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Gray C. Castle

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THE NEED FOR AN INTERNATIONAL DISPUTE PANEL: POSITION, CONSENSUS AND INTERDEPENDENT GOALS

GRAY CASTLE*

Trade-environment intersections manifest themselves with increasing frequency and in many forms. Among the trade-environment intersects with which the National Oceanic and Atmospheric Administration (NOAA)¹ is involved are tuna-dolphin, shrimp-turtles, whaling, Chinook salmon, and the spotted owl. The growing importance of these trade-environment intersections has resulted in an increasing willingness to address these conflicts.

An example of this changing attitude is seen in the timing of two recent international meetings. The Trade-Environment Experts Working Group of the Organisation for Economic Co-operation and Development (OECD), recently began deliberations aimed at formulating trade-environment guidelines for the twenty-four OECD member countries. Immediately thereafter, a General Agreement on Tariffs and Trade (GATT) Working Group on trade and the environment met in Geneva. The timing of these two meetings was not coincidental. Because many of the individuals involved with the GATT Working Group are also members of the OECD Working Group, the organizations scheduled the meetings so that one would follow the other.

Professor Stewart, in his paper, states that his objective is to “develop a conceptual framework for analyzing the interrelationship between trade restraints and environmental protection policy.”² I am in general agreement with Professor Stewart’s postulations and conclusions. In his concluding paragraph, he correctly states that “the economy is global.”³ The world has been moving inexorably toward economic interdependency for a long time. The pace at which this economic globalization is occurring has quickened in the past several years with the demise of the Soviet Union; the strengthening of the European Community; and the United Nation’s Conference on Environment and Development (UNCED). It is, of course, equally true that environmental issues are global in nature—particularly those that relate to the oceans and the atmosphere (the global commons).

There are those who assert that the environment is not a unique problem for GATT and world trade—that it is no different than the problems of

* Counsellor to the Under Secretary of the Department of Commerce. Trustee of Washington and Lee University. B.A. 1953, J.D. 1955, Washington and Lee University.

1. NOAA, the Nation’s Oceanic and Atmospheric Agency, “through Science and service, 1) describes and predicts changes in the Earth’s environment; 2) manages the Nation’s ocean and coastal resources; and 3) promotes global stewardship of the world’s oceans and atmosphere.” THE FUTURE OF NOAA at 2.

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

3. *Id.* at 1371.

taxes, labor, intellectual property and technology. The relationship between trade and the environment *is* unique. This problem is central, if you define the environmental objective as clean air, clean water, and food fit to eat. Trade and the environment are inextricably intertwined.

Because trade and the environment are opposite sides of the same coin, I submit that the approach to resolution of the trade-environment intersection must be *balanced* and *multilateral*. In accord with this view, Professor Stewart recommends some form of international tribunal.⁴ An international tribunal would be a natural outgrowth of a balanced and multilateral process.

A hodgepodge of unilateral, legislative efforts by individual countries will only serve to exacerbate the problem, particularly when the United States is the country taking the unilateral action. As a result of the tuna-dolphin embargoes, we are *persona non grata* in the world economic organizations—the European Community, the OECD and the GATT. Not content with antagonizing the trade interests, the United States also has succeeded, through its actions at UNCED, in alienating the world's environmental organizations.

The Interagency Working Group has not yet agreed upon a U.S. Government position on trade and the environment. The explanation for this difficulty lies in the fact that the U.S. Government is a microcosm of our socio-economic interests. Within the government, there are agencies with an economic-trade focus—such as the Office of the United States Trade Representative and the International Trade Administration of the Department of Commerce—and other organizations—such as NOAA and the Environmental Protection Agency (EPA)—with environmental responsibilities. Add to the mix, the disparate views of the State, Agriculture, Interior and Energy Departments, and the problem becomes self-evident.

The Department of Commerce (DOC) can play a pivotal role in the resolution of the problems arising from intragovernmental trade-environment conflicts as it is the only department or agency within the federal government which has both trade and environmental responsibilities. The International Trade Administration (ITA) of the DOC has the responsibility for trade development and NOAA is the federal government's principal environmental *science* organization.⁵ Additionally, NOAA has the responsibility for the administration and enforcement of both the Endangered Species Act and the Marine Mammal Protection Act. The enforcement of the latter gave rise to the Tuna/Dolphin dispute.⁶ The responsibilities of the DOC represent *all* of the interests which are reflected in the trade-environment intersection.

Unilateral action, whether by the United States or any other country, is, in most situations, unacceptable, and the United States should strive to

4. *Id.* at 1366-67.

5. EPA, of course, is the principal environmental *regulatory* agency.

6. See General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991).

obtain a construct which reflects international agreement on as many environmental standards as possible. Further, the United States should work to persuade GATT to view actions taken by a country in lawful implementation of these international agreements is "GATT consistent." The ITA shares this view.

To achieve this result will require several steps. First, NOAA and ITA must reach agreement on a departmental position on the major issues presented by the trade-environment intersect. Recently, after several months of negotiation, ITA and NOAA were able to reach a mutually acceptable trade-environment construct on several of the more important issues. The importance of this intradepartmental agreement cannot be overemphasized.

The agreed upon position statement asserted that:

The Department of Commerce now is uniquely positioned to provide leadership to the interagency trade-environment group. DOC program offices will now be able to frame priority issues for interagency policy debate in a *balanced* and *inclusive* manner. In addition, the development of common ITA/NOAA policy positions on these key trade and environmental issues should provide a solid basis for broader interagency consensus-building. Common ITA/NOAA policy positions will also be critical to effective DOC participation in policy and strategy decisions in connection with the second GATT tuna/dolphin panel.⁷

Now that we have a DOC position, our next step must be to "sell" it to the United States Interagency Trade-Environment Group so that our position—or some reasonable facsimile—may become "The U.S. Position on Trade and the Environment."

Once we have the United States position in hand, we have a dual challenge. First, we must persuade Congress to alter its long-held belief that this Country can impose its view on the world. A tenable U.S. position must advocate harmonization of standards and a multilateral construct—as opposed to the unilateral, "do it our way or else," approach evident in Congress' passage of Super 301, the Marine Mammal Protection Act and a host of other laws. Congress must be on board or our efforts to play a significant role in the resolution of these trade-environment issues at the OECD and GATT will "come to naught," or, at least, be substantially diminished. Second, coincident with our approach to Congress—and on the assumption that they will see the light—we will table our position with our friends at OECD. I say "friends" because OECD's twenty-four members are the developed nations of the world—the nations that conceptually see the world through the same prism, more or less, as the United States.

After the members of OECD have reached an agreement which, hopefully, will be the same as, or substantially similar to, ours, it will lobby the other GATT signatories—the less developed countries—in an effort to obtain

7. Report of DOC Trade and Environment Working Group (emphasis added).

their acceptance of the basic proposition that the trade-environment construct which is embraced in OECD's guidelines is appropriate, not just for OECD, but for GATT as well. Embodied in these guidelines, of course, will be the proposition that an action taken by a member country under an International Environmental Agreement signed by a certain number of countries is "GATT consistent."

Implicit in all of this is that I agree with Professor Stewart that "there is no reason in principle why GATT should not be capable of an evolution similar to that of the Supreme Court and the Court of Justice."⁸ Such an evolution will require a different mindset than presently exists at GATT, but "GATT will be especially likely to develop an environmental orientation if it fears a loss of jurisdiction to other international organizations such as UNEP or UNCED."⁹ Finally, I believe that Professor Stewart is correct in his conclusion that "an international tribunal rooted in the global trade regime has a better chance to harmonize trade and social regulatory concerns than a plethora of tribunals with special regulatory missions."¹⁰

This evolution may take five to ten years. Hopefully, however, during the interim, more and more international environmental agreements will be signed by an ever increasing number of countries so that there will be fewer *fundamental* issues as to which there is disagreement.

This trade-environment intersect is critically important—it cannot be an "irreconcilable conflict." There *must* be a recognition that these are "interdependent goals" and that, without a resolution of the issues which they present, we will *not* achieve the "sustainable development" which the United States, the other signatories to the North American Free Trade Agreement,¹¹ the OECD and UNCED—in fact, the whole world—have enthusiastically embraced.

8. Stewart, *supra* note 1, at 1349.

9. *Id.*

10. *Id.* at 1350.

11. North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., available in LEXIS, GENFED-EXTRA Database; WL, NAFTA Database (awaiting ratification as this article went to press).