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# Sovereignty and the Regulation of International Business in the Environmental Area: An American Viewpoint

*Stanley M. Spracker\**

## INTRODUCTION

**E**nvironmental protection and conservation issues have come to the forefront of the international political agenda. This is evidenced by the success of the Rio Earth Summit and the continuing dialogue between nations that has since followed. Although nations on the whole recognize the problem and agree on the ultimate goal of protecting the environment, countries remain divided on the issue of how to approach and remedy the problem. Some of the disagreement between nations stems from the clash of this issue of relatively new international prominence, the protection of the global environment, with a longstanding international concern, recognition of a nation's sovereignty.

## BACKGROUND

### *Defining the problem*

Increasingly, governments are recognizing the existence of environmental degradation that is occurring within their own territory and that extends beyond their boundaries:

- Global warming
- Ozone layer depletion
- Transboundary pollution
- Deforestation
- Land lost to desert

*Recognizing the imminence of a global environmental crisis, the international community has reached a general consensus that protection of the environment must become a priority for the global community as a whole.*

This consensus was articulated in *Our Common Future* by the World Commission on Environment and Development and more recently in the Rio Declaration on Environment and Development issued at the United Nations Conference on Environment and Development. The Rio Declaration stated:

in Principle 4- "environmental protection shall constitute an integral

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\* Weil, Gotshal & Manges.

part of the development process and cannot be considered in isolation from it," and reiterated

in Principle 7- "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."

- A major reason why nations have not been able to agree on a unified approach is the existence of sovereignty concerns that are unique to the environmental area.

*The concept of sovereignty has played a distinctive role in the environmental context. In the environmental context, sovereignty has come to symbolize to a state:*

- the ability to control its territory and natural resources located within the territory;
- the right to exploit natural resources in whatever manner it chooses, including the freedom to have larger populations that deplete natural resources more rapidly;
- the authority to create its own policy to regulate environmental conservation and protection and to develop its own standards including the freedom to set policy in accordance with its own priorities.

### *Effects of conflict*

When this concept of sovereign rights has been infringed upon, some nations refuse to join in environmental protection efforts or the measures are struck down as violations of traditional legal tenets. The result has been a failure to foster the cooperation needed to confront the environmental problem in a unified manner and a failure to enact provisions that will stand up to scrutiny and effectively protect the environment.

Cooperation of all nations is necessary because of the interdependence and interconnectedness of the global environment. A collective effort is essential because it is difficult to correct environmental harm within a country or environmental hazards emanating from a country without its cooperation. Individual efforts will not solve the problem if others continue to engage in activities that damage the environment. The infringement on sovereignty inherent in many environmental protection measures poses a serious threat to effective protection of the environment.

- Intrusions on sovereignty are obstacles in the path toward cooperation and agreement on solutions to the problem.
- Effective and enforceable environmental protection measures require nations to cede some sovereign authority. They place limits on a nation's ability to exercise its sovereign rights. They are based upon priorities set by other nations or the international community. At-

tempts by some nations to solve the problem have placed environmental protection measures in conflict with the sovereign rights of individual nations and with the established international framework.

- There is an inverse relationship between infringement on sovereignty and willingness to cooperate and assent to an approach to the problem. The more infringement, the less likely a nation is to assent to the proposed policy.
- The inability to get nations to assent to protective legislation is not the only obstacle. In addition, environmental protection measures which threaten sovereignty have been struck down by international bodies as well as national authorities. Intrusions on sovereignty may violate international law, binding international agreements or national laws.

#### THE PROBLEMS WE FACE ARE:

- Lack Of Cooperation
- Illegality Of Measures

#### TODAY I WILL DISCUSS THE FOLLOWING:

- The effect that the concept of sovereign rights of nations has had on efforts to protect the global environment, citing
- specific examples in the North American context where traditional notions of sovereignty have been threatened by attempts to regulate protection and conservation of the environment.
- Also, I will propose methods to effectively protect the environment while minimizing intrusions on sovereignty in order to progress toward a unified approach to the impending crisis..

*Intrusions on territorial sovereignty - Attempts by the U.S. to extend its relatively strong environmental regulatory regime beyond its territorial boundaries through extraterritorial legislation and adjudication have met with opposition premised upon sovereignty concerns.*

Extraterritorial legislation refers to the concept of applying one nation's statutes and regulations to activities occurring within another country's borders. The most prominent example involving the U.S. is the *Dolphin/Tuna Case*.

#### DOLPHIN/TUNA CASE

##### *Description of the case:*

The *Marine Mammal Protection Act* (MMPA) was enacted in part to reduce the number of incidental "takings" or killings of dolphins that occur in commercial fishing operations. The MMPA limits the number of dolphins that can be taken by U.S. fisherman. In addi-

tion, it imposes an obligation on each country that exports fish to the U.S. to demonstrate that it has a regulatory program governing the taking of marine mammals that is comparable to that of the United States. If the exporting country cannot make the required showing, the U.S. must impose an embargo against that country's product. The U.S. imposed such a ban on Mexican tuna citing the MMPA.

Mexico challenged the validity of the MMPA and the embargo before a General Agreement on Tariffs and Trade (GATT) Panel claiming that both were unfair quantitative restrictions that violated the GATT. The U.S. argued that the measures were within the exceptions in Art. XX(b) which allows provisions that are "necessary to protect animal life or health" and Art. XX(g) which allows provisions "relating to the conservation of exhaustible natural resources."

### *GATT Panel Decision*

1) The GATT Panel found that the MMPA sought to regulate production methods used by Mexico within its own territory. The GATT Panel held that both Art. XX(b) and Art. XX(g) apply only to natural resources located within the regulating country's jurisdiction and therefore do not permit extraterritorial application of standards set by one nation. The Panel reasoned that to allow the U.S. to legislate extraterritorially would permit one state to unilaterally determine the conservation policies from which other states cannot deviate without jeopardizing their rights under the GATT.

Also, the Panel found that to allow extraterritorial legislation such as the MMPA would endanger the multilateral framework established by the GATT. If the MMPA were permitted to stand it would create a situation where trade would be limited to parties with uniform regulations.

2) Also the Panel held that the MMPA was not "necessary" within the meaning of Art. XX (b) because the U.S. did not pursue other available alternatives such as international agreements to protect marine mammals (alternatives that are less intrusive on sovereignty). The Panel indicated that a multilateral agreement in which each signatory agreed to cede some sovereign authority in order to protect marine mammals would be a better solution.

### HOW SOVEREIGNTY WAS THREATENED

The GATT Panel rejected the extraterritorial application of U.S. environmental standards based specifically on its concerns for the intrusion that such application would have on Mexico's sovereignty. The holding of the Panel points to two major sovereignty conflicts:

- The imposition of one nation's environmental standards to regulate the natural resources located in the territory of another sovereign

nation. The MMPA infringed on Mexico's right to develop its own conservation standards.

- Unilateral responses to environmental problems interfere with an international multilateral framework that has been established where countries have agreed to cede some sovereignty in forming their policies.

### ENVIRONMENTAL POLICY IMPLICATIONS

The GATT Panel decision essentially states that it is impermissible for one country to unilaterally restrict trade based on the environmental consequences of another country's production methods. This will limit the ability of any nation to unilaterally extend its environmental regulations beyond its own borders using trade measures.

*Extraterritorial adjudication refers to the concept of using domestic courts to resolve disputes arising out of activity carried out in foreign territory. National Environmental Policy Act (NEPA) litigation is the most prominent example of attempts to use U.S. courts to address environmental harms originating in foreign territory.*

### GENERAL

Several environmental groups have used U.S. courts to try to impose the NEPA requirement that an environmental impact statement (EIS) be prepared for U.S. final agency actions, including those actions that occur outside of the United States. The U.S. government has consistently argued that NEPA does not apply to actions occurring outside of the territory of the United States. The government has primarily relied on the presumption against the application of United States law outside of United States boundaries unless there is specific Congressional intent that the law apply outside the U.S. Most U.S. courts have held that NEPA lacks any specific Congressional intent that the law apply outside the United States. Therefore, the presumption bars application of NEPA to agency actions outside the United States. However, in the past year, cases brought in the D.C. Circuit have added some new perspectives to the debate.

### CASES

*Environmental Defense Fund v. Massey* - The D.C. Circuit required the National Science Foundation to prepare an EIS pursuant to NEPA for a waste disposal unit to be built in Antarctica. The court reasoned that NEPA governs federal decision-making which normally occurs inside the United States not the federal action that may occur outside the United States. Therefore, the court held that the presumption against extraterritorial application of U.S. law did not apply. It is

important to note that the fact that the federal action was to occur in Antarctica, a sovereignless area, influenced the decision. In fact, the court specifically limited its holding to the context and facts of the particular case.

*NEPA Coalition of Japan v. Aspin* - The District Court for the District of Columbia found that the Department of Defense (DOD) did not have to prepare an EIS pursuant to NEPA for military facilities constructed in Japan. The court held that the presumption against the extraterritorial application of U.S. law did apply in this case relying on three bases:

- the court distinguished this case from *Massey* because in this case the plaintiffs were trying to extend NEPA regulation to govern activity in a sovereign nation (Japan), not a sovereignless area (Antarctica);
- the preparation of an EIS would require the DOD to collect environmental data from the surrounding area, thereby intruding on Japanese sovereignty;
- extraterritorial application of NEPA would interfere with complex treaty relations.

#### SOVEREIGNTY IMPLICATIONS

The purpose of the presumption against extraterritorial application of U.S. law that prevails in U.S. courts is to avoid conflicts with other sovereigns. The presumption helps to prevent situations from arising where governments will clash or where laws and legal systems of different sovereigns will conflict.

In *Massey*, the Circuit Court found that there was no sovereignty concern because the actions governed by NEPA occurred within U.S. territory and because that case involved a sovereignless area. Therefore, the court held that the presumption did not apply when no sovereignty conflict was at issue.

In *NEPA Coalition*, the district court distinguished the case at bar from *Massey*, finding that NEPA sought to regulate activity occurring outside of the U.S., and that the extension of NEPA regulation would cause the U.S. to infringe upon the rights of a sovereign state. Therefore, the court held that when sovereignty concerns are an issue, the presumption does apply.

Both decisions highlight the conflicts with sovereignty that U.S. courts can encounter if they become active in extraterritorial adjudication.

#### ENVIRONMENTAL POLICY IMPLICATIONS

Sovereignty concerns have limited the use of NEPA and the ability to resort to U.S. courts to remedy environmental harms that occur abroad.

*Intrusions on a sovereign's authority to set its own priorities for use of natural resources and to formulate its own conservation standards and policies.*

Attempts to influence the decision-making of developing countries in the environmental context.

### *Debt-for-Nature Swaps*

The U.S. government has advocated debt-for-nature swaps as a viable debt relief and environmental conservation alternative. Also, U.S. environmental groups have embraced debt-for-nature swaps as part of their environmental protection efforts.

### *Description*

Much of the environmental damage that is occurring is in developing countries that also have a great deal of foreign debt. Debt-for-Nature swaps try to address two problems in one deal. In a swap, foreign debt owed to commercial banks is purchased at a discount on a secondary market by a group, usually from outside the debtor country. The debt is canceled in exchange for the debtor nation placing an equivalent amount of local currency into a fund. The fund is then used to implement conservation policies or land is specifically set aside for environmentally safe use.

## SOVEREIGNTY PROBLEMS

Several debtor countries have rejected debt-for-nature swaps because they perceive the swaps as an infringement on their sovereignty. Actually, ownership and control over natural resources remains vested in the debtor nation. The sovereignty conflicts in this area are more subtle. Debtor nations argue that sovereignty is still an issue in debt-for-nature swaps because:

- foreign agents control the use of funds and influence the creation of policies;
- outside groups interfere with internal affairs by imposing their view that resources should be used to protect the environment rather than for other worthy causes;
- organizers impose conservation programs on indigenous groups without attempting to coordinate with these groups.

## ENVIRONMENTAL POLICY IMPLICATIONS

Debt-for-nature swaps are yet another method of environmental protection that has been rejected on the grounds that it intrudes on sovereignty. The result is less protection for the environment in devel-

oping countries where much of the environmental degradation is going on.

## SOLUTIONS

Solutions to the problems posed by sovereignty conflicts must balance the need for effective and enforceable environmental protection measures against the intrusion on sovereign authority imposed by such measures.

### MULTILATERAL AGREEMENTS

There is a definite trend toward the internationalization of environmental policy-making. According to the United Nations, more than 150 multinational agreements relating to environmental protection have been concluded in the past ten (10) years. Both the GATT Panel decision discussed previously and the Rio Declaration call for multilateral solutions to environmental problems. Principle 12 of the Rio Declaration states:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.

Many existing international accords involving environmental protection were created using the Convention-Protocol approach. Parties participate in negotiations in the convention stage and reach an agreement on standards and obligations to be imposed once the protocol enters into force.

### MONTREAL PROTOCOL

The Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol) requires signatories to:

- phase out their use and production of CFC's (chlorofluorocarbons) and other ozone-depleting substances and
- ban imports and exports of controlled substances to and from non-party countries.

### BASEL CONVENTION

Signatories of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal agree that:

- trade in hazardous waste can only take place between signatories;
- informed consent of the importing country must be received prior to any export of hazardous waste;
- hazardous waste should be exported only if the exporting country

lacks technical ability, necessary facilities or suitable disposal sites for the waste domestically.

More recently, the U.S. has utilized the treaty approach to implement environmental policy.

#### NAFTA SIDE AGREEMENT

The NAFTA side agreement on the environment attempts to ensure that existing environmental standards within each country (U.S., Canada and Mexico) are maintained and upheld.

- It creates the Commission on Environmental Cooperation which consists of a council, a secretariat to provide technical and administrative assistance and a Joint Advisory Committee made up of five (5) non-government members from each country who will advise the council.
- It creates the right of any organization or individual to submit a complaint to the secretariat claiming that a party has failed to enforce its own national environmental laws. If a violation is found, the parties may agree to implement an action plan to remedy the problem. If a party fails to implement the action plan they will be fined. If a party fails to enforce its environmental laws and refuses to pay the fine trade sanctions will be applied.

#### ADVANTAGES

- It fosters cooperation and allows for global reach.
- It creates an accepted response to environmental problems.
- It ensures minimal intrusion on sovereignty because signatories agreed to cede some authority (many Congressmen expressed concern over the effects the side agreement might have on American sovereignty and said they would not vote for any side agreement that too severely infringed on U.S. sovereignty).

#### DISADVANTAGES

Nations rarely cede significant power to a supranational power that would be able to effectively monitor and enforce the obligations undertaken by the parties. As a result, there is:

- **LACK OF ENFORCEABILITY**  
enforcement depends on individual nations, willingness to enforce and the availability of resources to put toward enforcement in the countries.
- **LACK EFFECTIVENESS**  
some agreements have opt-out provisions which allow countries to avoid obligations they do not like and the possibility of holdouts exists- countries may sign convention but never adopt the binding protocol.

### OPTIONS

Propose international agreements that:

- impose standards that are stringent but with the objective to increase willingness to assent;
- utilize a central monitoring agency that will set increasingly higher standards. Collect data and ensure compliance;
- avoid coercive sanctions (such as trade sanctions) that infringe on sovereignty.

Propose amendment of GATT:

- clarify the ambiguous language in the Art. XX exceptions;
- explicitly validate trade restrictions relating to the enforcement of international environmental agreements.

### UNILATERAL RESPONSE

Unilateral response from nations like the U.S have been called for to address the shortcomings of multilateral agreements.

Approaches:

Extraterritorial legislation- MMPA

Extraterritorial adjudication- NEPA litigation

Influence other countries to change their environmental policies- debt-for-nature swaps

ADVANTAGES:

- Bases for unilateral response-
  - global concern for the environment
  - externalities of pollution control costs
  - transboundary effects of pollution;
- effective and enforceable because high U.S. environmental standards would be implemented and U.S. resources would be used to enforce provisions.

DISADVANTAGES:

- often severe infringement on sovereignty as discussed previously.

### OPTIONS

Proposals to lessen intrusion on sovereignty imposed by unilateral response:

- make legislation applicable to private companies causing harm to the environment, not the country where the harm occurs;
- amend the GATT to include more specific and stringent environmental protection clauses (ie. allowing extraterritorial application of the internal law of one nation in certain circumstances). All contracting parties would be asked to agree to cede some sovereignty on the issue of environmental protection measures that affect trade;
- litigate the territorial effects exception to the presumption in the environmental context- use the increasing evidence that environmental

damage in other countries has an effect in another country (i.e. interdependence of environment- effect ozone layer depletion has on global warming and in turn rising water levels, transboundary air and water pollution);

- give control of the fund created by debt-for-nature swaps to domestic environmental groups that have strong environmental protection policies (Brazil which formerly rejected debt-for-nature-swaps has now approved a swap where a domestic environmental group controls the protection fund);
- coordinate the conservation policies implemented in debt-for-nature swaps with indigenous groups;
- include a sovereignty protection clause that imposes damages when sovereignty of the debtor nation is infringed upon, using mutually agreed upon standards.

### CONCLUSION

In order to achieve the goal of effective global protection and conservation of the environment while also minimizing the harsh effects of intrusions upon a nation's sovereignty, the U.S. as well as the rest of the international community must recognize the threat that sovereignty conflicts pose to agreement on solutions to our environmental problems. The solutions we propose and ultimately follow should include multilateral agreements that are global in scope, when possible. The internationalization of environmental policy is an integral step in the international community's efforts to foster cooperation and to set ever increasing standards for environmental protection. However, unilateral responses, when warranted, are an important interim measure to ensure protection of the environment at the highest possible levels.

