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The Relationship between the Multilateral Trading System and the Use of Trade Measures in Multilateral Environmental Agreements

– Synergy or Friction? –

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RESTRAINING THE USE OF TRADE MEASURES IN MULTILATERAL AGREEMENTS: AN OUTLINE OF THE ISSUES

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1.0 The World Trade Organization (WTO), through its Committee on Trade and Environment, is considering what to do about latent conflicts between multilateral environmental agreements (MEAs) and GATT rules. The traderegime is considering criteria to help identify trade measures eligible foraccommodation by the WTO.[1] Given the successes of the trade regime in recent years, there is certainly a lot that the environmental regime can learn from it.

1.1 The terms of reference for the Committee on Trade and Environment call for it to consider 'the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.'

1.2 Agenda 21 calls on governments to 'Develop more precision, where necessary, and clarify the relationship between GATT provisions and some of the multilateral measures adopted in the environment area.'[2]

1.3 The GATT began considering MEAs in the EMIT Group in early 1992. Many observers hope that some conclusions can be reached before the Singapore Ministerial in December 1996.

1.4 In a recent speech, the WTO Director-General stated that 'It is also not difficult to see how ill-considered international environmental agreements could needlessly frustrate trade and reduce income – and even put at risk environmental reform and improvement.'[3]

1.5 The Report of the Advisory Group (Japan) on Global Environmental Problems concluded that 'there is a need to recognize the significance of MEAs within trade rules, with a particular view to addressing global environmental problems.'[4]

1.6 Some commentators have argued that no problem exists, until such time as an MEA is challenged in WTO dispute settlement. But this ignores the cost of the lingering uncertainties to both the trade and environment regimes. The trade regime sacrifices the precious commodity of public support, as environmental NGOs continue to view the WTO as a threat to MEAs. The environmental regime loses access to an important

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1. WTO, Trade and the Environment, 8 December 1995, at 1.
2. Agenda 21 (1992), 2.22(j).
3. Paul-Henri Spaak Lecture, 16 October 1995.
4. Advisory Group on Global Environmental Problems, Harmonizing Environment and Trade Policies 19 (1995).

instrument, to the extent that environmental negotiators hesitate to introduce trade measures into new treaties.

2.0 Considerable legal analysis has been done on the interaction of MEAs and GATT rules and on ways in which MEAs might be treated as GATT-consistent. One focus has been on situations where two parties are members of both the GATT and the MEA and the trade measure is used between them. In this situation, the MEA might be viewed as an inter se agreement.

2.1 The Vienna Convention on the Law of Treaties has provisions dealing with the interpretation of treaties. Among parties, a later-in-time treaty relating to the same subject matter prevails (Article 30.2). It is unclear whether the WTO covers the same subject matter as MEAs. Even if it does, the effective date for 'GATT 1994' would make it more recent than most MEAs.

2.2 An MEA might be viewed as more specific (*lex specialis derogat generali*) than the GATT/WTO under general international law in which case the MEA might be viewed as 'trumping' the GATT.

2.3 Even if an MEA is recognized as superseding the WTO, there will always be a problem of determining when a trade measure is taken pursuant to an MEA. Will trade measures 'authorized' by the MEA be justified, or only those 'required' by the MEA?[5] How about situations when an MEA institution calls for trade measures not required by the treaty, such as the IWC's ban on the export of whaling equipment to non-parties, or the strict controls periodically recommended by the CITES Conference? How about situations when an MEA authorizes a trade measure 'consistent with international law,' as it does in the Wellington Convention? Is the GATT international law, or is it just a contract among like-minded countries?

2.4 More difficult situations will occur with trade measures taken to promote the effectiveness of a treaty. For example, the United States bans virtually all whale imports even though this is not required by the Whaling Convention. Norway, for various reasons, bans virtually all whale exports.

3.0 Trade measures taken pursuant to an MEA but used 'against' another country that is not a party to the MEA present a more difficult legal problem. A considerable amount of analysis has been done on this issue.[6]

3.1 This situation occurs in a few key environmental treaties such as the Montreal Protocol and the Basel Convention. It will be a salient problem immediately after an environmental treaty goes into force, because then its parties may not be numerous.

5. For a discussion of this problem, see Steve Charnovitz, A Taxonomy of Environmental Trade Measures, 6 Georgetown International Environmental Law Review 1-46 (1993).

6. For example, see John Temple Lang, 'The Problem was already solved: GATT panels and public international law,' IBA, Dublin, November 1994 and Winfried Lang, 'Trade Restrictions As a Mean of Enforcing Compliance with International Environmental Law,' 1995.

3.2 One possibility is that certain MEAs might be viewed as customary rules of international law, or as erga omnes rules, that would trump GATT disciplines.[7] Although the GATT makes no mention of international environmental law, it is interesting to note that Agenda 21 has been cited as authority during at least one GATT debate. This occurred in November 1992 when the GATT Council discussed an Austrian eco-labeling law. More than half of the contracting party representatives referred to provisions in Agenda 21 as providing relevant guidance to GATT members.[8]

3.3 Another possibility is that such treaties would qualify under the GATT Article XX(b) and (g) exceptions. At the time that CITES and the Montreal Protocol were written, it was presumed by negotiators (based on advice from the GATT Secretariat) that Article XX would apply to those treaties. But the two GATT dolphin decisions have cast doubt on that assumption. Although the two decisions concerned unilateral trade measures – rather than MEAs – the exclusionary logic of the decisions regarding Article XX could be viewed as applying also to MEAs.

4.0 Several options have been proposed for addressing the problem of incompatibility of MEAs to WTO rules.

4.1 One option is for the WTO to move environment-trade complaints to tribunals provided for under MEAs (e.g., part XV of UNCLOS) when the disputing parties are members of the MEA.[9]

4.2 A second option is for the WTO to adopt the provision in the Charter of the International Trade Organization (ITO) of 1948, which provided that a member prejudiced by an ITO decision could seek an advisory opinion from the International Court of Justice which would then bind the ITO.[10]

4.3 A third option is to amend the WTO to provide that members will comply with specified environmental treaties. This approach was taken with respect to intellectual property in the Uruguay Round which, in effect, requires supranational treatment.[11] An earlier precedent exists in the GATT which provides an exception for import controls aimed at effectuating exchange controls in accordance with the rules of the International Monetary Fund.[12] The GATT also yields to the treaties of peace arising out of World War II.[13]

4.4 A fourth option is to improve the Agreement on Technical Barriers to Trade which requires the use of international standards except when such standards 'would be an

7. See James Cameron and Jonathan Robinson, The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT, 2 yearbook of international environmental law 3 (1992).
8. GATT Doc. C/M/260.
9. See Report of the Chairman of the EMIT Group (Ukawa Report), 35.
10. ITO, Article 96.
11. Parties must comply with the Paris Convention (1967), the Berne Convention (1971), and the Rome Convention (1989).
12. GATT, Article XV:9.
13. GATT, Article XXIV:3(b).

ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.'[14] This provision could be strengthened so that governments will have fewer justifications for not harmonizing upward to product standards specified in MEAs. Trade measures based on such standards are rebuttably presumed to the consistent with the WTO.

4.5 A fifth option is to solve the problem of WTO-MEA compatibility through regional trade agreements. For example under NAFTA, a government defending its trade actions under certain MEAs can select NAFTA as the venue. The NAFTA panel will then use NAFTA (not GATT) law.[15] Disputes within the European Union are adjudicated internally, not in the WTO.

4.6 A sixth option is *inter se* agreements which provide for their own enforcement. For example, the recent OECD Agreement on Shipbuilding provides for trade sanctions against parties that violate the harmonization prescribed in the agreement. These sanctions seemingly may not be appealed to the WTO.[16] This model could be used for environmental harmonization.

4.7 A seventh option is to amend the GATT by inserting a new Article XX(k) relating to MEAs. There is precedent for this approach in the ITO Charter which provided an exception for trade measures 'taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds, or wild animals . . .'[17] There is also precedent from an earlier multilateral trade treaty – the Customs Formalities Convention of 1923. That treaty provides that its obligations 'do not in any way affect those which they (the contracting parties) have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention) . . .'[18]

5.0 Both the WTO and the OECD are considering criteria for the appropriate use of trade measures in environmental treaties. Generally, these criteria are derived from norms of the trading system. These criteria would be viewed as guidelines to the environmental regime when negotiating new treaties. The criteria might also be employed by a WTO panel when considering a challenge to a trade measure implementing an MEA.

5.1 In inter-governmental discussions, several useful criteria have been put forward for reviewing the use of trade measures in MEAs. Among them are: legitimacy, non-protectionism, necessity, non-discrimination, proportionality (as measured by costs and benefits), least-trade restrictiveness, openness and universality of participation,

14. TBT, Article 2.4.
15. NAFTA, Articles 2005.3 and 104.
16. Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry (1994), Article 8(9).
17. ITO, Article 45(a)(x). For a discussion, see Steve Charnovitz, Exploring the Environmental Exceptions in GATT Article XX, 25 Journal of World Trade 37, 45-47, 54 (October 1991).
18. International Convention Relating to the Simplification of Customs Formalities, 30 LNTS 373, Protocol 1, 1923.

effectiveness, the degree of scientific certainty involved, and lack of behavior-modification intent. All of these criteria have merit and are factors that environmental policymakers should consider in drafting treaties. The trade regime has expertise to assist the environmental regime in applying these criteria.

5.2 In a recent paper, the European Union put forward an option whereby certain MEAs would get 'preferential treatment' by WTO panels. There would be an irrebuttable presumption that the trade measure meets the 'legitimacy' and 'necessity' tests. Thus, the only role of the panel would be to review whether the MEA is consistent with the Article XX headnote. The advantage of this approach, according to the EU, is that negotiators of MEAs 'would retain full competence to judge the legitimacy of an environmental objective and on selecting the appropriate means for its achievement.' Yet it is doubtful that this advantage would truly arise. If the panel has to determine whether the trade measure constitutes 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail,' then it will have to make many substantive judgments about the treaty. For example, if one WTO country acts consistently with an MEA and another does not, do the 'same conditions' prevail in those countries? Is it 'unjustifiable' to discriminate against non-parties? Is a restriction on waste trade between OECD and non-OECD countries 'arbitrary'? It should also be noted that there is very little GATT caselaw on the provision about discrimination in the Article XX headnote.

5.3 Whatever criteria are applied to trade measures in the environmental regime should also be applied to trade measures in other multilateral regimes, such as the trade regime. In other words, these criteria should be applied in a non-discriminatory manner among regimes.

5.4 A number of the criteria listed in 5.1 raise interesting issues with regard to their applicability to the trade regime, as noted in the table on page 18.

5.5 The environment regime should assist the trade regime in applying these criteria to plurilateral trade agreements (PTAs). PTAs overuse mercantilist trade measures to the detriment of world trade and economic growth. It should go without saying that any retardation of prosperity is bad for environmental protection.

5.6 The Committee on Trade and Environment should test any criteria developed for MEAs by applying them to PTAs. Criteria that are politically unrealistic for PTAs may also be unrealistic for MEAs.

5.7 The trade regime needs help in spotting questionable use of PTAs. Environmental ministries should urge UNEP, UNCTAD, and the OECD to begin an exercise of applying these criteria to trade measures in PTAs. UNEP should develop criteria for determining what applications of trade measures are most socially beneficial. In other words, if there is interest in scaling back the trade measures used in treaties, what should be cut first: trade restrictions in commercial and mercantilist agreements or trade restrictions in environmental agreements?

MEA Criterion	Issue
Non-protectionism	The WTO Agreement on Textiles and Clothing provides for 10 more years of protectionist textile quotas.
Necessity	The WTO Safeguards Agreement allows governments to keep one voluntary export restraint until the year 2000.
Non-discrimination	A large number of regional trade agreements have been and are being negotiated which will violate the MFN principle.[19] Such regional agreements often have rules of origin provisions that distort and divert trade.
Proportionality	The WTO Agreement on Article VI permits the use of anti-dumping duties. Do the economic benefits of such duties exceed their costs?
Least-trade restrictiveness	The EU-sponsored Framework Agreement on Banana Imports provides for quotas. Are such trade measures the least restrictive way of dealing with an agricultural competitiveness problem?
Openness and universality of participation	Despite repeated efforts by the largest nation in the world, the GATT and WTO have refused to permit membership by China.
Effectiveness	GATT Article II permits tariffs. Are tariffs an effective way of promoting domestic economic growth?
Degree of scientific certainty involved	The WTO continues the practice of 'special and differential treatment' for developing countries. Is there any scientific evidence that this practice – which is pervasive in the WTO – helps rather than hurts developing countries?
Lack of behavior-modification intent	The WTO Agreement on Intellectual Property Rights (Article 51) requires members to utilize import measures at the request of a rights holder. What is the purpose of such trade measures?

19. It is interesting to note that of the 80 existing regional trade agreements that have been examined by the GATT, only 6 were found to be consistent with the GATT rules in Article XXIV.