FREE TRADE AND ENVIRONMENTAL PROTECTION:

WHY THE GATT NEEDS GREENING

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Editor's Note: The link between international trade law and environmental protection policies is one of the most critical, yet unexplored, economic relationships affecting the global environment. It has risen to prominence over the past year in particular, following a landmark decision from the international trade court convened under the auspices of the General Agreement on Tariffs and Trade (the GATT). This discussion by Prof McDonald outlines briefly the key principles of free trade, as they have been embodied in the GATT, and examines the application of these principles to the most recent and most controversial trade dispute involving a United States ban on Mexican tuna imports - the Tuna-Dolphin dispute.

1. THE GATT AND FREE TRADE

The GATT emerged from the post-World War II drive for economic recovery. The United States and the United Kingdom saw unrestricted access to international markets as essential to rebuilding the global economy and sought to have this access guaranteed by adherence to an international agreement. The GATT's fundamental philosophy is that the only permissible trade barriers should be tariffs, or duties, and that these should be set by formal trade negotiations. Apart from the negotiated tariffs, the GATT imposes a positive duty on all participating nations, of which there are now over 120, to maintain unrestricted trade relations with all other parties. The GATT prohibits discrimination and protectionism by obliging its participants to treat "like" products from all trading partners equally (the most-favoured-nation obligation) and to treat imported products as favourably as it treats "like" products produced locally (the national treatment obligation).

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1 This paper is an abstract of "Greening the GATT: Harmonizing Free Trade and Environmental Protection" Vol 23 Part 2 Environmental Law (1993) (in press).

2. WHAT IS A "LIKE PRODUCT"?

The effect of the GATT's free-trade mandate on national and international environmental protection measures can be illustrated by Country X, which enacts a requirement that all automobiles be installed with catalytic converters. Country X can not require other nations to install catalytic converters in their vehicles, but it might ban imports of cars that do not have the device. Such an import ban on vehicles lacking catalytic converters would violate the GATT in the following way; the most-favoured-nation obligation would be breached if cars from nations Y and Z that are equipped with catalytic converters are accepted, but cars from nations A and B are banned because they have not installed the devices.

Arguments by Country X that there is no discrimination because all nations *could* trade with it, if only they met country X's requirements, will not pass muster under the GATT because the raw effect of the catalytic converter law is to favour certain imports over others. However, nation X might defend its law on the basis that a car with a catalytic converter is a *different product* from one without such a device. Using this approach, X could avoid the GATT obligations altogether, as the most-favoured-nation and national treatment obligations only apply to "like products".

A much more vexing question arises from attempts by nation X to ban products on the basis of differences in production or manufacturing processes, not characteristics of the product itself. For example, a domestic ban on the use of timber that has been logged in an ecologically unsustainable manner is likely to be extended to an import ban on such timber. Here, nation X will have breached the most-favoured-nation and national treatment obligations for the same reasons as before - it has favoured its own products or those of certain nations over others. It will, however, have a hard time arguing that the wood itself is different from timber harvested using sustainable logging practices. Nation X will have to rely instead on the defence that the "like product" terminology used in the GATT extends the product's production or manufacturing process, not merely to the characteristics of the product itself. The United States raised this argument in the recent dispute involving import bans on Mexican tuna, but met with little sympathy from the GATT dispute resolution panel hearing the case.

3. THE TUNA-DOLPHIN DISPUTE

The issues raised above are well illustrated by the dispute that arose last year between the United States and Mexico, regarding Mexico's tuna fishing practices. The conflict began when the United States certified the Mexican tuna fleet under the *Marine Mammal Protection Act*, which required Mexico to observe a maximum 'incidental dolphin taking rate' for tuna harvesting in the Eastern Tropical Pacific Region. Once Mexico had been certified, the MMPA obliged the United States to prohibit imports of all Mexican tuna and tuna products, regardless of where and how they had been caught. It also required the United States to impose import restrictions on tuna from nations who had bought tuna from Mexico - the so-called "intermediary" nations.

Mexico challenged the United States' ban using the GATT's dispute resolution procedure. Under that procedure, a panel of three trade experts from countries that do not have a stake in the outcome of the case hear the submissions of the disputing parties and those of other interested GATT signatories. The panel then examines the measure in question and rules on its consistency with GATT principles.

The Issues

In the *Tuna-Dolphin* dispute, Mexico argued that the United States was in breach of the GATT's prohibition on import restrictions and was discriminating against Mexico contrary to the most-favoured-nation and national treatment obligations. Mexico's complaint was based on four arguments:

First, Mexico claimed that the ban unfairly discriminated against nations who fished in the Eastern Tropical Pacific region.

- Second, it claimed that the ban was not imposed until the American fleet had left the Eastern Tropical Pacific region, so that the impact of the legislation on the domestic fleet was minimal, but was devastating for nations still fishing in the area.

Third, Mexico pointed out that the *Marine Mammal Protection Act's* ban on the sale of tuna caught by the US fleet only extended to tuna actually harvested in contravention of the dolphin-protection requirements, while the ban imposed against Mexico applied to all tuna and tuna products.

Finally, Mexico argued that it was impossible for Mexico to know in advance what the incidental dolphin taking rate would be, since its rate was set according to the United States' fleet. Thus, the Mexican fleet was disadvantaged as against the United States' fleet.

The United States justified its ban in three key respects:

- First, the United States argued that tuna harvested using purse-seine nets that result in high levels of dolphin mortality were *different products* from tuna caught using more dolphin-safe methods. According to this rationale, the United States escaped its most-favoured-nation and national treatment obligations because the tuna caught using different methods were not "like products".

  Second, the United States claimed that its actions could be justified under a specific exception to the GATT that permits trade restrictions that are "necessary to protect human, animal or plant life". The United States claimed that attempts to obtain Mexico's compliance with dolphin protection programmes had failed, and that its ban was the only step that might prompt a change in Mexico's fishing practices.

  Third, the United States relied on another specific exception to the GATT's obligations that permits measures taken to "conserve exhaustible natural resources provided such measures are taken in conjunction with domestic restrictions on production or consumption".

The Decision

The dispute resolution panel upheld Mexico's challenge and interpreted the GATT's provisions narrowly in three significant ways:

(1) The panel rejected the United States' contention that tuna harvested using harmful practices is different from tuna caught using environmentally-sensitive techniques. The panel said that products and goods could not be distinguished on the basis of their method of processing or production unless the process altered the fundamental characteristics of the product itself.

(2) In the panel's opinion, the United States could only ever take trade measures to protect human or animal life or conserve resources under the GATT exceptions if the humans, animals, or resources were located *within the United States' territory.* To hold otherwise, it said, would be to allow one country to impose its will unilaterally on another.

(3) The panel also held that the import restriction in question was not "necessary" because the United States had failed to pursue a bilateral or multilateral co-operative resolution to the problem. To be necessary, for the purposes of the exceptions, the US must have first exhausted all its "GATT-consistent" alternatives.

While the facts of the *Tuna-Dolphin* dispute itself do raise doubts as to the *bona fides* of the United States' ban, the panel's decision has serious and far-reaching ramifications for the future of domestic and international environmental initiatives. The Panel's ruling on the "like product" terminology means that parties to the GATT could challenge a nation that encourages environmentally-benign production or processing methods by imposing import restrictions on products manufactured using less sensitive processes. Its interpretation of when a trade restriction is "necessary" means that nations must engage in extensive, often fruitless, negotiation to achieve before resorting to more swift and efficient trade measures.

The extra-territoriality ruling has the most chilling potential, however, because it fails to recognize the legitimacy of international efforts to protect the global "commons", such as the atmosphere and the oceans. By limiting the availability of the health and safety and natural resources exceptions to protection of animals, plants or resources located *within* a nation's borders, the Panel has signalled that conventions like the *Montreal Protocol on Substances that Deplete the Ozone Layer,* which contemplate the use of trade restrictions against non-signatories in order to protect transboundary resources, will violate the GATT.

The Outcome

Panel decisions are not binding, nor do they become part of GATT law until they are adopted by the Council. To date, the Council has never rejected a report, but Mexico, who has now reached an agreement with the United States on dolphin mortality, fears that if the United States is forced to amend its GATT-inconsistent

laws it will no longer be willing to enter a North American Free Trade Agreement, and thus urging the GATT Council not to adopt the *Tuna-Dolphin* decision.

The European Community, however, is trying to force the Council to adopt the report so that EC member States that are still subject to the United States' intermediary embargo can force the United States to lift the ban. The EC contends that the *Tuna-Dolphin* decision was sound because it made clear that economically-powerful nations, like the United States, could not act unilaterally whenever they perceived a need for conservation or environmental protection. This, says the EC, may be done only through international agreement.

The future of the *Tuna-Dolphin* report is unclear because debate is focussed for now on whether the EC has any right to force the Council to accept the decision. Until this secondary issue is resolved, however, the decision is still out there and has the implicit or explicit support of most GATT parties[2] (excepting the United States and Mexico!). Indeed, even if the Council never accepts the report, a panel hearing the same dispute again would be likely to decide it in the same way.

Conclusions

The *Tuna-Dolphin* conflict confirms what the environmental community has feared for some time; to the extent that conservation efforts might interfere with free trade, free trade wins. Nations may not discriminate against products manufactured in an environmentally-unsustainable manner, nor may they favour imports from countries with sound environmental regulations. The decision in the *Tuna-Dolphin* dispute also threatens the future viability of international efforts to protect global "commons" like the atmosphere and oceans. If a resource or the direct beneficiaries of a conservation effort are not located within a party's sovereign territory, the exception to free-trade does not apply.

Parties to the GATT recognize the dilemma, but to date, little has been achieved in the way of substantive reform. On the contrary, the Uruguay Round of trade negotiations contains proposals that would further jeopardize national efforts to go beyond "lowest common denominator" environmental protection. Moreover, the Rio Earth Summit indicates that the international community's embrace of ecologically sustainable development is continually being weakened by countervailing economic considerations. World trade policy that offers free and unrestricted access to markets is seductive indeed, especially for developing nations, and the conflict between free trade and environmental protection is a symptom, not a cause, of the global community's fickle approach to conservation. As such, it can only be resolved when agreement is reached on the wider issues of global resource management, allocation and consumption.

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2 Australia made fairly extensive submissions to the GATT Panel during the Tuna-Dolphin dispute widely criticizing the United States' conduct.