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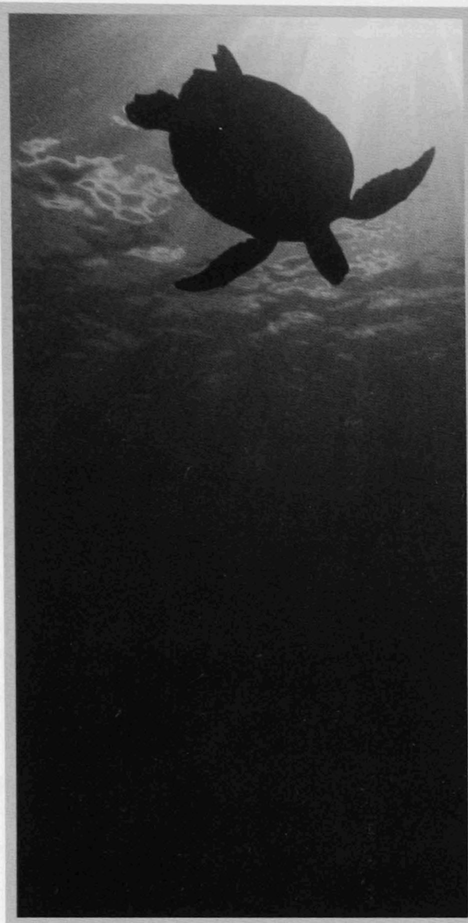


The following essay, which discusses the trade and environment jurisprudence of the World Trade Organization and its implications for the Japan-U.S. whaling dispute, is excerpted from "Multilateralism, Unilateralism, and Bilateralism in U.S.-Japan Trade Relations: A WTO Law Perspective," a paper the author delivered at the conference on Japan-U.S. trade relations, held at Keijo University, Tokyo, last spring. A complete copy of the paper, which discusses two additional WTO cases, one involving the European Union challenge to Section 301 of the U.S. trade legislation, and the other involving the Canada-U.S. Auto Pact, is available from the author or from Law Quadrangle Notes.

CAN TURTLES TEACH ABOUT WHALES?

— By Robert L. Howse

In *Turtles*, a case arising in the late 1990s, the WTO Appellate Body (AB) considered an appeal from a panel that found a U.S. embargo of shrimp fished with turtle-unfriendly technology a violation of Art. XI of the GATT, and not justifiable under Art. XX. Much along the lines of the earlier *Tuna/Dolphin* panels, the panel in *Turtles* basically excluded from the possibility of Art. XX justification unilateral trade measures targeting environmental practices or policies in other countries as *per se* inconsistent with the spirit or character of the multilateral trading system. (In this case, unlike the *Tuna/Dolphin* cases, the panel had relied in a very loose and imprecise way on the language in the preambular paragraph of Art. XX, or "chapeau" about "unjustified and arbitrary discrimination.")

Upon appeal, the AB took a very different approach. It viewed unilateral trade measures targeting other countries' policies as in principle capable of justification under the particular heads of Art. XX (in this case, exhaustible natural resources) and made the strong statement that: "It is not necessary to assume that requiring from exporting countries compliance with, or adopting certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX." However, in examining whether the U.S. embargo was in relation to the conservation of exhaustible natural resources, the AB body raised, without answering it, the question of whether some kind of territorial nexus between the country taking the measures and the resources being conserved was necessary to satisfy the requirement that the measures be "in relation to exhaustible natural resources." The AB considered that it was not necessary to answer this question, because even *if* such a nexus were required, it would be satisfied in this case, apparently by virtue of the fact that some of the endangered species of sea turtles migrated through U.S. territorial waters. But what if none of the turtles swam through U.S. territorial waters? Would the AB have viewed the "commons" nature of the endangered species, as reflected in relevant international agreements, as a sufficient nexus with U.S. interests, again assuming one is actually required? It is possible that the AB body was divided on whether a nexus was required, and what kind of nexus it might be. Perhaps the AB, or some of them, were groping towards something equivalent to the "effects" doctrine in international antitrust.

Having found the U.S. embargo to be justified under Art. XX(g), the AB went on to consider whether the United States had met the requirement under the "chapeau" of Art. XX that the measure not be *applied* "in a manner that would constitute arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Here, the AB found several elements of arbitrary or unjustified discrimination in the application of the scheme: the U.S. had

engaged in serious negotiations with some countries to deal with its conservation concerns but had not made comparable efforts with the complainants in this case; although the statute provided flexibility as to what equivalent technologies employed by other countries' shrimpers could satisfy the requirement of turtle-friendliness, when the scheme was *applied*, all shrimp not caught with the U.S.-prescribed TED technology were embargoed; and customs decisions on which shrimp could be imported, and which not, under the scheme were apparently arbitrary and non-transparent. The AB strongly implied that the straightforward extraterritorial application of domestic environmental regulation, indifferent to divergent conditions that prevail in different countries, would be unlikely to satisfy the requirements of the "chapeau." It suggested that the detailed application of embargoes of this nature would be judged against the expectation (found within certain international environmental agreements themselves, e.g., the Rio Declaration) that a state would not normally resort to unilateral action of this kind without having first seriously attempted to enter into negotiations with the other state(s) concerned, in order to find a way of achieving the environmental objectives in question in a manner consistent with the different conditions prevailing in the other state(s).

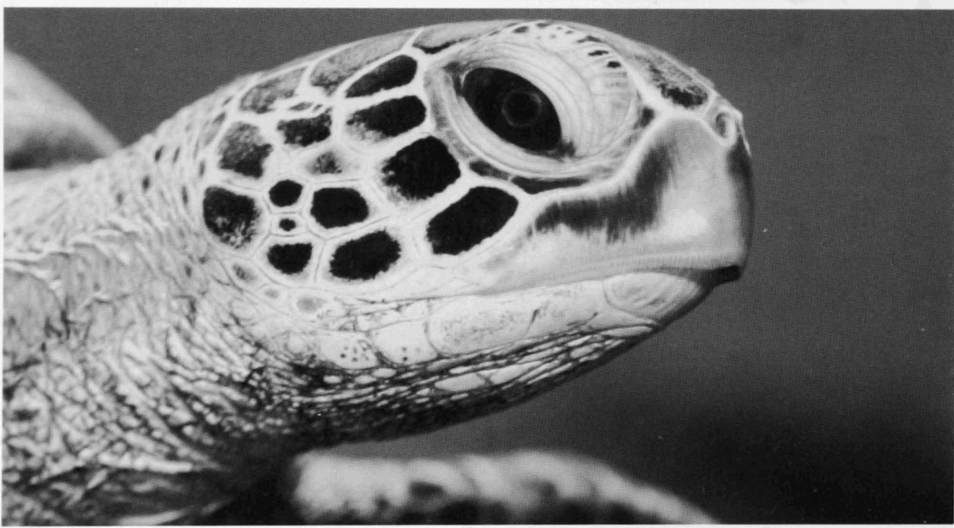
While being faithful to the entire text of Art. XX, which does not *per se* exclude such unilateralism, the AB arguably struck a balance that is beneficial to the enhancement of multilateral or plurilateral cooperation to solve environmental commons problems. On the one hand, a state that contemplates unilateralism cannot go forward with it — as an automatic reflex, as it were — without being prepared to make a significant investment in the attempt to achieve a cooperative solution, which includes addressing different conditions in the other countries that may make them justifiably reluctant to adopt U.S. environmental standards. On the other hand, a state or states that refuse to enter into serious negotiations and frustrate cooperative solutions to environmental commons problems will not be protected against unilateralism by WTO law. In sum, the effect of the balance struck in *Turtles* is to create significant incentives for all sides caught in a trade and environment dispute to negotiate.

The *Turtles* ruling has significant implications for the current dispute between the United States and Japan with respect to whaling. Whales are an endangered species, protected under a multilateral environmental agreement to which both the United States and Japan are signatories, The International Convention for the Regulation of Whaling. Under the Convention, the International Whaling Commission (IWC) may impose restrictions on whaling to safeguard whales as an exhaustible natural resource. Such decisions are to be taken by supermajority vote. Pursuant to these procedures, the Commission has enacted a moratorium on whaling. However, Art. V:3 of the Convention allows individual signatories to lodge objections to decisions of this kind by the IWC, within a specified time frame, with the result that the decision in question is not binding on that signatory. Thus, Norway has engaged in commercial whaling subsequent to the moratorium, pursuant to an objection that it filed within the required time period. While Japan did not file such an objection, it has for some time vigorously opposed the moratorium, arguing that there is scientific evidence that a complete ban on commercial whaling is no longer necessary to protect the viability of the species. Japan's manner of protesting the moratorium has been to engage in killings of whales for purposes of scientific research, which is permitted under an exception to the Whaling Convention. Under the practice of the Commission, this exception is interpreted narrowly; its guidelines in effect create a least restrictive means test, asking whether the research result could be achieved by non-lethal means, and also whether the sought research results are actually required for legitimate scientific purposes. When Japan's proposal for much expanded scientific research-based killings of whales was examined in the Scientific Committee of the IWC, the opinion of scientists was deeply divided as to whether the proposed activity would meet the guidelines for application of the exception, and the Committee was unable to endorse the Japanese proposal as consistent with the exception in Art. VIII of the Convention. Accordingly, the IWC promulgated a resolution stating that "gathering information on interactions between whales and prey species is not a critically important issue which justifies the killing of whales for research purposes" and that "information on stock structure, which may be relevant to management, be obtained using non-lethal means." Therefore, the Japanese government was urged to refrain from issuing the permits proposed under its program.

Japan, however, refused to comply with the resolution and proceeded to issue permits for the whaling in question. After expressing U.S. concern through subtler measures of diplomatic pressure, President Clinton, finally, in the fall, announced one sanction against Japan — a prohibition on Japanese fishing in certain U.S. waters — and the administration is currently considering trade sanctions pursuant to the Pelly Amendment. The Japanese government has made suggestions that it could commence a WTO action in the event that trade sanctions are imposed.

How would such a dispute be resolved under WTO law as interpreted in the *Turtles* case? There would be obviously no difficulty in characterizing the whales as exhaustible natural resources within the meaning of Art. XX(g). What, however, of the requirement that there be a rational relationship or connection between such sanctions and the protection of whales as an exhaustible natural resource? In the *Turtles* case, the AB found that such a rational relationship could exist where the trade measures were designed to "influence countries to adopt national regulatory programs" that would serve the protection

of the endangered species. However, it also seemed important to the AB that the U.S. measure was designed (although not applied) in such a manner as to permit entry into the United States of shrimp that were caught in a turtle-friendly manner, rather than being a prohibition on *all* shrimp from *jurisdictions* that catch shrimp in a turtle-unfriendly manner. From an observation along these lines, the AB concluded that "it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtles." Now here the AB does not actually say what *would* have been disproportionately wide in scope and reach. Given that the AB actually accepts that measures that operate through suasion of other governments in their policies have a rational relationship to the objective in question, it could not come to the



conclusion that a ban on all shrimp would necessarily be "disproportionately wide" in scope and reach, if such a ban could reasonably be viewed as appropriate to the kind of suasion at issue. Trade in whale meat and by-products is already banned by virtue of the Convention on International Trade in Endangered Species (CITES). Thus, the statement of the AB in *Turtles* leaves us wondering what additional measures *would* be disproportionately wide in scope and reach. What about import restrictions on Japanese automobiles? Or television sets? In the *Reformulated Gasoline* case, the AB severely criticized the panel below for interpreting the language "relating to" in Art. XX(g) in such a way as to assimilate the kind of fit required between a measure and objective in the case where the treaty language used the word "necessary" to the kind of fit required in the case of Art. XX(g). So we know from *Reformulated Gasoline* that the AB cannot have in mind here a test as strict as that of least-restrictive-means.

My sense is that what the AB is saying here is that the trade restricting scheme must be rationally coherent in light of the objective it purports to serve. Such rational coherence might be undermined, for example, if the scheme sanctioned Japan not only for killing whales but also other species not endangered or not protected as such under international law. Such coherence could also be undermined if the choice of imports to which the sanctions apply were chosen in such a way, not to maximize appropriate commercial pressure on Japan, but to maximize protective rents to domestic American producers for whom the products in question represent fierce import competition. Another example might be a case where the scheme provides for the sanctions to continue, say, for six months after the offending conduct has been discontinued. Such an extension could be regarded as punitive or protectionist or both, but not as well-tailored to the goal of inducing the other state to engage in the desired conservationist behavior.

Thus, the recommendations of the commerce secretary to the president should take into account the AB's concerns that measures under XX(g) not be disproportionately wide in scope and reach, by designing a scheme that avoids features not well-tailored or closely connected to the goal of stopping the offending whaling, or which would seem to allow other purposes or goals (protection of domestic industries) to intrude into and disrupt the means-ends coherence of the overall scheme. Discussion so far appears to revolve around restricting imports of Japanese fish products into the United States. To the extent that the dispute revolves around Japan's fisheries practices, and more importantly to the extent that these are not products that are in competition with domestic U.S. production, this seems a sensible approach. To the extent that products that are in competition with domestic U.S. production cannot be avoided for the sanctions to have the needed impact, the import restrictions could be balanced by export restrictions, say of pollock and salmon. Thus, any protective benefit to U.S. producers in the fisheries sector could be balanced by an at least equivalent burden to those producers (and the export restrictions would put further pressure on Japan, because these are products favored by Japanese consumers).

A different challenge posed by this dispute for WTO law is that Japan may possibly argue that the U.S. measures are not rationally related to conservation of exhaustible natural resources, because the Japanese practice at which they are targeted does not impair the conservation of those resources. Here, Japan would present the scientific evidence that it claims to be able to muster that certain whale populations have increased to the point where takings are not endangering. Could one really say that the "scientific" killings, even on the scale now engaged in by Japan, make a real difference as to whether the species are endangered or not?

But it only takes a moment's reflection on the "tragedy of the commons" to appreciate the speciousness of such a potential line of argument. The tragedy of the commons does not occur because an individual user, unconstrained, depletes the commons to the point of exhaustion — indeed an individual user might well have enough incentives in terms of future availability of the commons resource to itself, not to deplete to that extent. The tragedy occurs because the unconstrained, or uncoordinated exploitation of the commons by multiple users has the combined effect of exhausting the commons resource.

The real issue, therefore, is the relation of the conduct being sanctioned to the collective management of the commons resource in question with a view to avoidance of a tragedy of the commons. Refusing to abide by a resolution of the IWC that suggests its conduct falls outside of what is permitted under the multilateral regime for the management of whales as a global commons resource, Japan has effectively defected from a cooperative approach to the management of this commons resource. Where defections go unsanctioned, such regimes of multilateral cooperation may well unravel. In sanctioning such defection, the U.S. measures would be rationally related to preserving a multilateral regime for the conservation of whales.

The application of the U.S. measures would also have to be consistent with the "chapeau" of Art. XX. Here, it should be recalled that in the *Turtles* case, the AB found "unjustified discrimination" within the meaning of the "chapeau" because the U.S. scheme was applied differently to the complainants than to some other countries. One source of consternation in Japan about the possibility of United States trade sanctions is that the United States has not sanctioned Norway, which actually has an active commercial whaling industry, having reserved against the obligation to implement the IWC moratorium, as noted above. Despite its reservation, the IWC has also promulgated a resolution urging Norway to stop whaling. Is, then, the application of trade sanctions pursuant to the Pelly Amendment against Japan but not Norway "unjustified discrimination" within the meaning of the "chapeau"? I do not

believe so. The meaning of "unjustified" must be read in light of the Rio Convention objective of advancing multilateral, cooperative solutions to environmental commons problems, noted by the AB in *Turtles*. However objectionable Norway's behavior may be from the perspective of conservationist values and policies, Norway is not "cheating" or defecting from the relevant multilateral regime. Japan is using a "loophole" in the Convention that the IWC has determined that it is not entitled to use under the circumstances, and is thus threatening the coherence and integrity of that regime. Norway is operating under an objection or reservation to the IWC decision on a moratorium, which it is legally entitled to, under the terms of the treaty itself. I believe the United States is justified in taking into account this difference in the character of the two countries' behavior from the perspective of sustaining the legal and institutional framework for cooperative management of the exhaustible resource in question.

It is true that Japan questions, not without some justification, the premise of the current approach of the multilateral regime, i.e., whether a ban is any longer necessary for preservation of the species in question. The IWC itself, since 1994, has been developing an alternative approach, based upon catch limits set in light of best available information on the situation with regard to individual species. However, there are considerable uncertainties in estimates of whale populations. Therefore, in the absence of solving issues with respect to the reliability of data, it is understandable that the IWC has yet to implement this alternative approach; this could be said to reflect the precautionary principle, which the AB, in *Hormones*, viewed as an established principle of international environmental law, albeit not of international law more generally.

In any case, the bargaining costs of obtaining agreement among a range of state actors with divergent interests on specific catch limits could be sufficiently high that a moratorium might remain the most efficient rule, even if, in a world where bargaining costs were zero, the optimal conservation rule would rather consist of more specific limits on takings.

Robert L. Howse *came to Michigan from the Faculty of Law at the University of Toronto, where he was a faculty member from 1990 to 1999. An internationally recognized authority on international trade law, Professor Howse received his B.A. in philosophy and political science with high distinction, as well as an LL.B., with honors, from the University of Toronto. He also holds an LL.M. from the Harvard Law School and has traveled and studied Russian in the former Soviet Union. He has been a visiting professor at the University of Michigan Law School and at Harvard Law School, and taught in the Academy of European Law, European University Institute, Florence. He is a member of the faculty of the World Trade Institute, Bern, Switzerland, and an International Fellow of Canada's C.D. Howe Institute.*

Professor Howse is a frequent consultant and adviser to government agencies and international organizations such as the OECD, and has undertaken studies for, among others, the Ontario Law Reform Commission and the Law Commission of Canada.

While completing his LL.M., he served as a research assistant to Laurence Tribe on a project advising the Civic Forum of Czechoslovakia on constitutional reform, and as a research assistant to Paul Weiler on a project involving tort law reform and public policy. He has also held a variety of posts with the Canadian Department of External Affairs and the Canadian Embassy in Belgrade. Professor Howse serves on the editorial advisory boards of the European Journal of International Law *and of the Amsterdam-based journal,* Legal Issues in Economic Integration.

His research has concerned a wide range of issues in international law, and legal and political philosophy, but his emphasis has been on international trade and related regulatory issues. Professor Howse is the author, co-author, or editor of five books, including Trade and Transitions; Economic Union, Social Justice, and Constitutional Reform; The Regulation of International Trade, *first and second editions;* Yugoslavia the Former and Future; *and* The World Trading System; *and he is also the co-translator of Alexander Kojève's* Outline for a Phenomenology of Right. *He has also published many scholarly articles and book chapters on topics as disparate as NAFTA, whistleblowing, industrial policy, food inspection, income tax harmonization, and ethnic accommodation.*

Most recently, he is co-editor (with Kalypso Nicolaidis of Oxford and Harvard Universities) of The Federal Vision: Legitimacy and Levels of Governance in the EU and the U.S., *forthcoming from Oxford University Press in the summer of 2001.*