

A KANTIAN APPROACH TO TRADE AND THE ENVIRONMENT

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INTRODUCTION

At the outset let me note that I am delighted to see someone of Professor Richard Stewart's caliber taking aim at the trade and the environment debate.¹ Professor Stewart's article entitled *International Trade and Environment: Lessons From the Federal Experience* presents an interesting and informative discussion of how legal principles developed in the federal-type systems of the United States and the European Community can be examined as a template for solving many of the most troubling questions now being raised concerning the interplay between trade and the environment at the international level.² While Professor Stewart's analytical structure is informative, and in certain instances can provide answers to some of the problems raised by conflicts between trade and the environment, I caution against borrowing too much from the federal framework. This cautionary note is necessary because substantially different assumptions are at work when a federal system deals with commerce and environmental regulations, and when the international system deals with the interplay between trade and the environment.³ This comment deals with these different assumptions on a theoretical level and addresses how these theoretical differences can effect substantial, real world differences in trade and environmental policies.

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1. Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992). For an excellent general discussion of the trade and environment interplay see generally THOMAS A. WATHEN, *A GUIDE TO TRADE AND THE ENVIRONMENT* (1992).

2. See Stewart, *supra* note 1, at 1350-71.

3. See David A. Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?*, 49 WASH. & LEE L. REV. 1389 (1992). The rules domestically are established under the Commerce Clause of the Constitution. See U.S. CONST. art. I, § 8, cl. 3. These domestic rules of commerce fit into a broader mosaic of specifically enunciated individual social rights and obligations that generally trump our economic concerns. See *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (holding that Maine could ban importation of live bait fish because such fish endangered Maine's wild fish population); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) (holding that state could not own and operate building within which private enterprise discriminated against African-Americans). International trade rules are established under the General Agreement on Tariffs and Trade. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187 [hereinafter GATT]. At the international level GATT lacks the social protections embodied in United States law.

The comment closes with an alternative vision of trade and the environment premised on mutually reinforcing trade and environmental policies—"competitive sustainability."

I. *MILLS v. KANT*

Professor Stewart begins his analysis by observing that both trade and environmental measures are aimed at promoting human welfare.⁴ He adds that "[t]his conception rejects the position that environmental protection is an autonomous moral duty—an independent absolute."⁵ Having assumed that both trade and environmental measures serve the common good, it is easy to apply a Millian analysis, involving the greatest good for the greatest number, in solving trade and environment conflicts as Professor Stewart attempts to do.⁶ Under a Millian analysis, there are no conflicting trade and environmental agendas, only misguided regulatory efforts. Environmental measures that diminish some undefinable common good are inappropriate, as are trade measures that harm the same common good by undercutting the environmental bases of our society.

Although these simple equations are appealing, they have been highly criticized and generally rejected. Mill's approach generally fails to take into account the widely held belief that certain values are so central to humanity that they must be protected even at a cost to the larger society.⁷ Further, these normative values are offended when one suggests that they may be "priced." Many critics have described these values in terms of ethical or categorical imperatives.⁸

The concept of a categorical imperative, defined by the philosopher Immanuel Kant as "an action . . . objectively necessary in itself," without need for reference to another end,⁹ is particularly germane to the goal of environmental protection. Assuredly much of environmental protection can be justified, as Professor Stewart argues, as part of the improvement of human welfare.¹⁰ Thus, providing potable water is a necessary component of both improving environmental quality and standards of living for humankind. Other environmental objectives, however, are not so easily or directly linked with meeting the immediate needs of humanity and are, perhaps, most easily justified under ethical concepts as opposed to utilitarian concepts.

4. Stewart, *supra* note 1, at 1331-32.

5. *Id.* at 1332.

6. *See id.* at 1332-45. *See generally* THE COLLECTED WORKS OF JOHN STUART MILL (John M. Robson et al. eds., 1963) (compiling different aspects of Mill's philosophy).

7. *See generally* FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 279-96 (1984) (providing critical assessment of Mill's philosophical theories).

8. *See* ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 49-54 (1989) (defining Kant's categorical imperative in terms of moral imperatives).

9. *Id.* at 50.

10. Stewart, *supra* note 1, at 1331-32.

An excellent example of such an environmental and ethical objective is species preservation. While the preservation of some species can be linked to human consumptive needs or the economics of biodiversity protection, many, if not most species have little value to humans outside of our spiritual or ethical need to know that these animals and plants exist somewhere.¹¹ Consider, for example, the efforts to preserve the California condor. The California condor has little or no economic value to humanity. However, the United States has spent huge sums of money to ensure its continued existence.¹² If one uses a Millsian analysis, as Professor Stewart suggests, it is arguable that such expenditures would be considered improper.¹³

How then can these expenditures be justified? The answer is simple: The world is not made up of one imperative for the common good of humanity, but rather is made up of a number of imperatives, and among these imperatives exist both an imperative to increase human welfare and an imperative to act as a steward over the earth's resources.¹⁴

By beginning with a Millsian premise, Professor Stewart's approach to trade and environmental decision making necessarily attempts to balance competing agendas (environmental benefits vs. trade benefits) in hopes of finding the balance that creates the greatest overall benefit.¹⁵ A Kantian examination of trade and the environment, however, begins with the premise that there are at work both human welfare imperatives (which are not always the same as trade agenda objectives) and environmental imperatives that determine trade and environment policy. Neither of these imperatives can be compromised. Thus, it is necessary, although somewhat more difficult, to establish a framework for developing mutually reinforcing trade and environmental policies.

II. A KANTIAN RESPONSE

While the distinction between a world of Millsian equations and one of Kantian imperatives appears hopelessly adrift in the impractical world of philosophical musing, this distinction—when applied—has very real and dramatic effects on the manner in which one resolves trade and environment issues.

A. Environmental Standards

1. The Role of Environmental Standards

Perhaps the most striking area of difference between Kantian and Millsian approaches to trade and the environment is the role that each of

11. See David Ehrenfeld, *Why Put a Value on Biodiversity?*, in *BIODIVERSITY* 212, 212-16 (Edward O. Wilson ed., 1988).

12. See *id.* at 215; Suzanne Winckler, *Stopgap Measures*, *ATLANTIC MONTHLY*, Jan. 1992, at 74, 77.

13. See Charles C. Mann & Mark L. Plummer, *The Butterfly Problem*, *ATLANTIC MONTHLY*, Jan. 1992, at 47, 55; Thomas Palmer, *The Case for Human Beings*, *ATLANTIC MONTHLY*, Jan. 1992, at 83, 83; Winckler, *supra* note 12, at 77.

14. See generally *FREEDOM FOR THE SEAS: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY IN THE 21ST CENTURY* (John van Dyke et al. eds., forthcoming 1992).

15. Stewart, *supra* note 1, at 1331-32.

these approaches provides for environmental standards. One need only look to the General Agreement on Tariffs and Trade (GATT) panel decision on United States import restrictions of tuna (Tuna/Dolphin Panel Report),¹⁶ as well as to Professor Stewart's general approval of the decision, to see the differences between these two approaches.¹⁷

Professor Stewart argues that the Tuna/Dolphin Panel may have reached the correct result—striking down the U.S. trade embargo of Mexican tuna harvested with the needless slaughter of dolphin—for the wrong reasons.¹⁸ Professor Stewart would have had the Panel justify its conclusion based on the following points: 1) that “no showing was made that the [dolphin] species in the [Eastern Tropical Pacific Ocean] were endangered or had fallen below sustainable levels”;¹⁹ 2) that there was no showing that the dolphin-take quota for Mexico had any rational relation to the conservation of the species;²⁰ and 3) that the Mexican take quota was a “‘moving target’ constantly adjusted in relation to the performance of the U.S. fleet.”²¹ Each of these points bears further analysis.

Regarding the point that there was no showing of endangerment, Professor Stewart's use of endangerment as a trigger for permissible environmental protection displays how a Millsian analysis fails to account for essential environmental imperatives. Endangerment²² is a standard the United States uses as a trigger for deciding when environmental protection is so necessary that it may trump other goals such as economic activity.²³ Endangerment is, however, a woefully inadequate standard for determining when environmental protections are justified. Professor Stewart, however, uses endangerment as the “triggering” standard for environmental protec-

16. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna/Dolphin Panel Report]. Although I differ to a degree with his conclusions, Professor Dunoff's article in this volume provides an excellent factual record from which to work when analyzing the merits of the panel's conclusions. Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992). The author's view of the decision can be found at Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,268 (Apr. 1992) [hereinafter Housman & Zaelke, *Collision*].

17. Stewart, *supra* note 1, at 1357-61.

18. *Id.* at 1358.

19. *Id.* at 1359.

20. *Id.*

21. *Id.*

22. The Endangered Species Act of 1973 defines endangered using a list of factors the Secretary of the Interior is instructed to take into account when deciding whether to list a species as endangered. The list includes: 1) threats to a species habitat, 2) overutilization of the species, and 3) inadequacies of existing protection for the species. 16 U.S.C. § 1533(a)(1) (1988); see DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 42 (1989). A more common definition of endangered species is “a species in danger of extinction.” *THE AMERICAN HERITAGE DICTIONARY* 431 (1976).

23. See *TVA v. Hill*, 437 U.S. 153, 180 (1978); see also Mann & Plummer, *supra* note 13, at 47-70.

tion in his analysis of the Tuna/Dolphin Panel Report.²⁴ By the time a species has reached the endangerment stage, it is highly unlikely that human efforts, even on a herculean scale, can save the species.²⁵ Thus, endangerment completely fails to take into account the widely recognized precautionary principle of environmental governance.²⁶

Moreover, Professor Stewart's use of endangerment and the concept of below sustainable use levels of environmental protection reveal the hierarchy in his analysis: Trade *uber alles* (Trade over all). Human activities, even when unnecessarily destructive of the environment, such as the needless slaughter of dolphin, should not be constrained unless the constraint is absolutely necessary to prevent some harm to humankind. Once again a Kantian analysis is appropriate. Why constrain economically prosperous activities and preserve dolphin lives even if the species is not in jeopardy? Like every economic argument, this one can be dispatched with a normative response—that is, "I don't believe in that" or simply, "that is offensive."²⁷ Perhaps we preserve the dolphin because we believe it is simply immoral to slaughter another highly intelligent species.²⁸

Professor Stewart's second argument in favor of the Panel's ultimate conclusion provides that the decision is justified because the Mexican dolphin kill quota was not "rationally" related to the conservation of the species.²⁹ It is important to recognize that the Mexican quota was set by figuring the taking rate of the U.S. fleet operating under specific command and control standards to preserve dolphin lives and then multiplying that figure by

24. Stewart, *supra* note 1, at 1359.

25. The plight of the dusky seaside sparrow is informative in demonstrating the inadequate nature of the endangerment standard. Efforts to save the dusky included the spending of over \$787,000 to establish a habitat refuge for the small sparrow. Despite these efforts, the last dusky lamentably perished twenty-five years after it was granted protection under the Endangered Species Act. See Mann & Plummer, *supra* note 13, at 54-56.

26. See James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1 (1991); Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4 GEO. INT'L ENVTL. L. REV. 303 (1992).

27. The early American economist Daniel Raymond in his 1820 treatise *Thoughts on Political Economy*, explained to his readers why he had omitted any consideration of Thomas Malthus' ideas:

Although his theory is founded upon the principles of nature, and although it is impossible to discover any flaws in his reasoning, yet the mind instinctively revolts at the conclusions to which he conducts it, and we are disposed to reject the theory, even though we could give no reason.

DANIEL RAYMOND, *THOUGHTS ON POLITICAL ECONOMY*, quoted in HERMAN E. DALY, *STEADY-STATE ECONOMICS* xi (1991).

28. See generally CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987). An even more interesting, but less recognized approach provides that we try to protect other species because they have an independent right to life. See, e.g., Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 62 (1991).

29. Stewart, *supra* note 1, at 1359.

1.25.³⁰ Thus, the Mexican rate was derived from the rate of dolphin protection that could be achieved through proper harvesting controls.³¹ The Mexican rate was, however, more flexible than the standard imposed on U.S. vessels, and more lenient than the strict technology standards imposed on U.S. vessels.³²

While this method of setting the dolphin slaughter standard for Mexican vessels was far from perfect, to argue that it was not "rationally" related to the preservation of the species is far from correct. The standard was set by using the level of species preservation that could be achieved by a reasonable regulatory program on takings, as demonstrated by the performance of the U.S. fleet.³³ To say that this method is irrational is to disregard the jurisprudence of rationality review.³⁴

Professor Stewart's third justification for the Panel's decision provides that because the Mexican fleet had to meet a "moving target" that was derived from the performance of their American competitors, one can infer that the standard was protectionist in nature.³⁵ This third argument is Professor Stewart's and the Panel's strongest one. The "moving target" effect of setting dolphin-taking quotas under the Marine Mammal Protection Act (MMPA)³⁶ does have an element of protectionism from a trade point of view, and in hind-sight, it is possible to envision a number of better methods for imposing a standard upon Mexico.

The solution here is one of deference and leeway. In hindsight it is almost always possible to craft a better, less-restrictive way of enacting an environmental standard. What then becomes of these imperfect first attempts at preservation. Under Professor Stewart's analysis it appears that in order to protect trade rules an environmental standard must be the least trade restrictive means of meeting the environmental goal sought.³⁷ Following this

30. Further, the permit issued to U.S. boats included a hard ceiling for dolphin mortality. See Housman & Zaelke, *Collision*, *supra* note 16, at 10,270. Assuming the U.S. fleet reached this hard taking ceiling the Mexican fleets hard standard would have been 1.25 times greater than that standard. *Id.*

31. See *id.* Mexico's standard was calculated from the taking rate of the U.S. fleet, which was, in turn, subject to command and control restrictions on harvesting methods. *Id.* Thus, the Mexican standard was linked to the taking rate achievable through regulated harvesting. *Id.*

32. See *id.* Mexican vessels were not required to apply specific technologies or practices, as were required of their U.S. competitors. *Id.* Thus, Mexico's standard was more flexible. Mexico's standard was 1.25 times the U.S. taking rate, thus, it was more lenient. *Id.*; see also *supra* note 30.

33. See *supra* note 31.

34. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981). The rationality standard of review provides that a court shall defer to a legislature's decision "if there is any rational basis for [the decision]." *Id.*

35. Stewart, *supra* note 1, at 1359.

36. 16 U.S.C. §§ 1361-1407 (1988).

37. Stewart, *supra* note 1, at 1359. The least trade restrictive approach is also increasingly finding its way into GATT jurisprudence. See Robert F. Housman & Durwood J. Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L.

approach, one ex post facto trespass upon a trade rule appears sufficient to place the environmental standard in jeopardy. Such a strict "least trade restrictive" test, requiring a near-perfect link between an environmental standard and its conservation goal, is simply inappropriate in the environmental context. Environmental issues are highly complex and regulators need a great degree more latitude than this least trade restrictive approach affords them while attempting to address complexities.³⁸ Clearly, this must have been the approach Ambassador Carla Hills, the United States Trade Representative, took when she testified before Congress that the MMPA did not violate the GATT.³⁹

A second example even more graphically displays the differences of approach between Millsian and Kantian views on the linkages between trade and environment. Professor Stewart argues that "[i]n principle, at least, there is no reason why a pesticide banned" in one nation should not "be used in a less developed country with greater assimilative capacity."⁴⁰ Put into the trade context, this result means that it is proper for a U.S. manufacturer to sell pesticides banned in the United States to unsuspecting people in the developing world.⁴¹ To a Millsian this analysis is absolutely correct; however, to a Kantian the very reason why such a pesticide should be banned is one of principle, or more precisely one of ethics. Assimilative

REV. 535, 546-47 (1992) [hereinafter Housman & Zaelke, *Primer*]; see also General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on Thai Restrictions on Importation of and Internal Taxes on Cigarettes, para. 74, 30 I.L.M. 1122, 1137-38 (1991); Tuna/Dolphin Panel Report, *supra* note 16, para. 5.27, at 1620.

38. Global warming offers an excellent example of the complexity of environmental issues. See Christopher D. Stone, *Beyond Rio: "Insuring" Against Global Warming*, AM. J. INT'L L. 445, 446-47, 450-55 (1992) (discussing difficulties and uncertainties in evaluating and responding to threat of global warming). A wide range of legal and policy responses to global warming have been suggested. *Id.* at 455-87. It remains uncertain which policy approach is "necessary" to combat global warming. *Id.* at 450-55. Moreover, because of the scope of the problem, socio-economic data is insufficient to answer which response would be "least restrictive" from an economic standpoint. *Id.* The end result is that if a least trade restrictive approach to trade and environment is adopted, policy-makers could not satisfy this test in addressing global warming.

39. Ambassador Carla A. Hills, Testimony Before the United States House of Representatives Committee on Energy and Commerce 40-41 (Sept. 24, 1990) (colloquy with Congressman Scheuer) (marked transcript on file with author).

Congressman Scheuer: If Congress enacts the proposed law requiring tuna imports, only from those countries that use dolphin-safe fishing methods, could these laws survive a GATT challenge?

Ambassador Hills: Yes, because there is an exception in the GATT for protection of a nation's natural resources.

Id. at 40.

40. Stewart, *supra* note 1, at 1352.

41. The current U.S. regulatory framework similarly permits a U.S. company to sell pesticides banned at home to consumers abroad. See Alice Crowe, *Breaking the Circle of Poison: EPA's Enforcement of Current FIFRA Export Requirements*, 4 GEO. INT'L ENVTL. L. REV. 319, 320-21 (1992).

capacities aside,⁴² it is morally wrong to allow a pesticide shown as harmful in the United States to be used without restriction in a developing country.⁴³ It is morally repugnant and ethically unacceptable to allow the inhabitants of developing countries to be exposed to threats that the citizens of the United States have determined are unacceptable, solely so that the industries of the United States can profit through freer trade.⁴⁴ Moreover, if one assumes that the value of free trade is to advance the human condition, this result is a prime example of where the blind pursuit of freer trade is undercutting human welfare.

2. The Use of Unilateral Trade Measures for Environmental Ends

Recognizing a separate environmental imperative also has a marked effect on how one looks at the unilateral use of trade measures to advance environmental objectives. Professor Stewart's analysis of unilateral environmental trade measures in the areas of product standards, production process standards, natural resource conservation measures, and restrictions on waste trade all display more than a general distaste for the use of unilateral environmental trade measures, and Professor Stewart argues quite stridently against their use.⁴⁵

While few would argue that unilaterally imposed environmental trade measures are the most desirable way of encouraging the wider implementation of environmental imperatives, they are an effective means of achieving this objective. And many would argue that short of armed coercion, they are the only effective international means of developing a broader international consensus on environmental issues.⁴⁶ Professor Stewart himself rec-

42. The assimilative capacity approach to environmental protection has been rejected by the precautionary principle. See Hey, *supra* note 26, at 305.

43. See generally DAVID WEIR, *THE BHOPAL SYNDROME: PESTICIDE MANUFACTURING AND THE THIRD WORLD* (1986).

44. See *id.* at 75 (quoting Union Carbide spokesperson as saying "It is not proper for an international corporation to put the welfare of any country in which it does business above that of any other" in RICHARD J. BARNET & RONALD E. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* 16 (1974)); Alfred S. Farha, *The Corporate Conscience and Environmental Issues: Responsibility of the Multinational Corporation*, 10 *Nw. J. INT'L L. & Bus.* 379, 394 (1990); David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 *WILLAMETTE L. REV.* 547 (1992) (discussing need for "global citizenship" in international law). Alfred S. Farha noted that:

[A] truly responsible company should maintain the same standards of environmental protection anywhere it operates in the world. . . . There is no reason to treat a plant in a less developed country any differently than one in Western Europe or North America. By definition, a multinational corporation's responsibility is global, and its standard of care for the environment must be uniformly applied wherever its operations exist.

Farha, *supra*, at 344.

45. Stewart, *supra* note 1, at 1351-61.

46. Cf. Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 *B.C. ENVTL. AFF. L. REV.* 213, 218-19 (1991) (discussing time delay in crafting international environmental agreements) (Mr. Sand was Principal Legal Officer for United Nations Confer-

ognizes the role that trade sanctions, or the threat of such sanctions, have played in preserving hawksbill sea turtles, ending whaling, and ending the highly destructive practice of driftnet fishing.⁴⁷ He fails, however, to acknowledge that the use of trade sanctions by the United States has also led, in the Tuna/Dolphin case, to an international agreement to preserve the dolphin in the Eastern Tropical Pacific Ocean—the area where they are most at risk from fishing practices.⁴⁸ Simply put, when all else fails, unilateral trade measures are an important and necessary impetus for the international community to act on environmental threats. Absent the ability of nations to put such sanctions to use, it is highly unlikely that the international community, described by Philip Allott as “post-feudal society encased in amber,”⁴⁹ would have responded to these threats in time.⁵⁰ Had unilateral environmental trade sanctions not been available, it is highly probable that the only place a whale or a hawksbill turtle could be found today would be stuffed in a museum.⁵¹

3. The Multilateral Use of Environmental Trade Measures

While Professor Stewart would provide a high degree of deference for international standards aimed at preserving the global commons, he is not so generous toward other multilaterally agreed-upon environmental measures and standards.⁵² Although he provides that “group standards should, *ceteris paribus*, enjoy greater deference than unilateral ones,” he goes on to state that the multilateral character of an international environmental standard should not automatically validate a trade restriction, because such an international effort could be nothing more than a greenwashed attempt at cartelization.⁵³ Under Professor Stewart’s analysis it seems that all trade provisions in multilateral environmental agreements, even those as important as the Montreal Protocol on ozone depletion, would be subject to review under the provisions of GATT.⁵⁴ The provisions of these vital agreements would come clothed only in a higher degree of deference than that accorded unilateral measures. Once again, trade *uber alles*.

ence on Environment and Development). See generally *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1487, 1550-66 (1991) (discussing implementation and enforcement of international environmental agreements).

47. Stewart, *supra* note 1, at 1351-61.

48. See John Maggs, *Mexico, Venezuela and U.S. Reach Tuna-Dolphin Accord*, J. COM., June 18, 1992, at A3; Michael Parrish, *Pact May Stop Dolphin Deaths in Tuna Fishing*, L.A. TIMES, June 17, 1992, at A1.

49. Hunter, *supra* note 44, at 551-52 (quoting PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 238 (1990)).

50. See Sand, *supra* note 46, at 236; Hunter, *supra* note 44.

51. See Steve Charnovitz, *Environmental and Labour Standards in Trade*, 15 WORLD ECON. 335, 349 (1992).

52. Stewart, *supra* note 1, at 1361-67.

53. *Id.* at 1362.

54. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

Simply put, this approach is, from an environmental perspective, untenable. The protections afforded by these multilateral agreements have been hard won gains and the environmental community will not sit quietly by while these provisions are undercut by trade dispute panels.⁵⁵ Surely, the implementation of these agreements by nation-states cannot be allowed to become a safe harbor for trade protectionism; however, that statement is a far cry from making the provisions of these agreements subject to trade rules and challenges. Moreover, the international community has repeatedly stated that multilateral agreements on environmental issues are the preferred approach to environmental protection.⁵⁶ If multilateral agreements are truly the way that the international community wishes to deal with environmental threats, a better balance must be struck. Indeed, I believe that if one reads Professor John Jackson's excellent article in this same volume, one will find that there is a better balance already proposed.⁵⁷

B. *The Role of Growth in Trade and the Environment*

A Millsian approach to trade and the environment does, however, provide a helpful analytical framework in determining what is the proper role of growth in the trade and the environment equation. Professor Stewart argues that the growth attendant to trade necessarily raises our standards of living which, in turn, allows us to buy greater levels of environmental protection—"trickle down environmentalism."⁵⁸ Moreover, it is important to note that Professor Stewart is not alone in this belief; an entire school of thought sincerely believes in this paradigm.⁵⁹

Once again the assumptions upon which these beliefs are premised bear careful consideration. One must question whether enhanced trade *in and of itself* enhances the greater human condition. Herman Daly, the noted World Bank Senior Economist, has written quite eloquently on this topic. He has noted that "[t]he effort to overcome poverty through further growth in scale of throughput is self-defeating once we have reached the point where growth in scale increases environmental costs faster than it increases production benefits. Beyond this point, which we have in all likelihood already

55. From a purely political standpoint, it is unlikely that a party would challenge an agreement as important as the Montreal Protocol, however, the importance of these agreements is such that their fates should not be left to the vagaries of international politics.

56. See, e.g., Tuna/Dolphin Panel Report, *supra* note 16, para. 6.3, at 1623; see also Daniel C. Esty, *New Linkages and Policy Challenges*, ENVTL. FORUM, July-Aug. 1992, at 25, 26.

57. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992).

58. Stewart, *supra* note 1, at 1329. The phrase "trickle down environmentalism" was coined, I believe, by my colleague Professor David Wirth.

59. See Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, Paper Presented at the Conference on the U.S.-Mexico Free Trade Agreement at Princeton University (Nov. 1991, rev. ed. Feb. 1992) (prepared text on file with author).

passed, further growth makes us poorer, not richer."⁶⁰ Simply put, if the goal of enhanced trade is to raise standards of living through growth, the means may not fit the ends.

Raising standards of living will not be achieved through blind growth for growth's sake, it can only be achieved through "clean growth"—growth achieved through increased efficiency as opposed to increased consumption. In effect, clean growth will require us to do more with less. For example, Patagonia, the leading outdoor equipment manufacturer, in response to an internal full life-cycle environmental audit of their products recently decided that it would limit the number of different styles of ski pants they manufacture.⁶¹ Patagonia's rationale was simple; all of their products come at some environmental costs, and limiting the number of styles of ski pants they make would eliminate some of these costs. People did not need more than two styles of ski pants from which to choose.⁶² They should be applauded for this commitment to the future.⁶³

III. A NEW VISION FOR TRADE AND THE ENVIRONMENT: COMPETITIVE SUSTAINABILITY

There is, however, one area where I am in substantial agreement with Professor Stewart. Markets (read: the global economy) must be pressed into service if we are to both enhance environmental quality and improve the human condition. Paul Hawken, the founder of Smith & Hawken, one of the leading environmentally conscious companies, summarized this necessity in the following manner, "[b]usiness is the only mechanism on the planet today powerful enough to produce the changes necessary to reverse global environmental and social degradation."⁶⁴ Hawken stated that "[t]here is an economy of degradation, which is one objective way to describe industrialization, and there is a restorative economy that is nascent but real, whose potential size is as great as the entire world economy is today."⁶⁵

The difficulty is that the market will not effect this positive change unless governments play a role in creating both market incentives for clean

60. Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, Transcript of a Presentation Given at the Loyola Law School 9-10 (Feb. 29, 1992) (on file with author).

61. See Patagonia Catalog, Winter 1992, at 2.

62. *Id.*

63. In discussing Patagonia's decision to limit its own growth Yvon Chouinard, founder of the company, noted eloquently:

Last year, when we decided to limit our growth, we also committed ourselves to a life-span of a hundred years. A company that intends to be around that long will live within its resources, care for its people, and do everything it can to satisfy its community of customers. This direction is pleasing to us as a company, just as the lines of the Shaker box are pleasing to the eye. It's a gift to have survived twenty years and a gift to come back to where we ought to be.

Id. Well put.

64. Paul Hawken, *The Ecology of Commerce, Inc.*, Apr. 1992, at 93, 94.

65. *Id.*

growth and market disincentives for unsustainable growth.⁶⁶ Here again, we turn to the role trade plays in creating these incentives and disincentives. Trade's rules function like any other code, providing incentives for some economic activities and disincentives for others. Thus, trade rules must be crafted so that their built-in incentives and disincentives function to encourage restorative economic growth. "Competitive sustainability" provides a theoretical framework for thinking about economic and ecological systems that are mutually reinforcing. One of the principle goals of competitive sustainability is that environmental standards, both domestic and international, must be harmonized upward. The theory further provides that the best mechanism for encouraging this upward harmonization is to use competitive forces to create a level playing field for commerce at consistently higher levels of environmental and social protections through a set of incentives that reward the cleanest and most efficient economic actors for their efforts. A number of changes are needed in trade rules to allow for a system of competitive sustainability to develop.⁶⁷ Certain of these changes are discussed below; however, the following examples are not exclusive.

A. *Environmental Countervailing Duties*

Under the current system of trade rules, no acceptable way exists for a country to force products entering its markets to internalize the environmental costs attendant to their production.⁶⁸ Thus, companies operating in nations that lack appropriate environmental laws or enforcement receive what amounts to a pollution subsidy.⁶⁹ The environmental costs from their

66. See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 674 (1990); Michael Weisskopf, *Oil Recycling Success Provides Support for Differing Messages*, WASH. POST, Oct. 26, 1992, at A8.

67. See *infra* text accompanying notes 68-80.

68. See Housman & Zaelke, *Primer*, *supra* note 37, at 556; GENERAL AGREEMENT ON TARIFFS AND TRADE SECRETARIAT, *TRADE AND THE ENVIRONMENT* 19 (1992) (advance copy) [hereinafter GATT SECRETARIAT].

69. A 1991 report by the Research and Policy Committee of the Committee for Economic Development, an independent research and educational organization of more than two hundred business executives and educators provides:

There are significant differences among countries in expenditures on pollution control. According to a 1985 OECD study, expenditures on pollution control as a percentage of GDP were higher in the United States than in any other OECD country for which data were available. It is likely that even greater differences exist between the industrialized and less developed countries, and these discrepancies inevitably contribute to differences in production costs. Although the effect on U.S. international competitiveness of our relatively high environmental standards is minor for most industries, it is substantial in some sectors, such as nonferrous metals.

Given the effect on production costs of environmental regulations, the question arises whether the concept of unfair trade practices should include the failure of a country to maintain environmental standards or the subsidization by a government of private-sector pollution-abatement costs.

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production processes are passed downstream to other users of resources, such as local fishermen who find that the lakes and rivers are poisoned and no longer sustain life,⁷⁰ and to the general public, who pay higher personal and economic health care costs from diseases such as respiratory illness.⁷¹ For example, studies show that 140,000 Americans alive today will get cancer from exposure to toxic air emissions.⁷²

The competitive advantage held by companies producing products in nations lacking enforcement of acceptable environmental laws could be eliminated by allowing nations to apply a countervailing duty on these products, equal in amount to the environmental subsidy the products receive, when they enter the importing nation's market.⁷³ Detractors of this approach argue that the system would be difficult to administer, it would lend itself to protectionism, and it would allow the developed world to close its markets to products from the developing world, which could not bear the costs of heightened environmental protections.⁷⁴

A properly designed system of countervailing duties could, however, address each of these concerns. For example, developing countries have very real concerns that such duties will serve to exclude them from developed world markets. The standard for finding that a developing country industry receives a pollution subsidy, however, could take into account differences in the level of development in the country-of-origin. Moreover, the revenues collected from such a system could be returned to developing countries in the form of technology assistance that would allow them to become greener economic players.⁷⁵

Trade rules should be changed to provide a framework to allow countries to impose such duties in an internationally agreed upon manner. Moreover, such a system must also recognize that these trade "sticks" should be

(1991) (citing OECD, ENVIRONMENT AND ECONOMICS: RESULTS OF THE INTERNATIONAL CONFERENCE ON ENVIRONMENT AND ECONOMICS 50 (1985)); see Kenneth S. Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 Hous. J. INT'L L. 189, 209 (1988); Thomas K. Plofchan, Jr., *Recognizing and Countervailing Environmental Subsidies*, 26 INT'L LAW. 763, 780 (1992); Michael Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. INT'L L.J. 85, 86 (1987).

70. See VITAL SIGNS 1992, at 30 (Lester R. Brown et al. eds., 1992).

71. See Chris A. Wold & Durwood Zaelke, *Promoting Sustainable Development and Democracy in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Development*, 7 AM. U. J. INT'L L. & POL'Y 559, 563 (1992) (noting that air pollution costs Hungary 214 million dollars per year in health care costs) (citing INSTITUTE FOR ENVIRONMENTAL DEVELOPMENT, STATE OF THE ENVIRONMENT IN HUNGARY AND ENVIRONMENTAL POLICY 33 (Miklós Bulla ed., 1981)).

72. THE ENVIRONMENTAL EXCHANGE, WHAT WORKS: AIR POLLUTION SOLUTIONS 6 (1992).

73. See Plofchan, *supra* note 69, at 780.

74. Stewart, *supra* note 1, at 1355.

75. Such a proposal has already been advanced by Senator David Boren in the International Pollution Deterrence Act of 1991. S. 984, 102d Cong., 1st Sess. (1991). See generally Senator David L. Boren, Prepared Statement on the International Pollution Deterrence Act of 1991 in the Senate Finance Comm. (Oct. 25, 1991).

accompanied by trade "carrots"—incentives for positive actions.⁷⁶ Absent such a change, the United States should enact environmental countervailing duty provisions that provide for unilateral sanctions in order to force the evolution of the GATT.⁷⁷ Further, although a multilateral approach is always preferable, the proposed GATT Dispute Settlement Agreement⁷⁸ arguably would, if accepted, institutionalize internationally the unilateral approach of the United States section 301.⁷⁹ Section 301, which already covers unfair labor practices could serve as a model for U.S. environmental countervailing duty provisions.⁸⁰

B. *The Product—Cradle to Grave*

Similarly, under existing international trade law, a party is prohibited from enacting standards that set requirements upon the production process method by which an imported product is made.⁸¹ This limitation renders any attempt by a country to use trade measures to encourage companies to

76. See Craig Obey, Note, *Trade Incentives and Environmental Reform: The Search for a Suitable Incentive*, 4 GEO. INT'L ENVTL. L. REV. 421, 441-45 (1992).

77. See Robert Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM 113, 116-53 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (discussing "justified disobedience" as allowing for violations of GATT in order to force its evolution).

78. *Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade*, GATT Doc. MTN.TNC/W/IA (Dec. 20, 1991).

79. See Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L LAW. 795, 799 (1992). Section 301 of the Trade Act of 1974, as amended, enables private parties in the United States to petition the United States Trade Representative to initiate an investigation of foreign government policies, practices, and actions that violate a trade agreement or are otherwise in violation of section 301's provisions. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (1975) (codified as amended at 19 U.S.C. §§ 2101, 2411 (1988)). One of the most critical amendments to the Trade Act of 1974 was the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164-76 (1988) (codified at 19 U.S.C. §§ 2411-2420 (1988)). If this investigation finds that the foreign practice violated a trade agreement or was otherwise inconsistent with section 301, and burdened U.S. commerce then the United States Trade Representative must take responsive actions. See 19 U.S.C. § 2411 (1988); see also Judith H. Bello & Alan F. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (1988). If the foreign government refuses to eliminate the offensive practice within statutorily specified time frames the United States Trade Representative must take retaliatory actions against the foreign government. See 19 U.S.C. § 2411(c) (1988); see also Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301 (1990).

80. See Charnovitz, *supra* note 51, at 341.

81. See GATT, *supra* note 3, art. III, 61 Stat. at A18-19, 55 U.N.T.S. at 204-08; see also Tuna/Dolphin Panel Report, *supra* note 16, para. 5.12-.15, at 1617-18; GATT SECRETARIAT *supra* note 68, at 8-11; Housman & Zaelke, *Primer*, *supra* note 37, at 540-41; Frederic L. Kirgis, Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 859, 893-901 (1972).

adopt more sustainable production and disposal processes inconsistent with the GATT.

In order to encourage cleaner growth and to require environmental cost internalization, countries must be allowed to ensure that the full life cycle of imported products (from cradle to grave) meets the standards applicable to similar domestic goods. Thus, the term "product" as used in GATT Article III jurisprudence must be rethought to include the production and disposal cycles of the product as it appears at market.

C. Enhancing Public Participation

Public participation is vital to informed decision making, particularly with regard to environmental protection.⁸² Under existing international trade agreements, citizens are completely excluded from participating in the conduct of international trade disputes.⁸³ Individuals and nongovernmental organizations (NGOs) are not allowed to present information into the process, nor are they allowed to receive information, such as the submissions to a panel, from the process.⁸⁴ The end result is that no assurances exist in these dispute processes that the governments are acting in their citizens best interest.⁸⁵ Simply put, under the current framework individuals who are harmed by trade and environmental policies have no recourse.⁸⁶ Moreover, these limits on public participation not only preclude environmental NGOs from participating, they also preclude the participation of competitors harmed by pollution subsidies—the parties who have the competitive desire and the legal and technical capabilities to drive upward harmonization.

The rules of international trade must be changed to allow affected parties to play a much greater role in the trade dispute process. This will necessarily entail the right of these parties to obtain access to the information

82. See Sheldon Kamienieki, *Political Mobilization, Agenda Building and International Environmental Policy*, 44 J. INT'L AFF. 339, 347-49 (1991); Wold & Zaelke, *supra* note 71, at 595; David R. Downes, *Don't Blame It on Rio*, ENVTL. FORUM, May-June 1992, at 17, 20 ("If democracy means that those affected by political action participate in decisions about it, then the ultimate goal is a global and intergenerational system of law that is integrated into world politics, economics, and ecology").

83. See Housman & Zaelke, *Primer*, *supra* note 37, at 558.

84. *Id.*

85. For example, in the infamous Tuna/Dolphin case, the United States government refused for more than a decade to impose the trade sanctions required under law against Mexico. See Housman & Zaelke, *Collision*, *supra* note 16, at 10,271. Only after a lawsuit was brought by an NGO and a court order was issued and upheld on appeal did the United States government enforce the law. *Id.* This same United States government, which had worked diligently with the Mexicans to avoid the imposition of trade sanctions, then had to defend these same sanctions before a trade panel. *Id.* This is not to imply that the United States Trade Representative's Office acted improperly during the Tuna/Dolphin case; it does, however, display that the potential for abuse exists.

86. See WILLIAM O. DOUGLAS, *POINTS OF REBELLION* 63 (1970) (quoting Chief Justice John Marshall stating "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury").

developed within the context of trade disputes and to submit information directly into the dispute process.

CONCLUSION

Professor Stewart's Millsian approach to trade and the environment, applying the lessons learned from federal systems to this complex international policy sphere, is an important contribution to the trade and the environment dialogue. The Millsian approach, however, puts economic values too greatly at odds with normative values. In such an adversarial dialectic, the end result of every Millsian equation is that one or the other must lose.

A better approach would consider that higher standards of living through enhanced trade and environmental protection are necessarily interconnected and that any attempt to untie the Gordian knot of trade and the environment cannot compromise the important goals of either of these imperatives. This Kantian approach recognizes that mutually reinforcing trade and environmental policies are not a luxury, but a necessity. Competitive sustainability offers a framework for such mutually reinforcing policies.