COMMENTARY ON PROFESSOR TARLOCK'S PAPER: THE INFLUENCE OF INTERNATIONAL ENVIRONMENTAL LAW ON UNITED STATES POLLUTION CONTROL LAW

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&

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INTRODUCTION

Good afternoon and Aloha! We are pleased to have the opportunity to comment on Professor Tarlock's paper, *The Influence of International Environmental Law on United States Pollution Control Law*.[1] We represent "crossovers" between domestic and international environmental law, with Professor Jarman's specialty in domestic law and Professor McLaughlin's in international law. Therefore, most of Professor Jarman's comments will focus on the roles that states within the United States have played in the development and implementation of international environmental law. Professor McLaughlin's commentary will cover international trade issues.

In his paper, Professor Tarlock examined the influence of international law on three areas of domestic environmental law: (1) transboundary air pollution between the United States and Canada under the Clean Air Act;[2] (2) restrictions imposed by the World Trade Organization (WTO)[3] and the North American Free Trade Agreement (NAFTA)[4] on U.S. pollution law; and (3) application of the National Environmental Policy Act (NEPA)[5] to extraterritorial pollution prevention activities. He used the U.S.-Canada transboundary pollution case study to illustrate his theory that, although international law is part of United States

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1. A. Dan Tarlock, *The Influence of International Environmental Law on United States Pollution Control Law*, 21 VT. L. REV. 759 (1997).

2. Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).

3. Agreement Establishing the World Trade Organization, *opened for signature* April 15, 1994, pt. II of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1140 (1994) [hereinafter WTO].

4. North American Free Trade Agreement, Dec. 8-17, 1992, Can-Mex.-U.S., 32 I.L.M. 389 & 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

5. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1988).

Professor Jarman discusses a recent lawsuit in Washington State dealing with the issue of preemption of U.S. state laws by international treaties to supplement Professor Tarlock's points. In addition, she looks at a "success story:" a case where one state, Texas, effectively interposed itself in the international legal arena to implement the International Convention for the Prevention of Pollution from Ships (MARPOL)[6] in a way that served the needs of both the United States national government, Caribbean nations, and the United States Gulf States, Texas in particular. In his commentary, Professor McLaughlin examines the international trade issues and suggests a reevaluation of United States unilateral trade restrictions as a means of protecting marine living resources.

I. OVERVIEW

Professor Tarlock raises key points that are important when analyzing the synergism between United States and international environmental law. First, United States environmental law has often served as the international standard for the emerging regime of international environmental law. Conversely, the United States government has used weak domestic law to water down global treaties. Second, many domestic issues are linked to international issues, but the international dimension is often ignored. Because international environmental norms can be used to invalidate United States laws and regulations, the United States and state governments are on risky legal ground when they ignore or purposefully flout international law. Third, international law may impose duties on the United States beyond those adopted by Congress. As a corollary, domestic law that at one time conformed to international law can be weakened by congressional amendment, thereby taking the United States out of compliance. Fourth, Professor Tarlock, in his Clean Air Act example, acknowledges congressional recognition that state governments have a role to play in implementing international law.

Given the above, it is important to consider actions taken by state governments when we attempt to analyze how successfully the United States has harmonized domestic environmental law with international law. This issue was raised in earlier sessions and touched upon by Professor Tarlock in his paper. In the next two sections we will discuss it in the

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6. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, S. Treaty Doc. Nos. 95-1, Executive E, 100-3, 12 I.L.M. 1319, *as modified by* the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, *opened for signature* June 1, 1978, 17 I.L.M. 546 [hereinafter all references to the Convention, the Protocol and the Annexes will be cited as MARPOL].

context of pollution control through the use of two examples: (1) a recent lawsuit initiated by tanker companies challenging the authority of the State of Washington to impose operation, management, and training regulations that are stricter than federal and international standards;[7] and (2) Texas's role in the implementation of "specially protected areas" under MARPOL.[8]

II. INTERTANKO V. WASHINGTON[9]

Professor Tarlock's analysis of a transboundary air pollution dispute between Canada and the United States represents a situation where international standards are used to strengthen domestic law. The converse can also occur, such as when Washington State implemented an inspection program for oil tankers that is stricter than international norms used by the Coast Guard.

The purpose of Washington's tanker inspection program is to prevent oil spills in Washington's waters, particularly Puget Sound. Data gathered by the state demonstrated that the most effective way to prevent tanker spills is through enforcement of operational, management, and personnel training standards. After collecting information from the best tanker owners around the world, the state designed standards based upon the best achievable practices (BAP)—in other words, state of the art in the industry.[10] One of the groups from which they solicited information was the International Association of Independent Tanker Owners (Intertanko), a tanker association from Norway who instituted the lawsuit in federal district court in Washington State.[11]

Interestingly, Intertanko did not challenge the standards themselves. Rather, they disputed Washington's ability to set and enforce standards that exceed international law standards and the standards used by the United States Coast Guard. They cited four international agreements and the Foreign Affairs, Supremacy, and Commerce Clauses of the United States

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7. *See* Intertanko v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996).

8. MARPOL, *supra* note 6.

9. The information for this section was taken from telephone interviews with Nina Carter, staff member at the Washington Office of Marine Safety (May 6, 1996), and Bill Collins at the Solicitor-General's office of the Washington Attorney-General. This information is also derived from *Intertanko*, 947 F. Supp. 1484 (W.D. Wash. 1996).

10. Use of standards such as BAP is not uncommon in federal environmental law. *See, e.g.*, Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1988); *see also generally* Clean Air Act, 42 U.S.C. §§ 7401-7642.

11. *See Intertanko*, 947 F. Supp. at 1488. Interestingly, the U.S. Coast Guard intervened on behalf of Intertanko.

Constitution to support their position. The international agreements are: the International Convention for Safety of Life at Sea (SDLAS);[12] MARPOL;[13] the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW);[14] and the International Regulations for Preventing Collisions at Sea (COLREGS).[15] Essentially, Intertanko made a preemption or "federal occupation of the field" argument. Washington asserted in its defense that, under the Oil Pollution Act of 1990 (OPA),[16] Congress authorized states to implement programs more stringent than federal or international standards. Section 2718(c) of OPA states that "nothing in this chapter . . . shall in any way affect, or be construed to affect, the authority of . . . any State thereof . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil."[17] Washington argued that this provision, combined with the uncontested fact that their regulations are not in direct conflict with the federal rules, overcomes Intertanko's preemption argument.

Three non-profit environmental groups, the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates, intervened on behalf of the State of Washington. Addressing the international law issue, they argued that the allegedly applicable conventional law is advisory only and not uniformly applied. They also asserted that international treaties are not binding on states, absent affirmative congressional action. Congressional action in this instance, they contended, is OPA, which affirmatively permits states to regulate more strictly.

On November 18, 1996, Federal District Court Judge John C. Coughenour granted summary judgement to the State of Washington on all issues. As of early December, no appeal had been filed by Intertanko.

Key factors in the Intertanko case were the savings clause in OPA and the court's characterization of the challenged standards as environmental regulation rather than shipping regulation.[18] The court's interpretations of OPA's savings clause was critical to its conclusion that Congress did not

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12. International Convention for the Safety of Life at Sea, June 17, 1960, T.I.A.S. No. 5780, 26 U.S.T. 185 (entered into force May 26, 1965).

13. MARPOL, *supra* note 6.

14. International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, July 7, 1978, C.T.I.A. No. 7624 (entered into force April 28, 1984).

15. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, T.I.A.S. No. 8587, 28 U.S.T. 3459 (entered into force July 15, 1977).

16. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (1995).

17. *Id.* § 2718(c).

18. *Intertanko*, 947 F. Supp. at 1491-93.

intend for the states to be limited by international treaty law.[19] The court interpreted similar cases, decided by the United States Supreme Court[20] and the Ninth Circuit,[21] as establishing differing standards, based upon the subject matter being regulated, for determining field preemption.[22] State regulation of tanker design and construction is impliedly preempted; state regulation of water pollution or tanker operations arising from the particular characteristics of a local ecosystem are not subject to such implied preemption.[23]

This case represents a strong victory for states who seek to give more stringent protection to valuable natural resources than is provided under international law. It also provides an important lesson for states: work diligently to include a savings clause in any federal legislation implementing international treaties pertaining to environmental protection if such a law could impact resources within your jurisdiction.

III. TEXAS AND MARPOL[24]

In the transboundary air pollution case discussed by Professor Tarlock, certain states, fearing negative economic repercussions, used their political influence to delay implementation of stricter sulphur dioxide standards. However, the State of Texas has done the opposite. It has used MARPOL to deal with a local problem created by international actors. Annex V of MARPOL, which regulates shipboard dumping of garbage at sea, prohibits the dumping of plastics anywhere in the ocean, but allows dumping of other wastes under certain circumstances.[25] Regulation 5 of Annex V prohibits dumping of any garbage in ocean

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19. *See id.* at 1491-93. The court noted that Intertanko's argument that the state regulation was inconsistent with international law was undercut by Coast Guard regulations that impose requirements in addition to those mandated by international law. *See id.* at 1497.

20. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

21. *See* Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984).

22. *See Intertanko*, 947 F. Supp. at 1493-95.

23. *See id.* at 1495.

24. This information was taken from a telephone interview with Miranda Wecker, former associate director of the Council on Ocean Law and member of the National Academy of Sciences Panel on Marine Debris (May 2, 1996).

25. *See* MARPOL, *supra* note 6, at Annex V, Reg. 1(1). Regulation 1 of Annex V defines garbage to include "all kinds of victual, domestic and operational waste excluding fresh fish and parts thereof, generated during the normal operation of the ship and liable to be disposed of continuously or periodically except those substances which are defined or listed in other Annexes to the present Convention." *Id.*

waters designated as "special areas."[26] This ban takes effect only after adequate portside reception facilities are made available by parties whose coastlines border a special area.[27]

Frustrated by a growing marine debris problem on its beaches and the escalating costs to maintain clean beaches, the Texas Land Commissioner decided to seek designation of the Gulf of Mexico as a "special area" under MARPOL. He convinced Texas's congressional delegation to get the state a seat on the federal negotiating team and to persuade the executive branch to include the Gulf of Mexico's designation as a high priority item in the negotiations. Once on the team, the delegate played a key role in having the Gulf included in what became the "Caribbean special area." In addition, he was instrumental in securing a grant from the World Bank for Caribbean nations to support the construction of reception facilities so that the ban could go into effect.

In this case, Texas, rather than ignoring international law, succeeded in using it as a powerful tool to help solve a serious pollution problem.

IV. TRADE AND THE ENVIRONMENT

Professor Tarlock makes several interesting and cogent observations regarding the issue of restrictions on domestic environmental laws as a consequence of United States free trade obligations. He validly points out that United States environmental laws are subject to challenge and review under the dispute settlement provisions of the newly created WTO[28] and NAFTA.[29] As an example, he discusses the well-known *Tuna/Dolphin I* and *Tuna/Dolphin II* dispute settlement decisions handed down under the auspices of GATT in 1991 and 1994.[30] These decisions found that the United States violated GATT when it embargoed tuna imports from nations

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26. *See id.* at Annex V, Reg. 1(3). A "special area" is defined in Regulation 1 as "a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by garbage is required." *Id.*

27. *See id.* at Annex V, Reg. 5(4).

28. WTO, *supra* note 3, at Annex 2, 33 I.L.M. at 1226. The WTO was established to supersede the institutionally amorphous General Agreement on Tariffs and Trade (GATT). *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, 55 U.N.T.S. 187 [hereinafter GATT]. The WTO was formally established on January 1, 1995.

29. NAFTA, *supra* note 4.

30. GATT Dispute Settlement Panel, United States Restrictions on Imports of Tuna (Mexico v. U.S.), GATT Doc. D/S21/R (Aug. 16, 1991), *reprinted at* 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I*]; GATT Dispute Settlement Panel, United States Restrictions on Imports of Tuna, GATT Doc. DS29/R (June 16, 1994), *reprinted at* 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II*].

that failed to comply with United States-mandated dolphin protection standards during tuna fishing operations in the Eastern Tropical Pacific. Among other findings, the panels criticized the United States for imposing embargoes against other nations "so as to force them to change their policies with respect to persons or things within their own jurisdiction."[31]

According to Professor Tarlock, the current WTO/GATT trade regime frustrates the United States' efforts to improve global environmental quality as well as its ability to improve or maintain domestic environmental quality.[32] He argues in favor of environmentally-motivated trade restrictions as long as they are not disguised protectionist measures.[33] Because nations have little or no incentive to internalize the costs of global environmental degradation, he supports the use of "carrots" (such as subsidies and technology transfer arrangements) and "sticks" (including unilateral trade embargoes).

Although a combination of carrots and sticks is probably the most effective method of protecting the global commons, Professor Tarlock underestimates the growing ability of nations targeted by United States trade restrictions to receive judicial redress. Until recently, nations subject to United States embargoes were unable to seek an enforceable adjudicatory remedy. For example, a challenge before the International Court of Justice or some other arbitral tribunal was not a viable option because it required consent from all of the contending parties. Moreover, a challenge under the dispute settlement provisions of GATT was rarely enforceable.

This situation has significantly changed as a result of the establishment of the WTO on January 1, 1995. The newly created WTO dispute settlement regime is much more legalistic and less prone to political manipulation than was the old GATT regime.[34] Most importantly, parties

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31. *Tuna/Dolphin II*, *supra* note 30, at para. 5.24.

32. Professor Tarlock uses a recent ruling by a WTO dispute panel that found regulations promulgated under the U.S. Clean Air Act discriminated against Brazilian and Venezuelan oil refiners as an example of how WTO/GATT can weaken domestic environmental laws. *See* Tarlock, *supra* note 1, at 780-81 (discussing 35 I.L.M. 603 (1996)). For an analysis of the ruling, see Maury D. Shenk, *United States-Standards for Reformulated and Conventional Gasoline*, 90 AM. J. INT'L L. 669 (1996).

33. Professor Tarlock credits much of his argument to an analysis by Professor Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

34. The revised dispute settlement provisions may be found in Annex II of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* 33 I.L.M. 1226 (1994). For a good explanation of the changes between the old GATT rules and new WTO rules, see Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994).

to a dispute no longer have the ability to veto dispute settlement decisions. Rather than requiring a consensus of the parties to adopt a panel decision, as was the case under GATT, the new rules require consensus not to adopt a panel decision. In other words, in order for the United States to block a WTO dispute panel decision, it will have the almost impossible task of convincing all of the parties to the WTO, including the winning party, not to approve the decision.

The serious impact of the new WTO system is easily illustrated by comparing the United States' reactions to the two *Tuna/Dolphin* holdings decided under the old GATT rules versus a recent ruling by a WTO dispute panel that found against the United States on an issue concerning the regulation of imported reformulated gasoline. Despite two unambiguous *Tuna/Dolphin* GATT panel rulings calling for the lifting of the tuna embargo, the United States has kept the embargo in place by simply blocking formal adoption of the GATT panel report.[35] In contrast, the Clinton administration has agreed to implement the WTO ruling in favor of Brazil and Venezuela and to change its domestic environmental regulations concerning imported gasoline. The Administration was forced to implement the ruling or pay compensation because it was unable to convince all of the WTO member states to reject the ruling.

In the future, it is increasingly likely that United States embargoes for marine conservation purposes will be challenged in the WTO and other international adjudicatory bodies.[36] United States Public Law 101-162, which prohibits shrimp imports from countries that do not use sea turtle excluder devices (TEDs), provides a good case study of this trend.[37] After being hit with shrimp embargoes, four Asian nations (India, Malaysia, Pakistan, and Thailand) filed a formal complaint in the WTO on October 8, 1996, seeking consultations with the United States. If consultations fail,

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35. A 1996 congressional bill implementing the so-called Panama Declaration between the United States and a number of Latin American nations, which would have lifted the tuna embargo, was recently defeated in the U.S. Senate. Consequently, the embargo remains in place five years after the first GATT Tuna/Dolphin decision. *See* Dori Meinert, *Senate Tuna Bill Blocked by Boxer*, SAN DIEGO UNION TRIBUNE, Oct. 4, 1996, at C1.

36. For example, if the U.S. were to become a party, U.S. trade restrictions may be subject to challenge under the United Nations Convention on the Law of the Sea. *See* U.N. Doc. A/Conf. 62/122 (Dec. 10, 1982), *reprinted in* 21 I.L.M. 1261 (1992); *see also* Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1 (1994).

37. *See* Department of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, § 609, 16 U.S.C. § 1537 note (Conservation of Sea Turtles; Importation of Shrimp) (1994). The most recent guidelines for implementing the Act may be found at 61 Fed. Reg. 17,342 (1996).

a full dispute panel will convene.[38] Should a WTO dispute panel hear the claim, there is a strong possibility that the United States will again be found in violation of the trade agreement. Moreover, as in the reformulated gasoline decision, a WTO ruling may require the United States to change its domestic environmental laws or pay compensatory damages.

In light of the changes brought about by the dispute settlement provisions in the WTO and other international environmental and trade agreements, it is time for the United States to reevaluate its use of unilateral trade restrictions as a method of protecting marine living resources.[39] The United States needs to face the fact that its embargoes may not be as effective as in the past because targeted nations now have access to binding adjudicatory forums never before available. In response, the United States needs to be more willing to compromise with other nations and to place more emphasis on negotiating bilateral, regional, and global conservation treaties rather than relying so heavily on unilateral trade restrictions. Professor Tarlock correctly asserts that there is still a place for sticks in the United States arsenal. However, because these sticks are getting smaller every year, the United States must be prepared to find a more balanced and thoughtful method of using them.

CONCLUSION

In conclusion, we commend Professor Tarlock on his excellent presentation of some of the critical issues raised in the interaction between international environmental law and United States federal and state pollution control law. As with most areas of the law, there are few bright lines to guide the lawyers or their clients. For scholars, on the other hand, the area is ripe for thoughtful and critical commentary. We hope that more conferences such as this one will be held in the future to foster such discussion and commentary.

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38. *See* Robert Evans, *Asian States Launch WTO Shrimp Case Against U.S.*, THE REUTER BUSINESS REPORT, Oct. 8, 1996.

39. There is some hope that the WTO will become more environmentally friendly as a result of future work by the Committee on Trade and Environment. *See* Trade and Environment, Ministerial Decision of 14 April 1994; *see also* WTO, *supra* note 3, at 1267-69. To date, very few tangible accomplishments have emerged from the Trade and Environment Committee.