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Globalization and the Environment: Why all the Fuss?

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I. INTRODUCTION

The controversy over the environmental effects of globalization continues to simmer, with the pot boiling over at frequent intervals. For example, the first report of the new Appellate Body created under the auspices of the World Trade Organization (WTO) concluded that the treatment of foreign refiners in a federal regulation designed to protect air quality contravenes United States obligations under WTO rules.[1] The provisions of chapter 11 of the North American Free Trade Agreement (NAFTA), the first major trade agreement to include rules on investment, have been criticized as potentially having a "chilling effect" on domestic regulation to protect public health and the environment and have been blamed for scuttling a multilateral treaty on investment.[2] A decision is expected any day in a challenge in the WTO initiated by the United States, Canada, and Argentina characterizing the European Union's (EU's) refusal to permit the use of genetically engineered foods and crops as a non-tariff barrier to trade.[3]

As new institutions such as the WTO and expanded free trade agreements such as NAFTA are put in place, we are crafting the structural and legal architecture of a globalized world for the 21st century. The endpoint of the phenomenon of globalization is not a clearly defined outcome, but instead depends on how the process is molded and shaped as it progresses. While law is not the only discipline that offers a perspective on the phenomenon of globalization, lawyers are uniquely well-positioned to relate the content of rules and structures to expected outcomes. Precisely because globalization is an inevitable, unidirectional, and irreversible phenomenon, it is critically important to integrate goals of sustainability into that trajectory now.

Pitting globalization and environment against each other as conflicting goals is a simplistic and self-defeating perspective. Proponents of both globalization and environmental policy aim to improve human welfare. With no "black hats," the relationship between globalization and environmental policies presents more nuances than the popular paradigm of free trader versus self-serving protectionists, the familiar model of environmentalist battling greedy polluters, or the outmoded view of a progressive multilateral agenda juxtaposed against a parochial, inward-looking domestic one. The analytical tools for identifying and analyzing this situation consequently must be more sophisticated than may have been required in the past.

II. THE CENTRAL CONUNDRUM

From an operational and structural point of view, globalization is characterized by an accelerated movement of goods, services, capital, know-how, or even ideas across an international landscape dominated by sovereign states. It has become something of a cliché that globalization implies an "erosion of sovereignty" on the part of states, which in the Westphalian model have exclusive authority to govern within their territories. While that model continues to demonstrate vitality as the basic structure of the international legal system, globalization has indeed been driven and facilitated by the removal of barriers erected by sovereign states that might impede the creation of something approaching a global market.

Free trade agreements or bilateral investment treaties (BITs) encourage this policy goal through

obligations that limit governmental intrusion into what otherwise would be a free market. Consequently, international obligations in the area of trade and foreign investment are almost exclusively "negative," in the sense that they place constraints on governmental action. That is a structural attribute and not a normative critique. For instance, the First Amendment to the U.S. Constitution is also a negative directive, encouraging the policy goal of free speech through a legal requirement that disables the federal and state governments from regulating a free market of ideas.

Environmentally speaking, this phenomenon is the equivalent of deregulation -- that is, reducing the level of governmental intrusion in the market -- and free trade agreements and treaties to liberalize foreign investment are, by virtue of their negative obligations, inherently deregulatory. Environmental protection, by contrast, anticipates affirmative governmental interventions in the marketplace to offset externalities and market failures. As a European colleague and a student of this subject remarked, "Of course you can't rely on uncorrected markets to protect the environment." Obligations in trade and investment agreements *proscribe* certain governmental behavior that impede trade and investment, while environmental regulations *prescribe* governmental actions to protect public health and ecosystems.

International obligations in free trade and investment agreements, by their very terms, do not mandate any minimum standards for protection of the environment or human health. Rather, these instruments establish constraints on how states may act if they choose to regulate in these areas. To that extent, the WTO suite of agreements, NAFTA, or BITs are the international equivalent of the Dormant Commerce Clause in that they prohibit certain activities by sovereign states, which in the international setting are nations or countries. Those agreements, however, lack the affirmative rulemaking authority given the U.S. Congress by the textual grant of the Commerce Clause. The globalization-and-environment debate to a large extent centers around the resolution of this fundamental tension between the drive to remove barriers to encourage an increasing interconnectedness of the planet, while at the same time ensuring that that process occurs in a manner that preserves environmental integrity and promotes sustainability.

III. INTERNATIONAL CHALLENGES

In some situations, such as environmentally harmful export subsidies that also distort international trade, the international infrastructure of globalization and policy goals of environmental protection may reinforce each other. By and large, however, the greater concern has been for potential conflicts. The asymmetry between the imperative for globalization has manifested itself in a number of situations that appear to be discrete problems. Appropriately understood, however, each is no more than a particularized manifestation of the tug of war between deregulatory pressure on the one hand and the drive for appropriate market interventions that lies at the core of the globalization-and-environment debate.

A. Unilateral Trade-Based Measure to Protect the Environment

The earliest, and still dominant, setting for addressing the tension between globalization and environmental protection is the potential conflict between a unilateral trade-based measure adopted to protect natural resources on the one hand and multilaterally-agreed trade obligations or "disciplines" on the other. The first example of this clash, which still haunts the discussion, was an embargo imposed by the United States on Mexican tuna caught in ways that incidentally entrap and kill air-breathing dolphins. The U.S. lost a challenge initiated by Mexico under the auspices of the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO.[4] The GATT panel ruled that the U.S. ban illegally

discriminated against Mexican tuna based not on the content of the product, which was identical to tuna produced in the U.S., but according to the method by which Mexican tuna was produced. According to the panel, the U.S. embargo in effect amounted to an attempt by the U.S. to dictate Mexico's environmental policy and, if replicated across the globe, would have a seriously disruptive effect on international trade.

A virtually identical dispute subsequently appeared in the newly-created WTO, with shrimp from a variety of Asian countries occupying the role of the Mexican tuna and endangered sea turtles appearing in place of the dolphin. The WTO's Appellate Body considerably relaxed the rigor of the earlier tuna-dolphin analysis,[5] ultimately ruling that the U.S. shrimp embargo was legal. While the turtle-shrimp decision substantially defused much of the tension between trade and the environment in the WTO, there is still a strong sense that the issue is in effect a zero-sum game. That is, the task is to reconcile the unilateral domestic policy preferences of individual states with multilaterally-agreed trade obligations designed to ensure market access. This view of the problem tends to encourage a "split the difference" mentality which, while perhaps helpful in resolving disputes, is not necessarily responsive to the larger problem of identifying a trajectory for the globalization agenda that is sustainable as opposed to merely deregulatory.

B. Post-Discriminatory Disciplines

At the same time that concerns about the constraints imposed by international trade agreements on domestic environmental regulation were increasing, the potential for a domestic regulation that satisfies the traditional GATT tests of nondiscrimination to act as a barrier to international trade was attracting attention from the trade point of view. Just as the tuna-dolphin ban had crystallized the nature of the issue in concrete terms, a serious disagreement between the United States and the EU over the EU's prohibition both domestically-produced and imported hormone-treated beef, dating from the 1980s, motivated new science-based disciplines on nondiscriminatory measures such as those to protect food safety. The United States won a dispute against the EU based on these new disciplines,[6] and a similar dispute is now pending in the WTO concerning the EU's unwillingness to allow the use of new genetically-engineered foods and crops, either domestic or imported.[7] The structure of these disciplines raises questions as to the capacity and limits of science to act as a value-neutral touchstone for resolving trade-based disputes in an adversarial, adjudicatory setting, [8] with some eminent experts questioning whether the WTO is competent to do so.[9]

This new emphasis on science as a test for characterizing nondiscriminatory regulations to protect public health and the environment as either legitimate or unreasonable in turn has triggered a debate about the role of precaution in domestic regulatory processes. In settings such as protection of the stratospheric ozone layer or ameliorating climate change involving multilaterally-agreed standards adopted by consensus which individual states may choose to accept or reject, there is wide agreement that states acting in concert should act in a precautionary manner so as to prevent potential future harm. In a trade setting, by contrast, precaution as a public policy operates as a defense to a challenge to a national measures such as food safety regulations. The United States in particular has continued to identify the potential for governmental measures based on precautionary rationales, such as the EU's proposed comprehensive new regulatory framework for Registration, Evaluation, and Authorization of Chemicals (REACH),[10] to serve as trade barriers.

C. Foreign Investment

Just as GATT/WTO rules addressing trade in goods are negative in structure, so too international agreements designed to encourage foreign investment operate by requiring compensation for governmental expropriation of property owned by foreign nationals, by prohibiting discriminatory treatment of foreign investors, and in general by proscribing treatment of foreign investors that falls below an absolute international minimum standard. The historical evolution of the law in this area has been different from that of the law governing trade in goods, emphasizing in particular the need for remedies in the form of monetary compensation that can be initiated by private investors directly against host states for violation of applicable international standards. The development of the law of foreign investment converged with that of trade in goods in NAFTA chapter 11, which provides for investor-to-state dispute settlement through ad hoc arbitral tribunals of the sort generally utilized to resolve disagreements in a private law commercial setting.

The first dispute initiated under NAFTA chapter 11 alleged in effect a regulatory taking under those international rules. The Ethyl Corporation, the American manufacturer of a manganese-based automobile fuel additive designed to prevent engine knocking, challenged a Canadian prohibition on importation of, and interprovincial trade in, the chemical based on concerns about adverse impacts on public health. After losing a domestic challenge to the validity of the regulation, in July 1998 the Government of Canada announced a settlement with the company in the NAFTA proceeding, including payment of approximately U.S. $13.5 million and removal of the measure.[11] Despite the ambiguous relationship between the settlement and the chapter 11 disciplines, the Ethyl dispute triggered a surge of challenges to domestic environmental and public health regulations in each of the three NAFTA countries.

Concerns about the substantive impact of the NAFTA investment rules on the rigor of domestic environmental regulation were heightened by the capacity of private parties to initiate similar challenges without the involvement of governments as in the arena of trade in goods, the independent and potentially unpredictable nature of independent ad hoc arbitral tribunals, and procedures that left little opportunity for participation by interested members of the public in public policy disputes. That unease in turn contributed at least in part to the demise of a broader effort in the Organization for Economic Cooperation and Development, a proposed Multilateral Agreement on Investment.[12] As of the recent resolution of another dispute concerning the banning of a different fuel additive by California, in which an arbitral tribunal rejected all the claimant investor's challenges,[13] these concerns appear to have attenuated considerably if not evaporated altogether.

D. Multilateral Environmental Agreements

If trade agreements and investment treaties contain only constraints on environmental and public health regulation, and no commensurate minimum standards, where does one look on the international level for affirmative rules in these areas? The answer is a series of multilateral environmental agreements (MEAs) on such issues as climate change, designed to overcome collective action problems by establishing internationally-agreed minimum standards of potentially global scope. The GATT tuna-dolphin report appeared to call into question the validity of major existing MEAs that rely on trade measures as regulatory tools. These include trade provisions in the Montreal Protocol on Substances That Deplete the Ozone Layer -- the primary international vehicle for protecting the planet from harmful levels of ultraviolet radiation from chemically-induced ozone destruction -- the Convention on International Trade in Endangered Species (CITES) — a linchpin of international efforts to protect organisms threatened with extinction — and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal —- the principal multilateral instrument governing international

shipments of toxic waste.

These agreements discriminate between trade with parties and with non-parties, sometimes to the point of prohibiting trade in controlled chemicals, endangered species, or waste, in an effort to enhance the environmental efficacy of the agreement and to create incentives for non-party states to accept the obligations of the agreement. Because there is no precise analogue to the Supremacy Clause in international law that would operate to disable the negative international trade disciplines, these agreements have a legal status commensurate with, and not higher than, the obligations in GATT/WTO rules or NAFTA. Consequently there has been considerable discussion as to whether one group of obligations -- environmental treaties or trade agreements -- should trump the other, and how if at all they can be harmonized with each other.

To date efforts to resolve this issue as a generic matter in the WTO have been unsuccessful. There have nonetheless been no trade-based challenges to environmental regulatory measures based on multilateral instruments, and such an initiative would probably be poorly advised from a political point of view regardless of the legal merits of a potential dispute. Nonetheless, the potential for conflict may well act to dampen international efforts to adopt multilateral trade-based measures in newly-negotiated MEAs through a "raised eyebrow" theory that tends to enhance the leverage of countries that are skeptical of such efforts, whether for trade reasons or otherwise. A dynamic such as this appears to have been at work in the equivocal resolution of trade and environmental concerns in the Biosafety Protocol,[14] an ancillary instrument to the UN Convention on Biological Diversity, which governs trade in genetically-engineered products.

IV. DOMESTIC JUNCTURES

The globalization-and-environment debate also has potentially serious implications for domestic institutions and law. Black-letter doctrine asserts the supremacy of international law, but the Constitution and domestic legislation are paramount domestically. Giving domestic legal effect to international instruments designed to encourage either globalization or environmental protection may consequently invite gear-grinding at the interface between the international and domestic legal orders. By comparison with issues that have arisen on the international level, to date these junctures have attracted considerably less attention despite structural attributes that suggest that they are likely to be encountered repeatedly.

A. Impacts on Administrative Law

Difficult questions of administrative law can arise if the measure challenged in an international proceeding is a federal regulation promulgated, as is frequently the case in the environmental field, pursuant to a statutory directive adopted by Congress. A good example is the very first dispute to reach the WTO Appellate Body,[15] involving Venezuela's trade-based challenge to a rule promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act dealing with reformulated gasoline. As a matter of trade law, this was a relatively easy case of facial discrimination against foreign refiners, violating the basic GATT and WTO disciplines.

The real issue, however, was what happened domestically after the WTO dispute settlement panel report on the rule was issued. As a matter of U.S. law, trade agreement dispute settlement panel reports have no domestic legal effect, and the WTO report consequently required further action by EPA for its implementation. The agency subsequently started a new rulemaking process by publishing a notice of proposed rulemaking, soliciting comments, and the like. At the same time the rulemaking was

proceeding, another part of the Executive Branch, the U.S. Trade Representative, was reassuring Venezuela that the new regulation would comply with the WTO panel's report. This tended to attenuate, if not entirely undermine, the rights of public participation that we are accustomed to in the ordinary administrative process, and which have given domestic environmental law much of its vigor.

Later, the amended rule was challenged by a coalition of domestic refiners and environmental organizations. Unlike the original regulation, the amended rule had been transformed by the WTO report into an issue of foreign affairs. This situation created a structural dilemma for the reviewing court: Applying the domestic statutory standards might compel the United States, by judicial order, to violate its international obligations. In the end, the D.C. Circuit sought to harmonize the international obligations with domestic law, and upheld the amended rule on the questionable theory that the statutory standard was vague.[16] This approach arguably diluted a binding Congressional directive in reliance on an international authority that had no legal significance. This tension between domestic statutory mandates and the results of trade agreement dispute settlement proceedings will no doubt arise again, and there is little by way of doctrinal guidance to assist in identifying a principled approach to resolving it.

B. Effects on Federal-State Relations

International trade agreements can present similar imbalances between the federal government and the states. There appear to have been no international challenges to state-level environmental laws. The structural problem, however, is illustrated graphically by the case of a Massachusetts statute that prohibited procurement by the state government of products from companies that do business in Myanmar (formerly Burma) out of concern over human rights violations by the regime there. The statute was challenged on domestic legal grounds by commercial interests in the United States. Simultaneously, Japan and the EU filed complaints in the WTO initiating a dispute settlement proceeding under the WTO Agreement on Government Procurement. Those proceedings were held in abeyance pending the outcome of the domestic litigation. The U.S. Supreme Court ultimately resolved the case against Massachusetts relying on a theory of preemption,[17] and the WTO proceeding was consequently terminated.

In the domestic litigation, the private parties challenging the statute argued that the Massachusetts statute was an unconstitutional intrusion on the Executive Branch's capacity to conduct foreign relations, the evidence for which was the mere fact that Japan and the EU had filed complaints in the WTO. This theory generated considerable traction in the First Circuit,[18] which relied on it as one of the alternative bases for striking down the Massachusetts legislation as unconstitutional despite the fact that there had been no resolution of those allegations in the WTO. The First Circuit's treatment of this issue, however, is immensely unsatisfying as an analytical matter. Simply by initiating a challenge in the WTO, regardless of its merits, foreign states are in a position to disable the states as subnational units of the United States from exercising what otherwise would be their prerogative under the U.S. Constitution. As in the case of federal administrative law, this is a structural situation that is both troubling and likely to be replicated as the international institutions of globalization are put in place and operate with greater frequency and vitality.

V. CONCLUSION

Globalization at the international level has been defined virtually exclusively as deregulation. Although the Agreement Establishing the World Trade Organization pays lip service to the concept of sustainability,[19] the operative provisions of the WTO suite of agreements, like the GATT before it, articulate requirements for deregulation. Nowhere is there any suggestion of what sustainable trade, in

contrast to deregulated trade, might entail. Similarly, neither NAFTA chapter 11 nor other investment agreements even begin to explore standards of sustainability for foreign investment, let alone investment more generally. These are questions of great concern as the engine of globalization accelerates around the planet. Inherent in the notion of sustainability is the need to make decisions concerning the shape and direction of further economic growth and development. Until the international community engages with that debate, the tension between globalization and environment will likely continue to fester.

Similarly, there is a need for a much more serious discussion of how international initiatives on globalization mesh with our understanding of the domestic rule of law. As demonstrated by the domestic court proceedings on EPA's reformulated gasoline rule and the Massachusetts Burma statute, U.S. courts continue to be gripped by a nineteenth-century water's edge mentality when it comes to foreign relations, regarding the rule of law as a luxury in international relations. While a high level of deference to the Executive Branch may be appropriate in dealing with some international matters such as national security, recent developments in multilateral relations such as the creation of the WTO are explicitly constructed around the notion of the supremacy of the rule of law as an alternative to the naked exercise of power. Harmonizing the international rule of law with the domestic legal order is a complex task which cries out for creative thinking by judges and legal scholars.

NOTES

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1. United States -- Standards for Reformulated and Conventional Gasoline, W.T.O. Doc. WT/DS2/AB/R (adopted May 20, 1996). See section IV.A infra.

2. See, e.g., Rainer Geiger, Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment, 11 N.Y.U. Envtl. L.J. 94 (2002). See section III.C infra.

3. See, e.g., David A. Wirth, The GMO Dispute between the United States and the European Community: Some Preliminary Thoughts, in EU and WTO Law: How Tight is the Legal Straitjacket for Environmental Product Regulation? (Marc Pallemaerts ed.) (in press). See section III.B infra.

4. United States -- Restrictions on Imports of Tuna, Basic Instruments and Selected Documents 155 (39th Supp. 1993), reprinted in 30 I.L.M. 1594 (1991).

5. United States—Import Prohibition of Certain Shrimp and Shrimp Products, W.T.O Doc. WT/DS58/AB/R (adopted Nov. 6, 1998), reprinted in 38 I.L.M. 121 (1999).

6. European Communities — Measures Concerning Meat and Meat Products, W.T.O. Doc. WT/DS26/AB/R & WT/DS48/AB/R (adopted Feb. 13, 1998).

7. See note 3 supra.

8. See generally David A. Wirth, The Role of Science in the Uruguay Round and NAFTA Trade

Disciplines, 27 Cornell Int'l L.J. 817 (1994).

9. See, e.g., Robert E. Hudec, Science and "Post-Discriminatory" WTO Law, 26 B.C. Int'l & Comp. L. Rev. 185 (2003).

10. See European Commission, White Paper on the Strategy for a Future Chemicals Policy (Feb. 27, 2001), <http://europa.eu.int/comm/environment/chemicals/pdf/0188_en.pdf>.

11. See, e.g., Julie A. Soloway, Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy, 8 Minn. J. Global Trade 55 (1999).

12. See note 2 supra.

13. Methanex Corp. v. United States, Final Award (Aug. 3, 2005), <http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf>.

14. Cartagena Protocol on Biosafety, Jan. 29, 2000, 39 I.L.M. 1027 (2000).

15. See note 1 supra.

16. George E. Warren Corp. v. EPA, 159 F.3d 616 (D.C. Cir. 1998) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

17. Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

18. National Foreign Trade Council v. Natsios, 181 F.3d 38, 54-56 (1st Cir. 1999), aff'd, Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

19. Agreement Establishing the World Trade Organization, Apr. 15, 1994, preamble para. 1, reprinted in 33 I.L.M. 1144 (1994).