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INTERNATIONAL TRADE AND THE ENVIRONMENT: INTERDEPENDENT GOALS OR IRRECONCILABLE CONFLICT?

INTRODUCTION

The General Agreement on Tariffs and Trade (GATT) dates from October, 1947. It arose from concerns about trade restrictions and their effect on global relations. At the time the GATT was negotiated, the environment was not a significant public concern. Due to GATT's limited focus on environmental issues, many of today's domestic environmental laws may be undercut by the application of GATT provisions.

Illustrative of this developing tension is the Tuna-Dolphin incident which arose when the United States, concerned about dolphin safety, imposed a series of embargoes on tuna caught with purse seine nets in the Eastern Tropical Pacific Ocean. The purpose of the embargo was to prevent the sale in the U.S. market of tuna caught in a manner that did not comply with the dolphin safety regulations imposed by the United States on the U.S. tuna industry. Mexico reacted by requesting a GATT Panel review of whether the U.S. tuna embargoes violated GATT. A GATT Panel ruled that the unilateral American ban on tuna imports was inconsistent with GATT.

Commentators question whether the goals of GATT and the goals of many domestic environmental laws can ever peacefully coexist. In September, 1992, the Washington and Lee University School of Law held a symposium to discuss whether international trade and environmental policy were "interdependent goals" or an "irreconcilable conflict."

Professor Frederic L. Kirgis, Jr. delivered the symposium's keynote address. Professor Kirgis offers a domestic tax alternative to the embargo method of enforcing domestic environmental law on foreign products sold in domestic markets. He argues that domestic taxation, unlike domestic regulation, could be made compatible with GATT. Professor Kirgis further suggests that a streamlined rule-making procedure might be the most effective method to allow GATT to adapt to changing technology and attitudes.

The first panel addresses the relationship between world trade rules and environmental policies. Professor John H. Jackson, the author of the panel's principal paper, proposes that the current tension between the goals associated with the environment and with trade can be solved within the context of GATT. In his paper, Professor Jackson sets forth the changes that will be necessary to effectuate this reconciliation. In response, Patti A. Goldman questions Professor Jackson's assumption that the trade regime should be the preeminent system. Ms. Goldman asserts that the conflicts between trade and the environment must be resolved in a neutral forum.

The second panel addresses "Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement." Alan B. Morrison, the author of the panel's principal paper, asserts that the Free Trade Agreement's panel review scheme fails to pass constitutional muster because its members are not appointed in accordance with the Appointments Clause. Both Professor Harold H. Bruff and Professor William J. Davey emphatically disagree with Mr. Morrison's conclusion. In contesting Mr. Morrison's position, Professor Bruff asserts that *Buckley v. Valeo*, a case relied on heavily by Mr. Morrison, deals with administrative responsiveness to the President rather than constraining the power of the government to engage in effective foreign policy. Thus, Professor Bruff argues, the *Buckley* rationale for requiring compliance with the Appointments Clause is misplaced when applied in the context of international arbitration. Professor Davey argues that the dispute resolution provisions of the Free Trade Agreement do not violate even a strict reading of the Appointments Clause. This is because the binational panels that resolve disputes arising under the Agreement act pursuant to international law rather than U.S. law. Further, Professor Davey argues that the Appointments Clause has been, and should continue to be, interpreted less strictly in the context of foreign affairs.

The third panel addresses the appropriate framework for analyzing the relationship between trade and the environment. Professor Richard B. Stewart, the author of the panel's principal paper, draws upon the federal experience of political systems such as the United States and suggests the need for an international tribunal to govern this relationship. In response, Robert F. Housman cautions against relying too heavily on a federal framework. Mr. Housman instead advocates "competitive sustainability" as a framework. Professor David A. Wirth also cautions against overextending the federal analogy. Professor Wirth highlights the many differences between federal systems and current international systems. Gray C. Castle agrees with Professor Stewart that harmonizing trade and environment concerns is best achieved by an international tribunal. Mr. Castle asserts that as an imperative first step the United States, in particular the Department of Commerce, must adopt a position on this issue. Second, the United States must work to form an international consensus around the position to ensure that free trade and environmental policies become "interdependent goals" and not an "irreconcilable conflict."