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TRADE AND ENVIRONMENT: AN ENVIRONMENTALIST VIEW

*By Naomi Roht-Arriaza**

On the eve of the largest world conference on the environment, lawyers and policy makers are beginning to focus on the links between trade and environment. I have been asked to present an environmentalist view of how current rules of international trade affect the environment and what changes are needed to make them more compatible with ecologically sound development. I will focus on a few main areas of contention, using both GATT and regional trade agreements in North America and Europe to illustrate, and then will propose some general principles that should underlie an environmentally sound trade regime.

Areas of Conflict between Trade Rules and Environment

(1) Export restrictions on natural resources. GATT rules prohibit quantitative export restrictions, making it more difficult for nations to control their own rates of resource extraction. For example, Indonesia, the Philippines and states in the U.S. Pacific Northwest have implemented log export bans to conserve forest resources while easing local employment concerns by stimulating domestic processing industries. These export restrictions have been challenged by Japan and the European Community. While such export bans will conserve resources only if combined with overall limits on logging, even a well-designed conservation strategy will be GATT-illegal if it includes quantitative restrictions on exporters.

Deregulation and support for trade in energy is a major component of the U.S.–Canada Free Trade Agreement. Under the agreement, energy exporters must be free to export with few regulatory controls.[1] The result has been development of megaprojects in natural gas and electricity designed to export resources quickly and cheaply. Increased cheap nonrenewable energy supplies can only undermine attempts at energy conservation and at slowing global warming.[2]

(2) Import restrictions, production processes and extraterritoriality. GATT prohibits quantitative restriction on imports, including bans and quotas. Yet from an environmentalist's viewpoint, import bans have been useful in species conservation efforts, from whales to dolphins to turtles and fur seals. Limits on the hazardous waste trade would be impossible without import bans. There are proposals to implement import restrictions on nonsustainably produced tropical timber. These measures do not directly impose policies on the exporting state; they merely express consumers' desires not to participate in a market in destructive goods or goods made with destructive processes, or supplement otherwise watered-down or nonexistent provisions of international treaties. The GATT, both through its Secretariat and through a recent dispute panel decision,[3] objects to these restric-

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[1] *See* Chapter 9, U.S.–Canada Free Trade Agreement, 2 BDIEL 359, especially Art. 904, 905.

[2] The McKenzie Delta natural gas project, for instance, will export 90 percent of the area's reserves within twenty years. For a full description of these projects and their environmental impact, see Stephen Shrybman, *Trading Away the Environment*, 9 WORLD POL'Y. J. 93, 97–99 (1992).

[3] *United States—Restrictions on Imports of Tuna*, Report of the GATT Panel, August 16, 1991.

tions because they entail quantitative restrictions on imports and because they attempt to affect the environment outside the regulating state's jurisdiction.

The definition of a given problem as "extraterritorial" seems less useful with each passing day, as we discover that environmental problems previously thought merely local have unforeseen spillover effects: deforestation or dam construction leads to a loss of global biodiversity; polluted local water runoff leads to ocean pollution; ozone depletion, global warming, and acid rain stem from local activities. While states retain sovereignty over their own resources, they are also responsible for ensuring that actions taken within their territory do not harm the environment of other states,[4] and states have the right to legislate and adjudicate about actions taken outside their territory that cause substantial effects within their territory.[5] Thus a country's domestic laws and practices may be of legitimate concern to other countries if they affect global resources.

There is little doubt that import bans on certain products, if they equally affect domestic production, are permitted under GATT. However, restrictions are placed on some products because of the *way* they are produced. Examples include tuna caught "on dolphin," wood cut from primary or old-growth forests, shrimp caught with unnecessarily high turtle kills, fish caught using drift nets or goods made using chlorofluorocarbons (CFCs) as solvents. As currently interpreted, GATT rules distinguish products only on the basis of end uses, not production processes.[6] But without differentiation of products by *how* they are produced as well as by end use, it is impossible to provide incentives to clean and environmentally sensitive extraction or production processes. And, as we are increasingly recognizing, the most viable approach to avoiding environmental degradation is precisely a shift to emphasizing changes in production methods rather than after-the-fact palliatives.

There are undoubtedly difficult policy issues involved in the choice to restrict imports. For example, charges of protectionism have more credence where domestic producers may engage in the prohibited practice. This is the problem, for instance, with the "comparability" provisions of the MMPA at issue in the tuna-dolphin GATT decision.[7] Policy makers also need to contend with the possibility of simply shifting demand to other countries, the effect of depressing prices, and a host of other considerations. But so long as multilateral solutions either are not feasible or include only watered-down substantive and enforcement provisions, import restrictions will remain one of the few viable tools for worldwide conservation.

(3) Domestic regulations as nontariff barriers to trade (NTBs): Under GATT rules and case law, *prima facie* nondiscriminatory environmental, health and safety measures are nonetheless suspect as nontariff barriers to imports or as protectionist measures. For example, industry has challenged as violations of the

[4]Stockholm Declaration on the Human Environment, Principle 21, UN Doc. A/Conf.48/14 (1972), *reprinted in* 11 ILM 1416, 1420 (1972).

[5]*See* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 245–47 (1988).

[6]*See* panel decision on tuna, *supra* note 3. The panel found that the Marine Mammal Protection Act (MMPA) provisions at issue could not be considered internal regulations because they made no difference to the sale of tuna as a product, only to how it was produced. Thus, the provisions were a quantitative restriction on imports and would be allowed only if they came within an exception to GATT.

[7]*See United States—Restrictions on Tuna Imports*, GATT, August 16, 1991. Mexico challenged provisions of the U.S. Marine Mammal Protection Act permitting the U.S. tuna fleet to kill up to 20,500 dolphins per year in the Eastern Tropical Pacific, while requiring foreign fleets to kill not more than 1.25 times the average U.S. kill rate per "set" on dolphins.

U.S.–Canada Free Trade Agreement (FTA) Canadian regulations to reduce emissions at lead copper and zinc smelters and U.S. rules favoring newsprint recycling and phasing out asbestos.[8]

The few GATT dispute resolution panel decisions bearing on environmental or health matters show how difficult it is for a set of rules based exclusively on encouraging free movement of goods to distinguish narrow protectionism from legitimate protection. Article XX of GATT allows exceptions to trade rules for regulations concerning human or animal health, or for conservation of exhaustible natural resources.[9] The fundamental problem with Article XX is that it is framed as an exception to the general rules of the agreement, and as such, is to be narrowly construed.[10] By putting the burden of proof on the party defending its regulations rather than on the challenger, trade is given an ill-deserved primacy over the preservation of the world's environment.

And the burden of proof is an impossibly heavy one. Under Article XX(b)—measures necessary to protect human, animal or plant life or health—"necessary" has been defined as having no reasonable alternatives.[11] Article XX(g), which permits measures to conserve exhaustible natural resources, has, as interpreted, similarly strict requirements. A measure must be "primarily aimed at conservation," an apparently unobjectionable requirement that has been narrowly interpreted to mean both that no alternatives exist, and that the measure was adopted *only* for conservation purposes. Such requirements impose an impossible

[8] *See* Stephen Shrybman, *Selling the Environment Short: An Environmental Assessment of the First Two years of Free Trade between Canada and the United States,* Canadian Environmental Law Association, November 1990. The challenge to The U.S. Environmental Protection Agency's asbestos regulations was eventually decided without reference to their GATT-compatibility. *See* Corrosion Proof Fittings, *et al.* v. EPA, No. 89-4596, 947 F.2d 1201 (5th Cir. 1991).

[9] The relevant provisions of Article XX read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[10] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,* BISD 35S/98, 114 (1989) (analyzing Article XX(g)).

[11] *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes,* BISD 37S/200 (1990). The panel used this narrow interpretation of Article XX(b) to find against a Thai ban on foreign cigarette imports. The Thais had argued that even though they allowed the sale of domestic cigarettes through a government monopoly, they carefully controlled the amounts and types sold as part of a program to reduce smoking; that U.S. cigarettes were more aggressively marketed toward new smokers; and that they contained additives that encouraged new smokers. The panel rejected these arguments because it found that alternative antismoking strategies existed. Yet the strategies it proposed—ingredient disclosure labels on packages and limits on advertising—were either not as effective as a ban or were already being implemented. (¶¶74–81.)

In the recent panel decision on tuna and dolphins, the panel upheld a Mexican challenge to portions of the U.S. Marine Mammal Protection Act, 16 USC §1371(a)(2)(1990) imposing a ban on tuna imports if harvested in a manner resulting in excessive dolphin mortality. Interpreting Article XX(b), the panel required the regulating party to show it has exhausted all other options reasonably available. Multilateral options were considered an alternative, not a complement to national laws. Furthermore, the panel went on to consider the validity of the MMPA provisions as public policy, finding they were not "necessary" because they were based on "unpredictable conditions" (¶5.28). Whether or not one agrees as a policy matter, surely there is no legal basis for such an interpretation.

burden[12] on a regulating state. Like strict scrutiny in U.S. constitutional law, they will almost always be "fatal in fact."

It is true that health or environmental regulations can be used to keep out goods only from certain countries or to protect domestic interests. However, the party challenging the regulation in these cases should be able to prove that it arbitrarily discriminates or was designed for protectionist purposes. Incidental effects on trade should not be enough to overcome a presumption of validity.

(4) Harmonization: A special case of environmental or health regulations being treated as nontariff barriers is the area of sanitary and phytosanitary standards (SPS), which covers food and drug additives, pesticide residues and the like. Efforts to harmonize national standards to an internationally set level, codified in the Draft Final Agreement of the Uruguay Round, may well result in reduced protection for consumers. Under the proposed Draft, standards set by a UN Food and Agriculture Organization (FAO)-related body called the Codex Alimentarius must be used if they exist; current Codex standards are lower than those of the U.S. or European countries in several areas. A state wishing to apply more stringent rules has the burden of justifying them. It must show a scientific justification, or that it has applied specified risk assessment procedures. But "scientific justification" can imply a technical certainty often impossible to obtain and counter to the precautionary principle. Moreover, the risk assessment provisions require consideration of economic factors, effectively precluding health-based standards.[13] These harmonization rules will result in a least-common-denominator approach to environmental, health and consumer protection laws, as states (and sub-federal units) lose the ability to experiment with stricter standards and are reduced to advancing in lockstep.

(5) Cost internalization, competitiveness and eco-dumping. Environmentalists dispute the view reflected in current trade rules that differences in environmental regulation should be treated as one more factor of comparative advantage, and should not be compensated for. It will be possible for producers to undertake the short-term costs of moving to more ecologically sound production methods only if they are not undercut by others *not* forced to internalize environmental costs. Thus, environmentalists have proposed imposing a duty on goods where the price does not reflect the environmental costs of production: so-called "eco-dumping." Or to put it slightly differently, the lack of environmental regulation is a subsidy; a countervailing duty should be imposed to offset it. This would bring the trade system in line with the "polluter pays principle" (PPP) developed by the Organization for Economic Co-operation and Development (OECD).[14]

Proposals to move toward ensuring proper incentives to environmentally benign production are long term: they require determining an international floor of envi-

[12] *Supra* note 10; *see also Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the FTA Panel, October 16, 1989, ¶¶7.02–7.08.

[13] For example, the Delaney Clause of the U.S. Food and Drug Act or Canada's pesticide regulations are both health-based. Under the U.S.–Canada Free Trade Agreement, Canada has agreed to work toward "equivalence" with the U.S. regulatory approach. See Stephen Shrybman, *supra* note 2, at 93, 105.

[14] OECD, GUIDING PRINCIPLES CONCERNING INTERNATIONAL ECONOMIC ASPECTS OF ENVIRONMENTAL POLICIES, Recommendation c(72)128, adopted May 26, 1972, *reprinted in* 11 ILM 1172 (1972). The PPP "means that the polluter should bear the expenses of carrying out the . . . measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption."

ronmental regulation below which states could not fall, although they could set stricter laws. Goods produced in a manner that failed to comply would be subject to import duties equivalent to the amount saved by the lack of regulation. Because imposition of such a duty by itself would not provide resources for improving environmental protection, the funds collected would be returned to the exporting country for building up its environmental protection activities, or put into a "Green Fund."

Another proposal would make transnational corporations operating in non-OECD countries comply with the regulations of either the home or the host state, whichever are more stringent.[15] This would reduce the incentive for transnational corporations to relocate in countries with lax regulatory standards while also allowing indigenous industry in developing countries a phase-in period in which to comply with stricter regulation.

These proposals will no doubt require development of common minimum standards and enforcement mechanisms that allow for public participation. It is possible to create a trade regime respectful of, and in harmony with, the environment. But such a regime will also require recognition of certain basic principles.

Some Initial Principles for Environmentally Sound Trade Regimes

(1) Growth is not the answer. Both the GATT Secretariat and the Office of the U.S. Trade Representative (USTR) argue that trade has a positive effect on environment because it stimulates growth, and growth will allow more resources to be spent on environmental protection. There are two problems with this argument. First, there is no reason to think that growth alone will result in more resources being spent on environment; the explosive growth along the U.S.–Mexico border, and the concomitant growth of environmental problems, is a case in point. Second, the growth argument implies a two-step approach to the environment that says, "dirty it now to grow, clean it later." But damage may be irreversible by the time the resources exist to clean it; our experience with problems like the ozone layer and toxic waste show the need for a different approach. Growth, and trade as an instrument of growth, should be pursued only if ecologically sound. The market can be harnessed to serve environmental goals, albeit in conjunction with other approaches; it cannot be trusted to do the job alone.

(2) Respect the values of the small scale and of local diversity. Trade has undoubted benefits, but these must be weighed against its costs. Cultural, like biological, diversity, is important both for its own sake and for the survival of humankind. The liberalization of production and trade works against diversity, requiring standardization of technologies and products. In addition, liberalization of trade can increase environmental costs. Transport and energy costs increase. The true costs of production are not apparent to consumers, and the price of consumption and disposal is not apparent to producers. Because the problems are not visible, there is less pressure to use nonpolluting production methods, to ensure environmentally sound packaging and disposal, or to conserve resources for the future. Finally, liberalization of trade shifts the locus of decision-making activity from locally accountable decision makers to remote and inaccessible ones. Local decision-making processes within a single polity are more accountable to

[15] *See* Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEX. INT'L L. J. 463, 489 (1991). For a slightly different version, see Alan NEFF, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 ECOLOGY L. Q. 477 (1990).