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Industrial Policy and Environmental Regulation—Canada

John L. Howard*

INTRODUCTION

The phrase "industrial policy" immediately evokes concepts of overarching plans, grand strategies and common visions which, both in government agencies and private corporations, quickly degenerated from energizing doctrine, to platitudinous dogma and finally to discredited myth. Among all the prophets of human striving, few have summed up the issues more succinctly or more forcefully than Toynbee in his A Study of History. Using as metaphors the Old Testament trials of Job and Goethe's Faust, he argues persuasively that, in spite of great individuals or pretentious grand designs, civilizations rise in response to existing challenges and fall when they lose the energy and moral strength to respond to new challenges. The challenges arise slowly and almost imperceptibly. They are rarely ever dramatic threats. They are, rather, slow degenerative processes within complex systems that often defy any convincing cause and effect analysis even long after a civilization or nation has declined. That is what makes the metaphor of Faust so appropriate. He is redeemed not because he has found any ultimate answers as to what is right but because he never ceases to strive to learn more about himself, his relationship with other individuals and the world around him. In a world where the only constant is change, Faust strives his utmost to respond to constantly new challenges and in the process, to expand his knowledge of material things and of the good moral life.

This paper, therefore, rather than attempt to prescribe any grand design, falls precipitately from the lofty metaphysics of Faust to the more mundane world of international economic relations. Consistent with the purposes of this Institute and the narrower goals of this conference, I shall summarize briefly what I assume is a desirable industrial policy and, on that foundation, attempt to explain the nature,

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2 For an excellent critique of Faust, see the Introduction in 1 ROE MERRILL HEFFNER ET AL., GOETHE: FAUST, 66-72 (U. of Wis. Press ed., 1975), where the editors describe Faust's internal conflicts between material desires and spiritual demands, between action and contemplation, and finally between nature and reason. These same inner conflicts, as they relate to the inner state, are discussed with reference to Robert Unger's Knowledge and Politics in Mark Kelman, A Guide to Critical Legal Studies 64-74 (1987).
functions, applications and real world limitations of trade and environmental regulation.

The specific thesis of this paper is that to superimpose in the existing system of discretionary trade regulation the value-driven vagaries of environmental regulation would be, at best, to compound a felony. While easily stated, that thesis requires an examination of the characteristics of fundamental institutions of governance that are too often assumed - or assumed away - in question-begging arguments.

INDUSTRIAL POLICY

Although usually characterized as a technical issue concerning the relationship between governments and producer organizations, underlying every individual's concept of a desirable industrial policy is an implied moral decision about social justice, specifically the redistribution of wealth that motivates individuals to learn continuously and work effectively in any society. There is, therefore, no touchstone, only a balance, an inner tension that motivates people to do things.

In his recent book *Head to Head*, Lester Thurow, comparing large economies, concisely describes the generally perceived alternatives.

Benchmarking reveals a variety of foreign models. The Japanese Ministry of International Trade and Industry (MITI) orchestrates the development of a game plan in Japan. In Germany the large industrial banks, among them, the Deutsche Bank, are the conductors of the economic orchestra. Government-owned firms play a key role in France. But none of these foreign systems could easily be grafted onto the U.S. system. America is going to have to find a uniquely American way to develop a game plan.

The problem is that these are only perceptions. Ohmae convincingly argues that "Japan Inc." is an American invention and has little to do with Japanese industrial reality. And recent events make clear that Germany and France have no "game plan" that ensures continuous success. What they do have in common, however, is a rigorous, comprehensive education system and a wealth transfer system that give individuals and corporations a sense of security that enables them to work on a basis of cooperation rather than constructed conflict toward long-term goals. Indeed, notwithstanding superficial conflicts among them, Ohmae, Reich and Thurow tend generally to come to that same conclusion.

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Ohmae states the central points extremely well:

"When money, goods, people, information and even companies criss-cross national borders so freely, it makes no sense to talk of 'American industrial competitiveness.' The only thing is that IBM competes with DEC and Fujitsu."  

And he also points out with respect to the role of government:

If you look for an industry that has made its mark for a sustained period of time because of continuing government subsidies or guidance, you will look for a long time. Such industries often become docile because they lose touch with the competitive realities of the world. Government can stimulate, facilitate and even foster the growth of certain industries. This is true of American venture capital and Japanese semiconductors and robots.  

He adds, however, that the government functions did not develop the individual entrepreneurs or direct the highly motivated individuals who produced those products and services successfully. Thus "national competitiveness" is largely an anachronism. What counts is people and their ability, through education and teamwork, to add value to goods that global customers are willing to buy.  

There is, therefore, a relatively broad consensus even among writers from different nations and with different values as to what are the ends and means - and limits - of industrial policy. But that consensus impliedly requires some analysis and change, even radical change, of some of our fundamental institutions. The discussion below attempts to set out succinctly a framework for such analysis and then proceeds to explain the extraordinary impact of trade and environmental regulation.

**INSTITUTIONAL FRAMEWORK**

Any explanation of trade and environment regulation requires, as a point of departure, some analysis of the concepts of the basic institutional arrangements that distinguish political systems. In this broad context, the institutions of special importance are property ownership

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7 OHMAE, supra note 5, at 199.
8 Id. at 198.
9 At the level of the firm, the same principles obtain. There is no "best model" of management that can be adopted. What counts is the continuous learning of a firm's employees at all levels which enables the firm constantly to respond successfully to new challenges. See PETER SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 9-16 (1990).

At the national level in Canada these same conclusions are reached in two separate reports, see, MICHAEL PORTER & THE MONITOR COMPANY, CANADA AT THE CROSSROADS (1991); ALAN RUGMAN & JOSEPH D'CRUZ, KODAK CANADA, INC, NEW VISIONS FOR CANADIAN BUSINESS: STRATEGIES FOR COMPETING IN THE GLOBAL ECONOMY (1990).
and the political organisms having power to decide policy, the agencies that administer and enforce that policy, the courts in their role of reviewing administrative discretion exercised by those agencies, and the market. Table 1 sets out the distinguishing characteristics of modern political systems.

**TABLE 1**

<table>
<thead>
<tr>
<th>Ownership of means of production.</th>
<th>New</th>
<th>Corporatist</th>
<th>Socialist</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capitalist</td>
<td>Pluralist</td>
<td>Private (but usually some public ownership)</td>
<td>Public</td>
</tr>
<tr>
<td>Power to control production.</td>
<td>Pluralist</td>
<td>Private (market interaction, subject to market regulation, ostensibly to remedy market failures)</td>
<td>Public (bureaucratic planning and programming by a corporatist body - e.g., labour, industry and government, exercising command/control power)</td>
</tr>
<tr>
<td>Pluralist</td>
<td>Pluralist</td>
<td>Private (market interaction, subject to market and interest group driven social regulation that is frequently command/control regulation)</td>
<td>Public</td>
</tr>
</tbody>
</table>

Although both the United States and Canada flirted with corporatist structures to direct the economy in the 1930s, in both jurisdictions the controversial statutes were struck down as unconstitutional, compelling both governments to seek other solutions.\(^{10}\) What evolved with institutional variations in both countries\(^ {11}\) were a number of hybrid institutions that are essentially an analogue of the commissions long used in North America to regulate public utilities, that is, “independent” agencies having broad powers to decide policy issues and to implement those policies through the exercise of administrative, adjudicative and rule-making powers. The purpose of such agencies, in con-


\(^{11}\) For excellent analyses of the structures of and inherent problems connected with “independent” agencies in the context of Canada’s parliamentary system (i.e., no separation of legislative and executive powers), see Hudson Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*, 17 OSGOODE HALL L.J. 46 (1979); W.T. Stanbury, *Direct Regulation and Its Reform: A Canadian Perspective*, 1987 B.Y.U. L. Rev. 467, which describes in tabular form the full panoply of direct economic regulation in Canada.
Contrast to corporatist or socialist institutions, was not to displace the market but rather to remedy market "failures" and so cause the market to work better. In addition, each country continued to regulate through already existing institutions designed to balance power between and institutionalize responsibility in private market actors, particularly business corporations and labor unions. The spectrum of regulatory techniques employed is set out in Table 2.

**TABLE 2**

**TECHNIQUES OF ECONOMIC REGULATION**

<table>
<thead>
<tr>
<th>Regulatory techniques to remedy market 'failures' (monopoly, cartels, fraud)</th>
<th>Balancing power</th>
<th>Institutionalize responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Setting up external agency with power to control</td>
<td>Antitrust, industrial relations laws</td>
<td></td>
</tr>
<tr>
<td>* structure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>* entry</td>
<td></td>
<td></td>
</tr>
<tr>
<td>* conduct</td>
<td></td>
<td></td>
</tr>
<tr>
<td>* price</td>
<td></td>
<td></td>
</tr>
<tr>
<td>* exit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>in a market sector</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporation laws, union laws, social regulatory laws that impose liability on officers and directors.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utilities, transportation, communications, financial markets.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

During the last fifty years both the Canadian and United States governments have acquired more experience and better insight into the advantages - and pitfalls - of regulated markets that have been administered through external agencies. Although actual administration sometimes differs widely between the two countries and even from agency to agency within one country, it is possible to posit a hypothetical model and to compare with it the elements of regulatory systems in the United States and Canada, thus emphasizing the institutional differences between the two countries. Those material differences are highlighted in Table 3.
TABLE 3
COMPARISON OF REGULATION - INDEPENDENT AGENCIES

<table>
<thead>
<tr>
<th>Model</th>
<th>U.S.</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Statutory delegation to an agency of powers to prescribe and implement policy</td>
<td>Agency outside 'partisan' politics.</td>
<td>Because of lack of separation of powers doctrine, there is much less separation between the agency and the executive, indeed, statutes frequently provide for executive override of agency decisions.</td>
</tr>
<tr>
<td>(2) Policy making</td>
<td>Adjudicated cases and rule-making</td>
<td>Adjudicated cases and rule-making (and also, in some cases, executive regulation-making power).</td>
</tr>
<tr>
<td>(3) Constraints on agency powers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Judicial review of decided cases</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>• Judicial review of rule-making</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>• Executive control over appointments</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>• Legislative oversight by statutory amendment</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The obvious distinguishing feature of the two systems relates to the delegation of power to an agency. Since the executive is never separate from the legislature in Canada, a truly "independent" agency simply is not feasible.12 Less obvious, but probably more insidious, is the lack of effective constraint on the rule-making powers of departments or agencies. While such centralization of power in the executive tends to autocratic decision-making, the power is tempered by tension between the independent agency and the executive, which will override the agency only in cases that are to the government of extreme political significance. Clearly, to use an override power to veto an agency policy decision, if it even remotely implies partisan political intrusion into a publicly administered system, will elicit a sharp confrontation with the

12 See Janisch, supra note 11.
opposition in the legislature. There is, therefore, some merit in the system in the sense it "depoliticizes" or removes from the partisan policy arena more routine agency policy-making and administration. Moreover, as in the U.S., it is a useful technique to shelter the executive from responsibility for controversial but necessary administrative decisions that have no partisan implications. In retrospect, if one assumes economic regulation is in fact required, the U.S. and Canadian commission is an innovative and, from a political point of view, useful institution. The truly difficult problems arise, however, when we shift from economic regulation to social regulation as described in Table 4.

**TABLE 4**

**ECONOMIC AND SOCIAL REGULATION**

- **Economic** regulation (competitive markets)
  - Indirect
    - Balancing power
    - Institutionalizing responsibility
  - Direct
    - Constraints on market actors:
      - structure
      - entry
      - pricing
      - conduct
      - exit

- **Social** regulation (planning where there is no market)
  - Environment
    - Workplace safety
  - Employment equity
  - Consumer protection
  - National culture

Market regulation ostensibly occurs because markets fail. Social regulation occurs because there is no market. As a result, there is no
existing institution that can be regulated to cause it to achieve desired public goals such as environmental protection, marketplace safety and employment equity. The only program instrument available is planning, buttressed by command/control, to compel market actors to do or not to do certain things. Social regulation, therefore, is not just an extension of market regulation. It takes us through the looking glass into a planning world that is not just different from but utterly inconsistent with the operation of a market economy. In the U.S. it has led to some uncharacteristically autocratic governance but has been tempered by sophisticated separation of powers doctrine which confines the more outrageous commands of social program administrators. In Canada, however, where the legislature and executive are designedly not separated, the planning or command/control systems apply without any institutional constraint other than the desire of the elected government to continue in power. And since responsibility for specific bad decisions tends to become diffused or even lost in the election process, the Canadian system tends to excesses that inhere in any bureaucratic planning system. This is best illustrated by a comparison of U.S. and Canadian environmental laws. A comment by a leading writer on U.S. environmental law brings this comparison into sharp perspective.

Because of the high level of activity in the field, and because of the complex nature of the area, decisions with environmental implications now make up the majority of administrative law decisions in the federal courts, and, in consequence, the leading course books on administrative law could probably be adopted quite easily to teach a course in environmental law.\(^\text{18}\)

In contrast, in Canada, there is virtually no administrative law relating to any substantive environmental issues.\(^\text{14}\) Environmental standards are prescribed by rules - usually quantitative rules - that are not subject to judicial review. In short, the Canadian system reflects planning carried to its logical, ultimate end. This contrast is so striking it warrants more detailed explanation.

**ENVIRONMENTAL REGULATION**

Since 1970 governments have been pressed to extend the concept of economic regulation to deal with broad social issues such as consumer protection, equal employment opportunity and protection of the environment. Indeed, the phrase “environmental regulation” connotes that the function is, if not parallel to economic regulation, at least an


\(^{14}\) There has been considerable litigation concerning which level of government, federal or provincial, has jurisdiction over the preparation of an environmental impact statement in specific cases, but that concerns only the application of a bureaucratic procedure, not any dispute over a case decision or a rule.
analogical extension of it, permitting government to assign the function
to an agency insulated from the pressures of short-term, partisan polit-
ics. But that is clearly not the case. It is in fact a planning system that
public administrators, exercising broad statutory authority, superim-
pose on market actors. The public administrators may have some re-
gard for the effect on the competitive position of each firm but are not
subject to any express standards that confine their discretion in ac-
cordance with the economic regulation model.

The vanguard statute was the U.S. National Environmental Policy
Act ("NEPA"), which came into force on January 1, 1970. It estab-
lished the Council on Environmental Quality ("CEQ"), the predeces-
sor\(^{16}\) of the Environmental Protection Agency, and authorized it to col-
collect information, review and appraise existing federal programs,
conduct investigations and research, and recommend national policies.\(^{16}\)
The CEQ introduced the North American system of environmental
regulation through the devices of the Environmental Impact Assess-
ment ("EIA") and the Environmental Impact Statement ("EIS").\(^{17}\)
Specific statutes, such as the Clean Water Act of 1977, complete the
regulatory system, setting out general standards (e.g., "best available
technology economically achievable") and authorizing administrators
to issue permits that in effect grant an exemption from those
standards.\(^{18}\)

From its inception NEPA was understood to be very different
from other regulatory systems. One especially knowledgeable commen-
tator describes the enactment of NEPA as taking place in a "crisis
atmosphere" based on the premise that "the market economy cannot be
trusted to control its own externalities of production. National planning
was proposed and, to an extent, accepted as a solution."\(^{19}\) Nevertheless,
in the United States, the statutes were drafted to parallel the economic
regulation model, setting out express but general standards to confine
the discretion of administrators in accordance with the direction of

\(^{16}\) See BNA Staff, U.S. Environmental Laws 3 (1988 ed.).
\(^{16}\) National Environmental Policy Act § 42, USC § 4344.
\(^{17}\) The concepts of the Environmental Assessment and the Environmental Impact Statement
are set out in the Council on Environmental Quality Regulations promulgated as "guidelines"
under NEPA to regulate the activities of U.S. federal agencies. The final guidelines are set out in
38 Fed. Reg. 20, 550 (1973); see also BNA Staff, The Environmental Impact Statement Pro-
cess, Corporate Practice Series No. 27 B-401 (updated April 1989).

The B.C. counterpart is the environmental impact assessment provision set out in the Envi-
rionment Management, R.S.B.C., 1979, c. 110.5, s. 3. The B.C. Legislature is currently consid-
ering a replacement law, the proposed Environmental Assessment Act, Bill 32, introduced in June
1993.

\(^{18}\) See Clean Water Act, 33 USC §§ 1311 &1341 ff.
\(^{19}\) W. Ruckelshaus, Preface to BNA Staff, U.S. Environmental Laws xxxvi (1988 ed.).
"Externalities" in this context means any adverse impact on a publicly owned good such as air or
water by, e.g., an industrial firm or farming operation.
courts reviewing impugned administrative decisions. Not surprisingly, the social regulation laws, and particularly the environmental laws, evoked a large volume of litigation. The remedies sought are generally the particularly appropriate administrative remedies of injunction or compliance order.

The Canadian regulatory model, as shown in Table 3, differs from the U.S. model in two key respects. First, there are in the Canadian laws few if any workable statutory standards that permit effective judicial review. The Fisheries Act, for example, declares it is an offense to “deposit” a “deleterious substance” in “water frequented by fish”, unless, in effect, permitted by the regulations. Second, the regulation-making process is immune from judicial review in Canada. As a result we have extraordinary power delegated to the executive to determine the conduct standard, any breach of which can give rise to a penal accusation that bears all the opprobrium of a breach of a criminal law, that is, of some fundamental moral rule. Moreover, for constitutional reasons the Canadian Environmental Protection Act, for example, relies even more heavily on criminal law characterization to deal with toxic substances, nutrients added to waterways, federal government agencies, international air pollution, and ocean dumping.

The British Columbia law adheres in form more closely to the traditional Canadian administrative law model summarized in Table 3. Waste Management Act §3(1.1) states a strict standard prohibiting introduction into the environment of any waste generated by an industry or business. Reinforcing that provision, §(1.2) prohibits the introduction into the environment of waste produced by any activity or operation. But, true to the character of environmental laws, both prohibitions are subject to a number of exceptions, including especially the introduction of waste in accordance with a permit issued under §8. The issue of a permit however, does not depend on any measure of technological or economic feasibility. Instead a manager is empowered to issue a permit “subject to requirements for the protection of the environment that he considers advisable”. A decision made under that provision is subject to appeal under §27(1), but given the absence of express substantive standards in §8 it is difficult to conceive of any ground of appeal other than a breach of due process rules or breach of a vague,

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20 See BNA STAFF, Introduction to U.S. Environmental Laws 3-6 (1988 ed.). Since its enactment in 1970 the U.S. federal law, which included federal agencies, evoked from federal agencies alone some 22,000 EISs and has been the subject of some 1800 legal actions in the 1970-85 period, most brought by interest groups seeking to compel government agencies to prepare EISs.

21 See BNA STAFF, supra at A-28-30, which comments on litigation in connection with EISs.

22 Fisheries Act §§ 36(3),(4)

23 See Peter W. Hogg, CONSTITUTIONAL LAW OF CANADA 378-80, 598-99 (2d ed. 1985).

24 The invocation of the "national concern" doctrine in the Supreme Court's decision in R. v. Crown Zellerbach 7 DLR (4th) 449 (BCCA 1984); 49 DLR (4th) 161 (S.C. Can. 1988) clearly expands federal jurisdiction with respect to major issues that affect regions or even all of Canada.
implied and overarching standard relating to reasonableness of result.26

Even a cursory analysis of the Canadian laws tends strongly to the inference that we should go back to the beginning, reintroduce the rule of law by setting out express, workable standards in the statutes and, accordingly, subject the public administrators to judicial review of their exercise of discretion. That model, an analogue of the economic regulation model, appears seductively simple, implying only that administrators must set up and adhere to fair procedures, maintain a record and, if called upon to do so, demonstrate that they exercised their discretion in any specific case on a reasoned basis.

Unfortunately, like many analogues, the economic regulation model does not fit social regulation well. In the United States it has led to a system which leading critics have castigated as “extraordinarily crude, costly, litigious and counterproductive”,26 and which appears to empower the courts and counsel for the litigants in contested cases to dominate or even capture the public policy agenda.27 That the system works with even limited effectiveness by leading to a “bargained accommodation” depends in large part on ignoring the formal legal system and relying instead on bargaining among the regulators, the regulated and other interested parties.28 And that the system thus works in spite of the formal legal model is confirmed by an incontrovertible authority, who states that “[i]n real world situations Americans balance environmental values against other values, as does the Environmental Protection Agency, whether or not the law specifically allows it to so declare publicly”.29

26 Section 22 of the Waste Management Act sets out a “reasonable grounds” requirement that confines the administrator’s exercise of discretion to a case he must document and prove is reasonable. That section is, however, only an enforcement section relating to making a mandatory cleanup order.

An interesting feature of that Act is the right of appeal under § 28 to an appeal board, which certainly provides for broader review of the case than would obtain under common law judicial review standards. But because there are no substantive standards - only discretionary powers set out in the key prohibition and permit provisions - presumably the appeal board will only reverse or remand if there has been a breach of due process or no reasonable grounds disclosed to justify what appears to be an arbitrary decision. See S.A. de Smith, Judicial Review of Administrative Action 249-51 (3d ed. 1973).

In any case if, as usual, a “standard” is prescribed by rule in quantitative - or even qualitative rules - no judicial review is available.


27 See Richard B. Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1802-05 (1975); Richard B. Stewart, Controlling Environmental Risks through Economic Incentives, Columbia University Colloquium on New Directions in Environmental Policy, 10-11 (1987).


29 William D. Ruckelshaus, Preface to U.S. Environmental Laws (BNA) xxxvii (1986). Mr. Ruckelshaus was Administrator of the Environmental Protection Agency for two terms, 1970-72.
If the U.S. system of environmental regulation works despite the formal legal system, where does that leave Canada? The U.S. statutes at least set out standards which, under a sophisticated system of judicial review, can be relied on by parties in interest to constrain any biased or arbitrary or unreasonable exercise of administrative discretion. That may tend to tie the system up in legal knots from time to time or even most of the time; but, when coupled with constitutional protection of property rights against arbitrary confiscation, it shields individuals and corporations from arbitrary action by governments reacting to public hysteria.

In Canada a corporation is not entitled to claim any constitutional protection of its property rights, even where the effect of a statute is outright expropriation of its property. Canada adopted the environmental regulation model developed in the United States; but Canada omitted the key element of the U.S. system, particularly constitutional protection against takings effected by statute, express statutory standards and judicial review of agency rule-making, that achieve some - even if not an ideal - balance among the parties in interest through the judicial review process.

What we have in Canada is, at least in the formal laws, an extraordinarily autocratic system: standards are determined by the executive (cabinet and public officials); the conduct rules are set out in the laws as strict prohibitions; they may be amended through the permit system by public officials who are not constrained by specific regulatory standards; and any breach of the prohibitions by a party that has no permit exemption is subject to very harsh penalties that bear the stigma of violation of a criminal law. Complicating the system further is a patina of legitimacy conferred by advisory councils and the right to review and comment on proposed regulations, which implies some reasonable consensus but which operates largely to protect the administrators from making a technical or logical gaffe.

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30 See Hogg, supra note 23, at 745-49.
31 See, e.g., Canadian Environmental Protection Act § 5, (1988) (which empowers the Minister to appoint advisory committees and to establish their terms of reference. Advisory committees are not necessarily undesirable, but their effectiveness depends on a reasonable balance of representatives who have some bargaining power and, as a corollary some real influence on policy decision-making.)
32 Again, the right to comment on proposed regulations is always desirable, but is unlikely to have any influence in substance unless, as in the U.S., the regulation-making process is also subject to judicial review in accordance with standards which invalidate a regulation that is ultra vires, arbitrary or unreasonable. See Bernard Schwarz, Administrative Law 151-53 (1976).
33 See E. Donald Elliott, Re-Inventing Rulemaking, 41 Duke L.J. 1490, 1492 (1992) (where the author points out that even in the notice - and comment - rulemaking procedure has been relegated "...to making a record for judicial review").
One commentator, who is critical of the U.S. system of centralized "planning" with respect to environmental regulation imputes the U.S. problem to "...the size of the United States, the relatively low esteem accorded government administrators, the adversarial relations between government and business, and the extensive resort to litigation". He further speculates that the problem is less serious in other countries because "...other industrial democracies are smaller; regulatory requirements are determined through informal consultation between business and administrators who are generally respected and trusted; and litigation is infrequent".\(^3\)

That distinction may be valid for some other countries, but it clearly does not apply to Canada, in which public interest is whipped up by media event managers, which is larger in surface area and even more diverse than the United States, and which has adopted an autocratic regulatory system that renders consultation a formality and judicial review an improbable event.

**Bargaining Model**

A number of Canadian scholars, who have published thoughtful papers dealing with the problems of the present system of environmental regulation in Canada, have recommended review and, where necessary, modification of underlying institutions to make possible effective bargaining among the parties in interest.\(^5\) Influenced by a popular text on negotiating\(^6\) their thesis is that the basic decision-making institutions should be restructured to better balance bargaining power, that the parties in interest should become thoroughly knowledgeable about negotiating techniques, and that the negotiators should be empowered to make "contracts" which set out a consensus solution.

That is an interesting and constructive thesis, but it largely begs the fundamental question by assuming it is possible to balance negotiating power among several parties. The obvious analogue is the collective bargaining system. There, however, balancing power is, if not straightforward, clearly feasible. By giving the employer the right to lock out and the employee the right to strike and picket, a maximum tension model is created. Either party may invoke its ultimate weapon,

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but knowing its use can be self-destructive each party is highly motivated to reach a settlement. In short, the regulatory statutes create the right incentives.

In the context of an environmental regulation dispute there are frequently several parties in interest - government agencies (federal and provincial), industry, environmental interest groups, aboriginal groups, and even local property owners. Given that the objective of the exercise is to reduce an actual or perceived source of pollution at the polluter's cost, which usually implies "internalizing" the cost within a manufacturing firm, it is only the firm that has anything to lose. The other parties can only gain. What incentives can possibly be devised that can compel the parties to negotiate effectively? The scholars who have promoted the negotiating model have identified these problems but fall short of setting out workable solutions.

The bargaining model is especially attractive in the environmental context, for inherent in environmental regulation is relatively long-term social and, impliedly, economic planning among political decision-makers, public service program administrators, industry and interest groups. And as William Ruckelshaus states, that occurs in spite of the strict language of the regulatory laws. Two Canadian analysts have stated the point well.

However, one process that has not changed is the reality of the bargaining and negotiation that goes on all the time in the governance of natural resources. No matter what in principle might be the mode of decision-making, in practice there always has been and always will be bargaining and negotiation. Snapshot views of decisions being made by the courts, cabinet, legislature, boards and bureaucracy give a false impression of authoritative decision-making. When the dynamics of the decision-making are observed and seen in their longer term context, then the ubiquitous presence of bargaining and negotiation becomes evident. Authoritative decisions are then seen as points in bargaining and negotiations that are implicit and unfolding over longer time periods.87

If there is a bargaining system already in place in the real world, then what is the problem? In the United States the bargaining system has survived because of the safety valve provided by judicial review of administrative action, that is, of the broad discretionary powers exercised by public officials. Recognizing that social regulation is different from economic regulation, the courts have restructured the review process in three ways: (1) as in Canada the right of interest groups to initiate or intervene in court proceedings has been broadly expanded; (2) the courts impose ever more detailed and demanding procedures on public officials to urge them to achieve statutory goals effectively, sub-

87 Dorcey & Rick, supra note 35, at 8.
ject to allowing full participation of interest groups; and (3) the courts apply a "hard look" to judicial review, requiring the parties to build into the court record detailed analyses of extensive data by experts as well as the arguments of each of the parties. The result is a system that is complicated, slow, costly to the parties, and ineffective, both with respect to refining policy and making practical investment decisions.

In Canada the administrative process has been complicated by the grant of standing to interest groups to intervene in judicial proceedings and, increasingly, the "hard look" approach toward resolving economic and social regulatory problems. But those judicial innovations can have little effect on the present system of environmental regulation because of the two flaws in its foundation: first, the lack of substantive standards in the enabling statutes; and second, what is really a corollary of the first, the virtually unfettered discretion of the executive (cabinet and public officials) to make policy by regulation that is not subject to judicial review. A perspective of the present bargaining situation can best be seen by a quick survey of the Canadian "real world".

- A scientist will publish an article expressing concern, for example, about some chemical used or produced by an industry. Interest groups pick up the concern, expand on it and stage media events to dramatize it as an imminent crisis. As a result, the public becomes concerned irrespective of whether the risk of harm is real or purely speculative. The government then conducts polls, identifies the public concern, and resolves to take decisive action.
- The legislature passes a general statute prohibiting pollution which omits express conduct standards but delegates broad power to the executive to make regulations and to exempt persons from the general prohibition in accordance with "negotiated" permits, any contravention of which is treated like a criminal offense and is punishable by large fines or imprisonment or both.
- The Cabinet, after "consultation", promulgates regulations which contain detailed, quantitative standards that have an aura of scientific validity but that are usually, at least by implication, driven by technology-based "best available technology" standards rather than pollution-based "risk of harm" standards based on risk analysis and cost-benefit analysis. This is the essence of "technology-forcing, command and control regulations.
- Public officials "bargain" with respect to the issue of permits, which,

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38 See Stewart, supra note 28; Ackerman & Stewart, supra note 26, at 1333, 1336-40.
39 For a brief comparison of English and U.S. laws relating to judicial review of administrative regulation-making, see B. Schwarz & H. Wade, Legal Control of Government 91-92 (1972).
40 The usual iteration is from issue, to dispute, to interest group conflict, to government mediation, to a staged confrontation for TV production, to crisis, and finally to action by government as a crisis manager. It is in this context that governments say they do not lead, they follow.
by statute, are required as a condition of continuing to run an existing mill or to build a new mill.

- Having established a regulatory benchmark the officials then press, in accordance with their overall plan, to improve the environment on the ground, for example, that the mill using the chemical has been materially altered and impliedly is increasing the risk of harm to the environment or people or both. To buttress their requests for action, the officials refer obliquely to the punishing sanctions in the statutes.

- Unsure of the correct priorities for environmental cleanup, uncertain about the correct production process or abatement technology required to meet the more stringent standards, and uneasy about the required allocation of capital, industry managers temporize.

- Rival federal and public officials, determined to demonstrate who are the "tougher" enforcers, publish or "leak" documentation indicating that specific mills are in violation of their permits (originally issued pursuant to the officials' discretionary powers), insist on strict compliance, and even initiate prosecutions.

- The press publishes this information, characterizes the managers as "scofflaws" and demands immediate action.

- Interest groups force a dramatic, televised confrontation.

- Finally, under great pressure from government the managers, however uneasy about the investment, capitulate, then hold their breath until the next concern becomes topical.

That is indeed a form of bargaining. But it is not bargaining in the sense of arriving at a consensus or a contract. Instead, it is an insidious form of plea bargaining where firms yield to the requirements of public officials in order to avoid the opprobrium of prosecution as criminals. The discretion the public officials exercise is not administrative discretion but, directly or indirectly, prosecutorial discretion. It is an undesirable form of bargaining in a context where public officials, as monopolists, exercise broad discretionary powers to make the rules and then threaten prosecution for breach of those rules. Indirectly, public officials thus determine how business firms must allocate available capital, taking priority over research, product improvement, process innovation, and investment in new, more productive capital goods.

It is in this sense that such social regulation takes on the character of "economic planning" and that distinguishes it clearly from economic regulation designed to make markets work more efficiently. Conceptually, such planning is clearly undesirable but it is the real world in which industry operates. It is, relative to the area of economic regulation, irritatingly autocratic; but there is behind environmental regulation, if not logic, a general feeling that government must do something to remedy our general abuse of the commons.

Trade law regulation, however, does not even have the distinction of doing social good. It is the superimposition on market economics of mercantilist principles, a naked exercise of political power under a thin veneer of an avowed search for "reciprocity" or a "level playing field".
It is not only autocratic, it is anachronistic.

**Trade Law Concepts**

Although not always characterized as such, the competition laws and international trade laws can all be subsumed within the generic concept of fair trade practices. The competition laws tend to be confined to acts in or adverse effects felt within one country, whereas the international trade laws deal with similar issues across borders.

In this context the concepts of "incremental pricing", "price discrimination", "predatory pricing" and "dumping" tend to be used somewhat loosely. The discussion here attempts - if not to define - at least to explain and limit the boundaries of these concepts.

(1) "Incremental pricing" means that a firm, which has excess production capacity remaining after demand in its local (or "normal") market is fully satisfied, sells into an outside market at a lower price in circumstances where that lower, external price has no adverse "shadow effect" back on the local market. It does that to achieve greater operating leverage, that is, lower unit costs of production by operating at closer to 100% of the pertinent production mill's rated capacity. Thus, to the extent the lower external price exceeds its average variable costs ("cash costs"), it earns a contribution to payment of its fixed costs ("overhead") and accordingly reduces unit production costs on its total production.

In any one domestic market "incremental pricing" is a desirable phenomenon. Indeed, it is the pricing logic that in the short run forces the domestic price level down to the marginal cost level, that is, the level of the variable or cash costs of the least efficient producer that can remain in production at that price level.

It is not necessarily desirable, however, between two national markets where those markets are not totally integrated. For example, assume U.S. market demand for Product X is satisfied by five large U.S. mills and that Canadian demand for virtually identical Product Y is satisfied by five smaller Canadian mills which have, because of smaller scale, higher average total costs of production. Assume also that the U.S. market for Product X is ten times the volume of the Canadian market for Product Y. In such circumstances, absent antidumping laws, if aggregate U.S. demand falls ten percent, the larger, more efficient mills will incrementally price into the Canadian market and, if import duties are zero and transportation costs the same, tend to force closure of the Canadian mills. Although in practice the great threat is to Canadian producers from larger U.S. producers, the converse can be true, at least in the short run, particularly where large Canadian producers could have a like adverse impact in an industry on smaller, fragmented U.S. producers. Thus, incremental pricing can have a harmful - indeed devastating - effect on competitors, even eliminating them in extreme cases. As a result, legal constraints on incremental pricing or dumping has some demonstrable
merit.

(2) “Price discrimination” is a legal concept of dubious distinction but is firmly entrenched in both Canadian and U.S. competition laws. What it requires is that a producer sell its like product at a like price to like buyers who compete in one geographic market, except, at least in the U.S., where the producer can justify a lower price to one customer on efficiency (scale of production) grounds or on the ground he lowered the price in good faith to meet a competitor’s price.

Thus, price predation, which is based on intent to drive a competitor out of the market, is only indirectly in issue. The ostensible object of the price discrimination law was to shelter smaller customers of the producer from being eliminated by larger customers with the effect of increasing concentration and market power of the larger customer in the relevant market. The practical effect of the price discrimination laws is to compel competing sellers to maintain the product price at a level which shelters the smaller customer from competition. As a result, the competition law is applied not to further competition but to restrain it, maintaining a price umbrella over the inefficient customers. Price discrimination, therefore, is in effect the antithesis of incremental pricing. The first concept artificially props up the price level, whereas the second, incremental pricing, drives it down.

(3) “Predatory pricing” goes beyond price discrimination and even beyond incremental pricing. It means pricing at a low level with the objective of driving a competitor or competitors out of the market, achieving effective power in that market, and, inevitably, raising prices in that market to recover the costs of the original price war. Hence, the near synonym “monopolization”.

(4) “Dumping” while it can in rare cases mean predatory pricing within a producer’s domestic market, normally means incremental pricing across national boundaries. The acid test is selling a product in the foreign market over a sustained period at a price lower than the domestic market price. It rarely involves predatory pricing because in nearly all international trade cases, assuming balanced supply/demand, import duties and greater transportation costs, a producer’s net sales value (“net mill return”) will be greater with respect to sales in its domestic market. The domestic producer has little incentive, therefore, to have as its objective the elimination of any foreign competitor, even if that is a consequence of its action. Moreover, it usually has little chance of recoupment as there are usually several actual or potential entrants.

The boundaries between the concepts of “price discrimination”, “predatory pricing” and “dumping” have become blurred, particularly in U.S. law, because of the evolution of the dumping concept in U.S. international trade laws. Originally it was a predatory pricing concept, requiring proof not only of selling in the U.S. at prices lower than the

41 See, e.g., Canadian Competition Act, R.S.C. ch. C-34 as amended § 50(1)(b) (1985) (Can.).
price in the impugned producer’s domestic market but also of *specific intent* to eliminate one or more weaker producers to acquire market power and so injure competition, i.e. reduce competitiveness in that market in the long run.

That provision, because of the difficulty of proof of intent, proved to offer little protection to the industries which sought it. Congress therefore amended the dumping concept to eliminate the requirement of proving specific intent. What remains is thus an analogue of price predation. But it is an analogue only in that it does not require proof of intent to eliminate a competitor. It generally requires proof of sales in the market of import at a (net back or net mill) price lower than sales in the producer’s domestic market with the effect of causing injury to the producer in the market of import.

In practice, however, ‘‘dumping’’ is a unique concept. It goes far beyond simplistic ‘‘like price’’ comparisons in respect of like product sold to like customers in one market under the price discrimination laws. Whatever analytical process is employed in a dumping case – industry trend analysis, margin (net mill return) analysis, or comparative economic analysis – the analysis will be much more refined and certainly less realistic than analysis driven by conventional competitive market analysis. As in price discrimination cases the focus is not on increasing competition but on confining the conduct of foreign producers to shelter domestic producers from what the law declares to be unfair competition.

Accordingly, irrespective of the analytical technique used by administrators in a dumping case, the focus will be on the apparent adverse impact on and relative decline of the market share or profitability of both of domestic producers caused by the allegedly unfair pricing policy of the impugned foreign competitor. To compare ‘‘fair pricing’’ almost always the administrator of a dumping law will use, as a benchmark, an analysis not just of comparable net mill returns but an analysis of ‘‘fair price’’ margins. Whether a price is fair depends on whether the impugned foreign producer realizes a fair margin after deducting from its foreign market price variable costs, imputed overhead costs (pursuant to a formula), and imputed capital costs. This is a measure technique that can, in practice, militate against the fair operation of competitive markets in the sense it substitutes bureaucratic price determination for market-driven, marginal cost pricing.

Thus, it is the application of these analytical tools which give to the statute administrators broad discretion to determine dumping and injury to domestic producers, and which, as a result, tend to the politicization of specific cases.

**Alternative Approaches**

Even if sometimes exaggerated in the domestic political debates, it
is clear that even between very competitive markets, if those markets are not totally integrated into a common market, the dumping concept fulfills a legitimate function. The argument here assumes that, under the FTA regime in place, the U.S. and Canadian markets are sufficiently integrated to permit at least partial exclusion of the domestic dumping laws of both Canada and the U.S.

A number of approaches are possible.

(1) Modify the ADD laws to make them congruent in Canada and the U.S.A.
(2) Modify the ADD laws to make them, if not congruent with, at least parallel to the competition laws.
(3) Repeal the ADD laws of Canada and the U.S.A. as they apply to each other, modify the competition laws of each country to make them congruent, and apply only the competition laws to dumping cases concerning only Canadian and U.S. producers.
(4) By convention, set up a simplified antidumping law between Canada and the U.S.A. which reflects partial integration of these markets and which remains consistent with overarching GATT and pro-competition policies.

**Preferred Approach**

For several reasons, in the short run, the fourth alternative, a new Canada-U.S. convention, appears to be the preferable alternative. To make antidumping or competition laws congruent in both countries requires negotiation and settlement of detailed statutory terms between two foreign legislatures; a formidable if not impossible task. Even more important, assuming congruent competition laws and the abrogation of the antidumping laws in Canada-U.S. cases, the competition laws, conceptually, do not deal specifically with the essence of dumping, that is, incremental pricing by a strong foreign producer on a sustained basis that injures domestic producers. Although dumping can be a form of predatory pricing, it is a distinct form of conduct that can and should be dealt with, at least for a transition period of several years, by fairly specific standards. In the short run, where one country has a disproportionate number of small-scale plants, the “intent” element of predatory pricing normally does not exist and hence there is no legal constraint. After adjustment to that structural difference, congruent competition laws would be the ideal solution.

What is highly desirable in the short run is a comprehensive, new approach, not one that attempts to fit dumping cases into the Procrustean bed of existing domestic competition laws. It should be comprehensive to deal with the key issues of choice of law, choice of legal forum, standing of a complainant to initiate action, timely administrative procedures, review by the joint Canada-U.S. tribunal set up under FTA Part 19, and, finally, the recovery of legal costs as a technique to
discourage harassing actions.

It would be new law in the sense it attempts, without becoming rule-bound, to set out substantive measurement standards that can be applied to all cases.

The procedural issues are difficult but realistically achievable.

1. **Standing**: any complainant could initiate an investigation, subject to the constraining effect of being liable for legal costs if the complaint is determined to be frivolous or harassing.

2. **Choice of law**: the new convention applies, obviating the choice of domestic law.

3. **Choice of legal forum**: the original jurisdiction to make an investigation and to initiate a prosecution would be the country of the producer alleging injury.

4. **Investigation**: administrators in the country where the complaint is made would have full powers of investigation, paralleling existing powers under national antidumping laws.

5. **Administrative procedures**: these would be set out in the convention, adopting the better elements of U.S. administrative law, particularly the substantial evidence rule and strict time limitations for administrative decision-making. The time limitations are especially important. In trade cases where national administrators, who inevitably reflect some national bias, to "improve" competitive markets that are subject to some inherent "imperfections", can use delays to frustrate the entire process. In dumping cases the legal axiom that justice delayed is justice denied is especially true, for a firm being attached by dumping derives little consolation from winning in principle after going into bankruptcy.

6. **Review**: instead of judicial review in either country's courts, review of the administrator's action taken would be by the joint tribunal set up under FTA Part 19, applying the administrative review standards set out in the convention.

7. **Substantive standards**: while admittedly a demanding problem, the setting of substantive standards in a convention that applies equally to each party to the convention is certainly much less difficult than enacting congruent competition and dumping laws or harmonizing those laws between two jurisdictions. The objective is to constrain incremental pricing which is, in theory, desirable to enhance competition but which in practice can be unfair between markets that are not totally integrated. The essential elements of such standards are as follows.

   1. All calculations should be denominated in one currency, preferably the U.S. dollar.

   2. Relatively small transactions (e.g. affecting less than five percent of the total volume of the product in the complaining producer's market in a three-month period) and a small volume of transactions "at market" that cannot affect the price level (e.g. less than five percent of total sales in the period in the geographic market) should be precluded as
de minimis.

(3) The regulations would have attached a table setting out each term to be included in the determination of total costs, fixed costs, variable costs, and resulting net mill returns. Each term would be defined, and any permitted use of averages would be expressly specified.

(4) The analytical focus would be on the impugned producer's net mill returns from domestic and "foreign" sales, not on trends in the complainant industry (which may be declining for altogether different reasons) or on comparative economic analysis employing abstract models to calculate "reasonable" margins.

(5) Sales in excess of the de minimis volume that continue over three months at a price less than the impugned producer's average total costs (excluding depreciation) would be dumping.

Depreciation is excluded from the calculation not only because it represents sunk capital costs that are irrelevant to marginal cost pricing but also because, in theory, the dumping laws should not be used, like the price discrimination laws, to force the price level up to the total average cost level of the new actor in the market that has high capital costs. To include depreciation in the calculation is to raise one more hurdle to new entrants in the market and thus coddle old, obsolete mills.

Even if not a model of Doric simplicity, such a convention, both politically and legally, is much simpler than the alternatives.

THIRD COUNTRY DUMPING

Although a complicated problem, this issue can easily be encompassed by the proposed convention, treating the issue as analogous to third country, duty-free components incorporated in products that are duty free under the FTA in transactions between Canada and the U.S. Again the tribunal under FTA Part 19 would have final review powers.

SUBSIDIES - COUNTERVAIL

Indeed, if not elegant the convention approach is simple enough to justify its extension to encompass the countervail issue. Even more than in antidumping cases, the domestic procedure applicable to countervail cases is, if not skewed, at least tendentious to the point where a party charged with misconduct is rarely persuaded that justice was achieved or even sought. Countervail proceedings are not usually characterized as competition law cases because they involve a subsidizing country versus an importing country; but they concern, in essence, unfair trade practices. A country that subsidizes infrastructure or capital or other costs of a producing firm colludes with that firm to enable it to compete
as a potential predator relative to its unsubsidized competitors.

Although the definition of "subsidy" will always be contentious, it is the kind of problem that has long been dealt with and can be dealt with consistently and fairly by a court or adjudicative tribunal. The problem with countervail cases is not so much the substantive issue - or even the calculation of the amount of the subsidy - as the administrative procedure.

Consider, for example, the following criticisms of any domestic countervail procedure.

(1) The action is initiated by a petition that ordinarily must contain much data relating to the petitioners and the respondents. Only the data relating to the respondents are fully verified by the administrators.

(2) The cornerstone of the investigation is a detailed questionnaire which can be - and usually is - carefully and tendentiously crafted to achieve a preconceived policy goal: to protect domestic industry and preserve jobs.

(3) The questionnaire data are aggregated to merge all of a nation's producers, irrespective of geographic region and inputs and outputs, into one hypothetical firm. This is a Procrustean bed a firm can extricate itself from, if at all, only with much difficulty.

(4) The crucial issue of imports causing injury is usually determined by superficial, self-serving telephone surveys concerning business lost to foreign firms. Thus, causation and injury are virtually assumed without analysis.

(5) Domestic subsidies to complainant domestic firms are deemed irrelevant, however outrageous, relative to any subsidies received by the impugned producer.

(6) Separate regulatory tribunals determine different issues on the basis of separate records.

(7) The agency that conducts the initial investigation, which usually precludes any petition, frequently acts later as the court to make the final injury decision.

(8) The U.S. hearings at which oral presentations are made, in contrast to those in Canada, are largely a formality because no cross-examination of witnesses is allowed.

(9) There is no appeal on the merits from the decisions of the administrative tribunals, only judicial review of administrative action on the grounds the decision is arbitrary, capricious, the result of an abuse of discretion, or unsupported by substantial evidence.

(10) Because of the antitrust problems inherent in any negotiations to settle a trade case, the governments necessarily assume carriage of the action, depriving the respondent firms of effective control over defense strategy and settlement terms.

(11) Finally, the scarcely objective administrative system is rendered even less objective by the omnipresent threat of legislative re-
taliation by lawmakers pandering to local constituencies.

If the dumping issue can be resolved by convention, why not resolve the countervail issue in the same convention at the same time? The definition of "subsidy" and the measurement of the subsidy would be pursuant to uniform convention rules that would resolve the above criticisms, for example, by ensuring that all data used are fairly representative and fairly scrutinized by all parties in interest; that subsidies received by the complainant are offset in the calculations; and that all hearings are fair. Again, review of administrative action would not be by domestic courts but by the joint tribunal set up under FTA Part 19.

MEXICO

The convention approach has one further, signal advantage. Mexico has less experience with competition laws and international trade laws, particularly dumping and countervail laws, and therefore cannot be expected to contribute much to the debate. If, before the proposed NAFTA agreement among Canada, the U.S. and Mexico is ratified, Canada and the U.S. execute an antidumping-countervail convention, Mexico could be required to accept that convention as a condition of being a party to NAFTA. For several reasons a new convention which supplements the FTA, substituting well understood competition law concepts for discretionary trade law concepts, is the best approach to deal with what are now characterized as antidumping and countervail cases. It, in effect, provides for uniform substantive standards and procedures. It obviates the complexities of harmonization of domestic competition laws. And it simplifies the inclusion of Mexico in a comprehensive, tripartite FTA.

CONCLUSION

There are, therefore, better ways to deal with the complexities of trade regulation than superimposing on that highly politicized system the vagaries of equally politicized environmental laws. Indeed, to superimpose environmental laws is, in effect, to politicize the global trade regulatory regime to the point where we would be better off negotiating fixed tariffs on a comprehensive basis rather than determining tariffs case by case through emergency, dumping and countervail concepts. The inherent weaknesses of the international trade laws can be largely remedied by adaptation of well refined and well understood competition law concepts. Those weaknesses can only be exacerbated by introducing into the trade regulation analysis the complicated - indeed, utterly unmanageable - factors relating to environmental and labor laws.

The issue has been elegantly stated by Richard Stewart:

There are . . . major difficulties in determining the social costs of environmental degradation. Those costs are a function of the harms
caused by or risks of harm posed by environmental degradation and
the economic value that individuals or societies place on avoiding such
harm or risks. . . . As a result, there will be wide differences in as-
essment of the social costs of environmental degradation, and corre-
sponding disagreements about the stringency of the measures needed
to internalize those costs to the activities that cause them. . . . There
is no objective, uniform yardstick for measuring the social costs of
environmental degradation that could be used to resolve disagree-
ments between countries like A and B over the appropriate stringency
of environmental measures and determine whether the restraints on
trade imposed by a particular measure are justified by the environ-
mental harm or risks in question. 42

The fundamental problem is that environmental regulation stan-
dards are purely value-driven. Notwithstanding the enormous complex-
ity of the environmental statutes, the basic policy conflicts are between
two seemingly irreconcilable and largely immovable polar positions: on
the one hand that environmentalism is not a moral absolute and there-
fore, like preservation of the spotted owl, must be traded off against
other competing values; and on the other that "...certain values are
so central to humanity that they must be protected even at a cost to the
larger society". Further, these normative values are offended when one
suggests that they may be "priced". 43

This conflict between relative and absolute values brings us back
to Goethe's Faust, who is redeemed not because he has discovered any
ultimate truths based on absolute values but because he takes concrete
action better to understand himself, other individuals and the world he
inhabits. The future of each nation's economy in an interdependent
global order depends largely on relatively unfettered international
trade, that is, on exploiting each nation's relative advantage rather than
on some perceived absolute advantage, whatever moral absolute is in-
voked to justify it. It is an enormous challenge to develop a reasonably
balanced, workable solution to trade conflicts alone. To confuse trade
regulation with environmental and labor regulation, that is, economic
regulation with social regulation that is purportedly based on absolute
values, is to set up an insurmountable challenge. Developing an inter-
national trade regime within the context of the well developed competi-

42 Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Ex-

Robert Houseman's article is a critique of Richard Stewart's article cited in footnote 42. The
two articles bring the conflict into sharp relief and demonstrate clearly why environmental regula-
tion should not be superimposed on trade regulation.

In this context one should also read Alexander Pope's, *An Essay on Man*, which was pub-
lished in 1734 and which, in Epistle 2, sets out the frequently quoted admonition that "The
proper study of mankind is man."
tion law regime almost certainly would elicit fewer value conflicts, be easier to articulate and, in the world of economic reality, be far more effective to engender fair trade practices.
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