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ENVIRONMENT AND TRADE MEASURES AFTER THE TUNA/DOLPHIN DECISION

FREDERIC L. KIRGIS, JR.*

The recent General Agreement on Tariffs and Trade (GATT) panel decision on United States import restrictions of tuna (tuna/dolphin case)¹ is the leading participant in the current environment and trade drama. This paper will briefly address that decision, and then will turn to the international legislative process, if it may be called that, in the environment and trade field.

The GATT panel in the tuna/dolphin case concluded that the United States had acted inconsistently with the GATT by applying import restrictions on tuna caught by methods that kill significant numbers of dolphins.² The restrictions violated GATT Article XI, which prohibits most quantitative import or export restrictions. The GATT panel also held that the United States could not justify its action under the GATT Article XX exceptions for measures necessary to protect animal life and for measures relating to the conservation of exhaustible natural resources.³

I. THE UNILATERAL ALTERNATIVE TO IMPORT RESTRICTIONS

The GATT panel decision is not quite the environmental disaster that some have portrayed it to be. Professor John Jackson's paper points out some of the ways in which the impact of the decision could be softened, including the possible adoption of a GATT waiver that would permit at least some types of unilateral action for environmental protection purposes.⁴

Another avenue for possible unilateral action does not seem to be precluded by the panel decision. This is not to say that unilateral action is necessarily the preferred solution. It is only a second-best solution, in the absence of meaningful, cost-efficient and widely accepted multilateral environmental or conservation regulations that are buttressed by some fair and effective form of enforcement mechanism. Regrettably, such multilateral regulations are few and far between at present.

Unilateral environmental and conservation measures do not have to be in the form of regulations requiring specific conduct. The United States tuna/

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1. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereafter Tuna/Dolphin Panel Report].

2. The United States acted pursuant to the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(b), (g), 61 Stat. A11, A61, 55 U.N.T.S. 187, 262.

4. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992).

dolphin measures were in that form, however, regulating the conduct of American tuna fishing interests and prohibiting certain tuna imports. That is why the GATT panel concluded that they were inconsistent with the GATT Article XI proscription against quantitative import restrictions. But essentially the same goals could be served by domestic taxation. A tax could be devised that would be calibrated to the approximate number of dolphins caught and killed by tuna fishing methods, such as the use of purse seine nets, which are deemed to be unduly destructive of dolphins swimming above or with the tuna. The tax could be applied to the sale of tuna products in the United States, whether the tuna had been caught by fishing boats from the United States or from any other country.

To be economically efficient, the tax should bear at least some relation to the marginal value to the world community of the lost dolphins. That value may not be easy to estimate, but precision need not be sought in such matters. If even a close estimate could be made, fishing interests would have an economic incentive to use dolphin-safe fishing methods, as long as the marginal cost of doing so was less than the per-unit tax. Even if fishing interests did not change their methods, at least there would be a public fund from the tax receipts that could be used for dolphin conservation or other environmental goals.

Although compatibility with the GATT is not entirely free from doubt, the tax should be held compatible so long as it (a) is imposed directly on products, (b) does not discriminate in favor of American and against foreign fishing interests, and (c) does not discriminate in favor of products of some foreign flagships and against others. The tax should be compatible with GATT even though the tax is geared to tuna "production" processes rather than to characteristics of the tuna.

This might seem inconsistent with the GATT tuna/dolphin panel's approach to the United States regulation of imported tuna. The panel said that the GATT Article III(4) requirement of national treatment for imported products in connection with domestic regulations "calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*."⁵ But this was said in the context of determining that the United States regulation was a quantitative restriction on imports under Article XI rather than an internal regulation under Article III. The issue would be different if a domestic tax were involved. Article XI does not apply to taxes. The GATT provisions that limit domestic fiscal measures relating to imports (other than antidumping and countervailing duties) are Articles I, II, and III.

A tax would be subject to the national treatment requirement of Article III(2). In 1970 a GATT working party, in a report adopted by the GATT Contracting Parties, concluded that "taxes directly levied on products [are] eligible for tax adjustment" under Article III(2).⁶ The tuna/dolphin panel relied on that determination. It said:

5. Tuna/Dolphin Panel Report, *supra* note 1, para. 5.15, at 1618.

6. *Report of the GATT Working Party, Border Tax Adjustments*, GATT Doc. L/3464 (Dec. 2, 1970) (adopted by Contracting Parties), BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD] 18th Supp. 97, 100.

Thus, under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes).⁷

An earlier GATT panel in the environmental context also relied on the working party report. It said:

As these conclusions of the Contracting Parties clearly indicate, the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment.⁸

The context for this statement was a tax on chemicals, which themselves could pollute the environment of the importing country. Thus, one might argue that the panel's view would not legitimize a tax on a product that is not itself a pollutant. But a tax on a product that is produced by an environmentally-harmful process is no less a tax directly on the product than is a tax on a product that is itself an environmental hazard. Article III(2) requires only that the tax actually be on the product and that it not exceed the charge on the similar domestic product.⁹

The equal treatment of all foreign flag states should satisfy the most-favored-nation requirement of GATT Article I. This is the thrust of the tuna/dolphin panel's treatment of United States requirements for the labeling of tuna. The United States Dolphin Protection Consumer Information Act¹⁰ gave the right to use the label "Dolphin Safe" for tuna harvested in the Eastern Tropical Pacific Ocean (ETP) only if it was shown not to have been caught with purse seine nets harmful to dolphins. The GATT panel said that because the regulation was tied to the unique circumstances of the ETP (the only ocean area in which dolphins swim with tuna and thus are knowingly caught when purse seine nets are used), it did not discriminate against countries fishing in that area. Moreover, because the labeling regulations applied to all countries whose vessels fished in the ETP, they did not distinguish between products originating in different countries.¹¹ In other words, if a conservation or environmental measure applies equally to the products of foreign states produced

7. Tuna/Dolphin Panel Report, *supra* note 1, para. 5.13, at 1618.

8. *Report of the GATT Panel, United States—Taxes on Petroleum and Certain Imported Substances*, para. 5.2.4, GATT Doc. L/6175 (June 17, 1987), BISD 34th Supp. 136, 161, 27 I.L.M. 1601, 1614 (1988).

9. See Frederic L. Kirgis, Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 859, 899-900 (1972).

10. 16 U.S.C. § 1385 (Supp. II 1990).

11. Tuna/Dolphin Panel Report, *supra* note 1, para. 5.43, at 1622.

by equivalent processes under equivalent circumstances, it will pass most-favored-nation muster.¹²

If the tax is permissible under GATT Article III(2), and if it is calibrated to conservation or environmental externalities in both the domestic and foreign production processes, it should not be found inconsistent with GATT Article II. Under Article II, GATT parties are required to honor import duties bound pursuant to GATT negotiations. Article II(2) disclaims any intent to preclude charges equivalent to internal taxes imposed consistently with Article III(2).¹³

Of course, a tax scheme of this sort need not be limited to the tuna/dolphin situation. It could be applied in a variety of cases where foreign regulation or taxation of environmental or conservation externalities in the production process falls substantially below United States standards, as long as the externalities can reasonably be evaluated in monetary terms, and the product is produced both in the United States and abroad. The tax would be easiest to calibrate, and therefore easiest to justify under the GATT, if it were imposed on items produced under industrial and environmental circumstances similar to those prevailing in the United States—as might be found in other industrialized countries. Better yet, it could avoid the charge of imposing United States standards on the world if it simply enforced agreed international conservation or environmental standards. The problem, of course, is that there are very few agreed standards.

II. STREAMLINED MULTILATERAL RULE MAKING

The GATT panel in the tuna/dolphin case was sensitive to the possible charge of engaging in judicial legislation if it were to open the Article XX exceptions enough to justify the American import restriction on tuna. Better, the panel said, to leave such things to the international legislative process.¹⁴ But what legislative process? As Professor Jackson has pointed out in his paper, within the existing GATT system the choices are essentially to amend GATT's substantive provisions or to establish a waiver that would permit certain deviations from the normal GATT rules.¹⁵ Another possibility would be to append a new rule-making procedure to the GATT that would establish a streamlined method of making and amending rules in the environment and trade area, and perhaps in any other area that must adapt to changing technology.

A relatively streamlined rule-making method has been used successfully in some other international organizations. A framework convention establishes basic rules and principles, much as the GATT already does in the trade field. A body is set up within the administering organization to consider more detailed

12. This conclusion differs from the one hesitantly reached in Kirgis, *supra* note 9, at 896-97. The Tuna/Dolphin Panel Report has clarified the law on this issue.

13. See Kirgis, *supra* note 9, at 898-900 (noting difficulty of calibrating tax in such cases).

14. Tuna/Dolphin Panel Report, *supra* note 1, para. 6.3, at 1623. See generally Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

15. See Jackson, *supra* note 4, at 1244-45.

rules, often reflecting new technology, and later amendments to these rules as human needs change and technology develops. The detailed rules and amendments do not have to go through the normal treaty-making process of signature plus ratification by each state that is to become a party to them. Instead, they are adopted by the administering body, which need not consist of all parties to the framework convention. They are then submitted to all parties with a time limit within which states must object if they do not wish to be bound. A state may opt out by objecting, and if a certain percentage of states parties—say one-third—do object, the rule or amendment would not enter into force for any states.

This model has been used for nearly half a century in the International Civil Aviation Organization (ICAO) for rules governing a wide variety of civil aviation activities. The rules and recommended practices are adopted by the ICAO Council, a body currently consisting of thirty-three member states, and enter into force unless a majority of the total ICAO membership objects.¹⁶ Almost all independent states in the world are members.

The International Maritime Organization (IMO) has similar procedures for amendments to some marine pollution rules, although in the IMO all states that will be subject to the amendments are entitled to participate in the body formulating them.¹⁷ Rarely, if ever, have states objected to ICAO or IMO rules or amendments formulated in this way, in large part because they are carefully prepared by experts and are circulated to all states for their input well in advance of their adoption. They tend to cover matters that are less political than GATT environment and trade issues, but one should not pass them off as inapplicable to GATT simply on that ground. Particularly in the case of IMO amendments to rules on marine pollution, powerful domestic interest groups are affected, and yet the streamlined rule-making process has worked reasonably well. If it can work there, it has at least a reasonable chance of working in the GATT.

This procedure could supply a multilateral alternative to unilateral regulation or taxation by importing states, designed to internalize the costs of pollution from the production process. Moreover, it could do so consistently with GATT trade goals. GATT is premised on the economic principle of comparative advantage. That principle works efficiently only if the prices of goods reflect their real marginal costs. To achieve that, it is necessary to internalize to the producer at least the truly significant costs to society of producing the goods, such as measurable damage caused by water or air pollution from waste discharge. It would be extremely difficult to tailor international regulations to such situations through the normal, cumbersome treaty-making process or even through individual GATT waivers. That would be so whether the regulations

16. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 90(a), 61 Stat. 1180, 1205, 15 U.N.T.S. 295, 356.

17. See International Convention for the Prevention of Pollution from Ships (MARPOL), Nov. 2, 1973, art. 16, 12 I.L.M. 1319, 1330-33; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546 (1978).

are in the form of harmonizing measures designed to impose roughly the same requirements on producers in some or all member states, or in the form of tailored authorizations for unilateral import measures designed to make the cost of goods produced with environmental externalities reflect their true marginal production cost.

Professor Richard Stewart's paper points out that it would be impractical—even counterproductive in trade policy terms—to try to eliminate all cost differentials among countries not based on “natural” factors.¹⁸ That is surely correct, but his admonition should not apply to the internalizing of truly significant external production costs. One might note, for example, that the International Labor Organization (ILO) already does this through conventions that have the effect of internalizing to producers some significant health and welfare costs otherwise borne by workers in countries lacking self-generated domestic legislation to protect them.¹⁹ At present, the ILO does not try to do this through the tacit-consent and opt-out procedure I have suggested for the GATT, but it could if the ILO Constitution were amended. So could GATT, with an amendment or annex to the Agreement.

My colleague, David Wirth, has noted the lack of opportunity for public input into many rule-making decisions by international bodies.²⁰ This could be an inadequacy in the proposed GATT tacit-consent and opt-out procedure if it involves only representatives of governments. To take care of the problem, some form of public participation could be injected into the preparatory process for adoption of rules by the tacit-consent and opt-out procedure. This could be done when governments are consulted before a proposed rule is first adopted, or perhaps through participation by nongovernmental organizations in the adoption sessions, or in other ways.

Neither the GATT nor its dispute-settlement process irrevocably stands in the way of effective environmental protection, either by restrained unilateral measures or (preferably) by collective ones.²¹ GATT-bashing should cease, and our attention should turn to more constructive ways to harmonize environment and trade goals. Happily, that is what the papers in this symposium set out to do.

18. Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. AND LEE L. REV. 1329 (1992).

19. See, e.g., Convention Concerning Safety in the Use of Chemicals at Work, June 25, 1990, 73 ILO OFFICIAL BULL., ser. A, No. 2, at 71 (1990).

20. See David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 381-83, 417 (1992).

21. See David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law* (forthcoming 1993) (on file with David Wirth).