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I. INTRODUCTION

Because environmental legislation deals with a great number of topics — pollution, nature conservancy, energy, soil, mining, quality of life in a world where states and people move and trade — many problems can result from gaps in the national and international mechanisms for the protection of the environment. The environmental issue puts into question ordinary trade regulation in eastern as well as western countries, since there of course is no border for pollution.

Environmental legislation affects internationally traded goods in several respects. Generally, national environmental regulation decides whether to prohibit the use of certain substances, institute a licensing system, or charge polluters for the use of the environment. However, the problem is to know how goods linked with environmental issues can be internationally traded.

This article examines in succession a general framework of international commercial law, a special international regulation on trade of endangered species, and the difficulty of establishing a free market because of environmental exemptions from European market regulations.

II. GENERAL FRAMEWORK

National environmental regulations may amount to non-tariff barriers to international trade. The GATT agreement of 1947 gives some answers. The basic rule for GATT is nondiscrimination. The uncondi-

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tional most-favored-nation clause requires that the importing country avoid discrimination not only in the application of customs duties but also in the application of internal environmental regulations. Article IV of GATT requires that taxes and regulatory schemes be applied without discrimination to both domestically-produced goods and imported goods. Thus, national pollution taxes or national laws on emission control has to be applied equally to all products and to all companies, whether domestic or foreign.

There is only one exception to Article IV's nondiscrimination requirement. Article XX permits discrimination if it is necessary to protect human, animal, or plant life or health. However, such discrimination must not be trade restrictions in disguise. Article XX's exceptions are very much linked with today's environmental issues, even though the word "environment" is not used.

Non-tariff barriers appear also in indirect form. An example is the inspection required on imported goods and conducted generally by the importing country. In the case of automobiles, for instance, the imposed pollution emission standards can hinder trade.

Also there is the problem of an exporting country's environmental standards being more stringent than those of the importing country. If a country allows export of goods not in accordance with its own national environmental regulation — goods such as pesticides, for example — it has arguably provided an export subsidy. In this case, article VI of GATT would permit the importing country to levy a countervailing duty to neutralize the pollution control exemption.

As we see, international commercial trade would benefit if trade agreements took account of environmental problems. In particular, trade agreements should (1) address emission standards and (2) provide that standards verification be conducted by the exporting country.

In any event, the direction of the future should be to call upon nations exporting goods that produce chemical or toxic wastes, and nations with air pollution emission standards for automobiles or other machines, to close the gap between production standards and environmental restrictions. Reliance on GATT Article XX to protect the environment not only encourages commercial discrimination but also prevents uniform levels of protection. To reverse this trend, the International Center of Comparative Environmental Law has recommended international agreement at the UNEP and FAO level on pesticide toxicity regulation.

III. Trade of Endangered Species

There exists a good example of such multilateral cooperation in the international regulations governing trade of endangered species.

The Washington Convention on International Trade of Wild Fauna and Flora was adopted in 1973 and took effect in 1975. This convention has been ratified by ninety-one countries, more than have ratified any other environmental treaty.

The 1972 Stockholm Declaration (Declaration), a major worldwide environmental protection treaty, formalized international wildlife protection regulation. Principle 4 of the Declaration recognizes that flora and fauna are earth's resources, just as air, water, and land are. Further, it asserts man's special responsibility to safeguard and manage wisely the heritage of the wildlife and its habitat.

To halt the overexploitation of species that has resulted from international trade of certain animals and plants, the Declaration offers a system of protection based on a distinction between species listed in three separate appendices.

In the treaty, "trade" means export, re-export, import, and introduction from the sea. Appendix I of the Declaration includes all species threatened with extinction which are or may be affected by trade. GATT article III regulates trade of these species. Export requires a three-part process: (1) an export permit granted on the assurance of the exporting state's environmental authority that export will not adversely affect species survival; (2) a determination by the exporting state's management authority that the specimen was obtained according to law; and (3) verification that the importing country has granted an import permit. This system is the most rigorous in the world.

Appendix 2 of the Declaration includes those species which, although not endangered at present, may become so, unless their trade is strictly regulated. Appendix 3 of the Declaration includes species placed under special protection by a contracting party within its own jurisdiction. Export of these species is less broadly controlled than that of appendix 1 species: action by both exporting and importing states is not required. Nevertheless, control is strict. Appendix 2 and 3 species, for instance, can be traded only on grant and presentation of an export permit.

Even Appendix 1 control is not absolute. Under Articles VII and IV, animals included in Appendix 1 but held in captivity for commercial purposes, or plants artificially propagated for commercial purposes, shall be deemed to be species included in Appendix 2. This exemption removes these appendix 1 species from the broader control of Article III and puts them under only a single control by the exporting state. Because the protective purpose of the regulations may thus, in some measure, be circumvented, the Convention has set up a permanent international secretariat to organize a system of implementation and to study and modify the species lists.

IV. Environmental Exemptions to Trade Regulation

At the regional level, for example, Western Europe, and for all kinds of goods, the European Common Market organizes a free market without any discrimination or tariff barrier between member states. The Common Market has had an environmental program since 1973, with a great number of regulations and instructions. However, it is only since the December 3, 1985, modification of the treaty, the "Single European Act", that the environment became an official responsibility of the community. However, while there are many ways to reconcile environmental regulation within a state, governmental differences among the states remain a formidable bar to general harmonious regulation. Trade in goods with an environmental impact then continues to be a problem.

Article 30 of the Rome Treaty forbids all quantitative restrictions or "equivalent measures" between members states. Any national environmental regulation affecting import of goods, or any import control or license, should be considered equivalent to quantitative restriction and thus is disallowed by the Treaty and the Luxembourg Court of Justice.

However, there is one exemption to the nonquantitative restriction requirement. Article 36 allows some restriction of European trade between member states if it can be justified by such reasons of public necessity as order, security, or protection of the health or life of people, animals, or plants. Safeguarding the environment falls within the category of public necessity; environmental regulations restricting trade should therefore be allowed to stand.

The Court of Justice interprets the concept "quantitative restrictions" very broadly. Thus "equivalent measures" touches not only national regulations or administrative orders introducing a discrimination between national goods and imported goods but also national commercial regulations which do not discriminate but which introduce indirect obstacles to importation.

Equally broad interpretation of the Rome Treaty's article 36 exemption, however, would subvert the Treaty's purpose. These exemptions are not to be used to give member states exclusive exemptions for health or environment. Furthermore, the exemptions do not allow for customs taxes or equivalent taxes; however, they allow only for permit interdictions or limitations on import, export, or transit. Thus, for instance, though article 36 would allow health controls on imported goods, it would not allow levying a tax to pay for these controls.

The Court of Justice recognizes that even a strict interpretation of health-related import regulations allowed under article 36 gives to

member states a wide range of powers because the concept of health may differ from one state to another. In *Keldermann*,[1] the Court stated that it would allow discrimination only when applied for "imperative reasons."

Three recent environmental cases illustrate the Court's application of this standard. In *Sandoz*,[2] the Court held that a national regulation prohibiting the addition of vitamins to food was a justifiable health protection because of the scientific uncertainty regarding possible toxic effects of vitamins.

In *Albert Heijn*,[3] the Court allowed national regulation of those pesticides not regulated by European directive. The Court reasoned that under article 36 each member state is free to determine the methods of control necessary to safeguard life and health. Thus, even when a pesticide has been control-tested and accepted in one country of the community, another country may require new tests or different controls without violating Article 30.

The last example concerns the use of "hydrazide maleique," a pesticide used to preserve onions. In 1985 the Local Criminal Court of Dijon, France concluded that Article 36 allows French regulation prohibiting this pesticide for health reasons in both French onions and imported onions.[4] One year later, in 1986, the Court of Justice ratified this analysis, upholding a French regulation forbidding import of fruits and vegetables treated by a pesticide banned in France since 1968.[5]

The Court has allowed the import restriction on the ground that environmental protection is served by the evolution of scientific research on product toxicity. The General Counsel stated that because pesticides may significantly harm human and animal health and the environment in general (according to a 1976 EEC directive (76.825)), under Article 36 of the Treaty, each member state may determine its desired own level of protection and introduce discrimination on that basis. However, each state must re-examine its standards and import limitations in the light of new scientific research. That is, there should be continuous re-evaluation of the environmental risks on which exemptions are allowed.

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1. Criminal Proceedings Against Fabriekr oor Hoogwaardige Roedings produkten Kelderman BV, 1981 EUR. CT. REP. 1,3 (Feb. 18, 1981).

2. Officer van Justite v. Sandoz BV, 1983 EUR, CT. REP. 1,6 (July 14, 1983) (Prelim. Ruling).

3. Criminal Proceedings against Albert Heijn B.V., 1984 EUR. CT. REP. 4,6 (Sept. 19, 1984).

4. Ministère Public v. Xavier Mirepoix, 1986 EUR. CT. REP. 5 (Mar. 13, 1986).

5. *Id.* at 6.

Also, there is the export of chemical substances or of toxic wastes, regulated by the Common Market and the member states in the same way as pesticides. For instance, in 1983, after a last European toxic waste shipment turned up in France, the French government enacted strict legislation restricting import of dangerous and toxic wastes, justifying it on the basis of Article 36 of the Rome Treaty. In any event, protection of the environment is a compelling purpose. Always closely related to protection of health, protection of the environment gives each national administration many possibilities for restriction of foreign trade.

Thus, in a system promoting free circulation of goods, one is nevertheless witnessing the development of new restrictions and border controls. Because the EEC has not yet been able to reconcile the various national pollution standards, it has fallen back on trade regulation as a means of environmental protection. However, official competence established under the "Single European Act" should accelerate reconciliation of environmental laws among European states.

The needs of healthy trade and those of a healthy environment often conflict. International agreements appear necessary to regulate contradictions arising between the two sectors. As toxic wastes are now a true product with economic value, they must be subject to the same health and environmental regulations as any other product. The OCDE is preparing an international agreement limiting a country's toxic waste export destinations to only those countries guaranteeing their capacity to stock or eliminate the wastes without impact on the environment.

Finally, the author ventures to say that another aspect of trade, to the environment is transfrontier pollution. Because transfrontier pollution is illegal exportation of wastes (by air or water), it is a form of free waste disposal in practice. The polluter who sends his pollution to other countries gains a significant economic advantage while he is introducing a serious trade distortion.

However, since the trans-frontier pollution is a huge legal problem concerning eastern as well as western countries, it would need to be addressed in a separate conference.