Multilateral Environmental Agreements and Trade Rules

by Steve Charnovitz*

Introduction

In 1992, the General Agreement on Tariffs and Trade (GATT) began to consider the relationship between multilateral environmental agreements and international trade rules. This examination intensified in 1994, when the new World Trade Organisation (WTO) established a Committee on Trade and Environment (CTE). The Committee will report its findings in December 1996 to the WTO Ministerial conference in Singapore.

The issue of "MEAs" – that is, multilateral environmental agreements – first came into focus in 1991, following the GATT panel decision on the U.S. Marine Mammal Protection Act. The panel found that two GATT exceptions invoked by the United States – Article XX(b) and (g) – could not be used to justify a law protecting dolphins outside the jurisdiction of the importing country.[1] Although the "tuna-dolphin" dispute involved a unilateral import ban, not an MEA, many environmentalists began to worry that the same exclusionary logic could disable the Article XX exceptions from being used to defend a national import ban taken in connection with an environmental treaty. Indeed, Article XX makes no distinction between multilateral and unilateral measures.[2]

For example, if a government bans the import of an elephant from a foreign country pursuant to its obligation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a complaining GATT party could argue that the elephant was beyond the jurisdiction of the importing country. This concern is purely hypothetical – no GATT member has lodged a complaint about an MEA. Yet this scenario has been a persistent worry of environmentalists. Some business groups have joined environmentalists in these concerns and favour a clarification of trade rules in favour of MEAs.**

The potential conflict was considered at the U.N. Conference on Environment and Development in 1992. 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."[3] The GATT Group on Environmental Measures and International Trade devoted considerable attention to this topic during 1992–93, but little progress was made. In his final report, the Chairman of the Group explained that "The majority of delegations have yet to elaborate their positions over what, if anything, needs to be done."[4]

The WTO Decision creating the CTE calls 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."[5] The CTE is not examining the merits of particular MEAs, but rather the implications of drawing on trade measures as part of an MEA. Much effort has been devoted to developing a set of criteria for assessing the appropriateness of using trade instruments. Some participants and many obser-

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vers have expressed concern that the CTE may make no more progress on this issue than its predecessor committee. They worry that such inaction may be perceived by environmentalists as a signal that the trade regime will remain resistant to change.

The politics of WTO consideration of MEAs have taken an interesting turn from the early 1990s. Initially, the concern was that trade rules might not be flexible enough to accommodate MEAs. Some analysts advocated an amendment to expand GATT Article XX while others opined that an amendment was unnecessary since MEAs were unlikely to be challenged. A third perspective has now emerged suggesting that the problem lies not with GATT rules, but rather with MEAs that inappropriately use trade measures.

This view became more prevalent following the action in September 1995 by the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. At the meeting, the Basel Parties agreed to a ban on the exportation of hazardous wastes intended for disposal from industrial countries to developing countries.[6] Some business groups and government officials are becoming more interested in using the WTO as a vehicle to prevent the incorporation of trade restrictions into future environmental treaties.

In addition to the WTO, other international organisations are considering the issue of MEAs and trade rules. In 1995, the Trade and Environment Policy Committees of the Organisation for Economic Co-Operation and Development (OECD) concluded that "There is a need to develop further internationally-agreed upon principles to guide the use of trade measures within the context of MEAs, while avoiding protectionism and disruptions of the trading system."[7] In Spring 1996, the Secretary-General of UNCTAD issued a report to the Commission on Sustainable Development which stated that "there may be a need to develop comprehensive non-legally binding guidelines aimed at assisting MEA negotiators in their consideration of possible future use of trade measures in MEAs..."[8]

The purpose of this article is to present an outline of the main issues of the MEA debate and to offer a commentary on the ongoing effort to develop criteria for the use of trade measures in MEAs. The article reaches two main conclusions. First, although supported by numerous environmental groups as a way of sanctifying the use of trade measures, the application of WTO-written criteria for MEAs could undermine environmental policymaking. Second, the untenable nature of many of the proposed criteria can most easily be seen if one applies the same criteria to trade measures in multilateral trade agreements. In effect, the WTO is calling on the environment regime to adhere to rules that the trade regime itself does not follow.

The Stakes Involved

From the perspective of the environment regime, there is much at stake. Although it remains unlikely that existing environmental treaties – with the possible exception of the Basel Convention – will be challenged in WTO dispute settlement, some analysts worry that there may be a chilling effect on the utilisation of trade measures in new environmental treaties. Trade measures have been considered for a number of potential treaties relating, for example, to fisheries, forest protection, dangerous chemicals, persistent organic pollutants, and global warming. If trade measures are to be unavailable for such treaties, it may become more difficult to obtain effective agreements and to avoid free riders. Historically, trade measures have performed multiple functions in international agreements that were important to the integrity of these agreements.[9]

The trade regime also sees important interests at stake. Although it is unlikely that a truly multilateral environmental agreement could be an occasion for disguised protectionism, trade measures in MEAs can impair benefits of comparative advantage. In a recent speech, WTO Director-General *Renato Ruggiero* declared 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."[10] Another problem is that applying special trade rules to non-parties is a violation of the GATT non-discrimination principle. For example, some MEAs use trade measures to promote membership in the treaty by countries that might not otherwise want to join.

There are also important equity interests involved. Although the global benefits from an MEA are presumably higher than the global costs, the costs to a particular developing country may be higher than the benefits received by that country. The international community is responding to this dilemma through the Global Environment Facility and financial mechanisms within MEAs. More research is needed on the costs to developing countries of MEA-triggered trade measures.[11]

Sizing the Issue

In a report issued in 1992, the GATT Secretariat listed 17 multilateral environmental agreements with trade provisions.[12] This list has often been cited by governments to support the proposition that the conflict between MEAs and trade rules affects only a small subset of MEAs. Some commentators have also suggested that the small percentage of MEAs using trade measures indicates that they are not essential to environmental treatymaking. Although the number of MEAs using trade measures is indeed small, some clarifications of the current debate are in order.

First, the GATT Secretariat list of MEAs in force was incomplete. It failed to include several treaties such as the White Phosphorus Match Convention of 1906, the Convention on the Export and Import of Animal Products of 1935, the Treaty on the Protection of Movable Property of Historic Value of 1935, the Convention for the Regulation of the Meshes of Fishing

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Nets of 1946, the Wellington Convention on Driftnets of 1989, and the Protocol on Environmental Protection to the Antarctic Treaty of 1991. Second, following the listing, trade measures have been employed in new MEAs. For example, the Convention for the Conservation of Anadromous Stocks (1992) requires prohibitions against "trafficking."[13] The North American Agreement on Environmental Cooperation provides for trade sanctions as a means of enforcement. The Agreement Relating to Straddling Fish Stocks (1995) permits prohibitions against landings and transshipments of fish taken in a manner that undermines regional or global conservation measures.[14] Third, and perhaps most importantly, a merely quantitative analysis misses the fact that some of the most important MEAs rely upon trade measures.

Conflicts between Parties

Considerable legal analysis has been done on the interaction between MEAs and GATT rules and on ways in which MEAs might be considered GATT-consistent.[15] The least complex situation is where two parties are members of both the GATT and the MEA and the trade measure is used to control traffic between them. In this case, the MEA might be viewed as an *inter se* agreement that overrides inconsistent GATT obligations, in accordance with the principle of mutual consent.

The Vienna Convention on the Law of Treaties has provisions dealing with the interpretation of inconsistent treaties. Among parties, a later-in-time treaty relating to the same subject-matter prevails.[16] It is unclear whether the WTO covers the *same* subject-matter as MEAs. Even if it does, the effective date for "GATT 1994," that is, 15 April 1994, would make it more recent than most MEAs. The contemporary GATT was not brought forward into the WTO. Instead, a new instrument consisting of the original GATT-1947 and its subsequent amendments was, in effect, recodified as GATT-1994.

Another avenue for reconciliation is that an MEA might be viewed as more specific (*lex specialis derogat generali*) than the GATT/WTO under customary international law. Even if an MEA is recognized as "trumping" the WTO, there will always be a problem of determining when a trade measure is closely enough connected to the MEA. A strict rule might apply only to trade measures "required" by the MEA. Thus, trade measures merely "authorized" by the MEA (*e.g.*, straddling fish stocks) would not trump trade rules.[17] Others might view the authorisation of trade measures as an inseparable part of the overall bargain in the treaty.

When feasible, judges may interpret potentially-conflicting treaties in a way to make them consistent with each other. GATT Article XX opens the door to harmony in providing "General Exceptions" to all GATT obligations. Yet some commentators have expressed doubt as to whether a WTO panel would infuse the broadest possible meaning into Article XX so as to avoid a GATT-MEA conflict.

The problem of treaty reconciliation gets more complex when MEA institutions pass resolutions that promote trade measures not required by a treaty. For example, the International Whaling Commission has called for a ban on the sale of meat from all whales that could not have been taken in accordance with the Whaling Convention and CITES.[18] It is unclear whether such measures trump trade rules.

In recent years, some MEAs have authorized trade measures "consistent with international law." For example, the Wellington Convention states that parties, consistent with international law, may prohibit the importation of fish caught using a driftnet.[19] This raises the question of whether GATT rules are international law. Ambassadors to the WTO often point out that the WTO is not a U.N. organisation, but rather a contract among like-minded countries to govern their mutual responsibilities.

More difficult issues arise with respect to unilateral 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 or recommended by the Commission. Norway, for various reasons, bans virtually all whale exports. Import and export bans can be a violation of GATT Article XI.

Conflicts with Non-Parties

A different set of considerations apply when two countries are both members of the WTO, but are not both members of the MEA. Although trade measures may be used "against" another country even in the case of common treaty membership (*e.g.*, CITES), the possibilities for conflict are greater when the affected country is not a member of the MEA. In such a situation, the affected country may be burdened by trade restrictions included in an MEA that it has not ratified and has no ongoing role in managing.

Several MEAs provide for the application of trade measures to non-parties. In some cases, the rules applied to parties are likewise applied to non-parties. For instance, the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere does this. Few, if any, analysts would view this practice as trade discrimination. In other cases, the rules applied to non-parties differ from those applied to parties. That is trade discrimination.

For example, the CITES Conference of the Parties has recommended that imports of captive-bred Appendix I species be permitted from non-parties only after favourable advice from the Secretariat.[20] The International Commission for the Conservation of Atlantic Tunas has recommended that parties take "trade restrictive measures" with respect to Atlantic swordfish from non-parties whose vessels have been fishing in a manner which diminishes the effectiveness of the Commission's conservation programme.[21] The Montreal Protocol and the Basel Convention both require import bans on non-parties which do not apply to parties. Under the Montreal Protocol, non-parties complying with the Protocol may be exempted from these import bans by a decision of the parties.[22] ➤➤

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When the affected country is not a member of the MEA, one cannot assume any consent on its part to waive its rights under the GATT not to be discriminated against. Some commentators have suggested the possibility that certain MEAs might be viewed as *erga omnes* obligations, that would supersede GATT disciplines.[23] Perhaps CITES, with 130 member governments, ought to rise to that level. But MEAs, though "hard" law, are not typically accorded that status.

Whether trade measures against MEA non-parties violate WTO rules is not clear. A great deal depends on how a dispute panel would interpret GATT Article XX. Although the first tuna-dolphin panel declared that Article XX did not apply to "extrajurisdictional" measures, the second panel denied that bright line distinction.[24] Neither panel report was adopted by the GATT Council, however, so they have no precedential weight.

The view that Article XX(b) only applies to human and animal life within the territory of the importing country has a relatively recent origin. When CITES was being drafted in 1971, the Deputy Director-General of the International Union for Conservation of Nature and Natural Resources wrote to the GATT Secretariat asking if the draft convention would be GATT-consistent. The response from the GATT Secretariat was that CITES seemed consistent provided that it met the requirements of the Article XX headnote.[25] Significantly, the GATT Secretariat did not say that Article XX applied only to internal endangered species.

It is important to recognize that Article XX provides a general exception to all of the other rules in the GATT. Thus, although GATT Article I prohibits discrimination, the Article XX headnote only prohibits "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." For example, the new ban on waste trade between industrial and developing countries might be viewed as consistent with Article XX if the same conditions do not prevail in these two groups of countries.

While the GATT does not contain an explicit environmental exception, Article XX(b) covers measures "necessary to protect human, animal or plant life or health" and XX(g) covers measures "relating to the conservation of exhaustible natural resources..." As the European Commission has noted, "These exceptions virtually encompass all objectives of environment policy."[26] Of course, GATT and WTO panels have given a very narrow interpretation to these exceptions, and as a result, no environmental measure has been judged to be in compliance with Article XX.

If a trade measure in an MEA qualifies as a "technical regulation" under the WTO Agreement on Technical Barriers to Trade (TBT), then additional multilateral disciplines come into play. Technical regulations lay down product characteristics and related production methods with which compliance is mandatory. For example, the Convention for the Regulation of the Meshes of Fishing Nets directs parties to prohibit the landing and sale of certain sea fish smaller than prescribed size limits.[27] That is a technical regulation. Because most of the trade measures in MEAs lay down rules that go beyond product characteristics, it is doubtful that they qualify as "technical regulations."

If a technical regulation is in accord with "relevant international standards" and is adopted for an environmental purpose, then under TBT, it will "be rebuttably assumed not to create an unnecessary obstacle to trade."[28] This would apply to technical regulations in MEAs. While this clears one hurdle, the TBT Agreement also requires that technical regulations be non-discriminatory.[29] Since the exception in GATT Article XX for unarbitrary and justifiable discrimination does not apply to TBT, MEAs that apply different technical regulations to non-parties could be found to violate TBT.[30]

Accommodating MEAs

Much of the discussion in international fora has centered on how to head off or resolve conflicts between trade rules and MEAs. The basic approaches are to change treaty law or to change the adjudicative forum.

Two options have been suggested for changing trade law. First, a new exception could be added to the GATT (or to the WTO) specifically for MEAs. There is considerable precedent for such an approach. For example, an early multilateral trade treaty – the Customs Convention of 1923 – 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)..."[31] In 1948, the Charter of the International Trade Organisation provided an exception for measures "taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds, or wild animals..."[32] The Charter never came into force, however.

Regime coordination also occurs in the GATT. For example, there is an exception for import controls aimed at effectuating exchange controls in accordance with the rules of the International Monetary Fund.[33] The GATT also yields to obligations under the U.N. Charter for the maintenance of international peace and security.[34] It is interesting to note that the Charter of the International Trade Organisation yielded to "political matters" pursuant to Chapters IV or VI of the U.N. Charter, intergovernmental military agreements, and the treaties for Peace following World War II.[35]

A second option is for the WTO to require parties to become members of specified MEAs or at least to comply with them. The WTO takes this stance with respect to four treaties regarding intellectual property.[36] WTO members must accord treatment at the level contained in multilateral agreements on industrial property, literary and artistic works, phonograms, and integrated circuits. In other words, the WTO requires members to accord not only national treatment, but also

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supranational treatment. An earlier precedent for regime linkage occurred in the GATT which requires parties either to join the International Monetary Fund or enter into a special exchange agreement with the GATT.[37]

Conventional international law could also be changed to make an MEA more consistent with the GATT. For example, in 1994, Part XI of the U.N. Convention on the Law of the Sea was revised to subordinate the production policy of the International Seabed Authority to GATT rules.[38] CITES includes a provision stating that it shall not affect obligations deriving from a treaty relating to other aspects of trade including any measure relating to Customs.[39]

The other approach is to change the forum for disputes involving MEAs so that WTO panels will not adjudicate these cases. Four options have been suggested.

First, such disputes could be referred to the International Court of Justice (ICJ), perhaps to its Chamber for Environmental Matters.[40] It is interesting to note that the Charter of the International Trade Organisation provided that a member prejudiced by an ITO decision could seek an advisory opinion from the ICJ whose opinion would then bind the ITO.[41] If a WTO-MEA dispute were referred to the ICJ, the Court might apply Principle 7 of the Rio Declaration which declares that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."

Second, if the complaining party were a member of the MEA, the dispute could be referred to the dispute settlement mechanism of the MEA, if one exists. For example, the Basel Convention provides that parties may accept arbitration or compulsory submission of disputes to the ICJ.[42]

Third, regional trade agreements could keep disputes within the regional forum rather than the WTO. For example under the North American Free Trade Agreement (NAFTA), a government defending its trade actions under certain MEAs can select NAFTA as the sole forum.[43] Disputes within the European Union are adjudicated through Community institutions. For example, when various European countries banned imports of British beef, the U.K. government could not lodge a complaint with the WTO.

Fourth, MEAs could prohibit parties from taking complaints to the WTO. No MEA has yet done this. But the new OECD Agreement on Shipbuilding provides for trade sanctions against parties that violate the harmonisation prescribed in the agreement. These sanctions seemingly may not be appealed to the WTO.[44] This OECD model could be used for environmental harmonisation.

Finally, a related option is a moratorium on complaints about MEAs pending the establishment of a more balanced dispute settlement system in the WTO. In the first environment-related dispute to come before the WTO, the panel was composed of three trade bureaucrats with no experience in environmental matters.[45] WTO Secretariat staff reportedly engaged in undisclosed contacts with panel members about the interpretation of WTO rules.

The European Parliament has supported a moratorium on all trade/environment dispute settlement. It is interesting to note that the WTO Agreement on Agriculture provides for a limited moratorium on non-violation nullification and impairment complaints concerning domestic subsidies for a nine-year period. The moratorium applies regardless of the environmental damage caused by the subsidy.

Reshaping MEAs

The idea of developing criteria for utilising trade measures in MEAs has received considerable attention. The criteria could be used in several ways. They could be indicative criteria for drafting new MEAs so as to avoid WTO conflict. They could be standards for WTO panels to use in adjudicating disputes. They could be principles for sanctifying certain existing MEAs.

While environmental NGOs were initially in favour of the criteria-writing exercise, support has waned with the growing perception that the criteria could be used to prevent the use of trade measures. The unwillingness of the CTE to consider ways of promoting multilateral environmental cooperation has led some NGOs to reappraise WTO review of MEAs as a no-win proposition for the environment. At best, the WTO will permit an MEA to continue its current operations.

Many environmental groups have also expressed concern with the parochial nature of the CTE which is composed mainly of trade officials. A few countries have brought environmental officials to the meetings, but most have not. While representatives from the U.N. Environment Programme may attend CTE meetings, they are not permitted to speak. NGOs are denied opportunities even to attend CTE meetings.

In inter-governmental discussions, several criteria have been put forward for reviewing the use of trade measures in MEAs. Among them are:

- legitimacy of the MEA,
- non-protectionist intent,
- necessity of the trade measure,
- non-discriminatory use of the trade measure,
- proportionality (*i.e.*, cost-benefit analysis),
- least-trade restrictiveness,
- effectiveness of the MEA,
- degree of scientific certainty,
- lack of coercive intent of the trade measure,
- openness and adequacy of membership in the MEA, and
- transparency in drafting the MEA.

All of these criteria have merit and are factors that environmental policymakers should consider.

European Commission

In February 1996, the European Commission presented a proposal to the CTE for addressing the MEA issue. Boiling down a complex Commission "non-

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paper," their proposal would add a new clause to GATT Article XX to permit trade measures "taken pursuant to specific provisions of an MEA" if the MEA complies with a new WTO "Understanding."[46] The "Understanding" requires that MEAs meet criteria related to membership, participation, and transparency. When disputes are lodged, WTO panels would determine whether the MEA fits the "Understanding." If so, the only subsequent review by the panel would be the Article XX headnote which forbids trade measures that involve "arbitrary or unjustifiable discrimination" or are a "disguised restriction on international trade." If the MEA does not meet the "Understanding," panels would consider the legitimacy and necessity of the trade measure as well as the Article XX headnote.

While the Commission's proposal is the most MEA-friendly option that has been introduced in the CTE, it would still leave MEAs vulnerable. Discrimination against non-parties (*e.g.*, Montreal Protocol) could be adjudged "unjustifiable" discrimination. New MEAs might be challengeable for insufficient membership.

New Zealand

The government of New Zealand has presented a three-part proposal to the CTE for addressing the MEA issue.[47] First, trade measures mandated by an MEA would be deemed WTO-consistent among parties to the MEA. Second, trade measures pursuant to an MEA (but not mandated) would be judged by the criteria of proportionality, least-trade-restrictiveness, and effectiveness. Third, trade measures directed at MEA non-parties would be judged by the same three criteria plus a criterion regarding the adequacy of MEA membership. The New Zealand paper does not attempt to illuminate these criteria by explaining how they would apply to existing MEAs.

Inter-Regime Consistency

Whatever criteria the WTO devises for trade measures in MEAs should be applied to trade measures in other multilateral regimes, such as narcotics control and chemical weapons. It would also seem reasonable for the WTO to apply these criteria internally. In other words, criteria for trade measures should be applied in a non-discriminatory manner across regimes.

Many of the trade measures required or permitted by the WTO are inconsistent with the above criteria. For example, the WTO Agreement on Article VI permits the use of anti-dumping duties to avoid competition with low-cost imports. This would seem inconsistent with the criterion of legitimacy. The WTO Agreement on Textiles and Clothing provides for 10 more years of textile quotas. This would seem inconsistent with the criterion of non-protectionist intent. The WTO Safeguards Agreement allows governments to keep one voluntary export restraint until the year 2000. This would seem inconsistent with the criterion of necessity for the trade measure.[48] GATT Article XXIV permits regional trade agreements (*e.g.*, *NAFTA*) that provide lower tariffs to parties. This would seem inconsistent with the criterion of non-discrimination. From 1985–90, the GATT tolerated action by the United States to embargo trade with Nicaragua. This would seem inconsistent with the criterion of proportionality since the costs to Nicaragua were surely greater than the benefits to the United States. GATT Article II permits tariffs. This would seem inconsistent with the criterion of effectiveness, if tariffs are being used as an employment strategy. The WTO perpetuates "special and differential treatment" for developing countries. This would seem inconsistent with the criterion of scientific certainty, since there is now strong evidence that import substitution policies are counterproductive. The GATT permits countries to levy countervailing duties against foreign governmental subsidies. This would seem inconsistent with the criterion on non-coercive intent. Despite repeated efforts by China over a decade, the GATT and the WTO have refused to permit membership by the largest nation in the world.[49] This exclusionary practice would seem inconsistent with the criterion of open membership. The GATT did not provide for attendance by UNEP or MEA Secretariats in the Uruguay Round negotiations. This would seem inconsistent with the criterion of transparency. By contrast, GATT Secretariat officials have attended drafting sessions for MEAs.

It is contradictory for the CTE to preach a litany of criteria to the environment regime that the WTO itself fails to follow. The fact that the trade regime cannot live up to any of these criteria suggests that they are more idealistic than practical. For the WTO to proselytise in this way amounts to a double standard. Given the low level of policy harmonisation among countries, it is premature for any of these criteria to be included in a new code for MEA negotiators.

This is not to deny that many of these criteria are constructive. Avoiding protectionism is always a good idea. But it would be hypocritical for the WTO to forbid practices by environmental policymakers that trade policymakers routinely engage in. There is a need for a realistic approach to the MEA dilemma.

Conclusion

In dealing with problems that transcend national borders, governments will seek greater cooperation among nations. Since MEAs (almost by definition) respond to international problems, it seems reasonable for treaty negotiators to employ a variety of transnational instruments, including trade regulations. Trade instruments do not "belong" to one regime any more than another.

Sequential committees in the GATT and the WTO have made little progress in addressing the latent conflict between MEAs and trade rules. The issue has grown more complex during the past year as some groups began to view the CTE as a mechanism that could be used to roll back the utilisation of trade measures (*e.g.*, in the Basel Convention). While the recent proposals by the European Commission and New Zealand go in the

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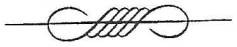
right direction, they would subject environmental governance to supervision by the trade regime.

If the CTE is continued beyond 1996, it would be useful to reconstitute it as a WTO-UNEP committee so that trade and environment officials could attend on equal terms. Within that kind of balanced committee, it might be appropriate to use the above criteria to analyze treaties on trade or the environment. By working together, trade and environment policymakers could enhance the effectiveness of both regimes. ❐



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28 WTO Agreement on Technical Barriers to Trade, Article 2.5.

29 *Id.*, Article 2.1.

30 See Agreement Establishing the WTO, Annex 1A.

31 International Convention Relating to the Simplification of Customs Formalities, Protocol §1, 1923, 30 LNTS 399.

32 Charter of the International Trade Organisation. Article 45(a)(x).

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34 GATT, Article XXI(c).

35 *Id.*, Articles 86(3), 99(1)(c), and 99(2)(a).

36 Agreement on Trade-Related Aspects of Intellectual Property Rights, Articles 1, 2, 3, 9, 16, 35, and 39.

37 GATT, Article XV (6).

38 Agreement Relating to the Implementation of Part XI of UNCLOS, Annex, Section 6(1)(b) 33 ILM 1309.

39 CITES, Article XIV (2).

40 Jeffrey Dunoff, "Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes," *Michigan Journal of International Law*, Vol. 15, p. 1085–93. In July 1993, the International Court announced the creation of a seven-member chamber of the Court for environmental matters. ICJ Communiqué No. 93/20 (July 19, 1993).

41 Charter of the International Trade Organisation, Article 96.

42 Basel Convention on the Control of Tranboundary Movements of Hazardous Wastes and their Disposal, Article 20.

43 NAFTA, Articles 2005.3 and 104.

44 Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry (1994), Article 8(9).

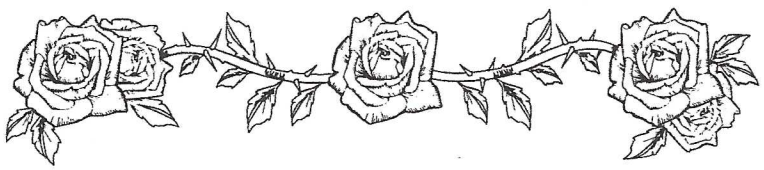
45 Steve Charnovitz, "The WTO Panel Decision on U.S. Clean Air Act Regulations," *International Environment Reporter*, 6 March 1996, p. 191.

46 "Non-Paper by the European Community," 19 February 1996, available at http://www.gets.org/gets.

47 WTO Doc. WT/CTE/W/20, 15 February 1996.

48 Many commentators have suggested that political necessity is not a justification under Article XX(b).

49 At issue is how much China needs to conform its trade and development policies to WTO norms. Until China is allowed into the trade regime, WTO members are permitted to use discriminatory measures against it.



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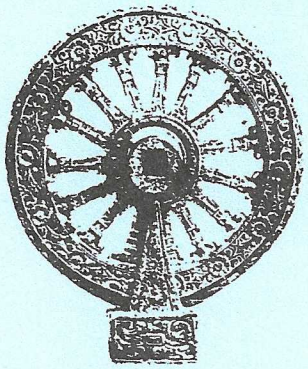

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CONTENTS

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