

Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy

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I have been asked to focus on issues of trade and the environment, with an invitation to inject something of the environmentalist point of view. Actually, I am not sure that a unique “environmentalist” perspective exists. Granted, people who identify themselves as environmentalists tend to assign greater value to the existence of rare species and wilderness areas than do most other people, economists included. But overall, and in the regards most important for social action, environmentalists and economists are disturbed by many of the same trends.

Specifically, all across the world the environmental inputs to production—water, forests, air, and so on—are priced imperfectly. Some factors, such as water and air, are clearly underpriced. Bob Ellickson rightly referred to the underpricing of water in California.¹ But the underpricing of water is behind the water shortage around the world. The same is widely true of forests and forest products. When factors are underpriced, they are fated to be overconsumed—whether water or trees or wilderness areas.

Other environmental resources, such as the waste storage capacity of air and water basins, are not merely underpriced, but all too commonly elude pricing systems altogether. As a consequence, polluters are invited to treat aquasystems and the atmosphere as cost-free waste dumps. Even worse than nonpricing, some countries have adopted resource policies that actually subsidize the destruction of biological assets.² The consumption of coal—and thus the impairment of atmospheric quality—is notoriously heavily subsidized globally. Ocean fishing is so heavily subsidized that the costs of sweeping the

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1. See Discussion, *Panel I: Liberty, Property, and Environmental Ethics*, 21 *ECOLOGY L.Q.* 417, 420 (1994).

2. “Subsidy” should be understood broadly. For example, local land laws can have the same perverse effect when they require would-be claimants of public lands to exhibit dramatic evidence of their possession, such as chopping or burning the forests.

seas reportedly exceeds the value of the catch (\$92 billion in costs, \$72 billion in value).³ Is it any surprise that fishery yields are declining?

Clearly, perpetuating these market failures is bad policy for the host countries involved and bad for the environment. What is less evident is that in a global economy increasingly marked by international trade, local distortions are transmitted and aggravate inefficiencies around the world. This is where trade enters the picture. In a recent series of papers,⁴ Graciela Chichilnisky has modelled this effect by asking us to imagine two countries: *S*, in which property rights in resources are ill-defined (imagine that *S*'s forests, for example, are owned in common or unmanaged), and *N*, in which property rights in resources are well-defined (the forests are privatized or nationalized with rational pricing). Chichilnisky points out, among other things, that even if we assume that all the other variables that drive trade (wealth, endowments, etc.) are fixed in a manner that would otherwise lead to a nontrade equilibrium between *N* and *S*: (1) the difference in property rights alone will drive commodities to move from *S* to *N*; (2) *S* will overconsume its forests; (3) *N* will underconsume its forests; and (4) the entire global economy will suffer.

Hence, if we regard the world's resources as one big basket, then trade, which ideally should amplify wealth, has the potential to magnify inefficiencies. This does not mean that we necessarily rectify the situation—or reduce the risks—by tinkering with the terms of trade. Once nontrade objectives are injected into trade talks, there is always the risk that someone will invoke the nontrade factor as a pretense for securing trade advantage. If the risks of such subterfuge are unacceptably high, there are other ways to address the underlying challenge of environmental pricing. Developmental bank loans can be conditioned upon a more sensitive use of resources. The developed nations can deliver assistance in the form of environmental technology, as Dave Doniger⁵ has mentioned. In other words, trade issues and environmental issues can be kept separate—and perhaps to some degree they should be.

Yet, in the last analysis, those concerned with the one cannot ignore the other. I do not mean to suggest that the conflict between

3. *Plundering the Seas*, N.Y. TIMES, Aug. 2, 1993, at A14. The figures are for the latest year available, 1989. They include only operating costs; when capital costs are also included, the loss (implicit subsidy) increases to \$54 billion. WORLD RESOURCES INST., WORLD RESOURCES 1994-95, at 183-84 (1994).

4. Graciela Chichilnisky, *Global Environment and North-South Trade*, in AMERICAN ECONOMIC REVIEW 1994 (forthcoming 1994); Graciela Chichilnisky, *North-South Trade, Property Rights and the Dynamics of Renewable Resources*, in STRUCTURAL CHANGE AND ECONOMIC DYNAMICS (forthcoming 1994).

5. See David D. Doniger, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L.Q. 477, 479 (1994).

trade values and environmental values is inherent, or that all the results of market integration are going to be bad. I think some outlooks are clearly good. Take agriculture, for example. If trade barriers come down, one can expect a shift of production from nations that strongly protect and subsidize their agriculture, such as France, to nations that are less intensively cultivated, such as Mexico. The benefit of liberalized trade to French consumers and taxpayers needs no elaboration. The environmental implications are less obvious. The best assumption is that the lands that will be removed from production in France will be the more marginal lands—those that require the most chemicals and pesticides to coax a harvest from the soil. Thus, some agricultural production will be transferred from marginal French soil to soil elsewhere that needs less of a pesticide boost. For France, liberalization should be both welfare friendly (lower consumer prices and lower subsidies) and environment friendly (fewer chemicals and pesticides). At the same time, for Mexico, greater production means higher welfare. True, one would expect marginal deterioration in the Mexican environment to be caused by added chemical inputs there. But if one can assume a global point of view, the result is quite likely to be a reduction in chemical inputs into the environment overall. For each two pounds added in Mexico, there may be four pounds eliminated in France.⁶

Unfortunately, not all the environment-trade tensions are so easy to dissolve. There is a fear that given the mobility of capital, investment is going to move to those nations that offer the most lax controls—a sort of race to the bottom, somewhat (but not exactly) like what has been discussed in connection with Delaware and U.S. corporate law.⁷ A second fear is that even if capital does not flee, the specter itself may excite political coalitions—between threatened labor and threatened industries—that will unite to frustrate efforts to tighten up domestic environmental laws. These two concerns are obviously related. The second worry, that the fears of capital flight will be manipulated, is rooted on the first worry, that capital flight will actually take place. So, let me concentrate on the underlying actuality and ask: “Is it really likely that the integration of markets aimed for by NAFTA, the European Community (EC), and GATT, will trigger

6. There may be a more complicated story to tell. It could be, for example, that in the context of the Mexican infrastructure of, for example, sewage and public health, the two pounds in Mexico might do more health damage than the four pounds that I presume it to replace in France.

7. See William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

an appreciable exodus of capital towards countries that offer, as an inducement, weaker environmental laws and enforcement?"

I think the general answer is no. Any country that thinks it can attract capital by offering lax environmental laws can do so right now, without further trade liberalization. True, a marginal reduction in tariffs will lead to a marginal shift in asset location. But environmental laws are not likely to be a major motivator of plant location. For one thing, while the industry of the United States and other developed countries generally complain about environmental and every other form of regulation, the cost of environmental compliance turns out to be a rather small fraction of total costs—reportedly, about 0.6% of the production costs of U.S. industry as a whole. The cost of compliance for the most burdened industry, cement, rises to only three percent.⁸

Moreover, to put even these modest savings in perspective, put yourself in the shoes of an American considering investing in Mexico. You are faced with perhaps a ten or even fifteen year investment payback period. Even if there is an attractive advantage to the investment now, the laws are only going to get stiffer over that ten or fifteen year period. The laws will get stiffer because environmental deterioration will increase the public demand for tougher laws. And they will get stiffer because people tend to demand higher environmental protection when they get wealthier.⁹ For these reasons, among others,¹⁰ we ought not to fear a large exodus of capital on the basis of regulatory advantage.

But there is an important caveat. While we should not expect a major flight, there is reason to suppose that the companies that do flee will be those companies that face the highest regulatory burden in the EC and in the United States. I presume that these firms are regulated because they present the worst environmental risks. For example, some petroleum refiners and coal burning utilities, which are treated

8. See Patrick Low, *Trade Measures and Environmental Quality: The Implication for Mexico's Exports*, in WORLD BANK, DISCUSSION PAPER NO. 159, INTERNATIONAL TRADE AND THE ENVIRONMENT 105 (Patrick Low, ed., 1992). But see Friends of the Earth, *Standards Down, Profits Up* (Jan. 1993) (claiming that gains of emigrating from U.S. environmental laws are appreciable when calculated as a function of company profits, not costs). And, of course, while a single regulatory scheme, such as environmental costs, is not apt to drive capital, it is conceivable that a total regulatory scheme, including, say, the costs of the proposed Health Plan, would have a cumulative effect.

9. See, e.g., Marian Radetzki, *Economic Growth and Environment*, in WORLD BANK, *supra* note 8, at 189 (noting that higher per capita incomes correlating with technological advances reduce environmental damage per unit of finished product).

10. Also, the opening to trade of insurance underwriting (including environmental damage liability) will have a potentially positive influence, assuming that insurance premiums will nudge firms in a more cost-sensitive direction.

fairly toughly under the 1990 Clean Air Act Amendments,¹¹ will give serious thought to relocating. In other words, insofar as there is an exodus on environmental regulatory grounds, one expects it to be concentrated among those activities that are probably the most despoiling. Of course, these also are the activities we should be the least sorry to see go.

To advance beyond these few general comments we have to distinguish three cases. First are situations where the pollution from the emigrant activity is wholly internalized within the borders of the receptor country whose regulatory laxity, let us assume, attracted the capital.¹² I will refer to these as the internalized harm cases. Second are situations of the sort Judge Ritchie was concerned about in the recent *Public Citizen* case,¹³ where some of the pollution from emigrant industries has transboundary effects, crossing back into U.S. territory. I will call these the transboundary pollution cases. Third, and where I find myself not wholly in agreement with Abe Chayes, are situations where the pollution or the activity affects the global commons areas. I will refer to these as the global commons cases.

First, when the pollution from an emigrating activity is wholly internalized within its new host country, it is not clear that we should have an objection. To illustrate, in 1988, the South Coast Air Quality Management District, the regional agency charged with reducing the smog levels in the Los Angeles basin, severely cracked down on the use of solvent-based paints, stains, and lacquers used by furniture manufacturers. A number of affected companies, typically rather small, did pull up stakes and move to Mexico.¹⁴ We can assume that the migration adversely affected employment and tax revenues in the Los Angeles basin. But against such losses we have to consider the offsetting benefits of a cleaner local environment and an ability to buy furniture at a cheaper price from Mexico, which resulted precisely because the Mexican government was prepared to absorb the additional damage.

What about the losses suffered by Mexico and other countries when polluting industries relocate? We should be concerned with the

11. Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401-7671q (Supp. IV 1992)).

12. For convenience I invoke the image of established plants relocating; obviously the same analysis that applies to production that emigrates from *A* to *B* applies to investment in enterprises that originates in *B* rather than in *A*.

13. *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993) (ordering the government to prepare an EIS for NAFTA).

14. See Chris Kraul, *A Warmer Climate for Furniture Makers*, L.A. TIMES, May 14, 1990, at D1 (indicating that Mexico's low labor costs were a powerful additional lure for the relocating manufacturers).

welfare of these countries. But there are obvious tradeoffs involved, and we in the United States should not be too quick to assume that we can make better judgments than can the affected populations themselves about what is in their best interests. There are two caveats. First, we take on special responsibility where the local population receiving the risk is unrepresented, uninformed, and highly imperiled. Second, I hope to see a growing role in the world community for international environmental standards. And, where those standards address truly lethal environmental conditions—say, the operation of nuclear reactors—we would certainly have to leave open the possibility of employing countervailing duties as one measure against noncompliers. But that is an issue that remains off in the future.

In the second situation, capital flight results in factories sited across, but still close to, the border, with the consequence that some dirty air or water is externalized by the host country, back to us. Obviously this situation demands some legal and institutional rejoinder. But the narrower question that is being debated is whether the rejoinder should take the form of imposing barriers on free trade (e.g., conditioning trade agreements on environmental enhancement by the "dirtier" nation). I am skeptical of this, because we have independent and, I believe, superior devices to defend ourselves from the potential perils without major revision of the trade laws.

The first defense is through trade sanctions. Interestingly, even under GATT, it is probably permissible for the United States to impose a tax on goods imported from, say, Mexico, where the production of the goods was causing damage to the U.S. environment, so long as the level of the duty is (1) metered to reflect the damage to the United States, and (2) in line with the implicit tax facing U.S. producers of the same product causing the same problems.¹⁵

Even if trade measures should prove inadequate, general principles of international law may provide a second line of defense. Transboundary pollution (as opposed to a nation despoiling its own internal environment) that causes significant injury to the environment of another state is impermissible under international law.¹⁶ Legal awards, including an injunction and damages, are not unheard of.¹⁷ If a formal lawsuit appears excessive or unrealistic, there is certainly leverage for diplomatic relief. Indeed, the more seriously a nation impairs its

15. This would seem to follow from the national treatment clause, General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. 3, 61 Stat. A11, A18, 55 U.N.T.S. 187, 204.

16. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (imposing the obligation "to the extent practicable under the circumstances").

17. See, e.g., *Trail Smelter (U.S. v. Canada)* 3 R.I.A.A. 1911 (Apr. 16, 1938).

neighbor's environment, the more likely it is that pressure will develop to reach a mutually agreeable settlement.

With regard to NAFTA specifically, it appears to me that the environmental side agreement is an effort to institutionalize a framework for just such "smoothings out."¹⁸ In fact, what NAFTA anticipates does not strike me as particularly distinguishable from the International Joint Commission, which has for a long time managed water disputes between the United States and Canada. Much can be done to improve the still-developing institutional foundation,¹⁹ but I think we are heading in the right direction. There are risks that free trade will increase transboundary pollution. But I think the damage is likely to be moderate and can be contained by available and projected instruments. When all is said and done, these risks certainly do not warrant capsizing the trade negotiations.

In the third situation, when a nation's activities degrade the commons areas, the tension between trade and environment takes its strongest form. Since much of the injury falls on the global commons, the country producing the damage captures the full benefits of the activity, but experiences only a fraction of the costs, which are borne undividedly by all the nations of the world. In this circumstance, unless the world community takes special measures, the actor has no motivation to restrain itself and self-impose the right level (i.e., the globally optimal level) of regulation.

Law could remedy this. That is, we could take special measures. The oceans and atmosphere are public goods, and the costs of their degeneration theoretically could, and certainly should, be internalized through any number of legal instruments, from pollution taxes to torts suits. But the reality is that where the commons are involved, international law—the general principles at least—is at its most feeble. Legal avenues of recourse, available in the second class of cases (transboundary pollution), are practically unavailable here. Specially tailored treaties are required. Indeed, we have some high-sounding treaties to protect the commons.²⁰ But as we all know, problems of free-riding make the job of instituting multilateral conventions, and especially of putting teeth in them, highly problematic.²¹ Therefore,

18. See North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480.

19. See Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279 (1992).

20. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. I, 14 U.S.T. 1313, 480 U.N.T.S. 43; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 26 I.L.M. 1529; Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

21. See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* 104-21 (1963).

in this situation, the case for trade sanctions, even unilateral boycott, strikes me as particularly strong.

Let me illustrate my position in the context of the *Tuna/Dolphin Decision*,²² by defending the U.S. position. Without invoking any exotic theory of environmental ethics (which I am prepared to defend,²³ but not before this group), a *prima facie* case for trade sanctions can be made out in efficiency terms. There are people who like tuna on their plates, and others who like dolphins in the sea. The people who like tuna on their plates can express their demand through market forces: they buy tuna, thereby bringing more tuna to market, and incidentally reducing the number of dolphins in the seas. The people who want dolphins in the sea want to shift the demand curve for tuna back the other way. But since dolphins in the sea are a public good, those willing to pay for dolphin conservation cannot signal their preferences through ordinary market transactions. Each dolphin lover can, of course, refuse to buy tuna, and thereby incidentally affect the conservation of dolphins. But the dolphin lovers may not be tuna eaters, anyway. What they really want is a social decision with the force of the nation behind them.

The United States has enacted the Marine Mammal Protection Act,²⁴ which amounts to just such a collective decision that when the price of tuna is too many dead dolphins, the price is too high—we won't buy. To characterize the Marine Mammal Protection Act as an imperialistic extraterritorial imposition of our moral preferences on others is a bit hyperbolic. What does a refusal to buy involve? We are not parachuting the CIA onto Mexican fishing vessels or sending the Coast Guard out to ram them in international waters. What we are doing is expressing our national preference that dolphins remain in the sea. Why should we not? In the past, we have refused to buy just about anything from a nation, South Africa, on the grounds of its racial laws.²⁵ In fact, the case for boycott appears particularly strong when, as in the tuna/dolphin context, we are reacting to an abuse of the global commons area (as opposed to a nation's abuse of its *internal* environment). We have as legitimate an interest in keeping the dolphins in the sea as Mexico and Vanuatu have in taking the tuna out. The refusal to buy is how we express our preference with regard

22. Report of the Panel, United States—Restrictions on Imports of Tuna (Mexico v. U.S.), GATT Doc. D/S21/R (Sept. 3, 1991), *reprinted at* 30 I.L.M. 1594.

23. See, e.g., CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS* 71-114, 132-83 (1977).

24. Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(B)(ii) (1988 & Supp. IV 1992) (banning importation of fish products caught with technology that results in incidental killing of marine mammals in excess of 125% of U.S. incidental kill).

25. Anti-Apartheid Act of 1986, 22 U.S.C. § 5113(b)-(c) (1988).

to the use of global resources that are conceptually as much ours as anyone else's.

I do agree that the United States should not be too quick to act unilaterally. The whole spirit of international law is to foster discussions and compromise—in fact for many of the same reasons that Cass Sunstein was talking about,²⁶ but on an international plane. My point is that unilateral actions such as a refusal to trade can be, and often are, part of the discussion process. In international relations, how many other peaceful devices are there to bring various nations to the bargaining table? Thank you.

26. See Cass R. Sunstein, *Panel II: Public Versus Private Environmental Regulation*, 21 *ECOLOGY L.Q.* 455, 457-58 (1994).