CONFLICTS BETWEEN INTERNATIONAL TRADE AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

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Compared with the major achievements over the past half century in international trade liberalization, efforts to institutionalize effective multilateral environmental protection have continued to face an uphill struggle. The author examines the conflicts between existing trade and environmental agreements, the resulting impediments to environmental policy-making and implementation, and the limitations of the currently available procedures for overcoming them. What is ideally needed, she concludes, is a Global Environmental Organization, with a broad but cohesive body of international environmental law, to promote and implement the goals of environmental protection, and to coordinate and integrate them with the objectives and policies of the World Trade Organization.

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I. INTRODUCTION

The issue of environmental protection has become increasingly important on the international agenda. At the same time, international trade has grown twice as fast as the global economy for the past thirty years, and this growth will continue. The liberalization of international trade receives much attention from those involved in it. As a result, environmental and trade policies become intertwined.¹

The Uruguay Round Agreement² established the new World Trade Organization (WTO).³ Through its regulation of international trade, the WTO affects the environmental character of trade and trade-related environmental issues. In light of growing concern for the environment and of the connection between environment and trade issues, the preamble to the Agreement Establishing the WTO includes a specific commitment to the objective of sustainable development and refers to the need to protect and preserve the environment.⁴

Environmental agreements are premised on the ideas that we live in a global commons⁵ with natural resources and that

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² Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1140 (1994) [hereinafter Final Act].
³ The World Trade Organization (WTO) is both an institution and a system of global trading rules that was established via the Agreement Establishing the WTO, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. Article II of the WTO Agreement provides that the General Agreement on Tariffs and Trade 1994, WTO Agreement, Annex 1A, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994] is an integral part of the Agreement and is binding to all members. GATT 1994 is the successor to and is legally distinct from the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].
⁴ See supra note 3, WTO Agreement, Preamble: "(...) while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment(...)."
nations must cooperate in developing strategies to protect these resources. Because multilateral environmental agreements increasingly use trade measures to implement and enforce their objectives, the dichotomy between trade and environment creates significant problems for resolving global environmental issues.

During the course of this paper, I will address the underlying conflicts between international trade and multilateral environmental agreements. In Part II, I review the major environmental agreements that use trade measures to achieve their environmental goals. In Part III, I review the applicable GATT and WTO rules and GATT and WTO panel decisions that have created the tension between trade and environmental rules. I discuss proposed solutions of the conflict in Part IV. Finally, I attempt to reconcile the conflict of trade measures in multilateral environmental agreements with international trade practice.

II. THE ENVIRONMENTAL APPROACH

Multilateral environmental agreements constitute an important part of the global environmental management framework. They are designed to coordinate policy action to tackle global and transboundary environmental problems cooperatively. For various reasons, the parties to these agreements chose trade-related measures to achieve their environmental goals. For instance, international negotiators incorporated trade measures into multilateral environmental agreements because they considered them to be essential and effective implementation tools. Trade measures have been particularly effective in the rapid implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer.

(Montreal Protocol). They secured the broad membership necessary to make the agreement work. Trade measures proved to be a key factor in persuading some countries producing or consuming chlorofluorocarbons (CFCs), such as Korea and Israel, to join the agreement, and to phase out production and use of ozone-depleting substances.

The policy reasons for the use of trade instruments in international environmental agreements differ according to the subject matter of the agreement. According to their policy objectives trade restrictions in multilateral environmental agreements can be grouped in three categories.

They are used to control trade which itself promotes harm to the environment. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates international trade in endangered and threatened species. The trade in species for pets, clothing, trinkets, and other products was leading to the overexploitation of many species. When a species reaches a certain level of vulnerability, the parties to CITES list it in one of the three appendices to the treaty. CITES restricts trade in varying degrees, depending on the ecological status of the species.

They are used to protect states from substances harmful to their domestic environment. Likewise, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) imposes trade

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restrictions on the transport of hazardous wastes because the trade itself is considered to be dangerous. The Convention imposes general conditions on member states prior to a shipment of hazardous wastes and prohibits trade in hazardous waste with nonparties.

They are used to support agreements to protect the global commons. For example, the Montreal Protocol imposes trade restrictions on parties and nonparties to entice more parties to reduce or eliminate the production and consumption of ozone depleting substances, such as chlorofluorocarbons (CFCs). Because the ozone layer protects all nations, the participation of a large number of parties is necessary to prevent nonparties from enjoying competitive advantages and to discourage the movement of CFC production facilities to nonparties. Consequently the Protocol requires parties to cease trade with nonparties both in ozone depleting substances and products containing ozone depleting substances.

The issue of environmental trade measures was raised most prominently in 1991 and 1994, each time by a controversial decision of a GATT dispute settlement panel. The United States had imposed a ban on imports of tuna from Mexico. The Mexican tuna fleet’s incidental killing rate of dolphins during tuna harvesting exceeded the limits permitted under the U.S. Marine Mammal Protection Act of 1972. Both panels rejected arguments of the United States that the environmental

13. Notification and consent of the importing party, conditions within the exporting country, and conditions within the importing party. Id. arts. 4 and 6.
14. Id. art. 4.5.
measures were justified under specific GATT Article XX exceptions. Although the Tuna/Dolphin disputes involved a unilateral import ban and not trade measures of multilateral environmental agreements, many environmentalists began to worry that the same arguments could be used to invalidate a national import ban taken in connection with the implementation of an environmental treaty.\textsuperscript{21}

III. THE GATT/WTO APPROACH

When the GATT was originally drafted more than 40 years ago, environmental policy was in its infancy. Consequently, the GATT does not refer to environmental measures as such. Instead, the general GATT obligations apply to environmental measures, just as they apply to measures imposed for other policy purposes.

GATT\textsuperscript{22} includes three core obligations intended to liberalize trade and eliminate discrimination between parties: 1) Article I requires parties to treat products from all other GATT parties the same (most-favored-nation principle),\textsuperscript{23} 2) Article III requires parties to treat foreign and domestic products alike (national treatment principle),\textsuperscript{24} and 3) Article XI limits the use of quantitative restrictions.\textsuperscript{25} However, the GATT parties recognized that there can be compelling reasons for breaching GATT obligations. Article XX contains a number of general exceptions for specific categories of national measures. Of particular interest are two of these express exceptions: one for measures necessary to protect human, animal or plant life or health\textsuperscript{26} and another for those relating to the conservation of exhaustible natural resources.\textsuperscript{27}

\begin{itemize}
\item [21.] Steve Charnovitz, \textit{Multilateral Environmental Agreements and Trade Rules}, 20 \textit{ENVT. POLY AND L.} 163 (1996).
\item [22.] GATT 1947, \textit{supra} note 3.
\item [23.] \textit{Id.} art. I.
\item [24.] \textit{Id.} art. III.
\item [25.] \textit{Id.} art. XI.
\item [26.] \textit{Id.} art. XX (b).
\item [27.] \textit{Id.} art. XX (g).
\end{itemize}
In addition to the three core obligations of GATT, provisions of multilateral environmental agreements must be interpreted in the light of new codes negotiated as part of the Final Act of the Uruguay Round of the GATT. The WTO incorporated the original GATT rules and added new rules regarding health, safety and consumer standards.28

A. THE CORE OBLIGATIONS

1. The Most-Favored-Nation Principle

The most-favored-nation principle29 refers to the obligation to treat goods of one country not less favorably than goods of another country. Any advantage, favor, privilege or immunity granted to one contracting party must be granted equally to all other contracting parties. The principle applies to any rules and formalities concerning imports and exports.30 This non-discriminatory treatment ensures that any tariff reduction or other trade concession is automatically extended to all GATT parties, multiplying its liberalizing effects.

2. The National Treatment Principle

The national treatment principle31 refers to the general obligation to treat imported goods no less favorably than domestically produced goods. Any internal restriction, regulations or taxes applied to imported products must apply to similar domestic products.32 The purpose of Article III is to ensure that, once products have passed through the importation process, they receive the same treatment as like domestic products so that they compete under the same conditions.33

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28. WTO Agreement, supra note 3; Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A [hereinafter TBT Agreement].
29. GATT 1947, supra note 3, art. I.
30. Guruswamy, supra note 9, at 868.
31. GATT 1947, supra note 3, art. III.
32. Wold, supra note 11, at 848.
33. Guruswamy, supra note 9, at 870.
3. GATT Article XI

Article XI prohibits quantitative restrictions such as quotas, bans and licenses on imported and exported products. The purpose of Article XI is to prevent quantitative restrictions on export and import. 34

B. ARTICLE XX EXCEPTIONS

If a measure violates a GATT obligation, a party may be able to justify it under one of the two environmental exceptions contained in Article XX. The provision makes no distinction between multilateral and unilateral measures. Article XX provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...).

(b) necessary to protect human, animal or plant life or health; [or] ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Before any exceptions may apply under Article XX, two key requirements must be met. First, the measure must not be an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." 35 This language leaves room for even a discriminatory measure to stand if it can be

34. Id. at 869.
35. GATT 1947, supra note 3, art. XX, Preamble.
shown that the same environmental circumstances and regulations do not prevail in different countries.\textsuperscript{36} Second, the measure must not be a disguised restriction on international trade.\textsuperscript{37} According to the plain language of the preamble, if these conditions are met, nothing in GATT should prevent measures to protect human, animal, and plant life or health or to conserve natural resources.

Article XX (b) allows measures necessary to protect human, animal or plant life or health.\textsuperscript{38} According to GATT panels a measure is necessary only if 1) a country has no reasonably available alternative measure consistent with GATT provisions and 2) the measure taken was the least trade-restrictive.\textsuperscript{39} In considering only the least trade-restrictive measure as necessary and so justified under Article XX, the panel does not recognize that the least trade-restrictive measure might not be the most effective means of reaching the desired objective.

\begin{itemize}
\item \textsuperscript{36} Hudnall, \textit{supra} note 6, at 186. Examples of factors which might bear on the analysis are whether the countries are party to any environmental treaty under which such measure would be authorized, as well as the countries' relative populations, levels of development and available natural resources.
\item \textsuperscript{37} GATT 1947, \textit{supra} note 3, art. XX, Preamble.
\item \textsuperscript{38} \textit{Id.} art. XX (b).
\item \textsuperscript{39} See also the recent WTO panel in United States - Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274 para. 6.24 (1996) [hereinafter Reformulated Gasoline Decision].
\end{itemize}

In this case Venezuela and Brazil challenged the regulations on the composition and emissions effects of gasoline (Gasoline Rule) promulgated by the U.S. Environmental Protection Agency (EPA). The Gasoline Rule had been established based on the U.S. Clean Air Act and in order to improve air quality in the most polluted areas of the United States by reducing vehicle emission of toxic air pollutants and ozone-forming volatile organic compounds. It applied to U.S. refiners, blenders and importers. Venezuela and Brazil argued that the Gasoline Rule violates the most-favored-nation provisions of GATT, because it provides more favorable treatment for gasoline exported from certain third countries (Canada), and that it violates the national treatment provision, because it provides more favorable treatment for U.S. produced gasoline. The United States argued that the Gasoline Rule falls within the art. XX exceptions, because it is necessary to protect human, animal and plant life or health, because it is related to the conservation of exhaustible natural resources and because it is made effective in conjunction with restrictions on domestic production and consumption. In its reasoning the Appellate Body stated that under the Gasoline Rule imported gasoline was treated less favorably than domestic gasoline and that no art. XX exceptions applied.
Panels have also required countries to attempt to negotiate an agreement and have prohibited countries from trying to change another country's policies or practices.

Article XX (g) allows parties to adopt measures inconsistent with the obligations of the GATT that relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. In the Reformulated Gasoline Decision the Appellate Body agreed that a measure must be "primarily aimed at" the conservation of a natural resource rather than merely relating to the conservation of an exhaustible resource.

A controversial issue under Article XX (b) and (g) with respect to trade measures taken pursuant to international environmental agreements is whether the provisions were intended to allow measures only within the enacting country or whether the provisions also intended to allow extraterritorial applications. The Tuna/Dolphin I panel declared that a measure could not be justified under Article XX (b) or XX (g) if it applied outside a party's jurisdiction. Three years later, the Tuna/Dolphin II panel explicitly refused to limit the scope of Article XX (b) and XX (g) and found that extraterritorial measures fell within the policies envisioned by the two provisions. The status of the extraterritorial requirement is uncertain, because panel decisions do not have precedential value. If Article XX (b) and XX (g) impose a jurisdictional limit, many provisions in multilateral environmental agreements are at risk, because they are specifically designed to resolve global environmental problems.

40. Tuna/Dolphin I, supra note 18.
41. Tuna/Dolphin II, supra note 19, paras. 5.26, 5.38.
42. GATT 1947, supra note 3, art. XX (g).
43. Reformulated Gasoline Decision, supra note 39, para. 18.
44. Tuna/Dolphin I, supra note 18, paras. 5.27, 5.32.
45. Tuna/Dolphin II, supra note 19, paras. 5.15, 5.31.
46. Wold, supra note 11, at 856.
Generally, panels appear to have settled on a three-part test for determining whether a measure is exempted from GATT's core obligations by Article XX (b) or XX (g). The party invoking the exception must prove

(1) that the measures are applied in conformity with the requirements of the preamble of Article XX;

(2) that the policy in respect of the measures for which the exception is invoked falls within the range of policies designed to protect human, animal, or plant life or health per Article XX (b), or is related to the conservation of exhaustible natural resources per Article XX (g); and

(3) that the inconsistent measures for which the exception is invoked are necessary to fulfill the policy objective under Article XX (b), or are related to the conservation of an exhaustible natural resource under Article XX (g).47

Because GATT and WTO panels have given such a narrow interpretation to these exceptions48 no domestic environmental measure has yet been judged to be in compliance with the Article XX.49

C. OBLIGATIONS UNDER THE GATT CODES

The new codes adopted as part of the Final Act of the Uruguay Round of GATT impose additional requirements upon parties. Thus, even if a measure satisfies the requirements of the Article XX exceptions, the measure still must be consistent with the applicable codes.

47. Reformulated Gasoline Decision, supra note 39, paras. 6.20, 6.35; Tuna/Dolphin II, supra note 19, paras. 5.12, 5.29.
48. Tuna Dolphin II, supra note 19, para 5.26 states that "the long-standing practice of panels has accordingly been to interpret Article XX narrowly in a manner that preserves the basic objectives and principles of the General Agreement."
49. Charnovitz, supra note 21, at 166.
The General Agreement on Trade in Services\textsuperscript{50} extends trade liberalization from international trade in goods to trade in services. This code is relevant for interpreting the rules concerning the trade in hazardous wastes because the disposal of hazardous wastes\textsuperscript{51} may qualify as a service, as opposed to a good.

The Agreement on Technical Barriers to Trade\textsuperscript{52} has a great impact on trade-related measures of multilateral environmental agreements.\textsuperscript{53} The Agreement requires parties to apply the most-favored-nation and national treatment obligations to their use of technical regulations. Parties must ensure that technical regulations and product standards do not create unnecessary obstacles to international trade.\textsuperscript{54} The TBT Agreement defines an unnecessary obstacle as one that is more trade restrictive than necessary to fulfill a legitimate objective. That is, the technical regulation must be the least trade-restrictive. The use of an international standard is presumed to be consistent with the TBT Agreement.\textsuperscript{55} If the international standard would be ineffective or inappropriate to fulfill the legitimate objectives pursued, the parties can adopt their own regulations.\textsuperscript{56} The TBT Agreement specifically lists as legitimate objectives the protection of human health or safety, animal or plant life or health, and the environment.\textsuperscript{57}

IV. RESOLVING POTENTIAL CONFLICTS

The preceding section makes clear that the trade measures of multilateral environmental agreements pose significant questions concerning their consistency with GATT and the WTO codes. To resolve these questions, it may be useful to

\textsuperscript{51} Basel Convention, \textit{supra} note 12.
\textsuperscript{52} TBT Agreement, \textit{supra} note 28.
\textsuperscript{53} Wold, \textit{supra} note 11, at 864.
\textsuperscript{54} TBT Agreement, \textit{supra} note 28, art. 2.2.
\textsuperscript{55} \textit{Id.} art. 2.4.
\textsuperscript{56} \textit{Id.} art. 2.4.
\textsuperscript{57} \textit{Id.} art. 2.2.
treat disputes between parties separately from disputes between or among parties and non-parties.

A. DISPUTES BETWEEN PARTIES

The rights and the obligations formulated in a multilateral environmental agreement on the one hand and the GATT/WTO regime on the other both originate in international treaties. International agreements are analogues of contracts among states and create rights and obligations among the parties to those agreements. Where two parties are members of the GATT/WTO and a multilateral environmental agreement and associated trade measures are used to control traffic between them, conflicting interpretations of inconsistent treaties may arise among them.

1. Rules of Interpretation of Treaties in the Vienna Convention on the Law of Treaties

The rules of interpretation of treaties under the Vienna Convention on the Law of Treaties and general rules of interpretation are standard tools for resolving conflicting treaties. Often, parties will include provisions that describe the relationship of an agreement to other treaties. Generally, the interpretation of an international agreement is limited to the text of the treaty, unless the provisions are ambiguous or obscure, or lead to absurd results. In such a case, the preparatory work might provide useful insights into the intent of the negotiators.

Article 30 of the Vienna Convention states that when the provisions of two treaties relating to the same subject matter are in conflict, the later in time prevails, as between parties to both, unless one of the treaties expressly specifies otherwise.

The first significant problem in applying this treaty

59. Wold, supra note 11, at 910.
60. Vienna Convention, supra note 58, art. 32.
61. Id. art. 30 (4) (a).
interpretation rule is to determine whether multilateral environmental agreements and GATT/WTO relate to the same subject matter. The existence of trade measures in environmental agreements and the existence of environmental exceptions in GATT suggest that certain provisions of the agreements may relate to the same subject matter. By including the protection and preservation of the environment in the preamble of the WTO Agreement, the WTO members expressly recognized the environmental concern of their agreement. Also, the report by the Committee on Trade and Environment, adopted in December 1996 by the Ministerial Conference in Singapore, indicates that there is a potential conflict between environmental agreements and GATT, which suggest that they relate to the same matter. On the other hand, one could also argue that such treaties relate to different topics, because the subject of an environmental agreement relates to a particular environmental problem, whereas GATT and the WTO codes relate to eliminating trade barriers.

If a multilateral environmental agreement and GATT relate to the same matter, then the Vienna Convention mandates that the later in time treaty prevails. GATT 1947 is an integral part of the Agreement establishing the WTO, but GATT 1947 and GATT 1994 are legally distinct. Whether GATT 1947 was brought forward into the WTO or retains its original date is unclear. The wording of the Agreement establishing the WTO suggests that a new instrument consisting of the original

62. WTO Agreement, supra note 3.
63. Report of the WTO Committee on Trade and Environment [CTE Report], posted online by WTO Nov. 14, 1996, <http://iisd1.iisd.ca/trade/wto/ctereport.html>. The report includes recommendations and conclusions to the issue of the relationship between provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements, see id. Item 1.
65. Vienna Convention, supra note 58, art. 30. The Vienna Convention does not state when a treaty is dated. Also scholars are not in agreement whether the treaty is dated from the time of its adoption, or from the time of its entry into force. Wold, supra note 11, at 911.
66. WTO Agreement, supra note 3, art. II (2).
67. Id. art. II (4).
GATT 1947 and its subsequent amendments was recodified as GATT 1994. The effective date of the GATT 1994, that is, 15 April 1994, would make it more recent than most multilateral environmental agreements.\(^{68}\)

Amendments to agreements, like the Decision III/1 of the parties to the Basel Convention,\(^{69}\) confuses this order of priority. The relevant date for treaty interpretation should be the date the amendments are adopted or entered into force.\(^{70}\)

Assuming that the Basel Convention and the GATT relate to the same subject matter, GATT as the treaty later in time would prevail, while on the other hand the amendment of the Basel Convention would prevail over the GATT. The application of Article 30 of the Vienna Convention may provide a convenient solution in a specific case, but not in general where the conflict between multilateral environmental agreements and GATT rules emerges.

2. *Lex Speciali Derogat Generali*

Although not stated in the Vienna Convention, specific treaties or provisions prevail over general treaties or provisions under the rule of *lex specialis*, even if the general provisions are later in time. Similarly to the *lex posterior* rule, the *lex specialis* requires the treaties to relate to the same subject matter.\(^{71}\) The provisions of a multilateral environmental agreement are more specific than GATT and its codes. The subject matter of GATT applies to the entire universe of products, with the goal of reducing restrictions to trade. A multilateral environmental agreement focuses on one environmental problem and provides measures, including trade measures, to reduce or eliminate the problem. Because GATT is a more general international

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70. Wold, *supra* note 11, at 912.

71. *Id.* at 912.
agreement than are multilateral environmental agreements, the later may control if there is a conflict.

3. Consensual Derogation by Parties

Where a conflict emerges over inconsistency of a multilateral environmental agreement and GATT, a multilateral environmental agreement might be viewed as an inter se agreement that overrides inconsistent GATT obligations. Analogous to contracts, the agreements create rights and obligations among the parties to those agreements. If the conflicting states are parties to both agreements, they have the identical obligations. It could be argued that parties to a multilateral environmental agreement have consensually relinquished their GATT/WTO rights by mutual agreement.\(^2\)

The explicit incorporation of the GATT rules in the new WTO trade system has weakened the argument of consensual derogation by the parties. The Uruguay Round Agreement does not recognize the legitimacy of existing international environmental agreements.

B. DISPUTES BETWEEN OR AMONG NONPARTIES

Disputes between nonparties emerge when two countries are members of the WTO, but are not both parties to a particular multilateral environmental agreement. In such a situation, the nonparty state may be burdened by trade restrictions included in the multilateral environmental agreement that it has not ratified and has no ongoing role in managing. Because the nonparty is not a member of the multilateral environmental agreement, one cannot assume any consent on its part to waive its rights under the GATT not to be discriminated against.

Whether trade measures against nonparties of multilateral environmental agreements violate GATT/WTO rules depends

\(^2\) Charnovitz, supra note 21, at 165; David A. Wirth, Trade Implications of the Basel Convention Amendment Banning the North-South Trade in Hazardous Wastes, 19 Int'l Envtl Rep. 796, 797 (1996).
on how a dispute panel would interpret GATT Article XX. Nonparty provisions are generally designed to change the practice and policies of nonparties. If a dispute panel follows the reasoning of the Tuna/Dolphin II panel, a nonparty provision will not fall within the GATT Article XX (b) and XX (g) exceptions.

Conflicts between multilateral environmental agreements and trade rules seem to require some harmonization of the two regimes so that they can co-exist.

V. RECONCILIATION BETWEEN MULTILATERAL ENVIRONMENTAL AGREEMENTS AND TRADE RULES IN THE FUTURE

No formal GATT or WTO challenge has yet been filed against trade measures taken to implement a multilateral environmental agreement; but it seems nevertheless important to confirm the compatibility of the two regimes. The uncertainty about how WTO dispute settlement procedures would resolve such a challenge may impair the effective implementation of multilateral environmental agreements. It may also discourage negotiators of future environmental agreements from using trade measures, even if they may be vital for the effectiveness of the treaty. Negotiators of multilateral environmental agreements must have the certainty that if a trade measure is chosen as a tool to deal with a multilateral environmental problem, their decision will not be subject to challenge under trade rules. A consensus among both the trade and environmental communities has to emerge that the GATT/WTO system should not override

73. Tuna/Dolphin II, supra note 19, paras. 5.26, 5.38. The panel stated that measures designed to achieve their goals only through changes in another country's jurisdiction could not be necessary to protect human, animal, or plant life or health or primarily aimed at the conservation of natural resources.

74. Some authors have criticized environmental trade measures as neither really costless nor very effective as an environmental policy tool. ESTY, supra note 64, at 191.

75. WWF, supra note 8.
international environmental agreements. Therefore, and in order to promote sustainable development, the international community must establish a mutually supportive relationship between international trade and multilateral environmental agreements. Different suggestions have been made to accomplish this goal.

A. THE RECOMMENDATIONS OF THE COMMITTEE ON TRADE AND ENVIRONMENT

At the WTO Ministerial Conference in Singapore in December 1996 the members of the WTO adopted the report of the Committee on Trade and Environment (CTE). Item 1 of the CTE report considers the issue of the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.

In its conclusion the CTE recognized that the WTO and multilateral environmental agreements are efforts by the international community to pursue shared goals. They should be mutually supportive in order to promote sustainable development. Although the most important multilateral environmental agreements rely upon trade measures, the CTE emphasizes that trade measures have been included in a relatively small number of multilateral environmental agreements and that there is no clear indication as to when and how they may be needed or used in the future.

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76. FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT ET AL., ENVIRONMENTAL PRIORITIES FOR THE WORLD TRADING SYSTEM, RECOMMENDATIONS TO THE WTO COMMITTEE ON TRADE AND ENVIRONMENT, Jan. 1995, at 17.
77. Id.; CTE Report, supra note 63, para. 167.
78. CTE Report, supra note 63. The CTE was established by the WTO General Council in January 1995. The CTE’s mandate and terms of reference are contained in the Marrakesh Ministerial Decision on Trade and Environment of 15 Apr. 1994, 33 I.L.M. 1267 (1994).
79. CTE Report, supra note 63.
80. Id. para. 171.
81. Id. para.167.
82. Charnovitz, supra note 21, at 164.
83. CTE Report, supra note 63, para. 174.
view of the CTE, the range of provisions of the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to multilateral environmental agreements.\textsuperscript{84} The CTE stressed that policy coordination between trade and environmental policy officials at the national level plays an important role in ensuring that WTO members are able to respect the commitments they have made in the separate fora of the WTO and environmental agreements.\textsuperscript{85} The CTE also encouraged the cooperation between WTO and relevant institutions of multilateral environmental agreements.\textsuperscript{86}

Further, the CTE recommended that WTO members which are also parties to multilateral environmental agreements, resolve disputes over the use of trade measures applied between themselves pursuant to the multilateral environmental agreement through the dispute settlement mechanism available under the environmental treaty.\textsuperscript{87} At the same time, the CTE seemed to regard disputes between parties to multilateral environmental agreements as unlikely to occur in the WTO, since the parties have agreed to apply among themselves specifically mandated trade measures.\textsuperscript{88}

A joint statement from ten non-governmental organizations (NGOs) strongly condemned the failure of the CTE to produce any significant results over the past two years. The group called for the WTO ministers to:

(1) reaffirm the legitimacy of existing multilateral environmental agreements as instruments that operate independently of and in co-existence with the rules of the WTO;

(2) acknowledge the authority of the negotiations of multilateral environmental agreements to select the

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\textsuperscript{84} Id. para. 174 (ii).
\textsuperscript{85} Id. para. 174 (vi).
\textsuperscript{86} Id. para. 175.
\textsuperscript{87} Id. para. 178.
\textsuperscript{88} Id. para. 174 (iv).
objectives of agreements and the means to achieve them;

(3) confirm that the WTO in no way pre-empts negotiations of multilateral environmental agreements.89

B. OTHER SUGGESTIONS OF RECONCILIATION BETWEEN MULTILATERAL ENVIRONMENTAL AGREEMENTS AND TRADE

Actions taken by parties to specific environmental agreements cannot bind nonparties to those agreements. As a result, action by WTO parties would be a more effective resolution to conflicts between environmental agreements and GATT/WTO rules, because such action would establish rules for all parties having trade rights.

1. Exemption of Multilateral Environmental Agreements Through Waiver

One option available to WTO parties is the exemption of multilateral environmental agreements through waiver.90 Each multilateral environmental agreement authorizing trade restrictions would be submitted, after being negotiated, for a waiver action under Article IX.91 The WTO Agreement permits parties in exceptional circumstances to waive obligations if approved by a three-fourths majority.92 The rules of waiver allow the parties to waive all or only certain obligations. Similarly, the parties to the North American Free Trade Agreement (NAFTA) waived the trade obligations for CITES, the Basel Convention and the Montreal Protocol and

90. Wold, supra note 11, at 915; ESTY, supra note 64, at 219.
91. WTO Agreement, supra note 3, art. IX (3).
92. Id.
specifically incorporated those waivers into the text of the treaty.\textsuperscript{93}

Because under GATT the use of waiver is only permitted in exceptional circumstances,\textsuperscript{94} it seems to require a fundamental conflict between the proposed restriction and the GATT.\textsuperscript{95} The proposed case-by-case waiver approach creates a hierarchy which places the GATT and WTO above multilateral environmental agreements. Moreover, a waiver is ordinarily time-limited and would have to be renewed periodically, implying that the multilateral environmental agreement is being accepted only temporarily. This complicates the negotiations of international environmental agreements where trade measures may be regarded as a necessary implementation tool.\textsuperscript{96}

2. Amendment of the GATT

The parties could also amend the GATT or the WTO and add new exceptions specially for multilateral environmental agreements.\textsuperscript{97} Such an amendment could stipulate that trade

\textsuperscript{93} North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 289 (1993), art. 104. Article 104 (1) states:

In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,

(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,

(c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or

(d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

\textsuperscript{94} GATT 1947, supra note 3, art. XXV (5).

\textsuperscript{95} United Nations Department for Policy Coordination and Sustainable Development (DPCSD), Research on linkage between trade, environment and sustainable development, preliminary note posted online by DPCSD, undated.

\textsuperscript{96} WWF, supra note 8.

\textsuperscript{97} Charnovitz, supra note 21, at 166; ESTY, supra note 64, at 219.
restrictions in conformity with multilateral environmental agreements would be consistent with GATT.\footnote{In fact, GATT 1947 Article XX (h) provides a precedent for GATT acceptance of trade restrictions imposed under international conventions, in this case pursuant to commodity agreements.} A new GATT provision blessing multilateral environmental agreements could also specify that a country’s status as a party or nonparty to an environmental agreement does not figure in the GATT’s presumption of environmental legitimacy for actions taken pursuant to recognized international agreements.\footnote{ESTY, supra note 64, at 219.} The exception should be broadly drawn so as not to exclude any existing international environmental agreement or to prejudice establishment of legitimate trade measures in a future environmental treaty.\footnote{FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT ET AL., supra note 76, at 17.} The following wording of a new exception has been proposed:

Each Party affirms its respective rights and obligations with respect to measures under existing and future bilateral or multilateral environmental and conservation agreements to which it is or may become a Party. Nothing in the WTO/GATT agreements shall be construed to prevent or impede Parties from taking actions to implement or enforce existing or future international environmental agreements.\footnote{Id. at 17.}

If environmental provisions are integrated into international trade policy, developing countries may be concerned that incorporating environmental considerations into GATT would provide tools that could be used to disguise protectionism. Such concerns arise from one of the most pervasive problems of the global approach to environmental protection, namely in the vast economic disparity that exists between developed and developing countries.\footnote{Hudnall, supra note 6, at 210: “[D]ifferent countries have different natural resource endowments, levels of pollution, waste and absorptive capacities, systems of production, labor and capital intensities and level of development.”} There is a tendency for developing countries to view environmentally destructive development as
an entitlement.103 For many countries in the South, particularly those trying to develop export markets as parts of their development programs, the emphasis on environmental values in the North seems to present a subterfuge designed to maintain the economic dominance of the industrialized world.104 They vehemently object to the use of environmental trade measures to eliminate any competitive advantage that might arise when their environmental choices differ from northern preferences.105

Also, an amendment of GATT is not likely because of two procedural obstacles. First, two-thirds of the parties must agree to vote on the proposed amendment.106 Second, each party’s legislature must accept the amendment before it binds that party. Under international law, a treaty does not bind a country until the country formally consents, through ratification, acceptance, or accession to the treaty.107

Therefore, the suggested adoption of a decision of interpretation appears to be a valid alternative.108 Referencing specific multilateral environmental agreements, the parties could reinterpret existing GATT provisions.109 The parties could provide meaning to Article XX exceptions, particularly the preamble. GATT panels have construed the preamble and the two environmental exceptions so narrowly that no environmental measure is likely to meet the panel’s criteria. To clarify the “discrimination clause” of the preamble to Article XX, the parties should define the phrase “in countries where the same conditions prevail.”110 An interpretation of conditions

103. Id. at 210; ESTY, supra note 64, at 185. Developing countries argue that industrial countries were able to exploit their natural resources, virtually unchecked, until they reached a level of economic development at which they could afford the luxury of exploring less environmentally degrading modes of production.

104. ESTY, supra note 64, at 182-85. Many officials of developing countries denounce “ecoimperialism” and revile US and European environmentalists as a leading threat to their environment.

105. Id. at 183.

106. WTO Agreement, supra note 3, art. X (1).

107. Vienna Convention, supra note 58, arts. 11-16, 34, 39.

108. Wold, supra note 11, at 916.

109. ESTY, supra note 64, at 219; Hudnall, supra note 6, at 209.

110. GATT 1947, supra note 3, Article XX, Preamble.
that includes ecological and environmental conditions would legitimize the provisions of multilateral environmental agreements.\textsuperscript{111} GATT parties should also state clearly that trade distinctions are justifiable between parties and nonparties in circumstances where differences in regulatory systems exist. Also, the language of Article XX (b) and XX (g) requires a new meaning. The term "necessary" in Article XX (b) should not be read to mean that measure must be the least trade-restrictive alternative.\textsuperscript{112} Similarly, the phrase "relating to conservation" should not be read to mean primarily aimed at conservation.\textsuperscript{113} Such interpretations prohibit any environmental measure from meeting the requirement of Article XX.

3. Change of Forum for Disputes Involving Multilateral Environmental Agreements

Another approach is to change the forum for disputes involving multilateral environmental agreements so that WTO panels will not adjudicate these cases.\textsuperscript{114} Such disputes could be referred to the International Court of Justice. If a dispute were referred to the International Court of Justice, the Court might apply Principle 7 of the Rio Declaration\textsuperscript{115} which declares that "all States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem". If the complaining party were a member of the multilateral environmental agreement, the dispute could be referred to the dispute settlement mechanism of the agreement, if one exists.\textsuperscript{116} For example, the Basel Convention provides that parties may accept arbitration or compulsory submission of disputes to the ICJ.\textsuperscript{117}

\textsuperscript{111} Wold, supra note 11, at 918.
\textsuperscript{112} See supra Part III.B. (discussing interpretation of Article XX (b) by GATT panels).
\textsuperscript{113} Id.
\textsuperscript{114} Charnovitz, supra note 21, at 167.
\textsuperscript{116} Also suggested by the CTE. CTE Report, supra note 63, para. 178.
\textsuperscript{117} Basel Convention, supra note 12, art. 20.
4. Criteria for Using Trade Measures in Multilateral Environmental Agreements

The idea of developing criteria for using trade measures in multilateral environmental agreements has received considerable attention. The criteria could be used in several ways. They could be indicative criteria for drafting new multilateral environmental agreements so as to avoid conflict with GATT and WTO. There could also be standards for WTO panels to use in adjudicating disputes.

In intergovernmental discussions, several criteria have been put forward for reviewing the use of trade measures in multilateral environmental agreements. Among them are:

- legitimacy of the multilateral environmental agreement,
- non-protectionist intent,
- necessity of the trade measure,
- non-discriminatory use of the trade measure,
- least-trade restrictiveness and
- effectiveness of the multilateral environmental agreement.

While all of these criteria have merit, they could be used to prevent the use of trade measures. Such a criteria-related approach also raises the difficult question concerning their implementation. For example, who applies the criteria? While environmentalists are wary of a WTO panel or other WTO institutions applying the criteria, free-traders are likewise wary of environmentalists. The Commission for Sustainable Development and the International Court of Justice have been

118. Charnovitz, supra note 21, at 167.
119. Id. at 167.
proposed as neutral fora that would appease both environmentalists and free-traders.\textsuperscript{120}

5. Coordination of Trade and Environmental Policy-Making

Coordinated trade and environmental policy-making minimizes the chance of a GATT conflict over enforcement. A parallel practice — having environmental officials participate in trade negotiations and vice versa — should become a standard practice.\textsuperscript{121} The cooperation and coordination of the WTO with institutions of multilateral environmental agreements\textsuperscript{122} and the injection of the view of NGOs into the WTO\textsuperscript{123} would support such a practice.

This coordination and cooperation would affirm the legitimacy of multilateral environmental agreements as instruments that operate independently of and in co-existence with the rules of WTO. Multilateral environmental agreements should retain full competence to judge the legitimacy of their environmental objectives and to select the means to achieve those objectives. Conversely, the WTO should maintain its competence to prevent protectionist abuses of trade measures through its dispute settlement mechanism.

6. A Global Environmental Organization

Finally, the creation of a global organization for the sole purpose of promoting the goals of environmental protection and trade liberalization has been proposed.\textsuperscript{124} In fact there is no single institution, like GATT in the trade realm, charged with coordinating international environmental policy-making. Decisions are made and strategies are set issue-by-issue, agreement-by-agreement, with separate secretariats staffing each effort.\textsuperscript{125} The central problem is that no existing

\textsuperscript{120} Wold, \textit{supra} note 11, at 917-18.
\textsuperscript{121} Esty, \textit{supra} note 64, at 220.
\textsuperscript{122} CTE Report, \textit{supra} note 63, para. 175.
\textsuperscript{123} Hudnall, \textit{supra} note 6, at 209-10.
\textsuperscript{124} Esty, \textit{supra} note 64, at 230-31.
\textsuperscript{125} \textit{Id.} at 231.
organization has a mandate or the resources to coordinate worldwide efforts to protect the environment.

A Global Environmental Organization could, over time, create a broad but cohesive body of international environmental law and a set of methodologies and procedures for individual countries to follow in striving towards shared goals. As the GATT built the core concept of nondiscrimination as a means to trade liberalization, a Global Environmental Organization would establish guidelines, centered on the polluter pays principle, to promote international cooperation in addressing environmental matters and the integration of economic and environmental policy goals. A Global Environmental Organization would provide an institutional counterweight and counterpart to the GATT.

VI. CONCLUSION

If GATT and WTO rules apply to provisions of multilateral environmental agreements, many of those provisions are likely to be found inconsistent with GATT. The lack of conformity reflects the different purposes of the agreements. While GATT and WTO rules seek to remove barriers to trade, multilateral environmental agreements use trade barriers as a means of eliminating specific environmental problems.

The tension between GATT/WTO and environmental measures is real. GATT and WTO panels have already found several domestic environmental measures inconsistent with GATT. Even if a large number of countries have agreed to the trade provisions of environmental agreements and even if the trade measures are often vital to the success of the agreements, WTO

126. Id. at 230.
127. A precedent for a new international organization dealing with trade and the environment may be found in the North American Commission for Environmental Cooperation created by the NAFTA environmental agreement. Foundation for International Environmental Law and Development et al., supra note 76, at 23.
128. Wold, supra note 11, at 919.
129. Tuna/Dolphin I & II, supra note 18 & 19; Reformulated Gasoline Decision, supra note 39.
has not granted that a country's implementation of trade-related measures of multilateral environmental agreements should be specially favored. For agreements, such as the Basel Convention, that regulate trade because trade is the environmental problem, this situation is unacceptable.

Clearly, this tension between the two regimes must be reconciled. To accomplish this goal, however, the WTO will need to address environmental agreements and the environment. In establishing the CTE, the WTO has taken the first step in this direction. Despite the unwillingness of the WTO parties to make exceptions for environmental agreements, they could easily resolve any conflict by amending GATT rules to provide for such exceptions. They could accomplish the same objective through other procedural mechanisms such as waiver.

The WTO cannot accomplish this reconciliation on its own. Environmental auditing by a Global Environmental Organization could cooperate with the WTO in resolving trade and environment disputes. But the prospects of a Global Environmental Organization being established any time soon appear slim.\textsuperscript{130} Parties to multilateral environmental agreements must mutually support both regimes. After all, many such agreements have more parties than the WTO, and these parties have agreed to create uniform rules for regulating and resolving a particular environmental problem, such as hazardous wastes trade. They have agreed that resolution of certain global environmental problems requires a separate set of trade rules based on environmental factors. The parties to environmental agreements can declare that their rules are exempt from GATT and WTO code rules. This option, however, would only clarify the relationship between parties to the environmental agreement. All WTO parties that are members of the multilateral environmental agreement would be bound not to exercise WTO rights against parties implementing environmental agreements.

\textsuperscript{130} ESTY, supra note 64, at 231.
Trade and environmental interests need to come together and cooperate to achieve an environmentally sound world. As long as those interests remain separate and the two sides continue to advocate their own goals, the effectiveness of both regimes can never be enhanced.