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THE CASE FOR ENVIRONMENTAL TRADE SANCTIONS

RICHARD W. PARKER*

I. INTRODUCTION

Having grown up as the son of a preacher, only to wander away from the church, I suppose it is my everlasting curse to play the role of devil's advocate. In any case, that is certainly my role here today. For I am here to champion a particularly unpopular, if not unholy, cause. I am here to make the case *for* allowing, and using, unilateral economic sanctions in support of efforts to conserve the global commons. By "unilateral," I mean sanctions that are not specifically required or authorized by some prior multilateral agreement.

Such an undertaking may not appear particularly unholy to the lay observer. But initiates know that unilateral sanctions are virtually anathema to the high priesthood of free trade and international law. Indeed, if you ask almost *any* free trader, international lawyer, international policy-maker, or senior academic what he or she thinks of the use of trade sanctions to protect the international environment, the answer you get will be confident and categorical. They will say that it may be acceptable for multilateral environmental agreements (MEAs) to authorize trade restrictions against parties to those agreements. It may even be permissible for a few very broadly subscribed treaties—like the Montreal Protocol—to authorize measures against *non-parties* (though this is more troubling). But any other sort of trade restrictions are "unilateral" measures which should not be practiced or permitted.

Why not? At this point the conversation typically turns conjectural. Unilateral sanctions are objectionable because they may not be necessary. They may be used to bully and coerce. They may displace cooperative approaches. They may be abused. And because all these propositions *may* be true then it follows that unilateral environmental trade sanctions *must* be wrong, *must* be illegitimate, and *must*, of course, be General Agreement on Tariffs and Trade (GATT) illegal.¹

We are told that cooperation is the way to go, not coercion. But if you ask this same person about the actual experience with unilateral environmental trade measures (ETMs), that is, have ETMs as applied actually fulfilled all these dire prophecies, you are likely to get either a blank stare, an anecdote, or, more likely,

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

well-intentioned misinformation. Nowhere is this information gap more apparent than in the committees that need the information most. Though the World Trade Organization (WTO) Committee on Trade and Environment (CTE) and the Organization for Economic Cooperation and Development (OECD) Trade and Environment Joint Experts Group have been debating law and policy on ETMs for upwards of seven years, they have yet to commission or examine a single (in-depth) empirical study of the role that ETMs have actually played in the cases where they have been used.

Nor frankly are things much better in scholarly circles. While the mountain of legal scholarship on trade and environment grows higher every day, the number of thorough, empirical analyses of ETMs can still be counted on the fingers of one hand. And the analyses that exist do not support—indeed, they refute—the stereotypes about ETMs that now dominate both the literature and policy-makers' discussions of the subject.

Against this background, I would like to do two things today. First, I would like to encourage students and fellow scholars alike to consider the joys and responsibilities of field work in the law. There is nothing more satisfying or illuminating, in my opinion, than getting out there and talking to real people who are making, implementing and living with the consequences of the law. Moreover, the intrinsic interest pales beside the importance of the enterprise. You simply cannot comprehend the operation of the law, particularly in the international field, by reading treaties and declarations in the comfort of your armchair. If you are going to offer prescriptions for legal change you have to understand, and be able to predict, how things will work in practice, which requires an understanding of past experience.

Second, having made this pitch for empiricism in law, I will now offer a few of the fruits of it. In particular, I will look at how ETMs have actually worked in practice, based upon my two-year study of the actual use (and misuse) of sanctions in the Tuna-Dolphin controversy² and a review of the literature on other cases. I will then offer an empirical and practical perspective on what WTO law and doctrine on ETMs should be.

II. THE ROLE OF LEVERAGE IN THE TUNA-DOLPHIN REGIME

The key facts of the *Tuna-Dolphin Case* are these.³ Tuna swim with dolphin in the Eastern Tropical Pacific. Fishermen found they could use speedboats and helicopters to spot the dolphins on the surface, herd them into a ball, and encircle them with a net. Through all this, miraculously, the tuna will stay beneath the dolphins. Dolphins are thus a fabulous fish finding and catching device in this type of fishery. Moreover, they lead fishers to only the largest and

2. Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, (1999).

3. *Id.* at 11-56.

best tuna, for it is only the largest tuna that swim with dolphins. The only problem is that when fishers haul in the net, they kill all the dolphins—unless a way can be found to release them without losing the tuna. This caused concern among dolphin lovers and environmentalists alike.

Dolphin lovers objected to any killing or harassing of dolphins on aesthetic and moral grounds. Conservationists were concerned that dolphins—being mammals—have a much lower reproduction rate than fish, and practices that worked well at catching tuna might be wiping out the whole population of dolphins. Political pressure developed in the United States to end this practice, or at least to find a way to greatly reduce dolphin mortality. This pressure resulted in the Marine Mammal Protection Act,⁴ which required the U.S. National Marine Fisheries Services (NMFS) to regulate the dolphin mortality of the U.S. fleet, seek an international conservation agreement, and place an embargo on tuna caught with methods that caused mortality of dolphins in excess of U.S. standards.⁵

These events happened in 1972. In the years that followed, the NMFS, under court order, conscientiously regulated the U.S. fleet. Devices and techniques were developed to release the majority of the encircled dolphins most of the time, though mortality remained substantial. The U.S. also developed a dolphin conservation program in the Inter-American Tropical Tuna Commission (IATTC). This program involved both research into perfecting dolphin release techniques and a series of skipper workshops to disseminate these techniques among the foreign fleet.

However, the participation of the foreign fleet was limited. Fishers were still finding dolphins. They saw no short-term economic incentive to conserve. They had no assurance that if they conserved, others would do the same. By the late 1980s, the foreign fleet dominated the fishery. Dolphin mortality rates were much higher than reproduction rates, and the number of dolphins were declining. Meanwhile, the NMFS simply issued, year after year, sham certifications that foreign dolphin conservation programs and mortality levels were comparable to those of the U.S. fleet—even though everyone knew that they were not.

The one good thing that happened during this period was that the foreign flag states agreed to require their fleets to accept international observer coverage on tunaboats. They did this, the record shows, to avoid trade sanctions. In 1986, the NMFS, under intense congressional pressure, issued a draft rule that threatened to embargo tuna from any country that refused to accept observers. Once aboard, however, the observers documented a massive dolphin slaughter that was beyond anyone's prior expectations, including the fishermen themselves.

In 1988, Sam LeBudde, an animal rights activist posing as a cook, shipped out on a Panamanian tuna boat, bringing home video images of a massive dolphin slaughter. The gruesome spectacle aired on nationwide TV, with a special

4. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1994).

5. *Id.*

showing for a key Senate committee. With all eyes focused on the foreign fleet, Congress amended the law to eliminate all NMFS discretion. Henceforth, the NMFS would have to certify, on the basis of observer data, that the mortality rate of each foreign fleet was no greater than 1.25 times that of the U.S. rate or else the United States would embargo the imports of purse-seine caught yellowfin tuna from that country.

Frenetic efforts to reduce mortality ensued. However, it was too little, too late. The NMFS tried to cover for the foreign fleet with bogus certifications. This time the U.S. court found clear law to apply. The result, in the spring of 1991, was a court-ordered embargo on imports of purse-seine caught yellowfin tuna from the Eastern Tropical Pacific Ocean (ETP). A few months later, the U.S. imposed a court-ordered secondary embargo on four tuna importing and exporting countries that were unwilling to cooperate with the primary embargo.

The rest is trade and environment history. Two consecutive dispute panels ruled that the U.S. embargoes violated the GATT.⁶ The U.S. refused to adopt these reports or follow the panel's recommendations. Free traders attacked the U.S. embargoes as GATT-illegal. Environmentalists declared that these decisions proved that GATT was not concerned with the needs of environmental protection. There the debate deadlocked, at such a level of intensity, that few have noticed that what happened in the field, in the shadows of the embargoes, was the quiet emergence of one of the most innovative and effective environmental regimes in the world.

In 1992, the IATTC established a Dolphin Conservation Program that established a declining schedule of dolphin mortality rates for every vessel that sets nets on dolphins. It required an international observer on every vessel. It established an international review panel comprised of government, industry and environmental representatives who are charged with receiving observer reports, determining infractions, and recommending sanctions. Most of all, the program gained the participation of every country and vessel in the region.

The results are nothing less than remarkable. Dolphin mortality has fallen from 130,000 in 1986 to around 3,000 per year since 1994. Participation is 100 percent. Compliance is nearly 100 percent. Fishers' catch and profits remain high. Fishers and flag-states take real pride in their conservation accomplishments. One would be hard pressed to find another environmental regime anywhere that produced such a quick and dramatic turnaround.

There is one fly in the ointment, and it is a major fly. The countries still face a massive trade restriction in the U.S. market! This is not because of the embargoes, which were lifted in 1997 (five years after the program was born). The trade restrictions arise from a coordinated U.S. cannery and distributor boycott that was put in place in 1991 and remains in effect today. This boycott applies to all tuna caught by encircling dolphins at all, even if all the dolphins are

6. GATT 1947, *supra* note 1; THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 423 (1999) [hereinafter LEGAL TEXTS].

released unharmed. That is the legal definition of the “dolphin-safe” logo that you see on tunafish cans: no dolphin encirclement—period.

This circumstance presents two major ironies. The first is that dolphin-safe fishing may be good for dolphins, but it is horrible for eco-systems. Whereas dolphin encirclement targets large adult tuna, the alternatives to dolphin encirclement kill huge numbers of juvenile tuna, non-target-species, and even some endangered species like sea turtles. That is why Greenpeace and several other major environmental groups no longer support an immediate transition to dolphin-safe. It also explains why foreign fleets and flag states are bitterly resentful of the “dolphin safe” consumer boycott.

The second irony pertains to the trade regime. The GATT rejected embargoes which produced one of the most effective environmental regimes in the world, but upheld the “voluntary” cannery boycott which is far more trade restrictive and makes no environmental sense.

That is the Tuna-Dolphin story in a nutshell. What can we learn from it? Let me explore that question by considering what the experience tells us about three leading “free trade” criticisms of environmental sanctions: (1) unilateral ETMs are unnecessary and/or ineffective; (2) ETMs are coercive; (3) ETMs are prone to abuse. I will show that the empirical record squarely refutes the first two propositions but confirms the third.

III. ARE ETMS NECESSARY AND EFFECTIVE?

“Necessary” is a difficult word. It requires you to imagine every conceivable alternative way of getting to a result and conclude that none of them would have worked. I am not sure that anything can ever be proven to be “necessary” in the strictly logical sense of that word.

However, my research demonstrates conclusively that the threat of trade leverage was crucial in getting a dolphin conservation program started in the IATTC, getting observers on board tuna vessels, getting skippers and owners participating in IATTC dolphin mortality reduction workshops, mobilizing conservation interests, pressures, and environmental agencies in foreign states. The threat of trade leverage was also crucial in producing a real dialogue between fishers and conservationists in the IATTC, in the formation and successful implementation of the 1992 Dolphin Conservation Agreement, as well as its 1997 successor agreement. For 16 years, the U.S. did not apply trade leverage and nothing happened. Then came the embargoes, yielding rapid progress.

Tuna-Dolphin controversy is not unique. Other scholars have documented the key role that threats of unilateral trade restrictions played in the formation and implementation of the stratospheric ozone treaty, the ocean dumping convention, the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES), the International Whaling Commission, the high-seas driftnet ban, and certain regional fisheries regimes. Indeed, behind almost any strong, truly effective, international environmental agreement (IEA)

in the world today and you are likely to find—at some key juncture in its past or present—the credible threat of unilateral or small group economic leverage.

Perhaps the most eloquent testimony to the necessity of leverage lies in an examination of the fate of fisheries regimes that have tried to make changes without using trade leverage. They often have found themselves bereft of resources and authority, unable to enforce decisions against holdouts by any means short of physical coercion (as Canada was forced to do with respect to a Spanish trawler recently). To be sure, not all international ocean regimes require the aid of leverage. The counter-examples, however, tending to be straddling stock regimes where coastal state Coast Guards can apply physical muscle in waters adjacent to their Exclusive Economic Zone (EEZ), or regional fishing agreements among like-minded states already linked by a close sense of community and deep ties across a range of issues—such as the Pacific Halibut Commission.

The record demonstrates a further important point about the role of trade leverage in conserving the commons. It is that old habits die hard. New habits are not easily formed. Producers are reluctant to change the way they do business, and governments are reluctant to adopt new rules and then build new programs or institutions to enforce them. Moreover, no one can be sure, at first, that their conservation efforts will be matched by others. Conversely, once new technology is purchased, new practices adopted, and new enforcement programs are created, the compliance of competitors is proven. The advantage of inertia shifts to favor the new status quo—the status quo of a new, sustainable practice. This means that trade leverage is *most* needed precisely in the situation where it is now *least* accepted in the trade community—at the regime formation stage, where uncertainties are highest and the forces of inertia favor an unsustainable status quo.

These clear conclusions come, however, with a vitally important qualification. Trade leverage may often be necessary, but it is *almost never* sufficient. History makes clear that the effectiveness of leverage depends on the concurrent deployment of all sorts of other instruments of diplomacy encompassed in the so-called “managerial model”—research, training, financial assistance, capacity building, technology transfer, monitoring, reporting, issue-linkage, discourse, peer pressure. Leverage can empower management, but cannot substitute for it.

IV. IS ENVIRONMENTAL TRADE LEVERAGE COERCION?

Free traders love to refer to environmental trade measures as “coercion” or “bullying,” of which everyone, of course, disapproves. In fact, there is no instance in recorded history in which environmental trade leverage has actually been deployed with anything even remotely resembling a coercive effect. Certainly, there has not been physical coercion. Nor has there been economic coercion in the sense of depriving target states or industries of economically lucrative alternatives to compliance. Tuna kept out of the U.S. market found

profitable markets in Latin America and/or Europe. Shrimp embargoed by the United States could easily be sold in Asia, Latin America or Europe. "Pelly Amendment" sanctions connected to whaling or fisheries conservation violations have not come close to bringing any foreign industry to its knees. ETMs in practice have been very limited in scope.

One reason free traders are so easily lead to the conclusion that ETMs are coercive is because they have not looked very closely, or thought very deeply, about *how* ETMs work. The assumption is that sanctions or threatened sanctions work, if at all, by making target states and fishers do what they do not want to do, which looks like coercion. The reality is more complex. ETMs do impose or threaten significant (though not ruinous) costs. But my research shows that the primary function and effect of sanctions is indirect. It is cognitive and discursive.

In the *Tuna-Dolphin Case*, the threat of sanctions got observers on to tuna boats. These observers produced data which revealed that dolphin mortality was much higher than previously thought. The observer data thus showed that the issue at stake is not the cuteness of dolphins but the preservation of ecosystems. The observer data also revealed close correlations between certain fishing practices and high (or low) levels of dolphin mortality. These correlations suggested that dolphin mortality was not an uncontrollable happenstance as fishermen had previously assumed. Mortality could be reduced to very low levels through the use of proper gear and practice. That discovery revolutionized the way the fleet and flag states thought about the costs and benefits of conservation. It did not make them gung-ho conservationists; but it did dramatically lower their resistance to conservation.

These cognitive transformations, propelled originally by research, were reinforced by sustained discourse among fishers, government officials and IATTC staff in workshops, seminars, meetings of the IATTC, and inter-sessional talks. Fishers grew more sensitive to conservation concerns, while environmentalists gained a healthy realism about the economic and environmental costs of purist "dolphin-safe" policies.

Research and discourse thus wins much of the credit for the successful accord that followed. But the record is clear that it was U.S. sanctions and threats of sanctions that made dolphin conservation front page news in target states, and it was sanction threats that energized the discourse that ensued.

In sum, ETMs as applied to date have not been "coercive" in the sense of threatening foreign states *or* producers with bankruptcy or even with sustained and serious loss of revenues. They have succeeded without coercion.

Suppose, now, the facts were otherwise and the U.S. had wielded its enormous trade leverage to threaten target industries with real economic harm. Would this be unconscionable? Before one condemns "coercive" ETMs, one should consider the alternative: the destruction of the commons by holdouts who refuse to cooperate with any effective agreement. In such a case it is the conservationist countries who are coerced in a much stronger sense. The conservationist

countries are forced to stand by and watch the global commons being plundered against their will.

V. ARE ENVIRONMENTAL TRADE SANCTIONS PRONE TO ABUSE?

Free traders worry that environmental trade sanctions will be abused in one of three ways. The first form of abuse is disguised protectionism. The second involves the application of trade pressure in support of goals that are *environmentally* arbitrary or idiosyncratic. The third form of abuse occurs when a sanctioning country uses bilateral economic pressure to *displace* multilateral cooperation or to impose unfair terms of cooperation.

The tuna-dolphin experience illustrates *all three* concerns. The decision of the U.S. Congress to compel foreign fishers to match the performance of the U.S. fleet in the same year, or else be embargoed, was blatantly protectionist in effect, if not in intent. The foreign fleet had no way of even *knowing* the standards it had to meet until it was too late to do anything about it. The U.S. fleet, by contrast, always met the standards because its performance *was* the standard.

In addition, the U.S. standard was environmentally arbitrary. On its face, the actual rate of dolphin mortality by the U.S. fleet bears no relation to the sustainable level of mortality for given dolphin stocks. Moreover, in 1992, Congress amended the law so as to embargo imports of ETP yellowfin tuna unless the countries followed the U.S. standard in requiring exclusively dolphin-safe fishing (i.e. fishing with no encirclement of dolphins).⁷ This, again, was a requirement that U.S. and foreign fishers felt was environmentally irrational and economically ruinous in that fishery.

The *Tuna-Dolphin Case* also illustrates a third abuse scenario—in which economic pressure displaces or undermines cooperative management. Indeed, the dolphin-safe label and boycott, which effectively ensured that even tuna caught in full conformity with IATTC standards could not enter the U.S. market, has greatly strained, and may yet destroy, the IATTC dolphin regime.

The Tuna-Dolphin controversy may illustrate the dangers of abuse, but abuses are not confined to tuna-dolphin fishing. Similar misuses of environmental trade leverage have been documented in the Reformulated Gas Case, the Canadian Pacific salmon and herring export ban, and in the shrimp-turtle controversy. The danger of abuse appears to be generic.

VI. WHAT IS TO BE DONE?

We are left with an instrument that, in the environmental setting, is vitally necessary, often effective, and prone to abuse. What should the WTO do about this?

7. International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 (1992) (codified as amended at 16 U.S.C. § 1361 (1994)).

In my view, three things should be done. The first and most obvious thing the WTO should do is consider the empirical evidence and accept the conclusions that flow from it. For years the WTO has discussed the issue of sanctions in an empirical vacuum, which has elevated anecdotes, stereotypes, and ideology over evidence. But we are not writing on a clean slate. ETMs have a track record that needs to be assessed, carefully and objectively.

The second thing the WTO must do, if there is to be any meaningful discussion of environmental trade measures in that forum, is to jettison the term of reference, set forth in the 1994 CTE mandate, which arbitrarily limits discussion to trade measures taken "pursuant to" a pre-existing agreement. The evidence, however unpopular, is clear. Trade leverage is needed to *get* agreements, not just to enforce them. Unilateral leverage raises special problems of its own, but that does not justify excluding it out of hand.

The third thing the WTO should do is accept the words and recognize the wisdom of its own founding charter. Nothing in the text of GATT 1947⁸ or the WTO Agreement⁹ precludes a sensible, and empirically defensible, law and policy on ETMs. Article XX of GATT 1947,¹⁰ which was incorporated into the GATT 1994,¹¹ quite clearly allows as an exception to GATT disciplines, trade restrictions "relating to conservation of exhaustible natural resources . . ."¹² The preamble to Article XX limits the scope of that exception in two key respects: ETMs must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or [be] a disguised restriction on international trade."¹³

The language is prophetic. For we have seen that ETMs *are* prone to protectionist abuse, vulnerable to hijacking for the service of (environmentally) arbitrary goals, and subject to the temptations of unjustifiable peremptoriness. But if we compare these empirically demonstrated susceptibilities to abuse with the screening mechanism contained in the preamble to Article XX, a striking fact emerges. All that is needed to sort the wheat from the chaff among ETMs is careful application of the words of the Article XX preamble. The "disguised protectionist" bar clearly weeds out protectionist abuses, and the "arbitrary and unjustifiable" restriction covers the other two forms of abuse.

To be sure, the words "arbitrary and unjustifiable" are broad, and their application requires broad discretion. The exercise of that discretion must be guided by the needs of the trading system, by the environmental purpose for

8. GATT 1947, *supra* note 1.

9. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], LEGAL TEXTS, *supra* note 6, at 3.

10. GATT 1947, *supra* note 1, at art. XX.

11. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 6, at 17.

12. GATT 1947, *supra* note 1, at art. XX.

13. *Id.*

which the exception is invoked, *and* by the commitment to “sustainable development” that now appears in the WTO’s charter. But deciding the substantiality of the nexus between an ETM and a legitimate environmental purpose requires knowledge, experience and judgement in matters of environmental law and policy. WTO panels and judges are empowered to call on experts to help them make this determination. But, in practice, generalist lay judges have not compiled a particularly stellar record of umpiring “battles of experts” whether in the WTO or in domestic courts. Given that the planet’s oceans and skies are at stake, environmentalists are quite right, in my view, to insist that the “judges” themselves be experts, and empower them to make their own investigation of the bona fides of ETMs in particular cases.

In sum, what is required for a sensible, empirically valid WTO law of trade and environment is not primarily new law within the WTO, but a new institution outside of it. Until such a body exists, we can expect that the WTO will continue to lack credibility in deciding ETM cases.

Meanwhile, ETMs will no doubt continue to be used. But their use will be rare and their effectiveness impaired by the fact that ETMs continue to be regarded in the world community as reprehensible, belligerent acts with no redeeming social value. It is this stigma, more than anything else, which renders administrations reluctant to impose sanctions in practice. This stigma renders other countries unwilling to cooperate with sanctions that are imposed. It is this stigma which has prevented the tuna-dolphin program and any number of other high seas fisheries management regimes from authorizing the use of sanctions, even when circumstances make it plainly, often painfully, clear that their mission vitally requires the support of leverage.

This realization takes us full circle. For cleansing the stigma that has attached to environmental trade measures, in the United States and abroad, will require a broader understanding that environmental sanctions, whether multilateral or unilateral, are often necessary *and* effective in protecting the global commons, even if they are prone to abuse.