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Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests

Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests

REVIEWED BY GEORGE W. PRING* AND GEOFFREY SWEITZER**

RUNGE, C. FORD, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS*; Council On Foreign Relations Books, New York (1994); (\$17.95); ISBN 0-87609-154-0; 146 pp. (pbk.).

Freedom in a commons brings ruin to all.

Garret Hardin¹

Freer Trade, Protected Environment is the latest book on the “hot” international law topic of the 1990s — the interrelation of trade and the environment. Does expanded free trade spell ruin or rescue for the global environment? Are economy and ecology incompatible? Is “sustainable trade” an oxymoron?

While much has already been written on this important debate,² given its very formative stage, this slim volume is a valuable contribution. It is the outgrowth of the “Study Group on Trade and the Environment” convened by the Council on Foreign Relations³ and comprised of “a wide cross section of interested professionals from both the

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1. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (Dec. 13, 1968), reprinted in ZYGMUNT PLATER, ROBERT H. ABRAMS & WILLIAM GOLDFARB, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 35 (1992).

2. Good examples cited by the author include the U.S. Office of Technology Assessment, World Bank, and University of Michigan studies. C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* xii (1994) [hereinafter *FREER TRADE, PROTECTED ENVIRONMENT*]. Others include Robert Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992); Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185 (1994); *Symposium: The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform*, 1 IND. J. OF GLOBAL LEGAL STUD. 273 (1994).

3. Self-described on the flyleaf as “a nonprofit and nonpartisan organization devoted to promoting improved understanding of international affairs . . . [which] does not take any position on questions of foreign policy and has no affiliation with, and receives no funding from, the United States government.”

environment and trade communities.⁴ However, as its author, codirector of the Council study and a University of Minnesota professor of agricultural and applied economics, makes clear at the outset, the book is “the author’s alone” — not a report or consensus document of the obviously highly conflicted participants.⁵

The goal of the book is to provide a “general analysis” of the insights of the year-long Council study and bridge the gap between the environmental and trade disciplines.⁶ The book is expressly aimed “for an audience of interested but nonexpert readers,”⁷ and succeeds in meeting that goal, unfortunately at some expense to its promised aim of writing at a “layperson” level.

Free traders or environmental advocates looking for a book supporting one side of the debate over the other will not find it here. Professor Runge refrains from taking sides on the value of free trade versus the environment or vice versa. Instead, he adopts the position that free trade and the environment are equally important and that a “doctrine of balance” is required.⁸ As with much other writing of this type, the book asks more questions than it answers.

The layout of *Freer Trade, Protected Environment* is simple and well suited for its aim of educating the layperson. Unfortunately, as will be discussed below, it assumes a fair amount of expertise, succeeding better at its goal of bridging the gap between two disciplines than its goal of providing a “general analysis.”

The book is divided into three broad sections. The first of these sections establishes a framework useful for those unfamiliar with the topic. Chapter 1 discusses why environmentalists and free trade experts are at odds; how and when this conflict arose; and how the camps are currently divided, not only between environmentalists and free-traders but also along “North-South” geopolitical lines. Chapter 2 discusses the various perspectives — legal, economic, and environmental — from which the debate can be analyzed.

In the second section, specific cases and models are examined to highlight some of the critical issues in the sustainable trade debate. Chapter 3 examines the fundamental question whether trade liberal-

4. FREER TRADE, PROTECTED ENVIRONMENT, *supra* note 2, at xi. The over 140 listed participants come from U.S. environmental groups, academia, U.S. government agencies, the World Bank, media, corporations, and the legal profession. *Id.* at 118-122.

5. *Id.* at xi; Professor Runge does credit his research assistants, François Ortalo-Magné and Philip Vande Kamp, with co-authorship. A further disclaimer is contained in a remarkably tepid and arms-length “Foreword” contributed by Michael S. Smith, Chairman of the study. *Id.* at vii-ix.

6. *Id.* at xii, 1-7.

7. *Id.* at 7.

8. *Id.*

ization will lead to increased damage to the environment. Using the European Union (EU) and North American Free Trade Agreement (NAFTA) as models, Professor Runge illustrates how the question defies broad generalization. As the EU experience shows, trade liberalization can not only harm the environment (e.g. the European transportation sector) but also enhance it (e.g. European agriculture).

Chapter 4 examines two classic trade-environment clashes, the *Tuna-Dolphin Dispute*⁹ and the *U.S.-Canada Fisheries Landing Dispute*.¹⁰ These two cases are used to illustrate the key issues in sustainable trade: extraterritorial application of domestic environmental laws, preemption of domestic laws by the General Agreement on Tariffs and Trade (GATT);¹¹ "product" vs. "process" distinctions in GATT exceptions; and trade protectionism disguised as environmental protection. Chapter 5 explores the conflict between international environmental instruments and international trade instruments, focusing on the Montreal Protocol¹² and its potentially serious conflicts with the GATT.

Chapter Six is the third section and heart of the book. Based on the lessons learned from the cases examined in section two, Professor Runge proposes possible solutions. This chapter is devoted almost exclusively to the merits of creating a World Environmental Organization (WEO) to act as a counterweight to the World Trade Organization (WTO) of the GATT.

Ironically, *Freer Trade, Protected Environment* attempts to harmonize environment and free trade by proposing impossible principles, followed by a remedy for their inevitable failure. Central to Professor Runge's thesis is the arguable proposition that environmental problems are not likely to be solved by trade measures alone and that a better solution involves a combination of both trade and environmental policies.¹³ To this end Professor Runge lays out "[f]our principles of

9. In 1991, Mexico successfully challenged the United States Marine Mammal Protection Act. See "United States - Restrictions on Imports of Tuna." GATT Doc. No. DS21/R Sept. 3, 1991. Although the GATT Council rendered a decision regarding the challenge, commonly referred to as *Tuna-Dolphin I*, the decision has no direct legal effect as neither Mexico nor the United States asked the GATT Council to adopt it. For an extensive analysis of the *Tuna-Dolphin I* case, see Robert Housman & Durwood Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. 10268 (1992).

10. See U.S.-Canada Binational Panel Final Report, 12 I.T.R.D. 1026-44 (Oct. 16, 1989).

11. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

12. The Montreal Protocol on Substances that Deplete the Ozone Layer, *adopted and opened for signature* Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987) (*entered into force* Jan. 1, 1989).

13. For a provocative, opposing viewpoint, urging the U.S. to "violate" GATT to protect the environment, see Mary Ellen O'Connell, *Using Trade to Enforce Interna-*

balanced trade and environmental policies."¹⁴ The four principles are as follows: (1) perceived trade problems should be addressed using trade policies, and environmental problems with environmental policies; (2) trade policies should aim to lower trade barriers while remaining environmentally neutral; (3) environmental policies should focus on environmental concerns while remaining trade neutral; and (4) national governments should be encouraged to harmonize their trade and environmental policies. Failure to adhere to these principles, in Runge's analysis, is the reason for the conflicts in the cases profiled in chapters 4 and 5.

Up to this point, Professor Runge appears to be widening the gap between trade and the environment, calling for their separation rather than attempting to draw them together. However, in chapter 6 he meets this concern and remains true to the book's stated goal by conceding that in reality observing the Four Principles is often impossible.¹⁵ While not always the case, trade or environmental policies and instruments will often impact each other intentionally or unintentionally.

Because of this, the author advocates an authoritative, new international institution to work beside the GATT's World Trade Organization, operating across national governments to ensure that policies imposing either type of burden are sufficiently tailored to minimize potential challenges, if not remove them entirely. This idea is sufficiently undeveloped in previous writings on this topic to make Professor Runge's fairly detailed analysis quite interesting and valuable. Where previous writings speak generally about amending the GATT¹⁶ or expanding the GATT waivers,¹⁷ *Freer Trade, Protected Environment* proposes an unusually detailed and noteworthy institutional fix. How realistic it is, given the resistance of the U.S. and other nations to international authorities, is a serious question, but not one that should deter us from considering its numerous advantages. Professor Runge's "WEO" should be particularly attractive to environmentalists, among others, as it completely rebuts the image that environmental concerns are secondary to economic ones, a problem with other proposed solutions based on tinkering within the GATT.

His cure, however, is not without its price. By focusing on his "four principles" of balanced trade and environmental policies, much of the current relationship between international trade law and interna-

tional Environmental Law: Implications for United States Law, 1 IND. J. OF GLOBAL LEGAL STUD. 273 (1994).

14. FREER TRADE, PROTECTED ENVIRONMENT, *supra* note 2, at 29.

15. Runge calls their failure "unavoidable." *Id.* at 98.

16. Kennedy, *supra* note 2; Eliza Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. 10599 (1991).

17. *Id.*

tional environmental law is left out. By boldly attempting to bridge the gap, the author fails to give the reader much sense of the nature of the gap itself. Unlike international trade law, which has been melded together over the years under comprehensive authorities like the GATT and NAFTA, international environmental law remains a loose patchwork of unrelated instruments and institutions.¹⁸ Certainly, few would argue the international environmental regime has the binding authority and international respect commanded by the GATT.

Further, Runge makes little mention of the historically secondary role that environmental problems have taken to economic concerns. Economic instruments, like the GATT, make little reference to environmental concerns; in contrast, the Stockholm and Rio Declarations and other environmental instruments focus quite centrally on economic concerns, to the extent that "environmental protection" is now subsumed into "sustainable development." What makes omitting this relationship all the more surprising is that Professor Runge's very proposal would give international environmental law unprecedented parity with the other, economic fields of international law.

Another criticism of the book is its omission of other valuable case studies. While the *Tuna-Dolphin Dispute*, the *U.S.-Canada Fisheries Landing* case, and the Montreal Protocol illustrate some of the current problems in the sustainable trade debate, other cases would provide depth and avenues for further investigation. For example, the German Packaging case¹⁹ and the Danish Bottle case²⁰ could provide valuable additional insights on extrajurisdictional application of domestic laws and the product-process distinction. Also, in addition to the Montreal Protocol, both CITIES²¹ and the Basel Convention²² harbor potentially unique conflicts with the GATT.

None of this is intended to say that *Freer Trade, Protected Environment* is not a valuable learning tool. However, it is perhaps better suited for a more knowledgeable audience than for the "interested but

18. For a glimpse of the volume and diversity of international environmental instruments, see George W. Pring & David L. Joeris, *Book Review: Four International Environmental Law Collections*, 4 COLO. J. OF INT'L ENVTL L. & POL. 422 (1993); for the latest of such collections, see LAXSHMAN GURUSWAMY, GOEFFREY PALMER & BURNS H. WESTON, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENT AND WORLD ORDER (1994).

19. For a discussion of the German Packaging Ordinance, see Ray V. Hartwell & Lucas Bergkamp, *Environmental Trade Barriers and International Competitiveness*, 24 ENVTL. L. REP. 10109 (1994).

20. *Commission v. Denmark*, Case 302/86, 1988 E.C.R. 4607 (Judgement of Sept. 20, 1988).

21. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

22. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 27, 1989, U.N. Doc. UNEP/I.G. 80/3 (1989), *reprinted in* 28 I.L.M. 657 (*entered into force* May 21, 1992).

nonexpert reader." Certainly, a layperson would come away with a basic understanding of the important issues in the debate. However, without an understanding of international environmental law, such a reader could miss the bigger picture and be misled into thinking it has developed further than in truth it has. But, for those already fortified with at least the basics of international environmental law, *Freer Trade, Protected Environment* makes a valuable contribution to understanding and harmonizing the economic-environmental commons that we all must protect or ruin.