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SOVEREIGNTY AND ECOLOGY: AN INTRODUCTION TO THE ISSUE

BY PAUL STANTON KIBEL*

One of the most controversial policy debates today is over the relationship between environmental protection levels and increased international trade. The core of this debate is a disagreement as to the impact of the emerging international trade framework on the natural environment. This emerging international trade framework is expressed most clearly in the General Agreement on Tariffs and Trade (GATT) and the other agreements negotiated within and enforced by the World Trade Organization (WTO).

The critics of the emerging international trade framework maintain that increased international trade contributes to environmental degradation in at least two ways. First, the critics maintain that competition among different nations places downward pressure on environmental standards, as each nation seeks to attract and retain corporate investment.¹ Second, the critics maintain that the GATT does not provide appropriate rules, and the WTO does not provide a competent forum, for the resolution of complex international environmental ques-

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1. See Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996).

tions.² The promoters of the emerging international trade framework have responded to these critiques with two basic arguments. First, the promoters have argued that there is insufficient economic evidence to support the claim that increased international trade will result in a reduction of environmental standards.³ Second, the promoters have argued that even if such environmental degradation occurs, the economic benefits of increased international trade outweigh these environmental costs.⁴

The debate over the environmental impact of the emerging international trade framework has been vigorous. It has engaged a broad spectrum of citizens and interests, including environmentalists, diplomats, regulators, industry, agriculture, banks, lawyers, economists, indigenous groups, and labor unions. Despite this broad spectrum of participants, however, in many important respects, the debate has been somewhat limited. This is because the debate has so far focused primarily on two issues—the shortcoming of current trade rules and trade's impact on air and water pollution standards. Although air and water pollution standards and trade rule defects certainly provide some basis for evaluating the trade-environment debate, there are other criteria that may be of equal, or perhaps greater, ecological and legal significance. There are four criteria in particular that have been neglected in the discussion.

First, pollution standards do not indicate the extent to which we are preserving ecosystems, such as native forests, coral reefs, or wetlands. A nation can raise its pollution standards, while simultaneously logging its rainforests or destroying its underwater reefs. Second, pollution standards do not indicate the cumulative effect of increased industrialization

2. 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).

3. See, e.g., C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT* (1994); DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995); Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM J. EUR. L. 29 (1994/95).

4. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

and resource exploitation on the natural environment. The fuel efficiency of individual automobiles may be improving, but if worldwide another 500 million cars are on the road, the cumulative effect on air quality and global warming will be disastrous. Third, in the trade-environment debate, discussion of sovereignty has focused mostly on the rights of nations to set pollution standards without international interference. The concept of sovereignty, however, includes not only national rights but also national obligations, such as the obligation to not drive endangered species into extinction.⁵ Fourth, by focusing primarily on the reform of existing international trade rules and international trade institutions, environmentalists may have missed important opportunities to strengthen the international rules and institutions expressly designed to protect the natural environment. Financial and intellectual resources put into challenging GATT and the WTO could also have been spent to directly enforce the conservation provisions of treaties such as the United Nations Convention on Biological Diversity, the United States Statement of Forest Principles, and the United Nations Convention on the Law of the Sea.

The point here is not to belittle the efforts of those working to promote strict pollution standards, or of those working to reform international trade rules. This is clearly important work that should continue. Rather, the point here is to recognize that critical ecological and legal questions have remained on the margins of the trade-environment debate. In this special symposium of the *Golden Gate University Law Review*, entitled *Nature Beyond the Nation State*, we will explore and assess some of these marginalized questions. In the articles that follow, ecosystem preservation, cumulative ecological impacts, and international environmental obligations will be placed at the center of the trade-environment debate.

The first article examines the International Court of Justice's (ICJ) July 1997 ruling in the Hungary-Slovakia dispute over the Danube River. In this dispute, Hungary sought to

5. See DAVID HUMPHREYS, *FOREST POLITICS: THE EVOLUTION OF INTERNATIONAL COOPERATION* (1996).

withdraw from an agreement with the former Czechoslovakian Republic to build a series of dams on the Danube. Hungary's decision to withdraw was based in large part on concerns about the impact of the proposed dams on water quality and wetlands. Although the ICJ recognized that international law establishes the legal obligation and right of nations to protect the natural environment, the Court went on to conclude that these considerations did not provide Hungary with a basis to withdraw from the specific project under consideration. Stephen Stec, senior legal specialist with the Regional Environmental Center for Central and Eastern Europe (REC) in Budapest, analyzes the ICJ's ruling. Stec's analysis considers how the ruling will impact the future of the Danube's ecology, as well as the future of environmental principles under international law.

Next, we consider ecological and political issues involved in hydropower development on Southeast Asia's Mekong River. The Mekong travels thousands of miles from China, through Laos, Thailand, Cambodia and Vietnam, eventually flowing into the Sea of China. The riparian governments along the Mekong are currently engaged in negotiations to construct a series of hydropower dams along the river. International institutions, such as the Mekong River Commission, the United Nations Development Programme, the World Bank and the Asian Development Bank, are playing a key role in moving the negotiations forward. The proposed hydropower projects have resulted in harsh conflicts between different nations and between different economic interests. One of the most serious conflicts relates to the impact of the proposed dams on migratory fish, and on the communities that subsist on these fish. There is concern that the dams would destroy these migratory fisheries. Professor Philip Hirsch, of the University of Sydney in Australia, examines the local communities, national governments, and international institutions involved in the Mekong hydropower controversy.

Following these two articles on the ecology and development of rivers, we then turn to the question of agricultural reform in Europe. In the early 1990s, the European Union (EU) adopted several measures to reduce environmental damage caused by chemically-intensive farming practices. Most of these reform

measures focused on the role of subsidies and financial assistance. On the one hand, these measures called for a reduction of export, pesticide and chemical fertilizer subsidies under the EU's Common Agricultural Policy. On the other hand, these measures called for an increase in financial assistance for sustainable farming practices, such as reforestation, water conservation, wetlands preservation, and crop rotation. The latter measures, however, may conflict with trade measures adopted pursuant to GATT's Uruguay Round, which restrict the use of government subsidies and financial assistance in the agricultural sector. This complex policy nexus of farming, subsidies, trade and environmental protection is explained by Jim Dixon, senior policy officer for the Royal Society for the Protection of Birds (RSPB) in the United Kingdom. The RSPB has been at the forefront of efforts to improve the ecological conditions of agriculture in the European Union.

In the fourth article, Pedro Villegas, Senior Consultant to the California State Assembly's Select Committee on California-Mexico Affairs, provides an update on the trade-environment debate in the Latin American context. The nations of Latin America are pursuing the goal of increased regional trade through the vehicle of the Southern Cone Common Market (MERCOSUR). MERCOSUR, which currently includes Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, aims to create a single free trade zone. Environmental and natural resource issues related to MERCOSUR integration are being handled through the Specialized Conference on the Environment (REMA). At present, REMA is very marginalized within the MERCOSUR framework, and hence environmental issues have received scant attention. Villegas' article will explore the environmental dimensions of the evolving MERCOSUR process, paying particular attention to the prospects for REMA to play a more significant role.

In the last article, Martin Wagner, Director of International Programs for Earthjustice Legal Defense Fund (formerly Sierra Club Legal Defense Fund), discusses the problematic relationship between national environmental laws, and the expropriation provisions in several recent and proposed international trade agreements. International law has long protected foreign

property from direct expropriation—confiscation by the host-country government—by giving the foreign property owners the right to compensation for the value of the lost property. In recent decades, however, the doctrine of “indirect expropriation” has developed, to require compensation not only for actual confiscation of foreign property, but also for national laws that limit the use and development of foreign property. As such, this development in international law is somewhat analogous to the recent judicial expansion of “regulatory takings” claims in the United States.

This doctrine of indirect expropriation is recognized in the North American Free Trade Agreement (NAFTA), and foreign companies have begun to use the doctrine to effectively challenge, and in some cases rescind, national laws adopted to protect public health, natural resources and the environment. NAFTA's indirect expropriation rules and procedures are now being looked to as a model for the proposed Free Trade Agreement of the Americas (FTAA) and the proposed Multilateral Agreement on Investment (MAI). Wagner provides an analysis of the indirect expropriation claims that have been filed under NAFTA, and outlines strategies to ensure that such claims do not undermine health, natural resource and environmental standards.

As the articles in *Nature Beyond the Nation State* reveal, the relationship between international trade and environmental protection involves much more than the narrow issue of whether increased international trade tends to result in higher or lower pollution standards. At its core, the trade-environment debate presents a more fundamental and troubling question: can we preserve the earth's nonrenewable resources, biological diversity, and basic ecosystems if our cumulative extraction and consumption levels continue to increase? It will take great courage for international law to eventually ask this question, because most of us already know the answer.