, and loss of agricultural lands through soil erosion. See, e.g., PETER & SUSAN CALVERT, THE SOUTH, THE NORTH AND THE ENVIRONMENT 5-15 (1999).


7. The move to incorporate environmental concerns into the WTO framework has long been viewed with suspicion by developing countries. For example, at the conclusion of the Uruguay Round of GATT negotiations, a coalition of developing countries expressed vehement opposition to any measure designed to link trade and environmental protection, fearing that such measures would be used by developed countries to block imports of their products. See William Drozdiak, Poor Nations Resist Tougher Trade Rules, WASH. POST, Apr. 14, 1994, at A20; see also Jessica Matthews, The Great Greenless GATT, WASH. POST, Apr. 11, 1994, at A19 (reporting that the economic benefits of the GATT agreement outweigh substantial environmental shortcomings).

8. A recent article on the practice of shipbreaking illustrates the operation of these myths. See William Langewiesche, The Shipbreakers, ATLANTIC MONTHLY, Aug. 2000. The article describes
order to critique the environmental consequences of trade liberalization from an environmental justice perspective.\footnote{9}

In order to place the environmental imperialism claim in proper context, some historical background is appropriate. Although the tension between free trade and environmental protection had been building for quite some time, the conflict came to a head in 1991 when a dispute resolution panel, convened pursuant to the General Agreement on Tariffs and Trade (GATT), found that a U.S. embargo on Mexican tuna caught with dolphin-endangering “purse seine” nets violated the GATT.\footnote{10} The

North-South tensions permeated the debate, with developing countries accusing the North of “environmental imperialism,”\footnote{See ESTY, supra note 10, at 181-92 (explaining that the term “environmental dumping” refers to the sale of products at a price that fails to take into account the environmental harm occasioned during the production process. Northern environmentalists have argued that failure to internalize environmental costs amounts to an unfair subsidy, and have called for embargoes and “countervailable duties” on such imports. See Hudec, supra note 11, at 19-20; See also Jagdish Bhagwati, Trade and the Environment: The False Conflict, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 166-168 (Durwood Zaelke et al. eds., 1993) [hereinafter TRADE AND THE ENVIRONMENT].} and industrialized countries accusing the South of “environmental dumping.”\footnote{See generally ESTY, supra note 10, at 1, 181-92 (explaining that the term “environmental dumping” refers to the sale of products at a price that fails to take into account the environmental harm occasioned during the production process. Northern environmentalists have argued that failure to internalize environmental costs amounts to an unfair subsidy, and have called for embargoes and “countervailable duties” on such imports. See Hudec, supra note 11, at 19-20; See also Jagdish Bhagwati, Trade and the Environment: The False Conflict, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 166-168 (Durwood Zaelke et al. eds., 1993) [hereinafter TRADE AND THE ENVIRONMENT].}

One important element missing in much of the scholarly literature about trade and the environment is a critical assessment of the environmental imperialism claim. To what extent do the North’s efforts to integrate environmental protection into the international trade regime constitute an imposition of Northern values and preferences on less powerful nations? This article attempts to address this question by situating it in the larger context of North-South economic relations and by examining how the economic benefits and environmental burdens of liberalized trade are distributed.

Part I of the article discusses the myth that environmental protection is a luxury that the South can ill afford. It describes how international trade promotes environmental degradation in developing countries and threatens the physical health, cultural integrity and economic well being...
of the Southern poor. Included in this discussion is an analysis of how the North reaps the benefits of liberalized trade while exporting the environmental costs to the South. Part I concludes that environmental protection, far from being a luxury, is necessary to the protection of the natural resource base upon which the South relies for survival.

Part II of the article discusses the myth that industrialized countries have generally played a leadership role in the protection of the global environment. It examines the contribution of the North to the deterioration of the global environment, and identifies the North’s resource-intensive, consumption-oriented lifestyle as the primary cause of global environmental degradation. Regrettably, this lifestyle can only be maintained through the ongoing appropriation of the natural resources of the South. Part II concludes that the North, far from being a global environmental leader, is more accurately described as a global environmental looter.

Part III of the article examines why developing countries have denounced Northern proposals to incorporate environmental protection into the WTO framework as environmental imperialism, and reveals that many of these proposals attempt to impose Northern environmental standards on the South without addressing the North’s far more ecologically damaging behavior. Part III recognizes the validity of the environmental imperialism charge and suggests several approaches to the trade/environment debate that address the North’s disproportionate contribution to global environmental degradation rather than imposing Northern ecological preferences on the South.

Part IV concludes the article by redefining the term “environmental imperialism” as the North’s systematic and ongoing appropriation of the South’s ecological resources. It calls for the reconciliation of social justice and environmental protection through policy proposals designed to scale back the North’s over-consumption of the world’s resources, and through support of grassroots resistance to environmental degradation. The article calls for close scrutiny of initiatives to reconcile trade and the environment in order to ensure that they promote environmental justice and do not merely reinforce Northern political and economic dominance.

I. ENVIRONMENTAL PROTECTION: LUXURY OR NECESSITY?

The myth that environmental protection is a luxury that developing countries can ill afford rests on the assumption that environmental protection is an obstacle to economic development and is irrelevant to the immediate needs of the poor. This Part critically assesses this myth by

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contrasting the environmentalism of the rich with the environmentalism of the poor, and by examining the impact of environmental degradation on the Southern poor and on the natural resource base required for economic development.

A. Environmental Justice: North and South

The environmental movement in the United States has long been perceived as white, middle class, suburban, and concerned first and foremost with the protection of parks, wilderness areas and endangered species. The environmental justice movement, which emerged in the 1980’s, challenged the priorities of the traditional environmental movement by making an explicit connection between environmental degradation and issues of poverty, racism, and democracy. Environmental justice activists argued that the traditional environmental movement and the government agencies charged with environmental protection neglected the distributional consequences of environmental degradation and failed to effectively incorporate in environmental decision-making the communities bearing the greatest environmental risk. As a result, poor people and racial and ethnic minorities suffer disproportionately high levels of exposure to toxic substances while whites residing in more pristine suburban neighborhoods reap the benefits of environmental protection. These allegations were confirmed by studies that found income and racial bias in both the location of hazardous waste facilities, and in the en-
foremost, the movement to preserve the global environment has likewise been perceived as a Northern, middle class movement concerned primarily with the protection of nature. Northern environmentalists have typically adopted a technocratic approach to environmental protection, 


20. See Peter & Susan Calvert, supra note 5, at 2-3 (1999); Guha, supra note 16, at 98-99; Alexander Stille, In the ‘Greened’ World It Isn’t Easy Being Human, N.Y. Times, July 15, 2000, at B9 (describing World Bank-financed conservation projects in developing countries that displaced millions of local people in order to protect “nature”). As several commentators have pointed out, it is paradoxical that the North is viewed as more environmentally conscious despite the fact it consumes roughly 80 percent of the planet’s resources while possessing roughly 20 percent of the planet’s population. Tariq Banuri, The Landscape of Diplomatic Conflicts, in Global Ecology: A New Arena of Political Conflict 49, 50-51 (Wolfgang Sachs, ed. 1993) [hereinafter Global Ecology]. This perception has helped engender the belief that the North alone is capable of saving the planet from environmental devastation and has obscured both the large and growing environmental movement in the South, and the extensive literature documenting the environmental content of traditional and indigenous knowledge systems. Id. at 51-52; see also Guha, supra note 14, at 112-124 (describing the history of the environmental movement in India and Brazil). Indeed, a 1992 Gallup Institute poll, conducted to coincide with the 1992 United Nations Conference on Environment and Development, found no significant difference between the North and the South with respect to their level of environmental concern. See Banuri, The Landscape of Diplomatic Conflicts, supra at 51. However, there are significant differences between the environmental agenda of the North and the environmental agenda of the South. Like the environmental justice movement in the United States, Southern environmentalism is inextricably intertwined with the struggle for social and economic justice. See Guha, supra note 14, at 105-07. Moreover, this struggle is frequently grounded in an indigenous ideology of social justice, such as Gandhism in India, Buddhism in Thailand, and liberation theology in Latin America. Id. at 107. Finally, another striking feature of Southern environmentalism is the significant role of women at both leadership and grassroots levels. Id. at 107-08. The misperception of North/South interest in environmental issues, and the different agendas and ideologies of Northern and Southern environmentalism account, in part, for the familiar image of environmentalism as a Northern imposition on a reluctant South.

21. A prime example of the North’s technocratic approach to environmental protection is the 1989 special edition of the Scientific American, aptly entitled “Managing Planet Earth.” William C. Clark, Managing Planet Earth, Scientific American, Sept. 1989, at 47-54. The “global environmental management” approach advocated in this special edition and in many diplomatic conferences on the environment transforms environmental protection into the efficient allocation of resources and waste sinks so as to maintain a balance between human extractions or emissions on the one side, and the regenerative capacity of nature on the other. See Wolfgang Sachs, Neo-Development: “Global Ecological Management,” in Global Economy, supra note 3, at 243-45, 250-51 (describing the pervasiveness of the global environmental management approach during the 1992 United Nations Conference on Environment and Development in Rio de Janeiro); Eduardo Gudynas, The Fallacy of Ecomessianism: Observations from Latin America, in Global Ecology, supra note 20, at 171-78 (describing the belief of some Northern environmentalists and international institutions that they have the knowledge and the resources to manage the global environment); Eric
emphasizing global management of the environment based on scientific principles while neglecting Southern aspirations for social justice, cultural rights, self-determination and democracy. Southern non-governmental organizations (NGO’s) and grassroots movements have challenged the North’s technocratic approach by placing environmental issues in the context of international inequality and the struggle for social justice. Southern environmentalists have charged that Northern development policies and consumption patterns are the primary causes of resource depletion and global pollution and that the world economic order has institutionalized Southern poverty, which places additional stress on the environment. Indeed, one prominent Southern environmentalist has


22. The technocratic approach of Northern environmentalists and international institutions has been criticized on several grounds. First, this approach presents human beings’ relationship to nature as a strictly scientific and technical problem, and elevates scientific knowledge above the grassroots knowledge and preferences of farmers, indigenous people and local communities. This conception of scientific knowledge overlooks the diversity of views among scientists and produces a discourse that precludes democratic discussion of alternative approaches to environmental protection. Second, this approach suggests that we are all in the “same boat” with respect to protecting the global environment, and fails to acknowledge the North’s historic contribution to global environmental degradation and its corresponding obligation to bear its fair share of the costs of repairing the damage. Third, this approach obscures current power relations among and within nations by failing to identify who gains and who loses from environmental degradation, and by failing to explicitly address class, race, culture and gender issues as they pertain to access and control over natural resources. Fourth, this approach typically attributes environmental degradation to Southern poverty (i.e. insufficient capital, outdated technology, lack of expertise, faltering economic growth) rather than Northern affluence, and thereby promotes the notion that the solution lies in the transfer of financial and technical resources from North to South rather than in a radical reassessment of the development model adopted and promoted by the North. This, in turn, entrenches the Northern development model, and results in projects and programs defined by the North’s priorities and by the North’s assessment of the South’s environmental problems. Finally, by portraying environmental degradation as a global problem requiring global solutions, this approach suggests that only international institutions and national governments can address the problem, thereby reducing incentives for local stewardship of natural resources and disempowering local communities. See Gudynas, supra note 21, at 170-77; Vandana Shiva, The Greening of the Global Reach, in GLOBAL ECOLOGY, supra note 20, at 154-56; Nicholas Hildyard, Foxes in Charge of Chickens, in GLOBAL ECOLOGY, supra note 20, at 29-31; Joyceeta Gupta & Matthijs Hisschemoller, Issue Linkage as a Global Strategy Toward Sustainable Development: A Comparative Case Study of Climate Change, in 9 INTERNATIONAL ENVIRONMENTAL AFFAIRS 289, 295 (1997); RICH, supra note 21, at 273-80.


24. For example, Northern environmentalists want the South to protect its tropical forests in order to reduce global warming, preserve resources needed for biotechnological and medical research, and preserve nature’s majesty. See Laferriere, supra note 21, at 97. Several commentators have pointed out that this prescription ignores the root causes of global warming, namely the North’s wasteful and excessive energy consumption, and promotes the North’s appropriation of the forests of the South as pollution sinks and as raw material for the Northern biotechnology industry. See GUHA, supra note 14, at 142; Cheng Zheng-Kang, Equity, Special Considerations, and the Third World, 1
argued that the South is bearing a disproportionate share of the environmental consequences of globalization, and has described this phenomenon as environmental apartheid.\textsuperscript{25}

The allegations of Southern environmentalists have been supported by studies commissioned by the United Nations Development Program,\textsuperscript{26} and are explored below in the context of two specific environmental problems: the export of hazardous wastes and deforestation. These examples are designed to illustrate the North-South distribution of the environmental costs of liberalized trade and to critically assess the notion that environmental protection is a luxury that the South can ill afford.

B. Toxic Colonialism: the Export of Environmental Hazard

The North-South distribution of the environmental consequences of liberalized trade is perhaps most apparent in the context of the export of polluting industries and hazardous wastes from the North to the South. Indeed, the North-South distribution of environmental degradation was explicitly recognized by World Bank Chief Economist Lawrence Summers (subsequently U.S. Treasury Secretary) in a controversial 1991 memorandum outlining why the World Bank should encourage the mi-
igration of dirty industries from the North to the South. Mr. Summers cited three reasons in support of this policy recommendation. First, since the costs of pollution are generally calculated based on the foregone income caused by the premature death and illness of wage earners, the income lost through the death of a worker in a developing country is much less per unit of pollution than the income lost through the death of a worker in a developed country. Second, less contaminated countries, such as African countries, are the logical places to dump pollution since the marginal, incremental costs of pollution are much lower than in heavily polluted places. Finally, the demand for a clean environment is likely to be less in poor countries with higher mortality.

Newspapers throughout the world quoted the Summers memorandum and the outraged responses from environmental organizations. Although Mr. Summers claimed that his comments were not intended as serious policy recommendations, the memorandum served to alert environmentalists to the distributional consequences of neoclassical economic thinking divorced from ethical and social justice considerations.

27. For the text of the memorandum, see Let Them Eat Pollution, THE ECONOMIST, Feb. 8, 1992, at 66.
28. Id.
29. Id.
30. Id.
31. Id.
33. See Greenpeace Calls for Summers Resignation, THE WORLD BANK WATCH, Feb. 17, 1992, at 8 (recounting Greenpeace’s call for the resignation of Summers as the World Bank’s chief economist); Sam Dillon, Waste Dumping in Third World Urged, MIAMI HERALD, Feb. 8, 1992, at 18A (describing environmentalists’ indignant response to the Summers’ memorandum); David Lauter, Environmentalists Flex Muscle Over Key Appointment Transition, L.A. TIMES, Dec. 10, 1992, at A27 (describing how environmentalists lobbied to block the naming of Lawrence Summers as President Clinton’s chief economic advisor); South Americans Shut Door on Toxic Imports, CHRISTIAN SCIENCE MONITOR, March 10, 1992, at 4 (describing the furor the Summers memorandum caused in Latin America, and Argentinian and Brazilian efforts to regulate the hazardous waste trade).
34. See Rich, supra note 21, at 247. Environmental justice advocates in the United States have likewise critiqued utilitarian cost-benefit analysis in environmental decision-making. Under the utilitarian framework, the objective is the economically efficient result that maximizes overall wealth. Since it is more economical to place hazardous activities where land is cheaper and where local residents lack the political clout to successfully oppose the siting, the efficient result will sacrifice the interests of people of color and low-income communities in order to maximize net environmental benefits. See Gauna, supra note 16, at 40-41. As Professor Gauna concludes, “[e]nvironmental justice challenges reside in an ethical dimension beyond utility, and this is a central reason why environmental justice cannot be fully integrated into environmental regulation as it currently exists.” Id. at 46.
The export of hazardous wastes from North to South poses serious risks to developing countries. From 1978 to 1998, per capita waste generation in industrialized countries increased almost threefold. The United Nations Environment Program estimates that approximately 440 million tons of hazardous wastes are generated annually worldwide and that approximately 10 percent of these wastes are exported across international borders.

Hazardous waste generators in the North export wastes to the South because strict environmental regulation and citizen opposition to the location of waste disposal facilities have increased the cost of waste disposal in the North. By contrast, hazardous waste disposal is significantly cheaper in the South due to weak environmental regulation, lax enforcement, and government corruption. Moreover, poverty and debt create powerful incentives for developing countries to accept hazardous waste shipments from other nations in order to earn badly needed foreign exchange.

37. See Jennifer R. Kitt, Waste Exports to the Developing World: A Global Response, 7 Geo. Int’l. Envtl. Law Rev. 485, 488 (1995). In the late 1980’s, waste disposal costs in the North were often as high as $2000 per ton. Id. at 488. By contrast, the cost of waste disposal in Africa during the same period was often as low as $40 per ton. Id.
38. See Ibrahim J. Wani, Poverty, Governance, the Rule of Law, and International Environmentalism: A Critique of the Basel Convention on Hazardous Wastes, 1 Kan. J. L. & Pub. Pol’y 37, 38 (1991). When developing countries have comprehensive environmental regulations, they often lack the administrative infrastructure to ensure proper enforcement. Kitt, supra note 37, at 488-89. In addition, the hazardous waste trade is quite lucrative, thus encouraging government corruption and outright criminal activity. Waste exporters can often reduce their disposal costs and evade regulation by simply bribing individual government officials and concealing the toxic nature of the wastes. Wani, supra at 38. The consequences of ineffective government enforcement are best illustrated by the infamous Koko Island incident in Nigeria, where a resident allowed over 8000 drums of highly toxic waste from Italy to be dumped in his back yard for a mere $100 per month. See Mutombo Mpanya, The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism, in Race and the Incidence of Environmental Hazards: A Time for Discourse 205 (Bunyan Bryant & Paul Mohai eds., 1992). The Nigerian government did not discover the toxicity of the fraudulently labeled waste until the drums began leaking and local residents became ill. SeeWani, supra at 38. Workers involved in the cleanup effort suffered severe chemical burns, nausea, vomiting of blood, partial paralysis, and coma. Id. In addition, the rate of premature birth in Koko increased dramatically. SeeMpanya, supra at 205.
39. See Rebecca A. Kirby, The Basel Convention and the Need for United States Implementation, 24 Ga. J. Int’l & Comp. L. 281, 285 (1994). In Latin America, for example, it is estimated that a third of the population lives below the poverty level. See Quentin Wodon, Poverty and Policy in Latin America and the Caribbean, in World Bank Technical Paper No. 467, 15 (2000). In addition, many developing countries are pressed to concentrate on economic growth as opposed to enforcing environmental laws due to debt accumulated during the 1980s. See Kitt, supra note 37, at 488. “In one case, waste traders offered the West African country of Guinea-Bissau $600 million to import fifteen million tons of industrial waste over five years. This amount represents more than twice the country’s national debt and four times its gross national product.” Id. at 490. Under these circumstances, the lure of the waste trade can be quite powerful. Id.
Notwithstanding attempts to regulate the waste trade by treaty, and despite the decision of many developing countries to impose unilateral bans on the importation of hazardous wastes, the hazardous waste trade continues to flourish. Government officials have intercepted illegal shipments from the United States destined for Ecuador, Guinea, Haiti, Malaysia, Mexico, Panama, and Sri Lanka. East European countries have intercepted thousands of deceptively labeled waste shipments from Western Europe, including shipments labeled as humanitarian aid.  

40. The Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, which entered into force in 1992, allows parties to export hazardous wastes if the importing country has received prior notification of the shipment and has given its written consent. Environmental organizations and many developing countries have criticized the Basel Convention for legitimating rather than prohibiting the hazardous waste trade. Donna Valin, The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal: Should the United States Ratify the Accord? 6 IND. INT’L & COMP. L. REV. 267, 275-76 (1995); Marguerite M. Cusack, International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference? 5 Am. U.J. Int’l L. & Pol’y 393, 420-22 (1989). Indeed, many developing countries have enacted legislation unilaterally banning hazardous waste imports. Kitt, supra note 37, at 507. The members of the Organization of African Unity (OAU) advocated a total ban on the hazardous waste trade during the Basel Convention negotiations, and refused to sign the Basel Convention when it was opened for signature in 1989. Kitt, supra note 37, at 498-99. Instead, the OAU members negotiated the Bamako Convention on the Ban of Import into Africa and the Control of Hazardous Wastes Within Africa, which essentially bans the import of hazardous waste generated outside of Africa. Bamako Convention, 30 I.L.M. 773, 775, 780 (1991); Kenneth D. Hirschi, Possibilities for a Unified International Convention on the Transboundary Shipment of Hazardous Wastes, 10 GEO. INT’L ENV’T’L L. REV 169, 174 (1997). In September 1995, the parties to the Basel Convention adopted an amendment that would prohibit the shipment of hazardous waste from developed countries to developing countries. David A. Wirth, Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes, INT’L ENV’T’L REP., Sept. 4, 1996, at 796. The amendment is not yet in force, and a few key governments, including Australia, Canada, New Zealand, and the United States, continue to object to its provisions. FRENCH, supra note 36, at 74. Moreover, it is unclear whether the Basel Convention’s use of trade restrictions to promote waste minimization and responsible waste management would survive GATT/WTO scrutiny. As explained more fully in Part III of this article, GATT/WTO dispute resolution panels have consistently concluded that trade restrictions designed to promote environmental protection violate GATT obligations. While these determinations have been made in the context of unilateral trade restrictions rather than trade restrictions imposed pursuant to multilateral environmental agreements, these rulings raise significant questions regarding the legality under the GATT/WTO of trade restrictions imposed pursuant to environmental treaties that do not include all GATT contractual parties. See Lakshman D. Gurusswamy, Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?, 7 Minn. J. Global Trade 287, 288, 312-322 (1998); Ryan L. Winter, Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?, 11 Colo. J. Int’l Env’t’l L. & Pol’y 223 (2000); Jill Lynn Nissen, Achieving a Balance Between Trade and the Environment: The Need to Amend the WTO/GATT to Include Multilateral Environmental Agreements, 28 Law and Pol’y in Int’l Bus. 901 (1997). The United States, the world’s largest single producer and exporter of hazardous waste, is not a party to the Basel Convention. Lisa T. Belenky, Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law, 17 BERKELEY J. INT’L L. 95, 120 (1999).


42. See FRENCH, supra note 36, at 74-75.

43. Kitt, supra note 37, at 490-91, 491 n.40.
environmentalists have rightfully denounced this practice as “toxic colonialism.”

However, it is not only the illegal waste trade that imperils the health of people in the South. The expansion of the legal waste trade in recyclable materials is also a significant factor. The export of wastes for recycling is believed to account for 90 percent of the North’s total hazardous waste exports, and can be as harmful as the illegal waste trade. While recycling is generally viewed as environmentally beneficial, many recycling operations in the South are extremely hazardous due to improper waste management and lack of adequate worker protection. For example, millions of used car batteries are shipped from the United States to Brazil, China, India, and South Africa, among others, to be melted down for lead recovery. Without proper protective equipment, workers are exposed to dangerous lead levels, causing headaches, stomach cramps, dizziness, and kidney pains. Prolonged exposure can cause more serious problems, such as kidney damage, reproductive problems, and brain impairment in children. In addition, sham recycling is a growing problem. In many instances, hazardous waste generators label wastes “for recycling” in order to circumvent bans and restrictions on hazardous waste disposal, thereby blurring the line between the legal and illegal hazardous waste trade.

The consequences of improper waste disposal have been devastating for developing countries. Improper waste disposal poses particular


45. See Kitt, supra note 37, at 510. Technological advances have enabled industry to recover valuable materials from scrap metal, including lead, chromium, copper and mercury. In the United States, the export of scrap metal for recycling is estimated to produce annual revenues of over $5 billion. Valin, supra note 40, at 281-82. Indeed, the United States’ failure to become a party to the Basel Convention has been attributed to opposition by the U.S. Chamber of Commerce in the aftermath of the amendment banning North/South trade in hazardous waste, including recyclable waste. Id. at 281-87; Kitt, supra note 37, at 513.

46. See Kitt, supra note 37, at 510.

47. See Valin, supra note 40, at 282; Kitt, supra note 37, at 492 (describing workers at a lead recycling facility in the Philippines disassembling car batteries with their bare hands, in contrast to the full-body protection required in the United States); Garbage in the Backyard, BUSINESS LINE, Sept. 1, 1997, at 18 [hereinafter Garbage] (describing environmental and worker safety risks posed by the mishandling of car batteries and zinc ash exported to India for recycling).

48. FRENCH, supra note 36, at 82.

49. Id.

50. Id.

51. See Kitt, supra note 37, at 510; Garbage, supra note 47, at 18.

52. In 1998, for example, nearly 3000 tons of mercury-contaminated crushed concrete waste from Taiwan was dumped in plastic shipping bags with no warning labels outside the Cambodian port city of Sihanoukville. FRENCH, supra note 36, at 75. Local people scavenging among the
health and safety risks in the South because many developing countries lack the legal and administrative infrastructure to regulate waste disposal. Dumpsites are often located near population centers, and poor people are exposed to hazardous wastes when they scavenge for items to use or sell. In addition, the climate of many developing countries may increase the risk of human exposure to hazardous wastes. For example, heavy rainfall in tropical countries may cause wastes to leach into groundwater, thereby harming people who drink untreated water. The dumping of wastes into rivers kills fish and injures both those individuals who earn their livelihoods through fishing, and those who rely on the rivers for drinking water. Developing countries that receive hazardous wastes often experience soil and groundwater contamination, air pollution and threats to natural resources. While Southern elites can insulate themselves to some extent from the consequences of the waste trade by moving into more pristine communities with better access to clean air and water and uncontaminated land, it is the poor who must suffer the consequences of environmental degradation. Far from being a luxury, environmental protection is necessary to preserve the health, safety and well-being of the Southern poor.

While the South bears the environmental costs of the hazardous waste trade, the North reaps significant economic benefits. The shipment of hazardous wastes from North to South allows developed countries to maintain a level of economic activity that exceeds domestic waste disposal capabilities. The waste trade thereby reduces incentives to minimize waste generation, maintains the illusion of unlimited economic growth, and imposes the costs of industrialization on developing countries without the corresponding benefits of industrial production. Deposited materials initially believed that the crushed concrete might be used as fertilizer and that the bags might be used as floor mats or tarpaulins. After two people died from mercury poisoning, news of the potential danger sparked riots in which one additional person was killed. Four more people died as more than 10,000 panic-stricken citizens fled the city. The World Health Organization has been monitoring the consequences of mercury exposure in Sihanoukville, and has concluded that the wastes may pose serious long-term risk to the health of residents, such as nerve disorders and lung and skin ailments. Id., see also WHO Says Waste Dumped in Cambodia May Pose Long-Term Threat to Health, 22 INT’L ENVT. REP. 24, Jan. 6, 1999, at 24; Jim Puckett & Ion Hernandez, Avoiding the “Logic” of Waste Trade, BUSINESS WORLD, Jan. 24, 2000, at 5.
C. Deforestation: Clearing the Forest for the Trees

The North-South distribution of the environmental consequences of free trade is also well illustrated by the problem of deforestation. Forests harbor more than half of all plant and animal species on earth and provide a range of valuable natural services, including flood control, erosion control and regulation of local and regional rainfall. At the same time, forests are a valuable commercial resource, and the global trade in forest products has climbed steadily from $29 billion in 1961 to $139 billion in 1998. Since 1850, the world has lost one third of its forests, and the rate of loss is rapidly accelerating. Most deforestation has occurred in the temperate regions of the North, but forest loss is now occurring more rapidly in the tropical regions of the South, which contain 60 percent of the world’s remaining forests.

Northern environmentalists have depicted deforestation as a global problem, and have urged the South to protect its tropical forests in order to reduce global warming, preserve resources needed for biotechnological and medical research, and preserve the beauty of nature. However, the North’s depiction of forest preservation as a universal concern of all humankind masks both the underlying causes and the distributional consequences of deforestation.

Commercial logging is the major contributor to global deforestation, and it threatens both the tropical forests of the South and the temperate and boreal forests of Canada, the United States, and Russia. Indeed, while Northern environmentalists have focused on the protection of tropical forests, approximately 80 percent of the documented international timber trade comes from the temperate and boreal forests of the
North. Industrialized countries also account for approximately 80 percent of the value of forest product imports. The North’s demand for forest products and the North’s failure to protect its own forests account for a significant percentage of global deforestation attributable to the international trade in forest products. However, as demand for forest products grows, the South is rapidly increasing its share of global forest product exports. Brazil, Indonesia and Malaysia are now in the ranks of the top 10 forest product exporters.

Notwithstanding the serious levels of deforestation presently being experienced, a controversial proposed agreement championed by the United States at the 1999 WTO Ministerial Conference in Seattle could increase the pressure placed by global commerce on the world’s forests. The proposed agreement, denounced by environmentalists as the “global free logging agreement,” would eliminate both tariff and non-tariff trade barriers on pulp, paper, furniture and other forest products. Such non-

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66. See French, supra note 36, at 20-22. However, these figures reflect only officially reported trade. Much of the international timber trade is illegal, and this illegal trade accounts for a significant amount of the deforestation in Bolivia, Brazil, Cambodia, Cameroon, Ecuador, Georgia, Ghana, Indonesia, Kenya, Laos, Mexico, Paraguay, the Russian Federation, Thailand, and Vietnam. Id. at 21-22.

67. Id. at 20-22.

68. Despite the North’s significant contribution to global deforestation, discussions of global forest policy in preparation for the 1992 United Nations Conference on Environment and Development (UNCED) focused on the protection of tropical rainforests. See Stephen Hopgood, American Foreign Environmental Policy and the Power of the State 179-80 (1998). Developing countries insisted that any forest protection treaty include both tropical and temperate forests, and opposed any commitments that would impinge on their sovereign rights to use forest resources to meet their development needs. Id. Developing countries also sought to link protection of Southern forests to trade and debt issues and to Northern commitments to reduce greenhouse gas emissions. Id. When it became apparent that concessions from the North were not forthcoming, developing countries, led by India and Malaysia, blocked the adoption of any forest convention at UNCED. Id. Instead, the parties negotiated non-binding forest management principles. See id; see also, Ans Kolk, Forests in International Environmental Politics: International Organisations, NGOs and the Brazilian Amazon 159-60 (1996).

69. See French, supra note 36, at 21. The relative contribution of commercial logging to deforestation varies from region to region. In Southeast Asia, logging for the export market is the primary cause of deforestation, and the bulk of the processed forest products are exported to North America. See Heather A. Wolf, Deforestation in Cambodia and Malaysia: The Case for an International Legal Solution, 5 PAC. RIM L. & POL’Y J. 429, 430-31 (1996). Commercial logging for export is also the most significant cause of deforestation in certain parts of Africa. See Kolk, supra note 68, at 69. However, in Central America, cattle ranching for meat exportation is the leading cause of deforestation. Id. 69-70. In Brazil, highway construction, land colonization, hydroelectric and dam construction projects, livestock production and mining, along with commercial logging, are major causes of deforestation. Id. at 72.

70. See French, supra note 36, at 24-25; Merrill Goozner, WTO Awaash in Protests, CHIC. TRIB., Nov. 30, 1999, at N1. See generally, Earthjustice Legal Defense Fund and Northwest Ecosystem Alliance, Our Forests at Risk: the World Trade Organization’s Threat to Forest Protection, at http://www.earthjustice.org/news/pr091499.htm (analyzing and critiquing the proposed agreement). Indeed, the Asia-Pacific Economic Cooperation, a regional trade association, has identified several forest protection policies as potential nontariff trade barriers, including China’s
tariff barriers may include border restrictions to prevent entry of invasive species, export bans to reduce logging, and government procurement and eco-labeling practices designed to promote the use of recycled paper and sustainably harvested wood products. The proposed agreement would accelerate the process of deforestation by promoting the expansion of trade in forest products.

Expanded commercial logging benefits transnational timber corporations and their Southern partners. For many years, timber companies from the North have been conducting commercial logging operations in developing countries. For example, European firms have been cutting down timber in Africa, and Japanese firms joined forces with local companies to clear the forests of Indonesia, Malaysia, and other Southeast Asian countries. With their own forests depleted, timber companies from Indonesia, Malaysia and other Asian countries have, in turn, purchased logging rights in other developing countries, including Brazil, Cameroon, Guyana, Papua New Guinea, and Suriname. Transnational timber corporations have also joined forces with local investors to set up related wood-products operations, such as sawmills and pulp and paper operations, that utilize locally supplied wood.

A significant factor promoting over-exploitation of forests in the South is debt. The World Bank and the International Monetary Fund have accelerated deforestation in the South by promoting export-led structural adjustment policies designed to ensure loan repayment. These policies have resulted in the unsustainable export of forest products and in the clearing of tropical forests to produce export commodities such as coffee, cacao, and cotton. Declining terms of trade for primary commodities promote over-exploitation of forests in the South. In the aftermath of catastrophic flooding of the Yangtze basin, a logging ban was imposed.

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72 See French, supra note 36, at 25.

73 See French, supra note 36, at 22-24.

74 See French, supra note 36, at 22-24; Edward Goldsmith, Global Trade and the Environment, in GLOBAL ECONOMY, supra note 3, at 82.

75 See French, supra note 36, at 24.

76 See id.

77 Susan George, The Debt Boomerang: How Third World Debt Harms Us All 1-4 (1992); Robert Costanza, et al., An Introduction to Ecological Economics 235 (1997); Peter & Susan Calvert, supra note 5, at 80; Gudynas, supra note 24, at 109; Rich, supra note 21, at 188; French, supra note 36, at 130-31. Export-oriented development strategies have both environmental and social justice consequences. In addition to promoting deforestation, such development strategies produce a shift from the growth of subsistence crops to the production of commodities for the international market, such as coffee, tobacco, livestock and timber. Peter & Susan Calvert, supra note 5, at 179-80; Gudynas, supra note 24, at 109. The shift to export commodities is typically accompanied by the displacement of small farmers by modern agribusiness, which in turn destroys traditional social structures and results in migration to the cities. George,
Commodities have caused developing countries to attempt to increase their output by clearing additional forests as well as using existing agricultural lands more intensively. The World Bank and regional development banks have also funded energy, mining, resettlement and transportation projects in the South that have contributed greatly to deforestation, and have resulted in the massive displacement of indigenous and local people from their traditional lands. Mining, energy development and related activities represent the second largest threat to forests after logging.

While transnational corporations and Southern timber, mining, and agribusiness companies reap the benefits of deforestation, the costs are often borne by the Southern poor. The commercial exploitation of tropical forests has had significant social and economic consequences. Commercial logging operations as well as mining, ranching and agribusiness, displace indigenous and local communities, destroying their social structure and economic base, driving them to survive on smaller parcels of

supra at 3; GUDYNAS, supra note 24, at 109-11. This shift also causes Southern countries to rely on food imports to satisfy domestic consumption, and increases vulnerability to famine since staple foodstuffs are no longer produced in sufficient quantities to satisfy local demand. PETER & SUSAN CALVERT, supra note 5, at 179-81. The WTO’s Agreement on Agriculture exacerbates food insecurity in the South by requiring developing countries to phase out agricultural import restrictions designed to protect local farmers from being displaced by cheap grain imported from the North. French, supra note 36, at 64-65; Walden Bello, The Great Euro-American Agriculture Dumping Machine, Bus. World, Sept. 2, 1999, at 1.

Commodity prices have plummeted over time as debtor countries have flooded the market with raw materials. See GEORGE, supra note 77, at 2. Because commodity prices have fallen relative to the prices of manufactured goods, the purchasing power of developing countries has declined and their debt load has increased. As a result of mounting debt, the South is currently transferring vast amounts of wealth to the North in debt service (estimated at $40 billion per year since 1985), and is increasing its natural resource exploitation in order to earn the hard currency to make these payments. Increased natural resource exploitation accelerates environmental degradation and gluts the market with raw materials, resulting in a vicious cycle of declining commodity prices, over-exploitation of resources and growing debt. Stuart L. Hart, Beyond Greening: Strategies for a Sustainable World, HARV. BUS. REV., Jan.-Feb. 1997, at 66.

See Kibel, supra note 65, at 768-69. For a detailed description and critique of World Bank-financed development projects and their environmental and social justice consequences, see generally RICH, supra note 21; see also Nicole Wendt, 50th Anniversary of the World Bank and the IMF Prompts Criticisms, 9 TRANSNAT’L L. & CONTEMP. PROBS. 149 (1999). For a description of Brazil’s widely reviled World Bank-financed land colonization scheme designed to alleviate pressure for land reform, see PETER & SUSAN CALVERT, supra note 5, at 126-29. Deforestation is the product of both internal forces, such as population pressure and national development policies, and external forces, such as export-oriented development strategies designed to repay international debt and satisfy the demand for timber and other commodities in distant export markets. In the interest of clarity and brevity, this article does not attempt to address the variety of internal forces that promote deforestation in developing countries.

80. See FRENCH, supra note 36, at 26. In addition to disturbing ecosystems, mining activities are particularly harmful to local and indigenous communities, destroying forests and fields used for farming and grazing, and contaminating drinking water supplies with toxic chemicals. Mining and oil and gas firms are increasingly active in the South, and industrial countries are the main consumers of minerals. Id.
land, and ultimately creating an exodus to the cities. Deforestation produces flooding and soil erosion, and harms both subsistence and commercial farmers and fishermen as rivers fill with silt from the erosion of terraces and hillsides. Deforestation has been at the root of catastrophic events in Asia, Africa and Latin America that have caused massive injury and economic dislocation. For example, deforestation was a major cause of the Ethiopian droughts and famines of the 1970s and 1980s. Deliberate burning of forests for palm oil and pulpwood plantations was the cause of the Indonesian wildfires that blanketed Indonesia, Singapore, Malaysia, Southern Thailand, and part of the Philippines in smoke in 1997 and 1998, and forced some 20 million people to breathe contaminated air for prolonged periods. Finally, the massive clearing of the Central American rainforests for cattle ranching in the 1960s and 1970s made Honduras and Nicaragua particularly vulnerable to the devastating floods caused by Hurricane Mitch in 1998. These floods allegedly set back development in Honduras and Nicaragua by 30 years. Thus, deforestation affects not only those who live on or near tropical forests and rely on them directly for their survival, but also those who rely on the services provided by forest ecosystems, such as erosion control, flood control and regulation of rainfall.

Deforestation also has global consequences, and the costs and benefits are likewise unevenly distributed between North and South. Deforestation degrades the global environment through loss of biodiversity, release of greenhouse gases and loss of carbon sinks. The North is responsible for 90 percent of the anthropogenic greenhouse gas emitted.

81. See id. at 20; Whose Common Future: Reclaiming the Commons, supra note 21, at 40-45, 100-104; GEORGE, supra note 77, at 4. For a description of the environmental degradation and massive displacement of local and indigenous people caused by World Bank-financed infrastructure projects, see generally, RICH, supra note 21. For a description of the displacement of local and indigenous people in India resulting from dam projects, see MADHAV GADGIL & RAMACHANDRA GUHA, ECOLOGY AND EQUITY: THE USE AND ABUSE OF NATURE IN CONTEMPORARY INDIA 61-76 (1995). See also, Soren Hvalkof, Outrage in Rubber and Oil: Extractivism, Indigenous Peoples, and Justice in the Upper Amazon, in PEOPLE, PLANTS & JUSTICE: THE POLITICS OF NATURE CONSERVATION 83-116 (Charles Zerner ed. 2000) (describing the regime of terror imposed on indigenous people in Ecuador, Peru and Bolivia during the last century by extractive industries).
82. See Kibel, supra note 65, at 747-49.
87. See Myers, supra note 60, at 221-26.
during the past 150 years, and it has, therefore, benefited from its ability to use the global atmosphere as a sink for the harmful by-products of industrialization. However, Southern countries will bear a disproportionate share of the environmental consequences of global warming, including droughts, floods, rise in sea level, and more frequent storms and hurricanes, due to their more vulnerable geographies and economies. Loss of biodiversity will also have disproportionate impacts in the South. Tropical forests contain most of the world’s biodiversity, providing habitat for 70 percent of all known species. For the North, loss of biodiversity constitutes foregone opportunities for biotechnology, agribusiness and pharmaceutical industries to commercially exploit the valuable raw materials of the South. For local and indigenous communities in the South, biodiversity represents food, medicine, clothing, shelter, and cultural integrity. Conserving biodiversity is essential to the physical and cultural survival of the more than 500 million people who depend on

89. See Harris, supra note 88, at 30; Sachs, supra note 88, at 72-73; Meyer-Abich, supra note 24, at 78-81. The South will be disproportionately affected by global warming for several reasons. First, many developing countries are located in parts of the world that are already subject to extreme climate conditions (such as drought in many parts of Africa or floods and hurricanes in Bangladesh and the Philippines), and global warming will merely exacerbate the problem. Second, global warming will have particularly negative consequences for agriculture, and the countries most affected will be those whose gross national product and export revenues are most closely tied to agricultural production. Third, rising sea levels threaten the very existence of certain low-lying island states, such as Barbados and the Maldives, and threaten countries whose most fertile regions are in river valleys and coastal areas, such as Egypt, Bangladesh and Senegal. Finally, many developing countries lack the technical and financial resources to protect themselves from the impacts of global warming (by strengthening dikes and levees, for example) or to recover from devastating droughts, floods, and hurricanes. See Sachs, supra note 88, at 72-73.
90. See Sachs, supra note 88, at 78; Gudynas, supra note 24, at 73.
91. See Sachs, supra note 88, at 78; Shiva, supra note 24, at 120-21.
92. See Naomi Roht-Arriaza, Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities, 17 Mich. J. Int’l L. 919, 921-933 (1996). Local and indigenous communities in the South have long used plants native to their surroundings in order to satisfy a variety of needs, including food, medicine, shelter, and clothing. Id. at 921. While Western researchers breed plants for maximum commercial yield, indigenous and local farmers, who produce at least in part for their own consumption, strive to maintain crop diversity, including crops suitable for food, forage, medicine and shelter. Id. at 934. Indigenous and traditional peoples often transmit their knowledge of the medicinal as well as other properties and uses of plants, animals, and soils through stories and songs. Id. at 932. Indeed, indigenous and traditional peoples view the stories, songs and scientific knowledge, as well as the landscape and naturally occurring species of plants and animals with which a people have long been associated, as an indivisible manifestation of their cultural heritage and as essential to the preservation of cultural integrity. Id. at 930. For local and indigenous communities, conserving biodiversity means conserving the resources needed for economic and cultural survival. See Shiva, supra note 24, at 120-21. This is in sharp contrast to the Northern view of biodiversity as raw material to be altered and manipulated for commercial advantage. Id.
tropical forests for their well-being, and includes fighting to protect rights to land, natural resources and cultural knowledge.\(^93\)

As the hazardous waste and deforestation examples illustrate, the current organization of the global economy enables the North to reap the benefits of expanded trade while imposing the environmental costs on the South. In general, it is the Southern poor who bear the consequences of environmental degradation and whose health, safety and livelihoods are thereby jeopardized. Contrary to the myth that environmental protection is a luxury that the South can ill afford, environmental protection is necessary to the preservation of the natural resource base upon which the population of the South relies for its survival. It is therefore not surprising that Southern environmental movements are rooted in material conflicts and in the struggle for social justice.\(^94\)

\(^93\). See Sachs, supra note 88, at 78; Shiva, supra note 24, at 120-21; see also Mara Kimmel Hoyt, Breaking the Trade Barrier: Common Property Solutions to Tropical Deforestation, 5 Minn. J. Global Trade 195, 197 (1996). While a detailed analysis of the causes of biodiversity loss is beyond the scope of this essay, a brief outline of its historic evolution sheds light on its relationship to the problem of deforestation and to the question of social justice. Southern environmentalists have acknowledged that deforestation is a significant contributor to loss of biodiversity, but have accused the North of neglecting the primary cause of biodiversity loss, namely the deliberate replacement of naturally diverse ecosystems by monocultures through development projects spearheaded by the North. See Vandana Shiva, Monocultures of the Mind 83-84 (1993); Gudynas, supra note 24, at 102. Southern environmentalists have argued that this process began during the colonial era with the displacement of Southern biodiversity by plantation economies (spices, sugar, coffee, bananas, rubber, and cotton) designed to transfer wealth to the imperial powers. See Shiva, supra at 78-79; see also Gudynas, supra note 24, at 15-26. The process continued in the post-colonial era with the large-scale introduction of high yield monocultures in the South during the so-called Green Revolution. As a result of the Green Revolution, developing countries abandoned the cultivation of thousands of crops in favor of wheat, rice and other crops from a very narrow genetic base, and became dependent on Northern pesticides, fertilizers, and seeds. See Shiva, supra at 66-68, 79-80. Most recently, Northern pharmaceutical and agribusiness corporations have begun to realize the potential commercial value of the biodiversity that is being lost in the South, and have been actively collecting germ plasma for future seed development and plants, bacteria, algae, fungi, corals, sponges and other organisms as possible sources for new medicines. See id. at 80-82. Northern companies have patented plant and seed varieties and knowledge derived from indigenous and local communities with little or no compensation to those communities. Roht-Arriaza, supra note 92, at 924-26. The WTO’s agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) facilitates the North’s appropriation of these resources by requiring developing countries to adopt intellectual property laws patterned on those of the North even if these conflict with existing national laws and with the traditions of many agricultural and indigenous communities. See Lakshmi Sarma, Biopiracy: Twentieth Century Imperialism in the Form of International Agreements, 13 Temp. Int’l & Comp. L.J. 107, 123-27 (1999). The consequence is that developing countries can have their genetic resources appropriated for free, patented by Northern corporations, and sold back at exorbitant prices as medicine or “improved” seeds, resulting in a continuing transfer of wealth from South to North. Shiva, supra at 91; Gudynas, supra note 24, at 81-82.

\(^94\). See Guha, supra note 14, at 119-24. The relationship between social justice and environmental concerns is well illustrated by a petition of December 1990, addressed to the President of Mexico by a community of Nahuatl Indians threatened with displacement by the San Juan dam on the Balsas river:

Mr. President, we publicly and collectively declare our rejection of the San Juan Telecingo Dam because we cannot allow this project to destroy the economy, the historical and
The hazardous waste and deforestation examples also illustrate how liberalized trade under the GATT/WTO regime exacerbates pollution and natural resource depletion. By removing both tariff and non-tariff barriers to trade in forest products, the “global free logging agreement,” advocated by the United States at the WTO Ministerial Conference in Seattle, would expand global commerce in forest products and accelerate deforestation. With respect to the hazardous waste trade, the GATT/WTO dispute panel and appellate rulings discussed in Part III of this article raise serious questions about whether trade restrictions imposed under environmental treaties to promote waste minimization and curb the hazardous waste trade would survive a WTO challenge. Finally, the GATT/WTO rulings threaten to undermine environmental quality by creating uncertainty as to whether domestic legislation to protect the local or global environment would run afoul of WTO requirements. Countries might very well forego vigorous environmental protection measures (including taxes and trade restrictions) in order to avoid becoming embroiled in lengthy and protracted trade disputes.

GUHA, supra note 14, at 105. For an overview of environmental problems confronting the South and how these problems destroy the natural resource base needed to improve long-term living conditions, see C. Russell H. Shearer, International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation, 7 TUL. ENVTL. L.J. 391, 392-410 (1994).

95. See supra notes 71-72 and accompanying text for a discussion of the proposed agreement with respect to forest products.

96. See supra note 40 for a discussion of the Basel and Bamako Conventions on the transboundary movement of hazardous wastes and of the relationship between these treaties and the WTO regime.


98. See Charnowitz, supra note 97, at 539.
II. THE NORTH: GLOBAL LEADER OR GLOBAL LOOTER?

The second myth underlying the media image of environmental imperialism is that the North is a global leader in environmental protection. It follows from this myth that the North’s efforts to incorporate environmental protection into the international trade regime are designed to protect the global ecosystem by elevating the environmental standards of developing countries. While the North in general and the United States in particular have made significant progress in the protection of the domestic environment during the last three decades, the North’s role with respect to the global environment is far more problematic.

The international community has long identified the profligate consumption patterns of the North as the primary cause of global environmental degradation. Indeed, Gro Harlem Brundtland, former Prime Minister of Norway, and Chair of the World Commission on Environment and Development, whose work popularized the term “sustainable development,” recognized that “[i]t is simply impossible for the world as a whole to sustain a Western level of consumption for all. In fact, if seven billion people were to consume as much energy and resources as we do in the West today, we would need ten worlds, not one, to satisfy all our needs.”

The North, with 20 percent of the world’s population, currently consumes a disproportionate share of the world’s resources, including 85 percent of the world’s timber, 75 percent of its metals, 70 percent of its

99. Beginning with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370d (1989), the United States adopted a far-reaching regulatory program to control air and water pollution, regulate toxic substances and hazardous waste, protect endangered species, and require federal agencies to consider the environmental impacts of their actions. See ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION; LAW, SCIENCE, AND POLICY 105-13 (3d ed. 2000). In general, air and water quality have improved as a result of this regulatory program, and industry has become more efficient and less polluting per unit of output. See James Salzman, Sustainable Consumption and the Law, 27 ENVTL L. 1243, 1244-45 (1997). But see PERCIVAL, supra at 1204-26 (providing a more pessimistic account of the failures and successes of U.S. environmental regulation). However, many of these statutes address the symptoms of environmental degradation (pollution) rather than tackling the source: excessive energy and resource consumption. See Salzman, supra at 1244-45. The global implications of the failure to regulate consumption are explored in Part II of this article.

100. At the 1992 United Nations Conference on Environment and Development (Earth Summit), 178 countries endorsed the statement that “[t]he major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production . . . . Developed countries should take the lead in achieving sustainable consumption patterns . . . .” Report of the United Nations Conference on Environment and Development, Vol. I, at 37-38, U.N. Doc. A/Conf.151/26 (1992). Agenda 21, the consensus strategy adopted at the Earth Summit to achieve sustainable development, also acknowledges the primary responsibility of the developed countries to reduce the environmental impacts of consumption. Id. at 38, Vol. IV, at 32, ¶ 4.3; 33 ¶ 4.5; and 34, ¶ 4.8.

energy, and 60 percent of its food.\textsuperscript{102} The United States has the highest per capita consumption levels in the world, but consumption rates in Japan and Western Europe are only slightly less.\textsuperscript{103}

Environmentalists have pointed out that the North’s consumption patterns can only be maintained through the appropriation of the natural resources (timber, petroleum, metals, agricultural commodities, biodiversity) and waste sinks (forests, waste disposal facilities) of the South.\textsuperscript{104} A team of researchers at the Center for Sustainability Studies in Xalapa, Mexico, developed what they call the “ecological footprint” of 52 nations. This term refers to the amount of biologically productive land and water (“natural capital”) that each country must either possess or appropriate in order to maintain its level of consumption.\textsuperscript{105} The researchers found that the Netherlands, United States, Belgium, Germany, Switzerland, United Kingdom, Japan, and Israel were among the highest per capita importers of natural capital.\textsuperscript{106} In other words, these countries utilized far more natural capital (both natural resources and waste sinks) than they possessed. The Netherlands, for example, requires a land mass over 17 times its size in order to satisfy the national demand for energy, food and forest products.\textsuperscript{107}

The ability of the North to internalize the benefits of economic growth while shifting the environmental externalities to the South, and to the global commons, has masked the limits of the North’s growth-oriented development model.\textsuperscript{108} Proponents of the North’s development model argue that free trade promotes economic growth and thereby provides developing countries with the financial means to increase expenditures on environmental protection.\textsuperscript{109} This model assumes that economic

\textsuperscript{104} See Gudynas, supra note 24, at 204-05; see also French, supra note 36, at 9-10; Sachs, supra note 5, at 168-69.
\textsuperscript{105} See Mathis Wackernagel et al., National Natural Capital Accounting with the Ecological Footprint Concept, 29 Ecological Econ. 375, 376-77 (1999).
\textsuperscript{106} Id. at 386.
\textsuperscript{108} See Sachs, supra note 88, at 70-80; see also Costanza, supra note 77, at 173-74.
growth is a positive-sum game and that it is possible for all countries to achieve the level of development of the North. However, as the ecological footprint study illustrates, natural resources are finite, and over-consumption by one country requires under-consumption by another. The North is living far beyond its ecological means, and the South cannot “catch up” without exceeding the limits of the global ecosystem. Because it is impossible for both North and South to be net importers of ecological goods and services, economic growth can no longer be viewed as the solution to the problem of poverty and environmental degradation in the South. Ecological economists have warned that the global economy is rapidly approaching the limits of the global ecosystem’s ability to...
sustain continued economic expansion. Far from lifting all boats, the rising tide of globalization threatens to burst through the banks.

Globalization has obscured the fact that the ecological limits of local ecosystems have already been exceeded because production and consumption are physically separated. For example, when Maine cod fisheries went into decline due to over-fishing, consumers remained blissfully unaware of the problem because they could purchase Russian cod. When Costa Rican forests were cleared, Costa Rica simply imported logs from elsewhere to keep its sawmills operating. The separation between production and consumption creates disincentives to the conservation of local resources and the inability to assess or manage distant sources of supply. This problem is exacerbated by the failure of commodity prices to incorporate ecological damage and human health costs incurred in the production process. As a result, all countries maximize global resource exploitation, which increases total economic production and accelerates the depletion of natural resources.

Free trade facilitates the North’s over-consumption of the world’s resources. Indeed, the term “environmental imperialism,” the traditional meaning of which is discussed below, aptly describes the North’s systematic appropriation of the South’s natural resources and waste sinks. Free trade also obscures the degree to which local ecological limits have been surpassed, and perpetuates the myth of economic growth as the solution to global inequality and environmental degradation. Far from being global leaders in environmental protection, industrialized countries are more accurately described as global looters.

114. See GUDYNAS, supra note 24, at 205; COSTANZA, supra note 77, at 6-13; Herman Daly, Free Trade: The Perils of Deregulation, in GLOBAL ECONOMY, supra note 3, at 234-35. The United Nations Development Program (UNDP) has likewise recognized that excessive resource consumption threatens to exceed the “outer limits” of what the planet can support. See United Nations Development Program, supra note 26, at 3. Specifically, UNDP identifies the growing deterioration of renewable resources (water, soil, forests, fish, biodiversity), and the growing inability of the planet’s waste sinks to absorb ever-increasing amounts of waste as the primary threats to the global ecosystem. Id.
115. Wolfgang Sachs, the German environmentalist, developed this metaphor. See SACHS, supra note 5, at 168.
116. See COSTANZA, supra note 77, at 164-67; SACHS, supra note 88, at 70.
117. See ATHANASIIOU, supra note 102, at 190.
118. See COSTANZA, supra note 77, at 86.
119. SACHS, supra note 88, at 70; Daly, supra note 114, at 237; COSTANZA, supra note 77, at 165.
120. See JOAN MARTINEZ ALIER & JORDI ROCA JUSMET, ECONOMIA ECOLOGICA Y POLITICA AMBIENTAL 420-21 (2000).
121. See MATHIS WACKERNAGEL & WILLIAM E. REES, OUR ECOLOGICAL FOOTPRINT: REDUCING HUMAN IMPACT ON THE EARTH 21, 130-32 (1996); Daly, supra note 114, at 237; COSTANZA, supra note 77, at 173-74.
III. BEYOND ENVIRONMENTAL IMPERIALISM

Despite the fact that the South bears a disproportionate share of the environmental consequences of trade liberalization, much of the opposition to the integration of environmental protection into the international trade regime has come from developing countries. As explained more fully below, this opposition is due to the North’s historic use of trade sanctions to impose its environmental preferences on the South while neglecting to address the North’s far more ecologically damaging behavior. This Part provides the background to the trade/environment debate, describes some of the proposals advanced by the North to reconcile free trade and environmental protection, outlines the objections of developing countries, and proposes alternative approaches.

A. Unilateral Trade Restrictions: The Empire’s New Clothes?

The United States has long used trade sanctions to compel other nations to implement environmental conservation measures. However, the legality and legitimacy of unilateral trade restrictions to protect the environment did not become the subject of intense international debate until 1991, when a GATT dispute resolution panel found that a U.S. embargo on Mexican tuna caught with dolphin-killing “purse seine” nets violated the GATT. The tuna/dolphin decision exposed the previously

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122. See e.g., ESTY, supra note 10, at 181-192.
123. See Steve Charnovitz, Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices, 9 AM. U. INT’L L. & POL’Y 751, 758 (1994). The most well-known statute authorizing environmental trade sanctions is the 1971 Pelly Amendment, which authorizes sanctions against any country that diminishes the effectiveness of any international fishery or wildlife conservation program for endangered or threatened species. 22 U.S.C. § 1978 (2000). The United States has imposed trade sanctions under the Pelly Amendment on only one occasion, but has threatened to do so on at least twenty occasions. In general, the mere threat of sanctions has been sufficient to cause other nations to change their behavior. See Charnovitz, supra at 772; Joseph Robert Berger, Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case, 24 COLUM. J. ENVTL L. 355, 394-395 (1999).
124. For purposes of the analysis that follows, a “unilateral trade restriction” is a trade restrictive measure, such as an import quota, an export quota, an embargo, or a tariff, tax or duty that is not taken pursuant to an international treaty obligation.
125. See ESTY, supra note 10, at 29-32. See GATT DISPUTE SETTLEMENT PANEL REPORT ON UNITED STATES RESTRICTIONS ON IMPORTS OF TUNA, Aug. 16, 1991, 30 I.L.M. 1594 (1991) [hereinafter, Tuna/Dolphin I]. The GATT panel found that the United States violated GATT Article XI, which prohibits both import bans and export bans. Id., at ¶ 7.1(a). The panel also found that the United States violated GATT Article III’s “national treatment” requirement by discriminating against “like products” from another country based on how they are produced. Id., at ¶ 5.15. In other words, the Tuna/Dolphin I case stands for the proposition that the GATT does not permit discrimination between products with similar physical characteristics on the basis of the production process. See ESTY, supra note 10, at 30. Furthermore, the GATT panel found that the trade measures did not fall within GATT Article XX’s environmental exceptions. The panel agreed with Mexico that the GATT Article XX exceptions do not apply to trade restrictions adopted by countries to protect natural resources outside their jurisdiction. Tuna/Dolphin I., at ¶¶ 5.27, 5.31, and 5.32. Moreover, even if trade measures to protect extra-jurisdictional resources were permitted, the United
obscure link between trade and the environment, and represented the first volley in a long battle over the legality under GATT/WTO of unilateral trade restrictions designed to protect the environment. Three years after the 1991 tuna/dolphin decision, the European Economic Community challenged the United States’ embargo on tuna exports from intermediary nations that failed to certify that the tuna had been caught with dolphin-safe nets. In 1994, a GATT dispute resolution panel once again ruled against the United States. In 1996, the WTO Appellate Body determined that the U.S. violated the GATT by imposing discriminatory pollution standards on gasoline imports from Venezuela and Brazil. Finally, in 1998, the WTO Appellate Body found that the United States

States had failed to demonstrate that it had exhausted less trade-restrictive options to achieve this objective, such as the negotiation of a multilateral agreement. Even though Mexico did not have the panel’s decision adopted by the GATT Council (a necessary step for the decision to have binding effect under the pre-Uruguay Round GATT rules), the panel’s decision produced heated debate between environmentalists and advocates of free trade. See Esty, supra note 10, at 29-32.

126. See Esty, supra note 10, at 27-32.

127. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter, Tuna/Dolphin II]. Because Mexico did not ask the GATT Council to adopt the Tuna/Dolphin I decision, the European Economic Community was obliged to bring its own case in order to challenge the “secondary embargo” on countries that purchased tuna from an embargoed country. See Esty, supra note 10, at 31. The Tuna/Dolphin II panel rejected the notion that the GATT Article XX environmental exceptions apply only to natural resources within the jurisdiction of the country adopting the trade restriction. Tuna/Dolphin II, at ¶ 5.20. However, the panel found that the United States’ embargo did not fall within the GATT Article XX environmental exceptions because the United States had failed to demonstrate that less trade-restrictive alternatives were unavailable, and because the embargo was primarily designed to force other countries to change conservation policies within their own jurisdictions. Id., at ¶¶ 5.26, 5.35, 5.39, and 5.42.

128. See WTO Report of the Appellate Body: United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996) [hereinafter WTO Appellate Report: Reformulated Gasoline]. The case involved regulations promulgated by the U.S. Environmental Protection Agency (EPA) to implement a provision of the Clean Air Act requiring oil refiners to reduce a variety of contaminants in their gasoline from a baseline determined by the composition of the gasoline in 1990. See 42 U.S.C. § 7401 (2000); see also 40 C.F.R. § 80.91(a)(i) (2000). While U.S. refiners were permitted to use their own data from 1990 to establish the baseline, most foreign refiners were required to use the 1990 U.S. industry average due to EPA concerns about the availability and reliability of foreign data. See WTO Panel Report: United States Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, 296 (1996) [hereinafter, WTO Panel Report: Reformulated Gasoline]; see also 40 C.F.R. § 80.91(a)(i). A WTO dispute resolution panel found that the regulation violated GATT Article III’s “national treatment” requirement and did not satisfy the GATT Article XX environmental exceptions. WTO Panel Report: Reformulated Gasoline, supra at ¶¶ 8.1-8.2. The Appellate Body found that the regulation did meet one of the GATT Article XX’s environmental exceptions, but violated the Article XX chapeau (preamble), which prohibits “arbitrary” or “unjustified” discrimination or a “disguised restriction” of free trade. See WTO Appellate Report, Reformulated Gasoline, supra at 618-33. The Appellate Body found that the regulation violated the Article XX chapeau because the EPA failed to adequately consider ways of mitigating the administrative and enforcement difficulties associated with allowing individual baselines for foreign refiners, and because the EPA considered the cost of various regulatory options to domestic refiners, but not to foreign refiners. Id. at 631-33.
violated the GATT by imposing an embargo on shrimp from Pakistan, India, Thailand, and Malaysia on the grounds that these countries failed to require shrimp trawlers to install devices to protect endangered sea turtles. 129

The tuna/dolphin, shrimp/turtle and reformulated gasoline cases brought to a head the conflict between free trade and environmental protection, and the divergent views of Northern environmentalists and developing countries with respect to the use of unilateral trade restrictions to promote environmental conservation. In general, Northern environmentalists defended the use of unilateral trade restrictions as an appropriate mechanism to promote the internalization of environmental costs, and denounced the WTO/GATT decisions. 130 Southern environmentalists and developing countries condemned the North’s unilateral imposition of its environmental preferences on the South. 131

Northern environmentalists argue that incorporating the costs of resource depletion and pollution into product prices can mitigate many of the environmental harms arising from liberalized trade. 132 They claim

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129. See WTO REPORT OF THE APPELLATE BODY: UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, 38 I.L.M. 118 (1999) [hereinafter, WTO APPELLATE REPORT: SHRIMP]. A WTO dispute resolution panel issued a ruling in 1998 finding that the embargo violated GATT Article XI’s prohibition on quantitative trade restrictions and was not justified by the exceptions in GATT Article XX. See WTO PANEL REPORT: UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, 37 I.L.M. 832 (1998), ¶ 7.65. The Appellate Body ruled against the United States, but its reasoning departed from earlier WTO/GATT interpretations. The Appellate Body found that the Article XX exceptions did apply to unilateral trade measures designed to influence the conservation policies of other countries, and concluded that the shrimp embargo fell within one of the GATT Article XX exceptions. WTO APPELLATE REPORT: SHRIMP, supra at 121-47. However, the Appellate Body found that the U.S. had applied the embargo in a discriminatory fashion in violation of the Article XX chapeau. Id. at 161-84. For an analysis of the evolving GATT/WTO jurisprudence on unilateral trade restrictions, see Guruswamy, supra note 11; Carrie Wofford, A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT, 24 Harv. Envtl. L. Rev. 563, 565 (2000); see also Berger, supra note 123; Bruce Neuling, The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate, 22 LOY. L.A. INT’L & COMP. L. REV. 1 (1999).


131. See ESTY, supra note 10, at 181-88; See also Andrea C. Durbin, Trade and the Environment: The North-South Divide, 37 ENVIRONMENT 16, 18-19 (1995). The tuna/dolphin dispute is a prime example of conflicting North-South priorities and perspectives. Developing countries view the United States’ interest in preserving the dolphins as irrational since dolphins are not endangered. From the perspective of developing countries, tuna fishing with purse seine nets is an efficient means of producing low-cost protein for the poor and an important source of export earnings. See ESTY, supra at 188. Southern environmentalists denounced the killing of dolphins as cruel and unnecessary while pointing out that the U.S. systematically neglects to internalize the environmental impacts of other imports, such as Mexican petroleum products. MARTINEZ ALIER & JUSMET, supra note 120, at 433.

132. See ESTY, supra note 10, at 65-66; Hal Kane, Managing Through Prices, Managing Despite Prices, in TRADE AND THE ENVIRONMENT, supra note 13, at 63-67; Robert Repetto,
that goods produced under inadequate environmental standards should be viewed as goods being sold for less than their true cost of production—a phenomenon they call environmental dumping. Northern environmentalists contend that it is appropriate for governments to respond to environmental dumping by imposing unilateral trade restrictions, such as embargoes, or by equalizing the terms of trade through “countervailing duties” or “antidumping tariffs” on imports from nations with lower environmental standards. Northern environmentalists have also advocated upward harmonization of environmental standards across jurisdictions through multilateral agreements as a more long-term approach to the problem of environmental dumping.

Developing countries have expressed concern that Northern environmentalists’ demands for incorporation of environmental costs in product prices are merely disguised protectionist measures designed to maintain the economic dominance of the North by limiting the South’s access to Northern markets.

Developing countries have condemned unilateral trade restrictions, eco-duties, and international agreements designed to harmonize environmental standards as intrusions on their sovereign resource management and pollution control decisions. Many developing countries view

Complementarities between Trade and Environmental Policies, in TRADE AND THE ENVIRONMENT, supra note 13, at 242-43; COSTANZA, supra note 77, at 167-68.


134. See, e.g., Daly, supra note 114, at 233; Bhagwati, supra note 13, at 166; Charles Arden-Clarke, An Action Agenda for Trade Policy Reform to Support Sustainable Development: A United Nations Conference on Environment and Development Follow-up, in TRADE AND THE ENVIRONMENT, supra note 13, at 76-81; see generally Howard F. Chang, An Economic Analysis of Trade Measures to Protect the Global Environment, 83 GEO. L.J. 2131 (1995) (defending the use of unilateral trade restrictions to protect the global environment); Joshua R. Floum, Exporting Environmentalism: Thoughts on the Use of Market Power to Improve the Environment in the “Free Trade” Era, 35 SANTA CLARA L. REV. 1199 (1995) (arguing that unilateral trade measures such as embargoes and tariffs have proven effective to influence the environmental behavior of developing nations). For a list of U.S. legislative proposals designed to address “environmental dumping,” see Hudec, supra note 11, at 3-6.

135. See Bhagwati, supra note 13, at 166-68; Daniel C. Esty & Damien Geradin, Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements, 21 HARV. ENVNL. L. REV. 265, 282-93 (1997).


137. See ESTY, supra note 10, at 182; Durbin, supra note 131, at 18. Developing countries and several prominent economists have condemned unilateral trade restrictions as an imposition of the North’s ethical preferences on the South, and as a denial of the sovereign right to establish environmental standards in accordance with local conditions and domestic policy preferences. See
the North’s attempt to impose its pollution control and resource conservation standards on the South as paternalistic and hypocritical given the North’s historic and ongoing over-exploitation of the planet’s resources.\(^\text{138}\) Furthermore, the North tends to prioritize longer-term and more global issues, such as ozone depletion, climate change, and wildlife conservation, and to neglect issues of immediate, local concern to developing countries, such as basic environmental infrastructure (water systems and sewers), the dumping of outmoded technologies and banned products in developing countries (such as pesticides), the hazardous waste trade, poverty, food security and desertification.\(^\text{139}\) Confronted with environmental demands from the North that reflect Northern interests and priorities, many developing countries have denounced the North’s use of unilateral trade restrictions to promote environmental protection as environmental imperialism.\(^\text{140}\)

There are three fundamental flaws in the North’s proposals to reconcile free trade and environmental protection. First, these proposals attempt to change the behavior of the South without addressing the far more ecologically damaging behavior of the North. Environmental trade restrictions thereby become yet another tool for dictating the terms of the North’s appropriation of the South’s natural resources while the root cause of global environmental degradation, the unsustainable consump-

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\(^{138}\) See ESTY, supra note 10, at 181-88; Bhagwati, supra note 13, at 170-76; T.N. SRINIVASAN, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM 65-69 (1998). Equally problematic are efforts by industrialized countries to promote upward harmonization of environmental standards. As one commentator has pointed out in the context of the North American Free Trade Agreement (NAFTA), upward harmonization of environmental standards perpetuates economic and political inequality among states by depriving developing countries of the competitive advantage offered by lower environmental standards, and by forcing developing countries to divert resources from more pressing social and economic needs in order to “catch up” to the environmental standards of the industrialized world. See Ileana M. Porras, The Puzzling Relationship Between Trade and the Environment: NAFTA, Competitiveness and the Pursuit of Environmental Welfare Objectives, 3 GLOBAL L. STUD. J. 65, 72 (1995); see also ESTY, supra note 10, at 182. Developing countries have maintained that they cannot be expected to attain international environmental standards unless industrialized countries provide the necessary transfer of capital, know-how, and technology to enable them to do so, and have invoked the commitments made by industrialized countries at the 1992 U.N. Conference on Environment and Development to provide these resources. See Vaughan, supra note 136, at 594-97; Durbin, supra note 131, at 18-19. See also Gregory Shaffer, WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future, 24 FORDHAM INT’L L.J. 608 (2000) (arguing that the U.S. shifts the costs of environmental protection to developing countries via unilateral trade restrictions because domestic political constraints preclude the U.S. from providing significant financial support to international environmental institutions to promote sustainable development and from taking measures to curb its own contribution to global environmental degradation).

\(^{139}\) See ESTY, supra note 10, at 185; Durbin, supra note 131, at 20.

tion of the North, remains unchallenged. Second, the North’s proposals fail to address the activities of the most powerful actors in international trade, Northern transnational corporations. As described more fully in Part B below, transnational corporations account for a significant percentage of international trade and operate in a variety of polluting and hazardous industries in the South.141 Third, the North’s proposals reinforce North-South power relations via top-down solutions driven by the North’s environmental and economic agenda. Rather than developing a collaborative approach to the resolution of global environmental problems that takes into account the needs and priorities of developing countries and of local communities most affected by environmental damage, the North’s proposals to reconcile trade and environmental protection seek to impose Northern environmental standards on the South as a one-size-fits-all solution to global environmental degradation.142

B. Alternative Approaches: North and South

While a full discussion of alternative approaches to the trade/environment debate is beyond the scope of this article, several possibilities emerge from the preceding analysis. These alternative approaches can be grouped into two categories. The first category consists of strategies designed to change the behavior of the North and to scale back the North’s appropriation of the resources of the South. The second category consists of strategies designed to support local resistance to environmental degradation and to emphasize bottom-up versus top-down analysis and decision-making. The objective of this section is to suggest alternative approaches for future elaboration rather than to undertake a full-blown description and analysis of these approaches.

1. North

As discussed above, the fundamental flaw with the North’s proposals to reconcile liberalized trade and environmental protection is that they focus on changing the behavior of the South and do not address the far more significant role of the North in the degradation of the global environment. An approach to the trade/environment debate that spotlights the behavior of the North, rather than simply targeting the South, is therefore an effective way of promoting environmental justice and protecting the global environment. This section provides a brief sketch of two approaches to address the behavior of the North that have thus far received scant attention in the scholarly literature on trade and the environment.

142. See ESTY, supra note 10, at 181-88.
The first approach is to address the problem of Northern overconsumption. It is the over-consumption of the North that poses the greatest threat to the global environment while imposing the environmental costs on the South. Environmental law has traditionally emphasized pollution control and protection of natural resources while ignoring the ultimate cause of pollution and resource degradation: the overconsumption of the planet’s resources. There is little international law addressing the problem of over-consumption, and a remarkable dearth of legal scholarship on the issue. The scholarship that does exist tends to focus on domestic strategies to regulate consumption, and does not address the North-South implications of these strategies or fully analyze their relationship to the GATT/WTO trade regime. Moreover, efforts to regulate domestic consumption have thus far focused on the quality of consumption (improving product design to reduce environmental impacts during production, use, or disposal) rather than the quantity of consump-

143. The issue of consumption is addressed directly in Chapter 4 of Agenda 21, of the Earth Summit’s program of action for achieving sustainable development. See Report of the United Nations Conference on Environment and Development, Annex II, U.N. Doc. A/Conf.151.26, ¶. 4.3, 4.5, and 4.8. (June 3-14, 1992). This document is significant because it represents the first time that developed countries have acknowledged their primary responsibility for addressing the environmental consequences of consumption and for promoting sustainable consumption patterns. Id.

144. For a survey of legal scholarship on the issue of consumption, see Salzman, supra note 99 at 1293, 1293 n. 18. For an analysis of how U.S. tax policy encourages over-consumption and how tax provisions could be used to reduce consumption and to promote resource conservation, see Mona L. Hymel, The Population Crisis: The Stork, the Plow and the IRS, 77 N.C. L. REV. 13, 100-31 (1998).


146. For example, the North may decide to reduce consumption by imposing an ecological tax on fuels and timber. Reduced consumption in the North will likely cause producer prices to drop, and the producers may increase their resource exploitation so as to make up for the shortfall by selling their products in other markets. Consequently, reduced consumption in the North may accelerate resource depletion in the South rather than promote sustainable use of natural resources. See ESTY, supra note 10, at 189 (describing such a scenario in the case of timber imports); see also, Sachs, supra note 88, at 210-12 (discussing the North-South implications of using ecological taxes to reduce Northern consumption). For a brief analysis of the relationship between consumer product regulation and international trade law, see Salzman, supra note 99, at 1281-85.
tion (the total amount of products consumed).\textsuperscript{147} While it is important to address both issues, gains in the quality of consumption can quickly be eroded by the ever-expanding quantity of products consumed. For example, today’s automobiles are far more fuel-efficient (with the exception of sport utility vehicles, popularly known as SUV’s) and far less polluting than in the past.\textsuperscript{148} However, the increase in both the total number of automobiles and the total miles driven has outpaced the efficiency gains.\textsuperscript{149}

A second approach is to regulate the activities of transnational corporations. Transnational corporations are the key actors in the global economy and the primary beneficiaries of liberalized trade.\textsuperscript{150} Transnational corporations control 80 percent of foreign investment.\textsuperscript{151} The vast majority of transnational corporations have parent corporations that are based in the North.\textsuperscript{152} However, transnational corporations operate in a

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\textsuperscript{147} See Salzman, supra note 99, at 1253. While an analysis of the political, economic, cultural and legal obstacles to regulating the quantity of consumption is beyond the scope of this article, it must be acknowledged that these obstacles are formidable. Governments have traditionally promoted consumption in order to increase economic growth and have attempted to limit or reduce consumption only in times of crisis or resource scarcity. \textit{Id.} at 1266. Although fuel consumption is heavily taxed in Europe, efforts to regulate consumption through taxation in the United States, such as President Clinton’s proposed BTU tax, have frequently been rejected. \textit{Id.} at 1269; Hymel, supra note 144, at 107 (discussing European consumption taxes). The manufacture of needs through advertising is a linchpin of the modern consumer economy, and many citizens of the North view shopping as a primary cultural activity. See ATHANASIOU, supra note 102, at 41-43. As one U.S. diplomat candidly remarked in preparation for the 1992 U.N. Conference on Environment and Development, “the American lifestyle is not up for negotiation.” Salzman, supra note 99, at 1256.

\textsuperscript{148} See Sachs, \textit{Neo-Development}, supra note 21, at 249.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} See Robert J. Fowler, \textit{International Environmental Standards for Transnational Corporations}, 25 ENVTL. L. 1, 2-3 (1995). Transnational corporations in developing countries are perceived to operate in a legal and moral vacuum between ineffective domestic legislation and unenforceable or nonexistent international regulation. \textit{Id.} at 1-4. Economist Herman Daly argues that globalization benefits transnational corporations by separating the places that benefit from economic activity from those that bear the costs. Herman E. Daly, \textit{Problems with Free Trade: Neoclassical and Steady-State Perspectives, in Trade and the Environment, supra note 13, at 151.} “The larger the market, the longer corporations will be able to avoid the logic of Henry Ford – that he had to pay his workers enough for them to buy his cars. In a big trading area, you can go for a long time making cars with cheap labor in one place and selling them to the remaining high-wage earners somewhere else. The larger the free trade bloc, the longer you can get away with depleting resources and absorptive capacities in one area in order to enjoy the benefits produced from these costs in a well-preserved environment somewhere else. . . . That is why transnational corporations like free trade and why workers and environmentalists do not.” \textit{Id.} In other words, transnational corporations have little or no accountability to the communities or nation-states in which they operate, to their workers, or to the environment.


\textsuperscript{152} See Fowler, supra note 150, at 6. In fact, transnational corporations headquartered in the United States, Germany, France, Japan and the United Kingdom account for more than two thirds of global direct foreign investment. \textit{Id.}
wide variety of hazardous and pollution-intensive industries in the South, including mining, petroleum, and agribusiness. Their activities have the potential to produce significant impacts on human health and the environment. Transnational corporations also account for a significant volume of international trade. The trade/environment debate should therefore include an analysis of the role of transnational corporations in environmental degradation and of possible strategies to regulate their conduct. Such strategies might include strengthening environmental enforcement capacity in developing countries, regulating the extra-territorial environmental conduct of corporations headquartered in the North, developing multilateral agreements imposing standards of conduct on transnational corporations, and expanding the rights of foreign victims of environmental abuse to sue Northern corporations in Northern courts for acts committed in other countries.

153. See Fowler, supra note 150, at 8.
154. Id. The industrial accidents at Seveso, Italy; Bhopal, India; and Basel, Switzerland alerted the world to the grave consequences of inadequately managed chemical manufacturing plants. Id. at 9. The environmental and human rights implications of petroleum development in the Ecuadorian Amazon have also attracted wide attention. See generally Holwrick, supra note 151; Joe Kane, Savages (1995); Raissa S. Lerner & Tina M. Meldrum, Debt, Oil, and Indigenous Peoples: The Effects of United States Development Policies in Ecuador’s Amazon Basin, 5 Harv. Hum. RTS. J. 174 (1992); Judith Kimerling, Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon, 14 Hastings Int’l & Comp. L. Rev. 849 (1991).
155. The global trading system is no longer simply a group of nations buying and selling things to each other. Rather, international trade is increasingly dominated by transnational corporations importing and exporting among their own foreign-based subsidiaries. It is estimated that more than 40 percent of U.S. exports and nearly 50 percent of U.S. imports represent goods traded through intra-firm channels rather than in the open market. However, all of this intra-firm trade is included in national trade statistics even though international trade is increasingly driven by the priorities of transnational corporations, and less by traditional notions of comparative advantage among nations. See William Greider, One World, Ready or Not: The Manic Logic of Global Capitalism 22-23 (1997).
2. South

The trade/environment debate should also be expanded to take into account the local consequences of global environmental degradation. From Love Canal in the United States to the movement of the Ogoni people of Nigeria against oil drilling by Royal Dutch Shell, the environmental movement has grown out of the local struggles of the people most directly affected by environmental degradation.157 Indeed, one of the most important lessons of the environmental justice movement in the United States is the importance of paying attention to grassroots struggles in order to understand the precise social and economic forces that produce environmental injustice and to identify the types of policy reforms likely to promote environmental justice.158 This insight is particularly significant in the era of globalization because it is at the local level that ecosystem limits have already been exceeded.159 By spatially separating the economic benefits of production from the environmental costs, trade liberalization masks the overshooting of local environmental constraints until they become global crises.160 Consequently, both social justice and environmental protection imperatives call for close attention to local environmental struggles and for environmental policy-making from the ground up.

Focusing on local struggles reveals the relationship between environmental degradation and other forms of social injustice, and the unique issues that must be addressed to promote environmental justice in each context. While this article has focused on the North-South distribution of the benefits and costs of trade liberalization, the distributional paradigm is inadequate to address the full panoply of issues raised by environmental injustice. Environmental injustice manifests itself in different ways for different groups and along a variety of axes (racial, ethnic, gender, class), and calls for different solutions at both the global and local level.161 For indigenous groups in the North and the South, for example, sovereignty issues with respect to natural resource use may be paramount.162 In Central America, where women have borne the brunt of environmental degradation, the struggle to protect the environment is inextricably intertwined with the struggle to improve the status of

159. See supra notes 116-121 and accompanying text.
160. Id.; see also Daly, supra note 150, at 155-56.
161. See Foster, supra note 158, at 802-08.
women. Consequently, a one-size-fits-all solution to the problem of environmental degradation that does not pay heed to local conditions and to other axes of oppression is likely to exacerbate rather than relieve environmental injustice.

Human rights law can serve as an important vehicle to link the environmental struggle with the struggle for social justice. As the foregoing discussion suggests, environmental degradation in the South is often accompanied by human rights violations. Indeed, environmental degradation is itself a violation of the emerging right to a healthy environment. Civil and political rights (such as freedom of expression and freedom of association) can be deployed to allow groups and individuals to voice their objections to environmentally damaging activities, to organize resistance movements, and to seek official redress. The right to self-determination recognizes the rights of indigenous people to sovereignty over their natural resources. Economic and social rights (such as the rights to health and livelihood) may require governments to prevent environmental degradation. Emerging rights to a healthy environment, to environmental information, to participate in environmental decision-making, to environmental impact assessment, to legal redress for environmental violations, and to effective remedies for environmental harm are important tools in the promotion of grassroots participation in environmental decision-making. Human rights law is an important

163. Lois Ann Lorentzen, Bread and Soil of our Dreams: Women, the Environment, and Sustainable Development – Case Studies from Central America, in ECOLOGICAL RESISTANCE, supra note 23, at 56-69. Women are at the forefront of the environmental movement in Central America because environmental degradation directly affects their already under-compensated and under-appreciated roles as food producers, food providers, and caretakers for the young, the elderly, and the sick. Soil erosion results in a decline in food production and in malnourished children. Deforestation increases the distance that must be traveled to obtain firewood. Contaminated water supplies produce illness; and overuse of pesticides and chemical fertilizers result in an increase in birth defects. It is, therefore, not surprising that the Central American environmental movement has drawn an explicit connection between the degradation of nature and the subordination of women. Id. at 59-62.


165. See Michelle Leighton Schwartz, International Legal Protection for Victims of Environmental Abuse, 18 YALE J. INT’L L. 355, 359-75 (1993) (describing how environmental degradation can violate the right to life, the rights of indigenous peoples, the right to health, livelihood, culture, privacy, and property, the right to freedom of expression and to political participation, and the emerging right to environmental information and to a healthy environment); see generally HUMAN RIGHTS WATCH AND NATURAL RESOURCES DEFENSE COUNCIL, DEFENDING THE EARTH: ABUSES OF HUMAN RIGHTS AND THE ENVIRONMENT (1992).

166. See Michael Anderson, Human Rights Approaches to Environmental Protection: An Overview, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, supra note 164, at 8-10.

167. Id. at 4-5.

168. Id. at 6-7.

169. Id. at 5.

170. Id. at 8-10.
tool for ensuring that the trade and environment debate takes into account the local consequences of trade liberalization, and for ensuring that those most directly affected by environmental injustice have the opportunity to participate in environmental decision-making and to seek redress for environmental injuries.

C. Reconciling Environmental Protection and Social Justice

The critique of trade liberalization presented in this article gives new meaning to the term “environmental imperialism.” While this term traditionally refers to the North’s imposition of its ecological agenda on the South, it is also an apt description of the North’s systematic and ongoing appropriation of the South’s natural resources. The North reaps the benefits of liberalized trade while imposing a disproportionate share of the environmental costs on the South. While this may be efficient from the standpoint of some proponents of neoclassical economics,\(^{171}\) it is ethically problematic and ecologically unsustainable.\(^{172}\) Liberalized trade accelerates global pollution and resource depletion, masks ecological harm by shifting it to the South, and increases the likelihood that the global economy will exceed the limits of the global ecosystem.\(^{173}\)

The North’s consumption-oriented development model is the primary cause of global environmental degradation. This article therefore recommends that Northern environmentalists and policy-makers focus their energies on scaling back the North’s appropriation of the world’s resources rather than imposing their environmental preferences on the South through unilateral trade restrictions or through demands for harmonization of environmental standards. Regulating the conduct of transnational corporations and adopting strategies to promote sustainable consumption are two possible approaches to achieve this objective.

An environmental justice critique of trade liberalization also suggests that it is important to focus on local environmental struggles in order to understand the precise social and economic forces that promote environmental degradation and social injustice and to develop effective policy responses. Top-down solutions driven by the North’s environmental and economic agenda exacerbate environmental injustice by reinforcing Northern economic and political dominance, and by failing to take into account the needs and priorities of those most affected by environmental degradation.

Finally, it is important to recognize that trade, human rights, and the environment are inextricably intertwined, and that policy proposals to

\(^{171}\) See supra notes 27-34 and accompanying text.

\(^{172}\) See supra notes 108-121 and accompanying text.

\(^{173}\) Id.
address global environmental degradation must take into account their complex relationship. Northern initiatives to reconcile trade and environmental protection must be carefully scrutinized to ensure that they promote environmental justice and do not become yet another instrument for transferring resources from the South to the North under the guise of environmental protection.