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SOVEREIGNTY, TRADE, AND THE ENVIRONMENT – A U.S. PERSPECTIVE

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The topic of trade, the environment, and sovereignty raises some of the more passionate political debates going on within the United States and other countries, particularly in dealing with the world trading system. We are in a state of flux. This is a great time to be working in this field, since everything seems to be a case of first impressions. The boundaries are being rearranged, and a lot of the debates are white-hot.

As I prepared for this, I read a very apt summary of NAFTA by none other than Henry King, who pointed out in his conclusion the rather startling fact that, in Northeast Ohio, an area almost completely dependent on international trade in many respects, the Congressional representatives were against Fast Track. This scenario is repeated throughout the United States. Thirty of the fifty-two members of the House Agriculture Committee said they were against Fast Track. U.S. agriculture depends on exports; without exports it is in red ink. So this disjunction between economic reality and politics shows that Karl Marx indeed was wrong, but it also shows the current state of confusion we are in about the swirling interplay of issues such as trade, the environment, and sovereignty.

I am going to start with a deliberately simplistic way of looking at the world of international law and the environment, fairly conventional and somewhat over-generalized. You have environmental impacts within a country; local water pollution, for example. You have environmental impacts that cross borders, *Trail Smelter*[1] being, of course, the classic case for U.S. and Canadian lawyers. And you have environmental impacts in the global commons. Classically, this meant the high seas, and now it includes, as we all know, the atmosphere. One looks at the legal regimes, and to some extent the trade issues affecting those three spheres, and you see all three of those spheres being changed. You see legal rules that differ from the political pressures, and you see the categories being rearranged, NAFTA being an association of three sovereign countries.

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[1] United States v. Canada, Arbitral Tribunal, Montreal, Apr. 16, 1938 and Mar. 11, 1941; U.N. REP. OF INT'L. ARBITRAL AWARDS 3 (1947) 1905.

Let us start with the most classically, supposedly non-international environmental impact – solely within the territory of a sovereign nation. I am ducking all the arguments about what sovereignty is because we have heard them all day today. But, certainly, you would think that something like local water pollution would be, at least in international legal terms, of no concern to anyone but the relevant government of the territory. This is no longer true.

We have two very hot issues, perhaps not under international law, but certainly in the politics of trade negotiations which are changing that view. The first, and it was very, very strong in NAFTA, is the view, whether legitimate or not, that by maintaining low environmental standards, or by lowering its existing environmental standards, a country will "steal investment" and steal jobs. This was certainly something that some U.S. environmental non-governmental organizations (NGOs) played to the hilt during the NAFTA debate. Environmental NGOs in the United States have had to learn how to play hard ball in domestic political battles, notably the Clean Air Act of 1990.[2] I would guess, to some extent, this concern for plant stealing and lower environmental standards was a tactical choice to line up support for labor unions. So, one can discount it as a tactic. One cannot discount the force of the political appeal. So here you have, hypothetically, Mexico lowering its environmental standards, something that is presumably its own concern under classic doctrines of international law, and being told, no, you cannot do that. There is language, though hardly hard law or crystal clear hard law language, in the investment chapter of NAFTA, that a Member should endeavor not to lower its environmental standards to attract investment. This is language that is repeated in at least some of the drafts of the Multilateral Agreement on Investment (MAI), at the insistence of the United States.

So that is something that is no one's business except Mexico's, but Mexico must agree to that under NAFTA, and now the United States is selling it to the rest of the world. As I mentioned, there is considerable controversy about whether this plant stealing actually happens much. But the political reality is perhaps stronger than the underlying economic reality. That is one side of the coin. You have groups, not even governments, but non-governmental organizations, self-styled in one country, telling a sovereign government what it can do with that sovereign government's environmental regulations. I thought the NAFTA debate itself got rather carried away on this, since, in effect, you had at least some NGOs saying that the United States, Canada, and Mexico should all have harmonized environmental standards. But they were not willing to give the Mexicans and Canadians votes

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[2] Clean Air Act of 1990, 42 U.S.C. §§ 7401-7642 (1990).

on what those harmonized environmental standards would be. There is also something of a democracy deficit built into this debate as well.

The second aspect, the flip side, is represented by the recent WTO appellate body ruling in a case involving beef hormones.[3] U.S. exporters were trying to get the E.U. to comply with the result. But the nature of the debate, and I will stylize the case to avoid getting too tendentious, was essentially that the E.U. had no scientific evidence to support the ban on the use of certain natural hormones in beef.

So here you have a situation where a sovereign government, in this case the E.U., (let us assume there is no scientific support) acted inconsistently with the WTO. Prior to that, the E.U. argued that it could ban imports of beef that had been raised with these growth-promoting hormones if it also banned domestic production sales, which it did. It banned both. So, again, to stylize it a bit, you have a ban on something solely because of local political pressure for which there was no scientific evidence of danger. Yet, a WTO panel ruled that, under the WTO, this was inconsistent. This is not some accident, by the way. The sanitary and phytosanitary agreement within the WTO was negotiated very much with this specific dispute in mind.

So, the fact that the E.U. lost this dispute was not exactly a surprise, since the rules had been written to make sure it would lose. Indeed, you have since seen the E.U. propose that consumer concerns be considered a legitimate basis for regulation. Again, think about that in terms of a shift from what I would call the "classical doctrine" that a government basically can do whatever it wants. It can do that as long as that government bans domestic production as well as imports. We are now in this "brave new world," where the sovereign government cannot even make that decision if it does not have scientific support, as decided by an external supranational body. No wonder people all across Canada and the United States are worried about anonymous people in Geneva.

I would note that, while the E.U. spent ten years fighting off this imported beef when there was no scientific evidence of any harm, they did miss out on mad cow disease over the entire period. They also missed the point, that one does not encourage local beef consumption by bad-mouthing any beef, imported or domestic, without some scientific basis. You have never seen an ad by Coca-Cola saying that Pepsi is bad for you. It destroys the brand category. So within this first sphere, historically, the most sacrosanct in terms of sovereignty, we already see erosion, both legally and politically. No U.S. NGO believed that it was not allowed to push Mexico on Mexican environmental practices that had no cross-border effects.

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[3] *E.C. - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (Jan. 16, 1998). The author is council to the U.S. exporters.

The next stage beyond that is what I would call "fairly indirect" cross-border effects. In my view it is probably the most controversial, and it is also one of the most emotional issues. A classic example is the current furor over leg-hold traps, not a ban on the traps in Europe, but a ban on the traps in Canada and the United States. Here you have an alleged cross-border effect, which is that high-income consumers in western Europe feel injured by Inuits in Northern Canada using leg-hold traps on animals. That is the cross-border effect, a psychological one. I am stating that very neutrally. I am not telling you it is good or bad. But it is a somewhat novel claim. In effect you have a claim that these people in Europe can tell Inuits how to do something they have been doing for years. This kind of environmental debate involving charismatic animals has not been a very pretty one. Typically, the debate has suffered from being played up in the press in a very one-sided way, and from there it just goes downhill.

The tuna/dolphin dispute had a lot to do with that.[4] If you actually read the tuna/dolphin opinion in the WTO, which had a lot of the same characteristics, you would see between the lines a very common characteristic of GATT panel opinions, which is a suspicion that the importing country was discriminating against foreigners. This was the case with the United States. If you actually go through the Dolphin Protection Consumer Information Act,[5] you will find that it does favor U.S. fishermen. Surprise. In fact, you will find many GATT panels where there is an underlying suspicion that a national law-making body will favor its own producers. I am sure you are all shocked. These are where the big controversies have been. We may be coming out of that in a more rational way, not in a legal sense, but because of public relations matters. I do not know how many of you followed the fight in CITES (Convention on International Trade in Endangered Species) last summer over elephant hunting and sales of ivory. It was the first time where you actually saw the public relations efforts more or less balanced. A group based in Harae called "Camp Fire" actually got to the media and put forward the view of the villagers, which was that they could make money having a controlled hunt of elephants. Since they had no control of the elephants, their fields were being trampled, and that had to be weighed against maintaining the species.

I cannot tell you which way is right or wrong. What I can say is this; it was the first time where the press reports were more or less balanced, and that led to some sort of compromise. I am addressing that carefully as a po-

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[4] *See United States - Restrictions on Imports of Tuna*, 30 I.L.M. 1594, ¶¶ 5.26-5.27, 5.31-5.32 (1991); *United States - Restrictions on Imports of Tuna*, 33 I.L.M. 839, ¶¶ 5.26-5.27, 5.38-5.39 (1994).

[5] Dolphin Protection Consumer Information Act, 16 U.S.C.A. § 1385 (1998).

litical relations matter. One did not see much argument about whether classic principles of international law applied here. This was very much a question of who could get the public sympathy. So that area has been, and I think will continue to be, the most emotional. You can raise a lot of money if you are on the right side of the issue. You can get a lot of votes. It gets a lot of public sympathy. So, this indirect cross-border effect has probably already been the nastiest issue in public terms, and it probably will continue to be so.

The more classic cross-border effects go back to *Trail Smelter*, and these actually seem to be working out better within North America. One sees at least increasing attempts at cooperative work recognizing that there are cross-border effects. The last time I was in Toronto, someone reminded me that half the air pollution in that city came from the United States. The U.S./Canada Agreement on Air Quality[6] does show some attempt to work things out in a practical way. There are some things being done between the United States and Mexico in the same sense. One of the more interesting things, given the OECD principle that the polluter pays, is that the rules are not always followed. The best example is the Chernobyl cleanup. The E.U. is funding a lot of that project. The victim pays because the victim wants it cleaned up and wants to prevent it from happening again. The victim recognizes that the polluter cannot pay. You do not have people standing on principle there. You have someone figuring how to get the place cleaned up. I think that the legal side of that has not really had many implications for trade. It is odd because it is the most obvious cross-border effect. There have not been many trade fights about it. People are not using trade sanctions to try to force people into remedying cross-border pollution. It is unusual because that is where you would expect the most fights.

The third general area is the global commons. This is probably the most interesting because of the Kyoto Convention[7] and the likely follow-up. My personal view is that, politically, the global climate change movement will be a juggernaut. It is going to run over a lot of people. Once again, there are legal instruments for some of the global commons, but not for all. If you go through WTO opinions, you will see some that you might consider to be wishful thinking by panels. The party, typically the United States, that took unilateral action should have gone out and negotiated an international agreement. Usually, they tried and could not do it.

The WTO appellate body has certainly shown an enthusiasm for acting like an appellate body. They always change something, and they also criticize the panel. That area is where the most serious confrontation is likely to

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[6] Agreement on Air Quality, Mar. 13, 1991, Can.-U.S., 30 I.L.M. 676 (1991).

[7] United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

occur. So far, despite much fussing about the relationship of the WTO to multilateral environment agreements (MEAs), there actually has not been any conflict. The most obvious example is the Montreal Protocol on chlorofluorocarbons (CFCs),[8] although there are provisions which are pretty obviously inconsistent and trade sanctions are permitted against non-members of the protocol, even though they are WTO members. That would violate the WTO, but none of those allegedly aggrieved people have ever bothered to challenge it.

That could change with the Kyoto Convention. That is why I think the most important item on the agenda right now is the so-far stagnant process of reaching some sort of accommodation between the WTO rules and the MEAs. I will not go through the entire debate, which has bored to tears everyone on the WTO's Committee on Trade and Environment for the last three years. There have been numerous proposals. Just to give you a very quick summary, one school of thought is that the WTO should create a set of *ex ante* standards, and any MEA that meets those standards is waived from the WTO rules. A second option would be a more conventional one-by-one waiver; as agreements come up, they should go through some sort of process and be waived.

The WTO rules are not set up for this. Getting waivers is an extremely difficult thing. Waivers, at least theoretically in the WTO, are supposed to be temporary, not permanent, although past history would not suggest that to be a firm rule. The Committee on Trade and Environment has been talking about this literally for three years and has gotten nowhere. If Kyoto is to work and become effective, then something will have to give there.

One x-factor for all us international lawyers is that, so far, the MEAs predated the signing of the WTO Agreement in 1994. Thus, you had considerable concern about the later-in-time rule from an MEA point of view. To the extent that there is a final agreement in Kyoto, binding on everyone – and we will get debates on that – it will be later in time. So the trade people can have heartburn about the later-in-time rule, rather than the MEA people. Speaking as an observer, I can only wish that both sides avoid heartburn by figuring out a common set of rules.

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[8] Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.