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THE EC PROPOSAL TO MODIFY THE GATT/ENVIRONMENT INTERFACE

BOB KAPANEN

There has to be a clear recognition in the GATT of the importance of the international environmental agenda, which ensures a mutually supportive relationship between the GATT and multilateral environmental agreements.

European Community (EC) Proposal on Trade and the Environment.¹

The interface between trade and environmental protection is vast and interesting, and will inevitably be the focus of much debate in the next few years as nations address the issue of how international environmental agreements containing trade sanctions ought to interact with global trade policies.

While the General Agreement on Tariffs and Trade² (GATT)³ does not govern or regulate trade directly, it does regulate the statutory and administrative rules which restrict or distort trade between GATT contracting parties. Environmental agreements containing trade sanctions which restrict or distort trade, will thereby be vulnerable to challenges from GATT contracting parties on the grounds that they violate trade provisions under GATT.

This note focuses on the fact that present and future multilateral environmental agreements may be found GATT-inconsistent due to

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¹ B. Arts & Sc. (McMaster), LL.B. anticipated 1995 (Dalhousie).


³ As a brief history, GATT was created in 1947, as part of the post-World War II international economic restructuring. The United Nations, World Bank and International Monetary Fund were also created at this time. There are 111 contracting parties to the GATT, and additional countries abide by its terms.
their restraints on trade. At present, the status of environmental agreements is unclear because, while there are GATT decisions illustrating how unilateral trade actions with environmental purposes will be treated by GATT, there are as yet no GATT Panel decisions on multilateral environmental agreements (MEAs) to indicate how they will be treated. Given the present interpretation of environmental exceptions under GATT, however, a strong argument may be made that MEAs would likely be found GATT-inconsistent. The EC has therefore proposed a collective interpretation of a GATT clause that would clarify the status of MEAs under GATT.

This note argues that the European Community's proposed collective interpretation presents a unique opportunity for GATT contracting parties to codify support for MEAs, and provide guidance in avoiding GATT-inconsistencies in future MEAs. Most importantly, GATT contracting parties have an opportunity to ensure that the overly restrictive criteria established in previous GATT Panel decisions, regarding unilateral environmental actions, are not applied to MEAs.

**Multilateral Environmental Agreements**

The GATT Group on Environmental Measures and International Trade found that of the 127 multilateral agreements concerning the environment, 17 of them have trade provisions. The three most significant of these are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances That Deplete the Ozone Layer and the Basel Convention.

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4 The EC makes the odd statement that "[t]he legitimacy of trade measures taken pursuant to [an MEA] has not been questioned in the GATT." "EC Proposal," supra note 1 at S-3. Does the EC mean to imply that MEAs will not be questioned—that they are immune to GATT challenges? While it is true that no contracting parties have dared to challenge an MEA, that does not imply that such a challenge could not be brought.

5 See infra notes 18–29 and accompanying text.


The EC proposes, upon examination of these three MEAs, "[that] the rationale for trade measures has been to ensure the effective implementation of commitments to protect the environment" and to ensure that environmental commitments established in MEAs would not be undermined or nullified by actions of non-parties to the MEA.

GATT Article XX

GATT does not specifically refer to the environment. The most relevant measures, regarding environmental policies, are the "General Exceptions" provisions of article XX of GATT.

The article XX exception "applies only to measures inconsistent with another provision of the General Agreement." Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health." Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These measures are permissible so long as they do not "constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction of international trade." These two article XX provisions allow for environmental exceptions to be made for otherwise GATT-inconsistent trade policies.

GATT Panels have interpreted the two environmental exception provisions in GATT challenges to unilateral trade actions. Challenges against unilateral trade actions have been highly

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10 "EC Proposal," supra note 1 at S-3.
11 Protection of the environment is not specifically stated in art. XX for historical reasons, and it is felt by the EC that the "public policy objectives reflected in XX(b) and XX(g) are broad enough to encompass the objectives of environmental protection." "EC Proposal," supra note 1 at S-4.
13 GATT, supra note 2, art. XX.
14 Ibid.
15 Ibid.
successful. At present, there are no compelling reasons why a GATT challenge brought against the trade restrictions imposed under an MEA would be treated differently from a GATT challenge against unilateral trade actions. Concern for the status of MEAs is thus warranted. The collective interpretation of article XX ought to define a new test for MEAs, or else international efforts directed at establishing and maintaining MEAs will be frustrated by individual nations pursuing complaints under GATT.

Growing Support for MEAs

In the past few decades, nations dissatisfied with extrajurisdictional environmental regulation will either attempt to negotiate an MEA with other nations, addressing the problem, or they will attempt to impose standards unilaterally, which generally materialize in the form of non-tariff trade measures.

At present there exists a broad consensus among GATT contracting parties that international environmental problems should be addressed by means of MEAs. It is ironic therefore that existing MEAs are presently susceptible to being found GATT-inconsistent.

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16 There also presently exists a dispute between the United States and the European Community over the use of unilateral trade actions to address international environmental problems. This dispute has had the unfortunate effect of delaying any sort of agreement on how the GATT ought to address the trade and environment nexus. “GATT Environment Work Delayed by Dispute Over Unilateral Action” Inside U.S. Trade—Special Report (13 November 1992) S–1.

As of October 1993, it is reported that “[t]he U.S. has been alone in the GATT in trying to establish a legal basis for a country to impose trade restrictions unilaterally to protect the environment beyond its borders” Inside U.S. Trade—Special Report (15 October 1993) S–1.

17 This is indicated in the three non-legally binding agreements adopted at the United Nations Conference on Environment and Development. Two of these agreements contain the following passage:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing international environmental problems should, as far as possible, be based on an international consensus.

Principle 12 of the Rio Declaration on Environment and Development; Proceedings of the Main Committee; Agenda 21, Chapter 2, Para. 22(i) and c. 39 para. 34. This passage was originally taken from paragraph 152 of the Declaration of the UNCTAD VIII in Cartagena. See “GATT Document on Earth Summit” Inside U.S. Trade—Special Report (13 November 1992) S–5, S–6.
The Montreal Protocol provides a good example of an MEA being found GATT-inconsistent. Parties to the Montreal Protocol have agreed to reduce their use and production of ozone-depleting substances in a series of stages, toward their overall elimination by 1995. The Montreal Protocol does not contain any restrictions on trade between parties, but there are powerful restrictions on trade between parties and non-parties, which are quite controversial.

Parties to GATT are required to restrict exports in the following manner: ban the export of controlled substances to non-parties; discourage the export to non-parties of "technology for producing or for utilizing controlled substances"; and refrain from providing various forms of aid that would support the export of such equipment, plants or technology which facilitate the production of the controlled substances. These measures violate article XI, which prohibits quantitative restrictions on imports and exports.

In regards to imports, GATT-parties are to ban progressively imports from non-parties of the following items: ozone depleting substances; products which contain these substances; and possibly products produced with, but not containing, such substances, provided that the ban is feasible. The underlying rationale for these import restrictions is to ensure commitment to reduced domestic consumption, and to ensure that non-parties are not deriving economic benefits from their own export of controlled substances.

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18 Montreal Protocol, supra note 8. The original deadline was the year 2000, which was subsequently moved forward.
19 Ibid. art. 4.2.
20 Ibid. art. 4.5.
21 Ibid. art. 4.6. It may be noted that the Montreal Protocol article 4.7 ensures that articles 4.5 and 4.6 do not backfire: "Paragraphs 5 and 6 shall not apply to products, equipment, plants or technology that improve the containment, recovery, recycling, or destruction of controlled substances ...."
23 Montreal Protocol, supra note 8, art. 4.1.
24 Ibid. art. 4.3.
25 Ibid. art. 4.4.
The import measures violate the most-favoured-nation principle because they discriminate against products on the basis of their national origin. Imports from non-parties are to be progressively banned. The import measures also violate the national treatment principle because imports are discriminated against based upon their production process. Although a domestic product, produced without the use of a controlled substance, may be more environmentally friendly than an imported product which is produced using a controlled substance, they are nonetheless "like products." The import measures also violate article XI, since they impose quantitative restrictions on imports.

Since these MEA provisions are inconsistent with GATT, the next step, in a GATT Panel analysis, would be to assess whether an exemption under GATT article XX is appropriate. This leaves the MEA in a precarious situation, especially since the GATT Panel decisions interpreting article XX, as discussed below, would not provide an exemption for an MEA such as the Montreal Protocol. A viable solution, however, has been offered to solve this dilemma: through clarification of the article XX test.

**EC Proposed Solution: Collective Interpretation of Article XX**

To assist in interpreting article XX, the EC proposed the creation of relevant interpretive materials. Specifically, the EC stated that "GATT members should interpret Article XX . . . to set out clear criteria on the use of trade measures to enforce MEAs."

The EC emphasized that "article XX must define the circumstances under which trade sanctions taken pursuant to an MEA, and applied to a GATT member which did not sign the MEA, can go...

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27 These conclusions assume that a trade measure is pursued under article 4.4 of the Montreal Protocol, and that the Tuna-Dolphin Panel's interpretation of "like products" is applied.
28 **UNCED Survey Report**, supra note 22 at 487.
29 **Section 337**, supra note 12.
30 The interpretation problem may be addressed through interpretive materials. In addition to interpreting the words provided in the General Agreement, there are Annexes to the General Agreement which provide interpretive materials to various clauses in the GATT. These materials must be considered authoritative, and be held to nearly as high a standing as the actual GATT clauses. See J. H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969) at 20.
31 "EC Proposal," supra note 1 at S-1.
against other GATT obligations of maintaining an open trading system." Such an approach appears logical, as it would reduce uncertainty about how trade measures may be used, and ought to be used, under MEAs. There is very broad support for this proposal.

Interpretation of General Exceptions

Extensive interpretation of the "General Exceptions" is provided by the Panel Report in United States—Restrictions on Imports of Tuna. The facts, decision, and net effect of this dispute have been discussed and criticized extensively in many articles and will not be discussed in this note. Discussion is warranted, however, on the tests that GATT Panel Decisions have developed in regards to unilateral environmental actions. A collateral test ought to be developed specifically for MEAs, because the tests applied to unilateral trade actions are inappropriate.

EXTRAJURISDICTIONAL APPLICATION

In the Tuna–Dolphin dispute, the GATT Panel ruled that article XX exemptions do not have "extrajurisdictional" application, but may

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32 Ibid.
35 The dispute involved import provision of the U.S. Marine Mammal Protection Act of 1972 (MMPA). The MMPA bans the importation of fish caught using techniques which result in an incidental kill of ocean mammals in excess of U.S. practices. In 1990, following a court order, an import ban was imposed on yellowfin tuna and tuna products caught by Mexican vessels using purse seine nets in the Eastern Tropical Pacific. Ibid.
36 The Panel found that the MMPA import and intermediary restrictions violated GATT art. III (national treatment) and art. XI (quantitative restrictions).
37 As Mexico did not want to jeopardize its negotiations of a trade agreement with the US, the US administration convinced President Salinas to not seek adoption of the GATT Council Report.
only be invoked by a country to protect living organisms or natural resources within that country's borders. The Panel stated that the intended use of XX(b) is for "sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country." 39

The Panel held that the same reasoning applies for article XX(g), whereby "[a] country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction." 40 One commentator claims that this interpretation is incorrect because the resource need only be consumed in the domestic market, as the exception is phrased as "production or consumption." 41 In other words, regardless of where the product is produced, if it's being consumed domestically then it is within that nation's jurisdiction to control its imports of that exhaustible natural resource.

The EC Proposal "firmly supports the conclusions of the Tuna Panel Report[,] . . . " including the rule that "a country should not unilaterally restrict imports on the basis of environmental damage that does not impact on a country's territory." 42 While the collective interpretation of article XX may support the Tuna-Dolphin decision with respect to unilateral actions, a distinction must be made for multilateral actions. The Tuna-Dolphin Panel held that article XX exceptions do not have extrajurisdictional application without acknowledging that MEAs may have extrajurisdictional application. In other words, the Panel held that a nation may only protect the territory within its jurisdiction. 43 While the collective interpretation of article XX may condone the Tuna-Dolphin decision, a caveat should be made that MEAs with extrajurisdictional application may qualify for exemption under article XX despite any contrary impressions, regarding unilateral trade actions, given by the Tuna-Dolphin Panel.

Suggestions
Essentially, the GATT Panel did not want individual contracting parties dictating life or health protection policies with which other

39 Tuna-Dolphin, supra note 34 at 45, para. 5.26.
40 Ibid. at 47, para. 5.31.
41 McDonald, supra note 26 at 442.
42 "EC Proposal," supra note 1 at S-3.
43 See Tuna-Dolphin, supra note 34 at 34, para. 5.26 and at 47, para. 5.31-5.32.
contracting parties would have to comply to retain their GATT rights. However, the prohibition on extrajurisdictional application could pose difficulties for MEAs created to protect the environment of entire regions of the globe, much less areas beyond the jurisdiction of any one nation. By definition the extrajurisdictional test ought not apply to MEAs because MEAs are international in scope. Many environmental effects cannot be contained locally, but have some impact upon the global ecosystem. Comments by some interested third parties support this view. The UNCED Survey Report argues that extra-territorial application is needed for territorial protection. For example, although the trade provisions of the Montreal Protocol apply extrajurisdictionally, one could argue that “depletion of the extra-territorial ozone layer is harmful to the territorial environment.” A nation, therefore, has an interest in environmental degradation beyond their territory for the sake of those extra-territorial regions themselves, and for the sake of spill-over effects on the nation’s own territory.

NECESSITY

Article XX(b) only excepts those measures that conflict with other GATT provisions if the measures are necessary in order to protect the life or health of humans, animals or plants. The collective interpretation of article XX should clarify which trade restrictions are acceptable under an MEA by specifying the test to be used in assessing necessity. The Tuna-Dolphin Panel interpreted necessary narrowly, following another Panel Report, stating that the objectives of article XX(b) were:

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44 This is consistent with the sovereignty of states doctrine, but it becomes more complicated once responsibility for environmental spill-overs is considered.

45 Australia commented that “Controls on trade flows necessary to give effect to international conventions... should be considered as incidental to GATT obligations. However, where a contracting party takes a measure with extraterritorial application outside of any international framework of cooperation, it is appropriate for the GATT to scrutinize the measure against that party’s obligations under the General Agreement.” See Tuna-Dolphin, supra note 34 at 26, para. 4.1.

46 UNCED Survey Report, supra note 22 at 488.

to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were *unavoidable* [emphasis added]. 48

Following the reasoning of yet another Panel 49, the *Tuna–Dolphin* Panel added that the party invoking an article XX exception must demonstrate that it has "*exhausted all options reasonably available*" to it to pursue its [objectives] through measures consistent with the General Agreement..." [my emphasis]. 51 The test adopted by the *Tuna–Dolphin* Panel may be restated as requiring that the trade actions were unavoidable, since all other options to achieve the environmental objective were exhausted.

The *Section 337* Panel had previously stated that if no GATT-consistent measure was reasonably available, then the contracting party would have to use the measure that "entails the least degree of inconsistency with other GATT provisions." 52 While it could be difficult to justify trade measures taken pursuant to an MEA as being unavoidable, it would be easier to justify the trade measure as being the least GATT-inconsistent of various alternatives to achieving the environmental goal. This Panel also held that the "necessary" test must focus specifically upon the trade measure as opposed to the overall system. 53 The EC Proposal supports the notion that "necessary" relate specifically to the trade measure and not the overall goal or policy. 54

**Suggestions**

The EC recommends that "the trade measure applied should not be more restrictive than it is necessary to achieve a public policy goal

48 *Tuna–Dolphin, supra* note 34 at 45, para. 5.27.
49 *Section 337, supra* note 12.
50 Commentators note that assessment of the likelihood of success of GATT-consistent alternatives is subjective. See McDonald, *supra* note 26 at 435. For example, if negotiated settlements are not working, how long must a contracting party pursue GATT-consistent alternatives before trade measures are deemed necessary?
51 *Tuna–Dolphin, supra* note 34 at 46, para 5.28.
52 *Section 337, supra* note 12 at 60, para. 5.26.
53 To rule otherwise would "permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary." *Ibid.*, para. 5.27.
as encompassed in article XX."55 The problem is that the Proposal does not specify what standard is intended for judging what is necessary. Does the test require that the trade actions were unavoidable, since all other options were exhausted, or that the trade actions impose the least-degree of GATT-inconsistency?

It is submitted that the least-degree of GATT-inconsistency test would be the most effective because it is inappropriate to ask a large group of nations whether their mutually agreed upon MEA is an unavoidable measure.56 Likewise, if the nations have assembled and put their collective minds to addressing an international environmental issue, it is quite likely that all other feasible options were exhausted. If nations had other options that involved less effort than negotiating and implementing an MEA, while imposing no worse trade effects, then those options would likely have been pursued.

The essence of GATT members' concerns revolve around protectionist trade policies. As the EC Proposal states, "the fact that such [trade] measures have been discussed and agreed multilaterally is the best guarantee against the risk of protectionist abuses or that unnecessary trade restrictions will be introduced" [emphasis added].57

The evaluation of "necessity" would be improved if the challenged trade measure could be interpreted in light of the urgency of the international environmental objective. For example, if time is of the essence in a particular environmental emergency, it would seem logical that more extreme trade measures would be appropriate, despite the fact that the general environmental objective could be pursued, less effectively and less quickly, by less trade restrictive measures.

There are other problems regarding the standards to be used by GATT Panels in assessing the "necessity" of trade actions. For example, should scientific studies be conducted to provide evidence that the trade measure pursued was necessary and unavoidable relative to the other options? What weight will such studies be given?

55 "EC Proposal," supra note 1 at S-5.
56 If a group of nations decide to make a particular environmental objective a priority and create an MEA to achieve that goal, then a GATT Panel would probably consider the resulting MEA to be a necessary measure. However, the resulting MEA may not be unavoidable as there is always the option of the nations not taking any action to address the issue.
57 "EC Proposal," supra note 1 at S-5.
Should an independent collaboration be required of such studies. Could one trade measure be deemed necessary merely because studies show that alternative trade measures would be too inconvenient or costly to administer?

**PROCESS AND PRODUCTION METHODS (PPMS)**

Some GATT provisions require that like products be treated alike, regardless of where they were made and how they were made. Although PPMs do not directly relate to article XX, they are extremely relevant to environmental and conservation measures.

The Tuna–Dolphin decision established that the relevant GATT provisions only involved “those measures that are applied to the product as such.” Regulations distinguishing products on any other basis than the physical characteristics of the product itself, were found to be inconsistent with the “like product” provisions. The PPMs, involving the rate at which dolphins were injured or killed by boats fishing for tuna, did not affect tuna as a product.

The Panel established that article XX can only be applied to the product facing the trade restriction, not to the circumstances under which the product was produced or harvested. The Panel held that

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\text{could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.}^{60}
\]

Exceptions must be made for PPMs, however, because measures taken against supposedly environmentally-friendly products that are produced in an environmentally unfriendly manner, will otherwise be GATT-inconsistent. For example, the potential ban on products produced with but not containing ozone-depleting substances under the Montreal Protocol would likely be declared GATT-inconsistent.

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58 *Tuna–Dolphin, supra* note 34 at 41, para. 5.14.
59 The Tuna–Dolphin Panel found that the U.S. import prohibition could not be considered an internal regulation under art. III because it concerned the process of tuna harvesting instead of tuna as a product. See *Tuna–Dolphin, supra* note 34 at 39–42, para. 5.8–5.16.
60 *Tuna–Dolphin, supra* note 34 at 41, para. 5.14.
The EC proposal would allow trade restrictions under article XX based on production processes "under certain circumstances."\textsuperscript{61} These circumstances would include consideration of whether other members of the MEA are applying such controls on production, or whether other forms of trade control are insufficient to achieve the goals of the MEA.\textsuperscript{62}

**Suggestions**

The EC Proposal represents significant progress in acknowledging the need for MEAs to effect change in the PPMs of various products. The GATT contracting parties should adopt this provision in order to support MEAs that tackle environmentally hazardous PPMs. After all, at one level, product distinction based upon PPMs already exists. Many companies are realizing that their sales may be boosted by advertising or labelling their environmentally-safe production processes. Why would the international trade regime want to deny this trend? A nation’s trade policies ought to be able to reflect the PPM policy-choices that the country has made. It should be possible to incorporate limited PPM-based exceptions into article XX without opening the floodgates to protectionism.

The EC Proposal must clarify the circumstances in which PPMs will qualify as article XX exceptions. A good approach would be to expand the definition of "product" to encompass the life cycle of the product.\textsuperscript{63} This would imply that products which only differ in the environmental effects of their PPMs would not be like products. Such distinctions between products would not be unduly burdensome, but would allow trading partners to pursue and enforce PPM-policies under MEAs.

**CONCLUSIONS**

It is recommended that GATT contracting parties help facilitate the creation and effective operation of MEAs, by establishing clear, flexible criteria upon which trade sanctions used to enforce MEAs will not be frustrated under GATT. Specifically, MEAs ought not to

\textsuperscript{61}"EC Proposal," \textit{supra} note 1 at S-5.
\textsuperscript{62}\textit{Ibid.}
be restricted by the extrajurisdictionality test that has arisen from GATT Panel decisions: MEAs are international in scope and often involve environmental concerns that are not limited to one confined territory. The EC Proposal must acknowledge the manner in which an extrajurisdictionality test could suppress MEA development. The necessary test ought to incorporate the standard of least-degree of GATT inconsistency, in preference to other standards that have been used which require that the trade action was unavoidable, or resulted from the exhaustion of all other options. Process and production methods ought to be incorporated into the collective interpretation. The EC Proposal represents great progress in this area. The circumstances under which PPMs are excepted will have to be specified. A suggested starting point is the consideration of the life-cycle of a product.