Common Ground

by Kaylee Newell

Introduction

Free trade and environmental protectionism are big buzzwords in the international trade arena. These words represent two polar opposites on the trade spectrum. The conflicting ideas these terms encompass are deeply rooted in American trade policy, from the Smoot-Hawley Act of 1930 to the North American Free Trade Agreement (NAFTA) of January 1, 1994. The United States is a signatory to NAFTA, and also to the General Agreement on Tarriffs and Trade (GATT). This paper will analyze these two international trade agreements, to illustrate common misconceptions regarding trade and the environment.

The basic problem underlying trade and environmental issues is the perceived lack of common ground between advocates of free trade and environmental conservation. It is important to understand the overarching themes of each position. The following descriptions are broad categorizations of the two camps. Those advocating free trade fear that environmentalism will lead to new types of protectionism, giving rise to trade barriers. They object to proposed adjustments to environmental standards out of fear that those standards will destroy countries' comparative advantage and ability to compete effectively in the international marketplace.[1]

Under the theory of comparative advantage, a country will specialize in production of goods which it is best suited to produce, giving that country an economic advantage in production as compared to other countries. That country then trades its goods for goods from other nations. Comparative advantage is seen as the impetus for countries to trade. Advocates of free trade feel that regulation places chains on a country's ability to best exploit that area of a market that it is comparatively best suited to exploit. From this perspective, regulation becomes a roadblock to competitiveness, and environmental protectionism ultimately leads to a breakdown of the international trade regime.[2]

Environmentalists, on the other hand, are alarmed by many aspects of international trade. Environmentalists fear a loss of national regulatory sovereignty which will force harmonization of environmental standards at levels too low to effectively promote conservation. Environmentalists envision the development of "pollution havens" in regions that have fewer regulations and compliance costs. In addition, environmentalists fear that unfettered free trade will promote unsustainable consumption,[3] depleting precious natural resources. The tension between free trade and environmental protection is obvious; how to reach a common ground is not so apparent.

There does not need to be such a stark juxtaposition between the two sides. There is a middle ground in which trade can be used as a mechanism for environmental protection and still result in monetary gains for the trading partners. The question is: Where does this common

ground lie? How do we get there from where we are now? In order to propose solutions to the problems posed by trade and conservation, it is important to look at the international trade regime as it currently exists to see where the problems and benefits lie.

The General Agreement on Tariffs and Trade

GATT, originally opened for signature in 1947, was initially negotiated to eliminate tariffs, quotas and discriminatory treatment of foreign products.[4] The basic premise of GATT is economic nondiscrimination.[5] GATT mandates adherence to two components designed to achieve nondiscrimination. The first component is most favored nation (MFN) status. GATT signatories are required to treat products from any member nation no less favorably then those same products from other member countries.[6] The second component is known as national treatment. This idea is similar to MFN status except that it applies to domestically produced goods. Goods from member nations are to be treated no less favorably then goods produced domestically.[7]

GATT has a small administrative structure; trade barriers are lowered primarily through rounds of negotiations.[8] Since the inception of GATT in 1947, eight rounds have been completed. The most recent round, called the Uruguay round, was concluded in 1993.

GATT has been slow to recognize environmental issues. In 1971, the Group on Environmental Measures and International Trade was created to address environmental concerns. This group first convened in late fall of 1991, in delayed response to environmental concerns that began to surface in 1990. The group met to create its agenda and address environmental concerns within the structure of GATT.[9]

Three GATT provisions control implementation of environmental measures.[10] The first of these is Article III, which stipulates that domestic taxes and regulations affecting product sale or use must apply equally to foreign products and like products produced domestically. Article XI prohibits member nations from establishing quantitative restrictions on imports or exports. Environmental treaties often call for import bans to force compliance by non-signatory countries, in violation of Article XI.[11] Article XX permits exceptions for measures which are inconsistent with GATT provisions. Section (b) provides exceptions "necessary to protect human, animal, or plant life or health." Section (g) excepts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[12]

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Conflicts between member countries are resolved by GATT dispute panels. One GATT panel decision which outraged the environmental community in the United States is known as *Tuna-Dolphin I.*[13] *Tuna-Dolphin I* involved Mexico's challenge to the United States Marine Mammal Protection Act of 1972 (MMPA). The MMPA was enacted to reduce the number of incidental killings of dolphins by tuna fishing operations. The law applies specifically to tuna caught in the Eastern Tropical Pacific Ocean with purse-sein nets. US fishing operations must apply for a permit to fish in this area. These permits allow no more than 20,500 incidental dolphin killings or injuries per year. Other countries must be able to prove an incidental killing rate of no more that 1.25 times the average killing rate of the US fleet in order to export tuna to the US. If the country wishing to export can't prove this rate, an embargo is placed on tuna exports from that country. Such an embargo was placed on tuna from Mexico.

In Tuna-Dolphin II, the European Union challenged the US intermediary embargo imposed on countries that buy tuna from countries in violation of the [Marine Mammal Protection Act].... Again, the US embargo was found to be inconsistent with GATT....

In *Tuna-Dolphin I*, the GATT panel found that the MMPA was inconsistent with GATT for several reasons. First, it violated Article III(4) because the MMPA regulated the manner in which the product was caught and not the product itself.[14] The panel found that the MMPA did not qualify under either of the Article XX exceptions, because under those exceptions member countries were only allowed to protect objects within that country's territory.[15] Aside from the jurisdiction issue, the panel found that the MMPA was inconsistent with GATT because the US had failed to show that other multilateral measures to protect dolphins were unavailable. To qualify for an exception, the US needed to show that it had pursued the least GATT inconsistent measure possible.[16] The panel also found that since the number of kills other countries were allowed was based on past US kills, the amount was too unpredictable from year to year to be primarily aimed at dolphin conservation.[17] The panel's decision in *Tuna-Dolphin I* was seen as extremely threatening to any US environmental regulations that might be considered trade barriers.

A more recent decision has slightly lessened the sting of the *Tuna-Dolphin I* decision. In May 1994, a second *Tuna-Dolphin* case was decided (*Tuna-Dolphin II*). In *Tuna-Dolphin II*, the European Union challenged the US intermediary embargo imposed on countries that buy tuna from countries in violation of the MMPA,[18] like Mexico. Again, the US embargo was found to be inconsistent with GATT by a dispute resolution panel. The panel affirmed the earlier decision that Article III only applies to the products themselves and not production.

The panel applied the test articulated in *Tuna-Dolphin I*, which allows for exceptions based on Art. XX(g). Under *Tuna Dolphin I*, the measure must first be "primarily aimed" at the conservation of an exhaustible natural resource.[19] Second, the measure must be "primarily aimed" at rendering effective domestic restrictions on consumption or production.[20] The panel

held that the MMPA violated GATT because the trade sanctions were insufficiently targeted to the environmental harm the US was trying to avoid. However, the panel rejected the first panel's decision that a country could only protect objects within its own territory. This last finding on the jurisdictional issue is seen as a concession, although not a significant one, to environmental interests.

In September of 1994, a GATT panel addressed another challenge to US environmental standards. This challenge by the European Union included two separate issues. First was the "Gas Guzzler and Luxury Car" tax imposed on less fuel efficient cars. The 1994 panel found that the distinction between larger, less fuel efficient cars and smaller, less expensive, more efficient cars was consistent with Article III so long as the US was not protecting its domestic industry via the distinction. Because there was no such protection, the panel upheld the taxes.

The second issue addressed by the 1994 panel was the Corporate Average Fuel Efficiency (CAFE) standards. In order to determine corporate fleet average fuel efficiency all cars were categorized by ownership/manufacturer. This method of categorization was found to be inconsistent with Article III because it was based on the identity of the manufacturer rather than the product. The panel did find that categorization qualified as an exception under Article XX(g) because it was designed to conserve gasoline. The panel considered petroleum an exhaustible natural resource within subsection (g). The panel also determined that a measure need not be the least GATT inconsistent measure available to qualify as an exception.

The Gas Guzzler/CAFE decision on its face seems to be a victory for domestic environmental standards. Environmentalists like Patti Goldman, a staff attorney with Sierra Club Legal Defense Fund, urge caution regarding future challenges. She feels that the Clinton administration heralded the Gas Guzzler/CAFE decision as a major environmental victory to gain environmentalists' support for the Uruguay Round. The decision of the panel was clearly proper since the fuel economy program is a legitimate conservation program. Thus, the Gas Guzzler/CAFE decisions may not necessarily signal that other domestic regulations will be similarly upheld.[21]

Looking at these three decisions, (*Tuna Dolphin I & II*, and Gas Guzzler/CAFE), from an environmental perspective, one can see that the framework of GATT still has a ways to go before environmental conservation measures will be consistently validated. The most recent decisions are steps, albeit tiny ones, in the right direction. Unfortunately, however, GATT also poses a potential threat to international environmental treaties already in existence.

Under the framework of the three decisions outlined above, Kevin McAnaney and Ellen Tenenbaum[22] conclude that trade measures in multilateral environmental treaties that are narrowly tailored to environmental goals should be found GATT consistent.[23] They cite specifically the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as examples of treaties that should be found GATT consistent. Treaties that do

not have narrowly tailored measures, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), will most likely have problems under GATT.[24]

The idea that existing international environmental agreements might be found inconsistent with GATT is a disturbing one at best. It is not clear whether goals of environmental conservation can be added to GATT's current framework to safeguard vulnerable agreements. Some feel that environmental issues can be incorporated under GATT regulations, while others feel that a complete revamping of GATT is necessary to promote environmental protection. What is clear is that GATT has been unreceptive to environmental concerns, both in the US and internationally.

The North American Free Trade Agreement

In contrast to GATT, the NAFTA partners have incorporated environmental issues into the text of the NAFTA agreement. NAFTA, negotiated between the United States, Canada, and Mexico, went into effect on January 1, 1994. NAFTA is unique among trade agreements. It purports to create a free trade zone by linking two countries of relatively similar levels of wealth and development with a much less developed nation. The preamble of NAFTA

> affirms the three countries' commitment to promoting employment and economic growth in each country through the expansion to trade and investment opportunities in the free trade area and by enhancing the competitiveness of Canadian, Mexican and US firms in global markets in a manner that protects the environment [and] confirms the resolve of the NAFTA partners to promote sustainable development....[25]

NAFTA includes more environmental provisions than any other trade agreement in US history.

Zane Gresham, a partner at Morrison and Foerester, characterizes NAFTA as a "truly unique framework for environmental issues."[26] One reason this is true is because of the Environmental Side Agreement negotiated by the Clinton Administration. The goal of the Administration in negotiating the Side Agreement was to make sure that economic growth spurred by NAFTA does not compromise the environment.[27]

The side agreement has four major purposes, to be accomplished by the North American Commission for Environmental Cooperation (NACEC). First, NACEC will work toward upward harmonization of environmental laws of the member nations.[28] Second, NACEC will investigate and resolve any complaints regarding non-compliance with environmental laws. These investigations can be prompted by citizens, non-governmental organizations, businesses, and government entities.[29] Third, formal governmental disputes regarding enforcement problems will be resolved by NACEC by a process similar to the trade dispute mechanisms in the main agreement.[30] Finally, NACEC will disperse information on environmental protection issues, trans-boundary environmental harm, and natural resources accounting methods.[31]

Because NAFTA has already been implemented, many environmentalists seem to accept NAFTA and have turned their focus to GATT.[32] Two differences between NAFTA and GATT are particularly evident. First, NAFTA insulates international environmental agreements from NAFTA challenges. Therefore, under NAFTA, protective measures do not need to be narrowly tailored to environmental goals to be upheld.[33] Second, NAFTA provisions are tempered to provide greater leeway for individual national standards.[34] NAFTA expressly prohibits a downward harmonization of individual nations' environmental standards.

NAFTA takes much larger steps than GATT does towards conservation of the environment through international trade. The future success or failure of NAFTA in general, and the environmental side agreement in particular, will broaden our understanding of how successful a synthesis of international trade and environmental protection goals can be.

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In general, trade increases a country's financial resources, which can benefit the environment in turn. The more resources a country has, the more funding it can allocate to environmental conservation. In a 1991 study, Grossman and Krueger examined the effects of economic growth on three different types of air pollutants. They found that at low levels of national income two pollutants rose with GDP per capita. Once countries reached a GDP per capita of about $5000 (1985 US Dollars) the concentration of both types of pollutants began to decline and continued to do so with further increases in GDP per capita.[35]

The Grossman and Krueger study provides further evidence that economic growth in developing counties can benefit the environment. International trade represents one way in which developing countries can grow. With support from more developed nations and international environmental agreements, growth in developing countries can be sustainable growth.

Conclusion

Solutions that mesh the goals of free trade and environmental conservation are hard to come by. By observing what currently is and is not working, we may be able to develop a model for the future. One commentator suggests creation of a Global Environmental Organization (GEO) to put environmental issues at the same international level as trade issues.[36] However implemented, common ground between free trade and environmental protection must be found.

In today's international economy, US competitiveness will be hampered by erecting protectionist barriers. However, as a major player in the international arena, the US must lead by example. Economic growth cannot come at the expense of the global environment. Using current international environmental treaties and trade accords, we must strive to promote

sustainable growth and development. To strike the proper balance between international trade and environmental protection, we must carefully analyze the successes and failures of existing international agreements.

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NOTES

1. Daniel Esty, *Greening the GATT: Trade, Environment, and the Future*, Institute for International Economics, 1994, at 2.
2. *Id.* at 2.
3. *Id.* at 2.
4. Patti Goldman, *Dolphins, Pesticide Bans, Gas Guzzlers and Recycling Programs: International Trade Rules Will Determine Their Fate*, Environmental Law News Vol. 3 No. 4, Winter 1994, at 5.
5. *See* Esty, *supra* note 1, at 245.
6. *Id.* at 245.
7. *Id.* at 245.
8. *Id.* at 247.
9. Susan Fletcher and Mary Tiemann, *Environment and Trade*, CRS Issue Brief 92006, Library of Congress, Washington D.C., 1992, at 3.
10. Kevin McAnaney and Ellen Tenenbaum, *GATT and Multilateral Environmental Treaties*, Environmental Law News, Vol. 3, No. 4, Winter 1994, at 14.
11. *Id.* at 14.
12. *Id.* at 14-15.
13. *Id.* at 13
14. *Id.* at 15.
15. *Id.* at 15.
16. *Id.* at 15.
17. *Id.* at 15.
18. *See* Goldman, *supra* note 4, at 6.
19. *See* McAnaney and Tenenbaum, *supra*, note 6, at 16.
20. *Id.* at 16.
21. *See* Goldman, *supra*, note 4, at 7.
22. Kevin McAnaney is a partner with the environmental practice group of Dewey Ballentine. Ellen Tenenbaum is an associate with that group.
23. *See* McAnaney and Tenenbaum, *supra*, note 6, at 17.
24. *Id.* at 17.
25. Inside US Trade, *Summary of NAFTA Agreement*, Special Report, August 13, 1992, at 1.
26. Zane Gresham, *Remarks at McGeorge Symposium on Trade and Environment*, March 4, 1995.
27. Mark Spalding, *Environmental Protections in NAFTA and Its Side Agreement:Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, Environmental Law News, Vol.3, No. 4, Winter, 1994, at 21.
28. NAAEC, Article 5, in *Id.*, at 22.
29. NAAEC, Article 14, in *Id.*, at 22.
30. NAAEC, Articles 10, 12-13, 22-36, in *Id.*, at 22.
31. *Id.* at 22.
32. *See* Zane Gresham, *supra*, note 16.
33. *See* McAnaney and Tenenbaum, *supra*, note 6, at 17.
34. *See* Goldman, *supra*, note 4, at 8.

35. Gene Grossman and Alan Krueger, *Environmental Impacts of a North American Free Trade Agreement*, Working Paper 3914, National Bureau for Economic Research, Massachusetts.35.
36. *See* Esty, supra, note 1, at 4.