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It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty

By Terry L. Anderson and J. Bishop Grewell*

The world is shrinking. Increased interactions between nations, especially in the areas of trade and commerce, have led to an interwoven global community. At the same time, some actors on the world stage have confused this increased globalization as necessitating increased international government action. This is prevalent in environmental policy. Before 1970, only thirty-seven environmental treaties were in force. After 1970, an additional 104 were created.¹

Environmental concerns have not only moved onto the radar screen in the international policy sphere, they have become a dominant force. This became evident in 1999 when a group of environmental protestors joined with union activists and self-proclaimed anarchists to disrupt the Seattle meeting of the World Trade Organization ("WTO"), an international body that promotes free trade by settling trade disputes between countries.

The protestors objected to decisions by the WTO and its predecessor, the General Agreement on Tariffs and Trade ("GATT"), that treated environmental regulations as trade barriers. Under GATT and the WTO, governments are not allowed to ban imports based on their means of production and processing. So, for example, GATT panels ruled that US regulations barring imports of tuna not caught in a dolphin-safe manner were protectionist. After the initial ruling in 1991, environmentalists circulated posters in Paris, Tokyo, and Washington showing the

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monster “Gattzilla” smashing the US capitol, spilling DDT from one hand, and squeezing a dolphin to death with the other.¹

The rioting in Seattle and the 2001 protests in Quebec City by members of the environmental community were attempts to shape international debate and to bend the rules of international law to their liking. The changes they have brought about—and continue to promote—are the subject of this paper.

These efforts have serious impacts. First, there is less trade, which raises international tension. Second, economic growth suffers as a result and, in turn, weakens the ability to protect and restore long-term environmental health. Third, nations' sovereignty and the accountability it provides are compromised. Finally, regulations become more centralized, creating a nightmare of monitoring and enforcement problems when applied to diverse regions and peoples.

Fortunately, there is an option to this “greening” of foreign policy, an option called free market environmentalism.¹ Those adopting this approach to environmental issues recognize that the best way to improve the international environment is to act out the adage, “think globally, act locally.” Because different parts of the world require different solutions to environmental problems, decentralized policies that acknowledge national sovereignty are preferable to multinational “one size doesn’t fit anyone” solutions. Under free market environmentalism, only problems that cross the borders of countries become international issues.

This paper examines how foreign policy involving trade, defense, diplomacy, and international law is being “greened” at home and abroad as environmental groups pressure government agencies to give environmental concerns greater weight. It argues that these changes represent a fundamental shift in US foreign policy and international relations. It identifies problems that arise from these revisions and explains how free market environmentalism offers a sound alternative that will lead to better environmental protection through freer trade, increased wealth, and decentralization.

I. GREENER POLICIES AT DEFENSE AND STATE⁴

Between 1984 and 1994, Department of Defense (“DOD”) spending on environmental programs such as the conservation of resources on military bases and

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2. Economists increasingly accept the benefits of markets in protecting the environment. In academic circles, this framework for understanding environmental problems is sometimes known as the New Resource Economics. For a general discussion, see Terry L. Anderson, The New Resource Economics: Old Ideas and New Applications, 64 Am J Agr Econ 928 (1982).
3. For a general discussion on the greening of international bodies including the United Nations, World Bank, International Monetary Fund (“IMF”), and International Criminal Court, see Schaefer, Green Creep at 41 (cited in note 1).
environmental research jumped from $250 million to $5 billion. That twenty-fold increase accounted for nearly two percent of the department's annual budget. While the DOD should pay for environmental harm that it causes, that is not the primary place it is spending these funds. In 1999, the military devoted only $51 million of the Pentagon's several billion dollar environmental budget to cleaning up training ranges while the Defense Science Board, a Pentagon advisory group, estimated that it would cost $15 billion to decontaminate just five percent of the millions of US acres that have been employed as bombing and target ranges. Instead of environmental cleanup, the DOD has been required to spend funds on items such as changing military operations and procedures on the twenty-five million acres under its control in order to protect endangered species.

As the idea of a "greener" DOD began to germinate in the early 1990s, the Department created a new position, the Deputy Assistant Secretary of Defense, to deal solely with environmental issues. At President Clinton's order in 1993, the position was elevated to the status of a Deputy Under Secretary of Defense. Clinton further modified the department's mission when his preface to the 1997 National Security Strategy listed countering environmental damage among the "core national security objectives." Much of the DOD's budgetary shift away from defense and toward environmental protection can be attributed to the relaxed atmosphere at the end of the Cold War. Though it makes sense to decrease expenditures on defense in light of a reduced threat, it does not follow that more should be spent on environmental protection or that the DOD should be doing it.

In fact, Congress tried to temper the shift in DOD objectives. In a roll call vote in the House on May 20, 1998, the House passed by 420–1 an amendment to the Defense Authorization Act for Fiscal Year 1999 stating that "no provision of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, or any regulation issued pursuant to such protocol, shall restrict the procurement, training, or operation and maintenance of the United States Armed Forces." Short of a serious new security threat, however, it seems unlikely that environmentalists will lose their foothold at the DOD.

The State Department is also focusing more on environmental issues at the expense of traditional diplomatic functions. On Earth Day 1997, the State Department released its initial report on the environment and foreign policy called

5. Id at 61.
7. Schaefer, Green Creep at 61 (cited in note 1).
8. Id at 62.
9. Id at 61–62.
Environmental Diplomacy: The Environment and U.S. Foreign Policy, Challenges for the Planet. This report provides the strategy for advancing global environmental protection through diplomatic efforts, international organizations, and multilateral treaties.

Numerous official State Department pronouncements have featured environmental goals. In a State Department document entitled the United States Strategic Plan for International Affairs, “global issues” are listed alongside national security as primary goals. Two of President Clinton’s three global issues are a sustainable environment and a stabilized world population.

John Cohrssen lists environmental diplomacy changes proposed by then-Secretary of State Madeleine Albright. These include “appointment of an Under Secretary for Global Affairs; requests to embassies and bureaus to develop regional environmental activities; ‘new’ regional environmental hubs at five embassies, making environmental cooperation with other countries important; the pursuit of environmental priorities for climate change, toxic chemicals, species extinction, deforestation, and marine degradation; and advances in several treaty areas.” Schaefer concludes that the State Department “has morphed from a representative of US foreign policy priorities in international treaty negotiations to an advocate of international environmental treaties.” To the extent that environmental issues threaten national security, this new emphasis may be justified, but to the extent that it puts pressure on other countries to comply with US environmental goals, it is a questionable use of State Department authority.

The state and defense departments are not the only government bodies shifting their emphasis toward the environment. The United States Agency for International Development (“USAID”) was founded to help developing countries grow economically and to prevent the expansion of communism. Its goals, however, have become increasingly environmental. According to Cohrssen, USAID projects have been rhetorically repackaged with sustainable development terminology. USAID now works to eliminate “environmentally unsound” energy production and use. It has plans to lobby foreign governments to embrace environmental regulation as well as international efforts to combat global warming and protect biological diversity. To the detriment of the third-world countries it once purported to help, USAID

12. Id at 47.
discourages the use of DDT to combat malaria because of concerns about the chemical's environmental impact.\textsuperscript{17}

The Clinton administration's emphasis on environmental issues caused a confrontation with Congress over his fast-track authority on trade issues. The purpose of fast-track is to streamline the progress of free trade agreements through Congress once they have been reached between countries. With fast-track in place, Congress must vote on trade legislation submitted by the president without adding any amendments, and it must do so within sixty days. Congressional members cannot tinker with the agreements to favor special interests, and the partner countries learn quickly whether the agreement has final approval. Congress had granted fast-track authority to every president since 1974.

Since 1994, however, Congress has refused to grant fast-track authority. One of the reasons was President Clinton's insistence on including supposed protections for environment and labor in the authority. The stalemate brought US trade negotiations to a virtual standstill in the latter half of the 1990s.

Over the long run, delays in trade liberalization hurt environmental quality. As mounting evidence cited below indicates, economic growth leads to environmental protection after a certain level of income is reached. Hence, slowing trade causes economic stagnation in the Third World, keeping the standard of living low and retarding environmental improvement.

II. TRADE GOES "GREEN"

Environmental issues are shaping international trade agreements. GATT, which was signed in 1948, did not mention the environment, but the WTO, which was created out of the 1994 Uruguay GATT meetings, includes references to both sustainable development and the need to protect and preserve the environment.\textsuperscript{15} Yet for those who proclaim dedication to the environment, the WTO does not go far enough. They want it disbanded or changed so that environmental regulations are never treated as trade barriers.\textsuperscript{19}

The North American Free Trade Agreement ("NAFTA") is another trade agreement that incorporates environmentally popular causes. Initially aimed at reducing protectionist trade policies between the United States, Canada, and Mexico, NAFTA incorporated such provisions as requiring the signatory countries to meet

\textsuperscript{17} Richard Tren and Roger Bate, \textit{When Politics Kills: Malaria and the DDT Story} (Competitive Enterprise Institute 2000).
\textsuperscript{18} Schaefer, \textit{Green Creep} at 56 (cited in note 1).
\textsuperscript{19} It should be noted that in both of the controversial environmental decisions by the WTO, the final rulings did not prevent the country where the regulation originated from imposing the restrictions on its own citizens and businesses. Rather, it simply held that imposition of the regulation on the denizens of another country was a protectionist measure.
certain automobile emissions standards. These provisions exported US environmental standards to Mexico.

In addition, under Article 104 of NAFTA, multilateral environmental agreements signed by both parties supersede any conflicts those agreements might have with NAFTA. Assume, for example, that the United States and Mexico sign an environmental agreement that makes economic sanctions a penalty for failing to cut back on carbon dioxide emissions. Such an agreement would take precedence over tariff elimination under NAFTA.

The “greening” of NAFTA and the WTO was just the beginning. In November 1999, President Clinton’s Executive Order 13141 directed the government to come up with guidelines that would subject future trade agreements to much stricter environmental reviews. The guidelines were published in the Federal Register for public comment.

In October of 2000, just before leaving office, President Clinton signed a trade agreement with the nation of Jordan that included environmental and labor standards. In order to bypass criticism for exporting US environmental and labor standards to a country that could not afford them, the Jordan agreement only requires each country to enforce its own laws. Still, it leaves either country free to use obscure violations of law as an excuse for restricting trade. Clinton initiated similar trade deals with Singapore and Chile in the closing days of his administration.

In effect, Jordan could navigate the US laws to find technical violations and employ those violations as an excuse for sanctions. Finding violations will not be a problem given that a 1993 survey by the National Law Journal found that only thirty percent of corporate counsels believe that complete compliance with US environmental laws is even possible.

III. CHANGING INTERNATIONAL LAW

International law is also changing along environmental lines. Traditionally, international law dealt with interactions between the governments of nation-states. But with the 1948 Universal Declaration of Human Rights, international law began to address individual rights and obligations, areas previously left to the nation-state itself. As a result, the role of national governments is being eroded as the representation of individuals moves to the international sphere. Environmental groups have been working to take advantage of these changes.

International law generally forms via one of two routes, either treaties or custom. Treaties are formal agreements by the governments of nations. Today, customary international law ("CIL") is established when international courts decide that certain rules or norms are shared widely enough that they reflect "custom." In the strictest sense, traditional customary law can be seen as similar to the common law and, in fact, is often the basis for the common law. CIL arose in a way similar to common law, reflecting what was assumed to be the customary laws of private society. Hence, CIL evolved from a bottom-up, grassroots sense of custom.

A new interpretation of CIL has started to arise, though. Several law theorists have concluded that the unanimous or near-unanimous passage of resolutions and declarations by an international organization such as the UN General Assembly constitutes a basis for CIL. Patrick Kelly notes that in the case of Nicaragua v United States, the International Court of Justice used the countries' consent to nonbinding UN resolutions as the basis for part of its decision and termed the decision in accordance with CIL. This is a top-down approach, unlike the traditional evolution of customary law.

Indeed, Fernand Keuleneer states that international courts base many of their decisions on the conclusions of UN agencies. These decisions or resolutions are not international law per se, but they are used as evidence of emerging custom. Thus, CIL can be indirectly created by agencies that have no legislative power and, while ostensibly answering to the national powers that appoint them, are unchecked by any particular body of citizens. Kelly writes, "This 'new CIL' approach is the preferred methodology of human rights activists and environmental advocates."

Under customary law, human rights have obtained the status of an international legal norm, largely based on those parts of the Universal Declaration of Human Rights that the US has decided to accept. International law could wield a hefty sword because it enables domestic courts to invoke a fundamental international right without any laws being passed by the nation's representatives. Kelly finds that "new CIL' theorists are attempting to create a new process of lawmaking rather than utilizing the methodology of customary law."

In the case of Filartiga v Pena-Irala, for example, the Second Circuit of the US Court of Appeals held that CIL or the law of nations has always been part of US federal common law and thus has recognized human rights as part of that body of

27. Id at 492.
Thus, Kelly notes that the US Senate has made sure to include numerous reservations, declarations, and understandings in human rights treaties to ensure that the treaties do not become a self-executing part of US law.29

Environmental groups are lobbying to get certain environmental considerations treated as human rights and ultimately as part of CIL. In 1994, a formal campaign to create a document known as the Earth Charter was begun by Maurice F. Strong, Chairman of the Earth Council, Mikhail Gorbachev, and Green Cross International. The campaign received support from the government of the Netherlands. The Earth Charter’s website clarifies the goal of the project: “The Earth Charter will be designed as a soft law document. It is, however, important to remember that some documents like the Universal Declaration of Human Rights are initially accepted as soft law instruments but over the years acquire increasing binding force among those who have endorsed them.”

The environmental rights that are included in the Earth Charter seem purposely vague: “All human beings, including future generations, have a right to an environment adequate for their health, well-being, and dignity, and the responsibility to protect the environment.”30 Deciding on the standards adequate to maintain one’s environmental dignity and the responsibilities to protect the environment would likely be left up to international bureaucrats and the nongovernmental organizations (“NGOs”) advising them.

These suggested additions to the definition of human rights could give unprecedented power to environmental interests, especially since, under the evolving system of international law, NGOs find themselves on the same ground as states and governments. As Keuleneer puts it, environmentalism is “a powerful tool” for achieving a shift in global power.31 He observes that “law is increasingly replaced by rights, States by networks, and elected officials by judges and appointed NGO-experts, often operating in a system of auto-reference.”

In the introduction to his book Global Greens, James Sheehan also noted the shift to increasing NGO power, writing, “A new and unprecedented force has been created in world politics—the nongovernmental organization. NGOs have joined nation-states, central banks and international agencies as institutions authorized to define the world’s problems and propose policy fixes.”32 The rise of NGOs represents a

29. Kelly, 40 Va J Intl L at 466 n 77 (cited in note 23).
31. Id at 37.
32. Id at 32.
33. Id.
fundamental shift in power because the groups are accountable to no one but their own members.

IV. PROBLEMS WITH “GREENING”

In carrying out foreign policy, officials are learning what Kermit the Frog has known all along: “It isn’t easy being green.” Numerous problems are emerging as this new agenda takes center stage. Increased environmental regulation on an international level changes many of the rules of the game. As discussed below, it threatens sovereignty, reduces the accountability that comes from a country’s internal system of checks and balances, and increases international tension. By reducing international trade, it hurts long-run environmental health, creates more opportunities for unintended consequences from regulation, and leads to monitoring and enforcement problems. Finally, it suffers from a lack of the information and accountability that are available with devolution and decentralization.

A. GREATER INTERNATIONAL ENVIRONMENTAL REGULATION WEAKENS NATIONAL SOVEREIGNTY

Under traditional international law, disputes settled outside of war—including environmental ones—were dealt with under a system of national sovereignty. Disagreeing countries handled matters through bilateral contractual agreements or arbitration. The new regime evolving under international environmental regulation seeks international cooperation, which means trying to secure nearly universal participation. No longer are only a few countries involved in a dispute; rather, the dispute becomes global. As Jeremy Rabkin writes, “the homeowner who pushes up his thermostat in Minneapolis has now become the concern of people in Belgium and in Australia.”

International agencies act as ongoing authorities for implementing and directing the details of a global plan, whether it be the Kyoto Protocol, the Montreal Protocol, or the Convention on Biological Diversity. The power of sovereign governments is forfeited to these organizations, as a one-world banner challenges the traditional view of the sovereign state embodied in international law. Accountability is weakened as the unelected end up in charge.

While some claim that the WTO curbs sovereignty, this is an exaggeration because each national government can ultimately decide whether to abide by a ruling or not. If one country refuses to accept it, the petitioning country may impose sanctions, something that could be done with or without the WTO. Furthermore, the rulings apply to just one area—international trade—and in that area only to

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regulations that restrict trade. Thus, it is somewhat like the US Constitution’s
Commerce Clause, which spurred free trade among individual states. The WTO
enables national governments to give up regulations that favor special interests.
Furthermore, even if the WTO does curb sovereignty, such a curb may be beneficial
since it reduces barriers rather than builds them. If the WTO erected barriers by
legitimizing trade-restricting environmental or labor standards, then the possible loss
of sovereignty would become more threatening.

In contrast, several international agreements represent genuine threats to
sovereignty. For example, there is talk of an international regulatory agency for the
1997 Kyoto Protocol, an agreement to reduce carbon dioxide emissions. One option is
to trade permits for emitting carbon dioxide. Discussing these permits, John Prescott,
Deputy Prime Minister of the United Kingdom, said that he wanted to see “the
equivalent of Interpol to allow police, customs and enforcement agencies to combat ...
global illegal trade.”6

Similarly, the US State Department’s environmental initiative promotes the
United Nations as a police force for the world that will patrol regulations affecting the
emerging science of biotechnology. The UN Industrial Development Organization
proposes that the UN and its agencies advise nations as they create authorities in each
country to monitor genetically modified organisms and their development.7

The 1992 Convention on Biological Diversity, a product of the UN’s Conference
on Environment and Development held in Rio, also has the potential to create
sovereignty problems. It is unclear whether the treaty’s signatories will be forced to
adopt a biosafety protocol, that is, regulations on biotechnology to carry out the goals
of the treaty. As Schaefer writes, “The treaty also establishes an international
regulatory framework to examine, regulate, and, in some cases, prevent development
of biotechnology.”38 If nations adopt such a protocol, who will ensure that proper
regulations have been implemented? The answer is likely to be international agencies.

The real importance of sovereignty is the accountability it levies upon those
making the rules to those who must live by the rules. International agencies have
almost no accountability compared to US domestic agencies, where top officials at
least must be confirmed by the Senate or where funding must be approved by the
House.

In fact, international regulation inherently changes the US Constitution by
weakening the accountability provided by its checks and balances. Agreements such as
the Biodiversity Convention no longer deal solely with conflicts between nations (true

36. Henry I. Miller, Biotechnology Regulation and Foreign Policy: Eccentric Environmentalism Instead of Sound
Science, in Terry L. Anderson and Henry I. Miller, eds, The Greening of US Foreign Policy 221, 230
(Hoover 2000).
37. Id at 229–32.
38. Schaefer, Green Creep at 71 (cited in note 1).
international issues), but now also deal with problems within specific countries (intranational issues). For instance, encouraging a country to set aside reserve areas to keep species from becoming extinct is clearly entering into matters of internal domestic policy.

This has additional ramifications, one of which is to discourage federalism. If the US or any other nation is to comply with directives from outside its borders, the national government will have to crack down on various competing state policies, so the one-size-fits-all international policy can be implemented. This increased federal power will trump the current federalist revival that has reinforced the system of balance between state and federal government.

Another impact of limiting sovereignty is on the checks and balances between the executive and legislative branches. Changes in the Organization for Economic Development and Cooperation ("OECD") illustrate how this can occur. The OECD was created by a 1961 treaty and ratified by the US Senate to help achieve economic growth in developing countries. In April 1998, a ministerial meeting reinterpreted the treaty, adding social and environmental considerations to the economic ones. The executive branch agreed to the changes, but the Senate had no opportunity to debate this treaty, even though it was changed significantly from the 1961 treaty. In short, the executive branch negotiated a new deal without Senate approval.17

B. GREATER INTERNATIONAL ENVIRONMENTAL REGULATION CAN INCREASE INTERNATIONAL TENSION

Foreign policy is a bag of goods that includes issues from free trade to arms trading to human rights. Each new issue in the bag weighs it down, lessening the focus on other issues and even creating conflicts between issues.

Increased environmental regulations could cause countries to lessen their focus on international threats of violence, such as the sale of ballistic missiles or border conflicts between nations. As countries must watch over more and more issues arising in the international policy arena, they will stretch the resources necessary to deal with traditional international issues. As Schaefer writes, "Because diplomatic currency is finite... it is critically important that the United States focus its diplomatic efforts on issues of paramount importance to the nation. Traditionally, these priorities have been opposing hostile domination of key geographic regions, supporting our allies, securing vital resources, and ensuring access to foreign economies."

There may indeed be environmental problems that threaten national security, but the issues currently being given parity with threats of violence, such as sustainable development and population control, are not among them. It is questionable whether

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40. Schaefer, Green Creep at 46 (cited in note 1).
population growth and sustainable development should be a consideration for international policy at all, since they are not really a transboundary problem, but rather can be handled within a nation.

Environmental regulation at the international level is divisive. Countries that are expected to make a greater sacrifice can resent countries they perceive as free riders. For instance, the United States has expressed concern that India and China are not joining the Kyoto agreement and thus not contributing to the reduction in output of greenhouse gases. The US Senate even passed a resolution making approval of the Kyoto treaty contingent upon full participation by the developing world. In response, China and India point out that they are now entering their industrial revolutions and should be allowed to enjoy the same prosperity that countries such as the United States already enjoy.

Finally, expanding the foreign policy agenda weakens the enforcement of violations of international agreements. If we punish India for not complying with the Kyoto Protocol, what punishment is left if India threatens Pakistan or tests nuclear weapons on the high seas?

C. GREATER INTERNATIONAL ENVIRONMENTAL REGULATION CAN REDUCE FREE TRADE

The unintended consequences of punishment for violating environmental agreements with trade restrictions should be considered. Trade offers the most likely route for acceptable punishments. Yet invoking sanctions, tariffs, and other economic penalties to ensure compliance with international environmental agreements could rebuild the wall against free trade that the United States and other countries are working so hard to tear down. And once the wall is up, the wealth and prosperity that accrue under free trade will be staunched, as will the potential for environmental progress.

In addition, the effort to subject future trade agreements to more stringent environmental review risks slowing and even halting future trade agreements altogether, with enormous impacts on trade and world prosperity. The long-term effects of stifling wealth creation will harm environmental quality, as developing countries and former Communist countries take longer to grow wealthy enough to afford improving environmental quality. Subjecting free trade to subjective environmental review is shortsighted and misses the bigger picture of long-run environmental consequences.

D. GREATER INTERNATIONAL ENVIRONMENTAL REGULATION SUFFERS FROM NUMEROUS MONITORING AND, THEREFORE, ENFORCEMENT PROBLEMS

If regulations are to have any real effect, they must be enforced with some sort of penalty for noncompliance—whether that be loss of economic, military, or diplomatic power and/or wealth. For penalties to be implemented, violations must be assessed, and assessment requires monitoring to detect noncompliance.

The problems of enforcement become crystal clear if we ask what would happen if Al Gore’s declaration that we “make the rescue of the environment the central organizing principle for civilization” were taken seriously.42 Henry Miller sums up the farcical nature of this principle by asking, “[H]ow would Americans (to say nothing of citizens of other countries) react to Washington launching cruise missiles at China’s Three Gorges Dam because it has negative environmental consequences?”

Catching noncompliant countries will be costly if not impossible. This is evident from the problems individual countries have faced trying to make their own citizens comply with international agreements such as the Convention on International Trade in Endangered Species (“CITES”) ban on ivory trading.43 Detecting whether a country is cheating on something like emission rights will surely be as difficult, unless an international police force can monitor within countries, something most countries are not likely to condone.

Even if there were an international police force, the data required to detect noncompliance may not be accurate. Monitoring technology may be poor, or those keeping the records may have an incentive to cheat. Kal Raustalia and David Victor conclude, from their sampling of international agreements, that “national data often are not comparable, and their accuracy is often low or unknown.”44

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43. Henry L. Miller, Biotechnology Regulation at 226 (cited in note 36).
44. Consider Michael ‘t Sas Rolfes, Assessing CITES: Four Case Studies, in Jon Hurton and Barnabas Kicson, eds, Endangered Species Threatened Convention: The Past, Present and Future of CITES 69, 69–78 (Earthscan 2000). After the ninth CITES meeting, held in 1994, a report was released by a group of respected elephant scientists. It found the results of the ivory ban to be mixed, with some range states reporting increased poaching. The report also noted that the field enforcement budgets were falling in most range states. Id at 76.
E. ULTIMATELY, GREATER INTERNATIONAL ENVIRONMENTAL REGULATION SUFFERS FROM A LACK OF LOCAL INFORMATION, LACK OF COMPETING INSTITUTIONS, AND LACK OF LOCAL ACCOUNTABILITY

The benefits of federalism and devolving government to the lowest level possible were pointed out by Terry L. Anderson and Peter J. Hill. First, there is better information at the local level, so specific circumstances are not ignored by “one size fits no one” policies. The CITES ban on trade in ivory, for example, ignores the circumstances of local people in Africa and their potential to manage wildlife sustainably. CITES is an example of top-down regulation failing to take advantage of time- and place-specific knowledge typical of centralized environmental management. Second, the more policy decisions devolve to the local level, the more experiments there are in developing effective institutions. These experiments compete with one another and lead to better solutions. Finally, accountability at the local level means that policy makers are more likely to face the consequences of their actions.

International agreements generally fly counter to all these benefits. In fact, the harms of moving policymaking and responsibility from smaller to larger communities may be greater when moving from international to national control than when moving from national control to state or local control. This is because international regulation involves even more heterogeneous populations and environments.

V. COASE, PIGOU, AND INTERNATIONAL FREE MARKET ENVIRONMENTALISM

A.C. Pigou emphasized the concept of externalities in looking at environmental problems. When individuals make economic decisions without incorporating the full costs and benefits to society, according to Pigou, they will either overproduce in the case of negative externalities (for example, pollution) or they will underproduce in the case of positive externalities (for example, biological diversity). Pigou’s arguments have been used to justify local, state, national, and international government intervention, in the form of regulation and taxes, to correct the perverse effects of these externalities.

Nobel Laureate Ronald Coase saw matters in a different light. Instead of externalities, Coase considered environmental problems as a case of competing uses. Those who pollute the air and those who want clean air have differing uses for the air. The question is no longer one of correcting externalities, but one of who owns the air. Once this has been decided and a property right to the air has been established, then the two parties can negotiate with one another through voluntary transactions for use

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of the air. These negotiations, or market processes, can determine the value of the air and its ultimate utilization.

Of course, defining, enforcing, and bargaining over property rights are not costless, as Coase recognized. If definition, enforcement, and/or bargaining are too costly, however, it may be difficult or impossible for the Coasean system to resolve the conflicting uses.

Free market environmentalism argues that the case against Coasean bargaining as a solution to environmental problems is overstated especially if governments work to lower definition, enforcement, and bargaining costs. It argues for better-defined property rights and points out that government can aid in defining property rights through common law courts and other means that lower the costs of definition. Free market environmentalism also advocates devolving decision-making to the lowest level possible. It thereby offers an alternative to the problems that come with the current greening of foreign policy.

A full description of free market environmentalism and the reasoning underlying it would require too much space for this paper. Two key insights from this approach to environmental protection, however, make clear that the greening of foreign policy, if it is allowed to continue, may do more environmental harm than good. These two insights are: 1) wealthier is healthier and 2) incentives matter.

The first tenet of free market environmentalism, wealthier is healthier, is derived from economic research linking wealth to environmental quality. "A growing body of empirical evidence shows a positive correlation among property rights, economic growth, and environmental quality," writes Anderson. For example, he cites work by Don Coursey showing that environmental quality has an income elasticity of demand of approximately 2.5. That is, above a threshold level, a ten percent increase in income results in a twenty-five percent increase in the demand for environmental amenities. Two economists examined air pollutants such as sulfur dioxide emissions and found a "J-curve" relationship between environmental quality and gross domestic product. Their research showed that although pollution levels may increase as incomes begin to rise from very low levels, most pollution levels ultimately decline before annual income levels reach $11,000 (in 1999 dollars).

In other words, as people become richer, they begin to improve their surroundings and seek environmental amenities. Any foreign policy striving to improve environmental quality should promote economic growth because only then

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can environmental progress be made. Efforts to hamper free trade in the name of environmental protection are counterproductive. As WTO Director-General Mike Moore said, "Our goal is very clear, it's better living standards for all our people. Because it is through higher living standards that we achieve better health care, superior education systems, and a safer, better environment." The data documenting that economic growth is the best way to achieve Moore's goals are incontrovertible.

The second tenet of free market environmentalism, incentives matter, recognizes the fact that people pursue the goals that directly and significantly affect them. In governments and international organizations, perverse incentives often result. A large body of literature has documented the destruction of the environment that occurs from perverse incentives under the rubric of government-subsidized activities.

The best way to get the incentives right is to provide institutional arrangements with well-defined and enforceable property rights. In his empirical work, economist Seth Norton found that "environmental quality and economic growth rates are greater in regimes where property rights are well defined than in regimes where property rights are poorly defined."

When property rights are well defined, defended, and tradable, people have an incentive to act in ways that are socially beneficial, including ways that preserve the environment. The most effective property rights are those held by private entities, whether individuals, businesses, or nonprofit organizations, because these entities bear both the costs and benefits of their actions. In areas where individual property rights cannot be established, decisions should be made at the local level, where possible, and then the state level before reaching national and international levels. As Chief Justice Charles Evans Hughes remarked in 1929, after he served on the Permanent Court of International Justice, "[T]he treaty-making power is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns."

If delegation of authority must go to the international level, only nations with a direct interest should be involved in the policy making as they have more incentive to find the best solution. As more parties sign on to a convention or treaty, there is less chance for actual cooperation and resolution and greater chance for loss of sovereignty.

The alternative is open-door participation of the kind that is expanding in today's international arena. This option risks suppressing science for politics. William Aron, a former United States Whaling Commissioner, suggests this is what happened with the International Whaling Commission ("IWC"). He and his coauthors note that, "Any nation can accept the 1946 convention and become an equal voting member of the IWC." Even landlocked countries can join the commission. Countries not directly affected by whales or whaling can vote on policies with the same degree of power as countries with a direct economic and cultural stake in whaling policy.

Environmental organizations have taken advantage of this situation. According to some observers, Greenpeace worked to pack the IWC against whaling and may even have paid membership fees for new member countries. Open participation undoubtedly contributes to the continuing moratorium on whaling for certain species of whale that scientific data indicate are no longer endangered.

Far more effective and appropriate are treaties that involve only those with a direct interest. The North Pacific Fur Seal Treaty is an example. This environmental treaty was signed in 1911 (before anyone would have called it an environmental treaty). In order to protect the fur seal population from over-harvest, the four nations involved in fur seal harvest—the US, Canada, Russia, and Japan—signed an agreement setting quotas for each country. Breach of the contract was punishable by dissolution of the treaty. Because dissolution would lead to a return to over-harvesting and thereby destroy the value of the resource, the countries had an incentive to play by the rules. After all, they held claim to all the benefits of future seal harvests. Other countries were discouraged from entry into the fur seal market by credible threats of trade sanctions.

Another example of the benefits of limited international involvement stems from an arbitration involving two countries. In the 1941 Trail Smelter arbitration, fumes

from a smelter operated by the Cominco Ltd. in British Columbia, Canada, were harming cattle ranchers in the United States. The ranchers petitioned the US government for help, since suing a foreign company directly did not give the ranchers much chance of winning an injunction. The case was taken to arbitration and settled. No other country had a direct interest in the case, and so no other country was involved. As a result of the arbitration, the ranchers were granted an injunction and awarded damages from Cominco.61

VI. POLICY RECOMMENDATIONS

To encourage property rights solutions that create the proper incentives, US foreign policy and international agreements must respect the rule of law, recognize that wealth leads to environmental protection, and recognize that devolution encourages better management. With that in mind, the following policies should be adopted:

- Policies that promote economic growth should be encouraged in order to spur wealth and thus a desire for environmental quality. Two of these policies are eliminating restrictions on trade and restraining from the casual use of economic sanctions.
- Environmental decisionmaking should be devolved to the most local level possible. This will increase accountability, information, and competitive solutions that will lead to better environmental management. It will reduce the likelihood of policies with unintended consequences.
- Because international environmental treaties have significant implications for the sovereignty and accountability of governments, they should be confined to issues that cannot be solved through protection of property rights and domestic policies. If an environmental problem can be handled internally, there is no need for international regulations that encourage encroachment on sovereign powers and discourage democratic accountability.
- Policies should be determined by officials accountable to those who will be affected by the new rules, not by unelected nongovernmental organizations or international bureaucrats.
- Foreign policy must support sovereign states that respect and enforce property rights and the rule of law. This will increase the chances of fostering free market solutions.

In sum, the rise of international environmentalism is posing grave dangers for the conduct of foreign policy, while at the same time short-changing long-run environmental protection in favor of currently popular “green” causes. Where conflicts over resource use do cross international borders, international procedures have a place.

61. Id at 271–72.
In these cases, the policies should be confined to the countries directly involved. Every effort should be made to avoid the IWC approach, which allows all countries, even those not involved in the environmental conflict, a seat at the table.

The greening of US foreign policy should be reined in. US foreign policy should address real international environmental problems in those few cases where it is necessary and should not use international law simply to export US environmental preferences. Nor should environmental policy be set by bureaucrats in organizations ill-equipped for it, such as the Department of Defense.

Property rights and trade liberalization must be respected. International solutions, where they are not needed, will only give more power to a system that weakens sovereignty and political accountability at home and abroad. By improving accountability and freeing trade, the nations of the world can contribute to economic progress and to environmental protection.