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JUDGE RANDOLPH: To illustrate the principle of the free migration of labor, I should mention what a friend of mine said after the budget reconciliation package passed last spring: “There is a time to fight, and there is a time to leave the country.” (Laughter.)

Since our remaining time is so short, we will proceed to take questions from the audience. I invite the panel members to use their answers to questions as a means to comment on the other presentations.

AUDIENCE: As of last year, I worked in the science office of the U.S. Embassy in Brasilia. Needless to say, I have witnessed some of the things discussed. I felt a need in Ambassador Keys’ absence to suggest to Professor Stone that we really do need to be very sensitive when our friends and allies around the world, and especially the developing nations, talk in terms of national sovereignty. Many of these states achieved independence during the lifetime of us in this room. They are used to diplomatic practice, where if they make a concession, they receive some kind of benefit in return. They are used to that process of negotiation, instead of what they might perceive as an ultimatum. I think we need to be sensitive and realistic when we try to carry forward a national objective.

PROFESSOR STONE: In general, I agree. For example, objections to the U.S. reservation of power under section 301 to act like a lout in the world community are really quite understandable.1 I was addressing the legitimacy of trade sanctions regarding the sea and other parts of the global commons. The case for deploying trade measures in response to practices that take place wholly inside other countries is more difficult than the case for deploying measures in response to actions that affect the commons. We are in a sense “co-owners” of the marine life of the high seas. I am, therefore, more comfortable with the United States using its muscle to preserve marine mammals in the high seas than I am with U.S. sanctions against Brazil for what it allows to happen within its forests. Even Article 12 of the Rio Declaration,2 which comes out against unilateral sanctions as a means of influencing how a nation uses its internal resources, suggested more leeway when it came to the global commons. The implication is that some unilateralism is tolerable, at least after bona fide attempts have been made to build a consensus.

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MR. DONIGER: I do not want to comment much on the policies related to the use of trade sanctions to achieve environmental objectives because, frankly, we in the Clinton administration are engaged in a review that tries to bring some order, logic, and principle to these policies. But we do have to remember that if one is trying to get to a different regime—i.e., a multilateral regime—one has substantial diplomatic hurdles to overcome. There is a role for use of at least the prospect of unilateral responses to motivate nations to favor multilateral solutions. We do not currently have a multilateral solution. So for the United States to forego trade sanctions in all areas, for example, would be to drop a point of pressure that helps motivate countries to get serious about these problems and arrive at a multilateral solution. I am not saying that this is the policy of the administration, but it is a consideration, because we need a mutually satisfactory motivation to adopt multilateral ways of resolving these problems. The actions that individual nations take do have a motivating role.

PROFESSOR CHAVES: My proposition is that we should be very reluctant to take unilateral measures in cases like the Mexican tuna case. Justifying this as motivating a multilateral agreement exaggerates the value of beating people over the head with sticks as a way of getting them to cooperate with us. People generally do not become motivated to cooperate by being beaten over the head with sticks.

Chris tells us that the Mexicans could sell their tuna elsewhere. But the only country to which Mexico can profitably sell its tuna is the United States, and tuna is a major export of Mexico. He tells us that the United States has voted unanimously not to eat tuna. It has not voted unanimously. We talked about the defects in the democratic process in achieving those results. Even if our democratic process were perfect, not one Mexican voted on the tuna issue despite their interest in that outcome. So it is hard to regard the outcome as a democratic response. On the other hand, I do not mind if private people boycott Mexican tuna.

PROFESSOR STONE: The dolphin-lovers may not want to eat tuna anyway. Is it an answer to those who oppose the death penalty that they do not have to carry out any executions personally?

PROFESSOR CHAYES: Too bad, they do not have to eat tuna. But my third point was that the global commons is a global commons, and if we do not develop a global approach, we are not going to have satisfactory regulation of the commons at any rate. I have no objection to using trade sanctions in support of generally accepted international standards, as the Law of the Sea Convention allows.\footnote{United Nations Convention on the Law of the Sea, done Dec. 10, 1982, 21 I.L.M. 1261.} The dolphin
case is very interesting in this regard, because it is an expression of a sort of moral preference, an unorthodox moral preference, of the United States for dolphins as animals. We can impose that preference on our own country, but when we start to impose our preference on others, it strikes me as a little harsh.

**AUDIENCE:** I am an attorney here in Washington. I wonder what became of the once fundamental tenet of deep ecology, that the global commons went well beyond oceans, or fishery resources, so that deforestation of Brazil or Malaysia caused an injury to all people of the planet in a sense. Perhaps this group has dismissed that tenet out of hand. But it seems to me that we are interested in such actions to the extent that we have an interest, an immediate interest, in these resources, and yet we are allowing them to be destroyed before we can find out what they are worth to us.

**PROFESSOR STONE:** Some pretty good efforts are being made to protect forest resources through privatization. There is a company called Shaman, Inc., which negotiates with indigenous peoples to get clues as to which forest products are most promising for pharmaceutical use, and makes arrangements to compensate the indigenous peoples. Protection of the environment through privatization, markets, and development of critical technology may prove as important as the efforts of international law.

As far as the present attitude of the international community, Abe Chayes' view is more representative than mine. Unilateral action as a means of influencing another country's use of its internal resources was clearly rejected by most nations at the Rio Summit.\(^4\) On the other hand, the United States distanced itself from that position,\(^5\) and I do not believe that it disregarded GATT in doing so. The better view of leading trade lawyers is that the United States can act unilaterally under GATT (in contrast with the dicta of the *Tuna/Dolphin Decision*) for what Chayes calls "moral preferences," so long as we do so nondiscriminatorily.\(^6\) We can refuse to import seal skins if the seals

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4. "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." Rio Declaration, supra note 2, principle 12.

5. See U.S. Dep't of State Dispatch, *U.S. Statements for the Record on the UNCED Agreements*, available in LEXIS, News Library, Curnws File ("The United States understands that, in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns, including long-term sustainable forest management concerns and environmental concerns outside national jurisdiction, subject to certain disciplines.")

were taken in ways that are inhumane under U.S. law, if we treat for-
eign- and domestic-based sealers according to the same standards. 
Such a refusal is legal under GATT or any other principle, although 
whether it ought to be legal, and whether we ought to exercise that 
power are unanswered questions.

Of course, the implications of "nondiscriminatory treatment" are 
unclear where, for example, we do not have tropical forests and other 
nations do. In those circumstances, when do rules about tropical for-
est products flout the principle of equal treatment?

AUDIENCE: I would like to say to Professor Stone that the problem is 
not that we have not been listening to the environmentalists. We have 
been listening to you, and find some of the things you say quite scary, 
particularly on this issue of dolphin fishing.

Professor Chayes raised the argument that trade is just another 
way of imposing our value system on another country. I would like to 
going a little deeper. Part of your value judgment is simply a preference 
for animals over people. It is a preference for dolphins even though 
these animals are not endangered, there is no knowledge of a negative 
to the world by reducing the supply of dolphins, and no account has 
been taken of the true cost to human beings, live people, trying to 
make a living by fishing in that manner.

I am not primarily concerned about that preference for dolphins, 
but about the other horrendous consequences in the world that this 
line of thinking has. The most significant consequence stems from at-
ttempts by the animal rights movement to preclude testing of 
pharmaceuticals on animals, since this has a direct human cost on 
Americans today. I realize that my comments are extending what you 
said, but this line of thinking is part of what is really scary about 
environmentalists.

JUDGE RANDOLPH: The question for Professor Stone is, which do you 
prefer, dolphins or people?

PROFESSOR STONE: People ... although I admit I may prefer some 
dolphins to some people. (Laughter.)

In all earnestness, I was actually basing my defense of dolphins on 
human preferences. My guess is that, without departing from so-
cial choice theory, those who want to conserve marine mammals 
would dominate those who want to eat them. Consider, for example, 
the controversy over minke whales, which is threatening to disrupt the 
International Whaling Commission. Suppose we took a global survey 
on the public goods question: "How much would humans around the 
world be willing to pay to conserve a whale?" If we offset that contin-
gent valuation by the value that those whales have in Japanese and 
Norwegian markets, my guess is that the conservationists would pre-
vail. In other words, based on the Kaldor-Hicks criterion, saving
whales is efficient. I made an economic argument without appealing to any exotic environmental rights-based argument (which I am prepared to make, but not before this crowd).

The strength of environmentalist factions and the potential distortions of the legislative process are obviously problems. Environmental groups, like any other lobby, can magnify their hand in any legislative decision that affects their interest. The Marine Mammal Protection Act may not exactly mirror the predominant feeling about the dolphin/tuna tradeoff. Ideally, one might prefer a Gallop poll to enable Congress to identify the predominant feelings. But lots of legislation fails to mirror public opinion.

JUDGE RANDOLPH: We could take a poll right here. (Laughter.)

PROFESSOR MERRILL: I would like to make a point about the dolphin issue, which is interesting because it completes the picture here and ties into the earlier panel discussion of information disclosure.7 American tuna companies did not stop killing dolphins because of any law passed in the United States. Rather, one of the tuna companies unilaterally decided to stop, and began prominently advertising the fact that they used dolphin-friendly nets, including the little fish it put on its cans as an insignia.

PROFESSOR CHAYES: Mammal.

PROFESSOR MERRILL: The little mammal. Sorry. See how far out of it I am. (Laughter.)

The company put the insignia on its cans to show that it was dolphin-friendly, and news of this action spread throughout the industry. The entire industry adopted the dolphin-friendly approach and the insignia because they perceived that market forces were driving them in that direction.

This episode makes the ban on Mexican imports particularly ironic and suspect. If information disclosure was sufficient to produce a dolphin-friendly regime among the producers in this country, why isn’t information disclosure sufficient for Mexican producers as well? Why didn’t we just insist that the country of origin be noted on the cans rather than trying to ban it all together? This consideration suggests that there was, in fact, some protectionist motivation behind the international ban.

PROFESSOR CHAYES: Country of origin is noted on tuna cans.

PROFESSOR MERRILL: If consumers demanded, or companies perceived that consumers demanded, dolphin-friendly tuna from U.S. producers, why would the consumers not also demand dolphin-friendly tuna from Mexico producers?

PROFESSOR STONE: Well, people don't want to restrict the expression of their morals to market choices. Tiger penis soup is being sold in some parts of the world for $300 a plate. A law that says the manufacturer has to label the can, "this is tiger penis soup," would not satisfy my objections.

AUDIENCE: I would like to raise a point about unilateralism and sovereignty. A trace of lobbying might show that the dolphin-friendly producer had something to do with the ban. Evidence also suggests that dolphin-friendly producers did not really stop killing dolphins, but just found it more efficient to announce that they did. (Laughter.)

There seems to be a consensus among the panel members that it is bad in most cases to impose our values on others, quite apart from the question of whether those values that favor protection of dolphins are good. Even Professor Stone agrees with their view by saying, "Well, if the animal was just inside the country, it might be different." The point was raised that we would offend other people's sense of sovereignty. But many of the nations most sensitive about their sovereignty will not even allow literature from other countries which with they disagree inside their borders. Their notion that they have the right to decide what comes inside their borders, and the extraterritorial effects of those decisions, would not stand up to the notion that we are somehow violating their sovereignty by deciding what we are going to have in this country.

Leaving aside the question whether dolphin protection or protection of forest resources in another country is a good thing, the panel might see my point with this example. Suppose that a country started making products with fetal tissue and we did not want that to happen (i.e., we did not want it to happen in our country, and we think it is a bad thing generally). It strikes me as elitist to say that people in this country cannot use products made in Sweden with fetal tissue—I am not saying Sweden does this. (Laughter.)

You have to decide how much you really care about what people are doing in other countries, and how much you really worry about violating their sovereignty.

PROFESSOR CHAYES: I am not a big fan of sovereignty, and I do not think I made my argument in terms of violation of sovereignty. The international environmental movement is modifying the classic version of national sovereignty all over the world. This movement is one of the important forces, another being international economics, that is reducing the true and practical scope of national sovereignty. My argument is that decisions ought to be made by a process that we can regard as legitimate. A process confined to a single country, a very rich country, with very specialized tastes and values, is not necessarily a legitimate process.
AUDIENCE: I am with the Environmental Science and Policy Institute. A question I have for all four panelists relates to the equity problems raised between nations by the potential impacts of global warming. If one assumes that such impacts will be more severe for less economically developed nations, such as the island nations of the Pacific and coastal nations such as Bangladesh and Egypt, how do your comments pertain to the dilemma faced by the leaders of those countries when trying to generate some modification in the behavior of CO₂ emitting nations?

MR. DONIGER: I think it is plain that people and governments are not divided in their feelings about global warming based on whether they are developed or developing. As you point out, there are a lot of island nations and low-lying nations that are very highly motivated to take prompt action on global warming because of their special vulnerability to sea level rise and more extreme storms.

We are making incredibly fast progress on dealing with some problems of the global atmosphere, like ozone depletion. This progress is based on a practical notion, in the words of Mustafa Tolba, the former head of the United Nations Environment Program, that we are engaged in constructing a “global bargain.” Everybody sees some risk, some danger, in letting these problems go unchecked. Those countries that need financial assistance, both in the public and the private sector, lay out their claim. Those countries that have resources lay out their concerns about what should be done. And we work out a bargain in which different countries are asked to do different things, and different countries give and receive assistance, depending on how the bargain is worked out.

You have to be a tough bargainer because the public fisc and private resources of the United States and other developed countries are very limited, while the demands of some developing countries have no end. On the other hand, we can assist through the multilateral development banks, the GEF, and bilateral aid to help them develop in more environmentally benign ways, for our benefit as well as theirs.

PROFESSOR STONE: I think it is a terrific question. Many poor nations regard the environmental movement that comes out of the United States as a little kooky. The real problem that the Third World faces is not global warming. It is not our worst problem either. The risks have been grossly exaggerated. But for the LDC’s it is very clear that being able to worry about climate change—about the state of the world in 2100—is not a luxury they can afford. Other problems clearly dominate in the Third World. People are dying from dirty water. People are dying of malaria. All sorts of risks are more imminent than climate change, including desertification, diseases, and loss of fuel wood. It is an indictment of the environmental movement in
the United States (and I have said so in environmentalist meetings) that U.S. groups put such stress on global warming, while disregarding the other, more immediate, problems the poor face.

To some extent, Third World representatives are subordinating the "environmental" agenda to their own objectives of economic development. They want to take advantage of the climate change regime and the ozone protocol regime as a means of transferring wealth from rich states to poor. Someone referred last night to this transfer as something the environmentalists want. That is not quite fair. The environmentalists do not want wealth transfer as such, but much of the Third World certainly does. Right now there is an uneasy alliance between the environmentalists and the poor nations, marshalled together under the banner of "sustainable development." The term is ingeniously vague, designed to gloss over the differences that are destined to induce strong tensions in the alliance when actual expenditures and actual projects come under consideration. In that temporarily muted debate between the environmentalists and the Third World, my own sympathies lie largely with the Third World.

JUDGE RANDOLPH: I think that ends the program. Thank you.