

A Few Under-Utilized Elements of Conservation Law

Conventions

As a general rule the United States has for the past dozen years been inactive in implementing international conservation treaties due to opposition in Congress or the White House. This can change with some help.

Convention on Biological Diversity

The nations that are party to the CBD are required by it to go through the processes it established, and make their decisions under those articles, in order to be said to be in compliance. One mandatory step, among others that the nations need only “promote” is the duty to restore degraded ecosystems.

Article 3 enshrines in black letter law, rather than customary law only, the duty of each nation not to harm the biological diversity of any another nation. This is referred to as the rule in the Trail Smelter arbitration, which held in essence that Canada should not allow smoke from the Trail Smelter to pollute Buffalo, New York. This has import of course not only for such things as Mercury fall-out from coal fired power plants but for other pollution or excess harvests or invasive species discharges as well, depending on whether any later or more specific agreements limit duties of the offending nation.

Article 14 requires environmental assessments by Governments for their projects and alternatives to those projects. Brazil and German delegates said in the negotiations from the floor in Nairobi that they would interpret that requirement to apply to all major projects within their jurisdictions and not just to government projects, while the US and some others argued for the more limited interpretation.

Article 14.2 states that the parties will address the question of damage payments for harm done to biological diversity of other nations. This complements Article 3’s duty not to harm, but the system of damage payments has not yet been resolved. This means that *ad hoc* damages may be sought and remain a liability for those entities depleting biodiversity that is shared by more than one nation.

Convention on International Trade in Endangered Species

Most are aware of the prohibition on Commercial Trade in species listed on Appendix I which has been somewhat successful though illegal tiger, rhino, and ivory trade continues at a reduced level. Species on Appendix II are not to be traded if the authorities of the exporting country determine that the species is not fulfilling its role in its ecosystem throughout its range or that the source of the supply was illegal. These are test that are too rarely met with any degree of scientific support in practice, thus it creates a potential liability for those relying on current lax enforcement that their current legal supply may be shown to be illegal.

Especially under-appreciated is the Appendix III listing process. Appendix III requires no vote of the parties, but simply the listing by one range state of a species it regulates. It

requires in turn export permits and certificates of origin from the listing country and other range states respectively. These make tracking much easier in theory at least, and importation of at least raw products whose sources are indeterminate, essentially illegal. While the wording of CITES does not limit listing nations to range states, resolutions and practice do so far. Numerous species have been listed by Mexico and other nations but many over-harvested species of trees, terrestrial animals and fish are not yet listed.

Endangered Species Act

Very few foreign species have been listed for many years despite their precipitous declines. This denies them protection from trade and potential protection from US subsidized habitat destruction.

Section 7 of the ESA, which has effectively constrained many Federally-funded or permitted actions that have an impact on endangered and threatened species, has not been applied since 1986 to US-listed species (over 525 occurring entirely or largely overseas) that face significant harm as a result of US funded or permitted actions. The 1986 regulation was challenged in court and the opinions on the law agreed that Section 7 applied but the regulation was not reversed as the cases were eventually reversed on procedural grounds --a for lack of a plane ticket to Sri Lanka in *Defenders v. Lujan*, (announced in June 1992, the same day President Bush declined to sign the CBD in Rio), or dropped as moot, when the US Bureau of Reclamation and Army Corps of Engineers and other agencies cancelled their participation in building the Three Gorges Dam in China.

WTO Appellate Decision in the Shrimp-Sea Turtle Case and Article XX (g) of GATT

This decision held that the US embargo on shrimp caught without turtle excluder devices is permissible in order to save exhaustible natural resources if the regulations give adequate and fair notice to all fleets, which is similar to the later tuna-dolphin decisions (as opposed to the initial tuna-dolphin decisions).

Tariffs and Embargoes

The Shrimp appellate decision of the WTO appellate Tribunal of the early 1990s confirms that nations can apply non-tariff barriers (embargoes or qualitative limits). This remains as stated in Article XX (g) and (b), the latter being for public health and safety.

The implication of the legality of embargoes is that equitably imposed taxes and tariffs are also acceptable tools for the pursuit of these ends. Thus, a nation might impose tariffs designed to internalize costs that are avoided by producers when they skip conservation methods that are required of similar producers in the importing state or when the exporter is subsidized in ways that make less dangerous products or those taking a lesser toll on the environment unable to compete.

Importing states might offer to provide loans and technical assistance to exporting developing countries funded by the tariffs that would help bring them up to the required standards of care. After a short period, if the aid were not accepted or successful, then the tariff could be replaced by an embargo as

provided for in article XX. The Doha round may address these questions, but in the meantime, states could proceed with an eye on the different “boxes” of tariffs targeted for reduction.

The Fisherman’s Protective Act and the Pelly and Driftnet Act (Studds’) Amendments to it created a range of trade sanctions in addition to the dispute resolution mechanisms in the treaties themselves, against nations whose nationals are diminishing the effectiveness of an international conservation agreement. The Pelly amendment creates a two-step process. It is usually triggered by a petition presenting evidence of such diminishment or violation. If validated by the appropriate Secretary (e.g., Commerce for driftnet violations) then the Secretary must certify as much to the President who is then presented with a range of trade sanctions, which in many cases are authorized, but not required, depending on the situation.

Title 13 of the International Financial Institutions Act

Title 13 is the primary environmental review process required of US agencies when considering proposals of the multilateral development banks (MDBs). The process is supposed to include a system for sharing information derived through it with other countries and with the public in a timely manner, and not just relying on the Banks’ own environmental assessments. The Pelosi amendment (22 USC 262m-7) also requires assessments of any proposal that will have a significant impact on the human environment. The information sharing system does not yet exist and the Pelosi process has been limited to projects, and largely those categorized by the Banks’ as requiring them rather than the full set that will, as many are not classified as they would be under normal modern assessment practice. (see, www.usaid.gov/pubs/mdb). The Pelosi amendment was updated somewhat within the past two years but is being reviewed again informally by both Houses.

Sections 1504 and 1505 of the International Financial Institutions Act, setting accountability, transparency, audit, law enforcement and policy enforcement goals to be sought by the US Government. Among the many opportunities opened by this amendment are the chance to require loans and country assistance strategies to set out in detail the resources and conditions necessary to ensure that conservation treaties applicable to the undertaking and borrower are obeyed. While the wording is broad conservation groups and agencies have a duty to define the most appropriate application of it in the context of different types of project, policy and structural adjustment and other loans and actions.