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EXPORTING ENVIRONMENTALISM: THOUGHTS ON THE USE OF MARKET POWER TO IMPROVE THE ENVIRONMENT IN THE “FREE TRADE” ERA

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Preservation and remediation of the global environment raises transnational concerns. Treaty organizations and multilateral agreements, however, rarely take sufficient steps to redress these concerns. Recent debates over ratification of the NAFTA¹ and GATT² treaties have focused attention on the alternative use of domestic market power to influence the environmental behavior of developing nations. Unilateral domestic measures such as embargoes, punitive tariffs and other trade measures conditioned on environmental performance have proven very effective. For example, court-ordered U.S. trade embargoes directly led to the virtual demise of the purse-seine tuna/dolphin fishery, saving hundreds of thousands of dolphins. Developed nations utilizing such measures, however, have been charged with economic demagoguery and “environmental imperialism.”

TRADE V. THE ENVIRONMENT

Now free trade advocates in the developed world also have begun to weigh-in in opposition to unilateral trade measures designed to preserve the environment. Since the use of trade restrictions runs counter to purist free-trade ideals, some believe that the ratification of NAFTA and the recent ratification of the Uruguay Round amendments to GATT

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1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993).

2. General Agreement on Tariffs and Trade, the Uruguay Round, 33 I.L.M. 1 (1994).

portends the demise of unilateral trade measures designed to preserve the environment.

Recently, a GATT panel was asked to resolve a dispute between the European Community and the United States over provisions in the United States' Marine Mammal Protection Act which conditioned imports of yellowfin tuna on the use of fishing methods designed to save dolphins. Article XX paragraphs (d) and (g) of the GATT allow exceptions to the treaty's general proscription against non-tariff trade barriers where "necessary to protect animal life or health" or where "related to the conservation of natural resources."³ The GATT panel recognized that the U.S. policy of protecting dolphins fell within these exceptions.

The panel emphasized, however, that the embargoes themselves would not save dolphins; dolphins would only be saved from drowning in tuna nets if the tuna embargoes "forced" the exporting nations to catch tuna using dolphin-safe techniques. In a wholly conclusory advisory opinion, the panel found that the United States could not implement unilateral conservation measures whose success depended on "forc[ing] other contracting parties to change their policies within their jurisdiction."⁴ The panel's decision does not have the force of GATT authority because it has not been adopted by the GATT Council—nor would it supersede U.S. law even if adopted by the council—but it is troubling nonetheless both for its paucity of analysis (ivory bans won't *necessarily* save elephants either), and because NAFTA incorporates by reference GATT's Article XX exceptions.

In a reversal of Bush administration policy, the Clinton administration has defended the propriety of the tuna embargoes under GATT. The U.S. Trade Representative advanced arguments indicating an appreciation of the greater significance of integrating environmental concerns into trade regimes. "The United States stated that in becoming contracting parties to [GATT], countries did not agree to surrender their ability to take effective action to protect the environment, including the global commons."⁵

3. General Agreement on Tariffs and Trade, 61 Stat. A3, 55 U.N.T.S. 187 (1947).

4. Report of Panel in United States—Restrictions on Imports of Tuna, DS29, para 5.26, 33 I.L.M. 839 (1994).

5. Panel Report, para. 3.10, 33 I.L.M. 839, (1994).

The relationship between environmental and trade measures will be considered in the context of preparations for the formation of the World Trade Organization, which will be established under the Uruguay Round Amended GATT. During the course of these and other negotiations, environmentalists will argue that the GATT and other multilateral trade treaties should be "greened." The outcome of these negotiations largely will depend on a proper valuation of the external costs associated with environmental degradation.

VALUING THE ENVIRONMENT

Proponents of the use of market power to protect the environment point out that economic influence is wholly appropriate as a means to counter environmental "free riding." Assume the example of a Mexican corn producer using harmful insecticides (or a Great Lakes industrial factory emitting harmful air pollutants). Each of these companies is free riding in the sense that it does not bear the real costs associated with the environmental degradation caused by its production processes. Since the environment is a "global commons," it is appropriate for the producer to pay these costs (in economic parlance, to internalize the externalities).

Developing nations will argue that it is unfair to require from them the same environmental standards as have been adopted by certain wealthy states. After all, the developed nations free rode on the environment for years during their industrial revolutions and only now, from the relative safety of their current market advantage, do they seek to export their new-found standards on economies struggling to achieve equivalent standards of living. In this view, unilateral measures which impose one nation's environmental standards on another are simply another form of jingoism.

EXIGENT CIRCUMSTANCES

The sentiments of the developing nations have a certain logic and appeal. After all, these countries are playing economic catch-up and, in many cases, have hungry mouths to feed. Isn't it more prudent to address environmental concerns through multilateral treaty organizations which balance such concerns with the legitimate economic interests of their constituents? Haven't, for example, the Montreal Protocol on substances which damage the ozone layer, the CITES

convention on international trade in endangered species⁶ and the Basel Convention on trade in hazardous wastes⁷ demonstrated that treaties can be effective?

Even putting aside the formalistic arguments of some free traders that GATT may trump even these multilateral treaties, however, the theories of the treaty advocates suffer from a more fundamental shortcoming. In many circumstances, there simply is not enough time to put environmental reforms on hold while economies achieve parity and production processes naturally evolve.

Take as another example the current controversy over the drowning of sea turtles in shrimping nets. The United States' Endangered Species Act prohibits the taking of shrimp by U.S. vessels and prohibits importation of shrimp products from countries which have failed to make relatively minor adjustments in net configurations which allow turtles to escape from the shrimpers' nets. While, in a perfect world, a treaty might already have been drafted requiring such adjustments, none exists and no preliminary treaty negotiations loom on the horizon. In the meantime, the population of species such as the Kemp's Ridley sea turtle has dwindled to the thousands, and since May 4 hundreds are washing ashore dead in the Gulf of Mexico after having gone through the shrimp nets. The prospects for other species such as the tiger are equally as dire. For the species which once flourished in the Black Sea and in most of East Europe's major rivers, it is already too late.

If one properly views the environment, in the words of the U.S. trade representative, as a "global commons," it is incumbent upon each nation to take whatever steps it can to ensure its preservation. Where remediation can be accomplished through mutual agreement, there is little need for unilateral action—indeed in this instance, unnecessary unilateral restrictions probably amount to disguised protectionism. But where, as so often is the case, consensus on meaningful environmental measures cannot be achieved, the exercise of market power may be the only effective means to prevent the irreversible destruction of a species or resource.

6. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, 993 U.N.T.S. 243 (1973).

7. U.N. Doc. UNEP/1G.8013, 28 I.L.M. 6459 (1989).

COST SHIFTING

This is not to say that developing countries need necessarily absorb alone the incremental costs of protecting the environment. Where a developed industry has enjoyed a free ride on the environment and thereby gained a competitive advantage over its fledgling counterpart in a developing nation, cost shifting in the form of subsidies or tariff incentives may be appropriate. Such issues of remuneration likely are the proper province for treaty discussions (perhaps in the context of the World Trade Organization or GATT) because resolution of those issues often can await protracted negotiation.

The fairness argument, however, should be carefully scrutinized in each circumstance. Returning to the tuna/dolphin issue, more tuna than ever is being caught using methods which do not involve encirclement of dolphins at all. In fact, so much tuna is being caught using dolphin-safe techniques that world tuna prices are severely depressed. There is, accordingly, no fairness issue in conditioning tuna imports on dolphin-safe fishing techniques.

On the other hand, the European Community's directives which would set mandatory levels for the use of recycled packaging, while laudable, may present difficulties for nations which do not possess a mature recycling industry. Rather than forfeit the directives under the mantra of free trade, a cooperative effort could be undertaken involving, for example, foreign investment in recycling plants and trade packages. This might enable the directives to be implemented; and to have their intended effect of reducing the destruction of forests and the production of plastics, and at the same time present business opportunities for companies within the import and export markets.

WHEN IS TRADE FREE?

Despite the absence of tariffs and other import barriers, free trade is not really "free" at all if environmental costs are incurred but not remediated. In these situations, absent an enforceable treaty obligation which allocates the costs of environmental externalities, the unilateral use of market power as a counterbalance to free-riding makes economic, and environmental, sense.

Elected officials and their constituents considering the United States' continued participation in free-trade pacts

should consider *all* costs associated with such participation, and who should bear such costs. In certain circumstances, cost-shifting from developing to developed economies may be appropriate. But the negotiation of such multilateral arrangements inevitably is time-consuming. Meanwhile, continued damage may raise remediation costs significantly or make recovery impossible. In these situations of environmental imperative, in the most literal sense, we cannot afford to wait. In the meantime, prudent nations (or industries) which have the ability to do so can and should use their market power to protect the global commons.