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THE GATT AND THE ENVIRONMENT: IRRECONCILABLE DIFFERENCES?

JOHN BOGARDUS[†]

[GATT] is currently the greatest obstacle to the formation and enforcement of international agreements and domestic policies aimed at protecting the global environment.¹

[T]he task for the next administration will be to extend the linkage between trade and the environment to the entire world trading system. GATT, the world trading organization, remains dead set against such change and it will take a few sticks of dynamite to blow that organization into the 21st century.²

Sustainable development: certainly one of the most interesting notions of our time. Some view this expression as an oxymoron, an ideal that is not logically possible over the long term due to the finite resources on which our continued development is based. Nevertheless, it is an ideal that politicians the world over are seeking to implement in practice.

Assuredly, as we enter the 21st century, in order to increase our standards of living, to "develop," we will become increasingly reliant on the global marketplace. International trade has not only become necessary for the growth of developing nations but is also becoming essential for the continued growth of industrialized nations.

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¹ K. G. Beacham, "International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts" (1992) 3 *Colo. J. Int'l Envtl. L. & Pol'y* 655 at 681.

² B. Babbitt, "Next Step for Environmentalists: Redeeming 'Lost Opportunity' of This Year's Rio Summit" *Roll Call*, (28 September 1992) at 34.

However, our physical environment places limits on such growth. Only recently have these limits come to be more fully appreciated. It is in the interest of our species to ensure that the natural environment is conducive to our continued existence, and that the environment be "sustained." To this end, the environmental movement has developed into a powerful force on both national and international levels.

The General Agreement on Tariffs and Trade (GATT) has governed the trading rules between its contracting parties since its inception in 1947.³ GATT has been subject to ancillary agreements over the years, including the latest and most comprehensive set of modifications coming as a result of the so-called Uruguay Round of Trade Negotiations. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed in Marrakesh on April 15, 1994.⁴ The Final Act included, as its substantive provisions, all of the Articles of the GATT along with a number of negotiated Understandings, Agreements and Decisions.

The Final Act also called for the creation of the World Trade Organization (WTO) which came into being on January 1, 1995.⁵ The *raison d'être* of the WTO is to eliminate barriers of any sort that have an adverse impact upon trade between WTO contracting parties.

Environmental leaders are concerned that an effective technique for promoting environmental ends, namely the threat or imposition of trade barriers, will no longer be available. The goals of development and sustainability have therefore come into direct conflict in the international arena.

While this conflict had been developing over a long period of time, the release in 1991 of the GATT panel decision in the infamous Tuna/Dolphin case⁶ served to define the parameters of the debate.

³ General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 188 [hereinafter GATT].

⁴ *The Results of the Uruguay Round of Multilateral Trade Negotiations, Market Access for Goods and Services: Overview of the Results*, (Geneva: GATT Secretariat, 1994) [hereinafter Final Act]. Henceforth, the term GATT will be used to signify the substantive provisions of the Final Act while WTO shall indicate the organization itself. However, current literature can, and does, use these terms interchangeably.

⁵ *Ibid.* at 6.

⁶ *United States- Restrictions on Imports of Tuna*, GATT Report of the Panel DS21/R, 39S BISD (1991) 155, 30 I.L.M. 1594 [hereinafter Tuna/Dolphin case].

This decision caught many in the environmental movement by surprise.⁷ While the GATT's mandate of wealth generation through increased trade was always somewhat at odds with the desire of many environmentalists to decrease production and consumption, prior to this case environmentalists had no concrete reason to view the GATT as anything but a benign entity.

In light of the Tuna/Dolphin case, the GATT became an enemy. World-wide, environmental groups moved quickly to make their concerns known. Domestic leaders, particularly in the U.S. and the European Union (EU), came under considerable pressure to make the environment a central topic of the ongoing Uruguay Round of Trade Negotiations.

This pressure was in part successful;⁸ environmental concerns made it into the Final Act in the form of the Decision on Trade and Environment.⁹ As a function of this resolution, a Committee on Trade and Environment was formed and shall report its initial findings and recommendations to the first biennial meeting of the Ministerial Conference, set to occur in 1996.¹⁰

The Committee is to address, *inter alia*, "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements."¹¹ Currently, there exist

In 1991 Mexico requested that a panel be established to determine if the Marine Mammal Protection Act of the United States (MMPA) was in compliance with the GATT. Mexico was specifically concerned with an embargo applied against it by the U.S. Government in respect of yellowfin tuna and yellowfin tuna products. This embargo was applied under a provision of the MMPA that required that the level of incidental killing of dolphins through purse-seine netting of tuna in a particular area comply with U.S. restrictions. The Panel found that the embargo was a prohibited quantitative restriction under GATT Article XI rather than a product requirement under Article III and could not be considered a valid exception under Article XX.

⁷ See e.g.: E. Christian & S. Geffin, "GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System" (1992) 23 U. Miami Inter-Am. L. Rev. 569.

⁸ While some gains were made, there was still considerable concern for a time that the Final Act would not be passed by the U.S. Congress due, in part, to the sustained objections of various environmental groups.

⁹ Final Act, *supra* note 4 at 469.

¹⁰ Note that a Working Group on Environmental Measures and International Trade was convened by the GATT Council in 1991.

¹¹ Final Act, *supra* note 4 at 470.

provisions in the GATT that can be interpreted alternately to permit or exclude various environmental trade restrictions. Generally, trade measures taken in order to safeguard the domestic environment are permissible provided that they do not have protectionist effects.¹² On the other hand, generally speaking, trade measures that seek to have an impact on the environment outside of the implementing parties' jurisdiction are prohibited.

It is accepted that the provisions allowing for non-protectionist environmental trade measures (ETMS) should be maintained. Instead, the committee shall focus on resolving the debate between proponents of the status quo and those who believe that there should be allowances for the "extrajurisdictional" application of ETMS.¹³

This paper shall serve as an exposition of the arguments for and against the extrajurisdictional application of ETMS. Potential compromises, along with possible and probable outcomes, shall be explored through an analysis of the permitted and prohibited types of ETMS. It is hoped that the following discussion contributes to a clearer understanding of the issues and fosters future accord.

I. PERMISSIBLE ETMS

The GATT, contrary to the general perception of many environmentalists, allows for the extensive use of trade measures in support of environmental goals. In particular, Articles III and XX¹⁴ make ample allowances for the use of trade restrictions that are directed at environmental conservation within the jurisdiction of the importing country.¹⁵

¹² A protectionist trade measure is one that unfairly discriminates against imports thereby conferring a benefit upon domestically produced like products.

¹³ "Extrajurisdictionality" is a term apparently invented, but not directly defined, by the panel in the Tuna/Dolphin case, *supra* note 6. It shall be used here to refer to environmental trade measures that seek to impact upon the environment outside of the implementing party's own territorial jurisdiction.

¹⁴ Final Act, *supra* note 4 at 490, 519.

¹⁵ Department of Foreign Affairs and International Trade, *Dangerous Liaisons: The World Trade Organization and the Environmental Agenda* (Policy Staff Paper No. 94/14) by K.A. McCaskill (Ottawa: Department of Foreign Affairs and International Trade, June 1994) at 12.

1. Article III

With regard to Article III, any contracting party is permitted to impose restrictions on imported products so long as the restrictions are no less favourable than those accorded to like domestic products. For example, a ban on the presence of PCBs in transformers, equally applied to both foreign and domestic suppliers, would be permissible.

However, Article III contains fundamental flaws from an environmentalist's point of view. For example, a restriction requiring that newsprint contain a certain percentage of recycled fibre may not be permissible; if recycled newsprint and virgin newsprint are determined to be "like" products, then a restriction adversely effecting imported virgin newsprint would violate Article III:4.¹⁶

Article III also only permits restrictions on imported "products," and cannot be invoked when it is the processes or production methods (PPMs) that result in the adverse environmental impact. Unfortunately, it is most often the by-products of the production process—the waste and resource consumption—that are the most environmentally damaging. It has even been said that "[w]ithout the ability to regulate PPMs, environmental law would be virtually useless."¹⁷

The Tuna/Dolphin dispute presents a prime example of this problem. The GATT panel found that the impugned domestic provision was directed at the way in which the tuna was harvested and in no way applied to the tuna as a product. As the measure was directed at a production method, Article III could not be successfully invoked.¹⁸

2. Article XX

Article XX allows for exceptions to be made to the general rules of the GATT where it is "necessary to protect human, animal or plant life or health," or for those restrictions "relating to the conservation

¹⁶ S. Charnovitz, "Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures" (1994) 7 Tul. Envtl. L. J. 299 at 306.

¹⁷ W. J. Snape III, & N. B. Lefkovitz, "Searching for GATT's Environmental Miranda: Are 'Process Standards' Getting 'Due Process?'" (1994) 27 Cornell Int'l L. J. 777 at 779.

¹⁸ Tuna/Dolphin case, *supra* note 6 paras. 5.8–5.16.

of exhaustible natural resources.”¹⁹ The only express limitation on these measures is that they may not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”²⁰

Further limitations to Article XX have evolved as a result of disputes brought before GATT panels. The term “necessary” in Article XX(b) has alternately been interpreted to mean that there must exist no reasonable alternative measures²¹ or that the restriction must be the “least trade restrictive” and the “least inconsistent with GATT.”²² Article XX(g) has been held to require that any trade measure that seeks an exemption under this section must be “primarily aimed at” conservation and must be taken in conjunction with domestic conservation provisions.²³

However, by far the most distressing limitation implied by a GATT panel with respect to Article XX originated in the Tuna/Dolphin dispute. In this case, the panel found that trade restrictions seeking an exemption under Article XX(b) or (g) could not succeed where the measure was to effect the environment beyond the importing country’s jurisdiction.²⁴

In light of Article XI, and as a result of the implications of the Tuna/Dolphin decision, import prohibitions, sanctions and other restrictions based on process and production methods are prohibited. Nevertheless, many environmentalists argue that unilateral and multilateral trade measures that have precisely this effect are necessary and highly effective in the quest to ensure that the environment be “sustained.” The advantages and disadvantages of the use of such ETMS shall be the next area of focus.

¹⁹ Final Act, *supra* note 4 at 519.

²⁰ *Ibid.*

²¹ *United States: Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439, 36S BISD (1990) 345.

²² *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R, 37S BISD (1990) 200.

²³ *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268, 35S BISD (1988) 98 at 114.

²⁴ Tuna/Dolphin case, *supra* note 6 paras. 5.22–5.33.

II. PROHIBITED ETMS

1. Unilaterally Imposed Trade Restrictions

All but two of the contracting parties to the GATT, the U.S. and Austria, have expressly rejected the use of unilaterally imposed trade restrictions²⁵ as a means to effect environmental programmes on other nations.²⁶ Conversely, many environmental groups, particularly those in the U.S. and in the EU, push for their continued use. This dispute is of some importance for not only are unilateral trade measures threatened and often used on a regular basis, but they are a technique that often achieves its objective.

Unilateral trade measures have been in use since at least the early 19th century. Denmark and Great Britain, in 1804 and 1807 respectively, each unilaterally prohibited the trade in human slaves. These actions eventually led to an international consensus on the matter.²⁷

Unilateral trade measures are still in use. The EU, interestingly a GATT/WTO member that has generally rejected the use of unilateral restrictions, is in the process of engaging a ban on the importation of animal pelts that have been gathered through the use of steel leg-hold traps.²⁸ While such a ban would most certainly be found in contravention of the GATT,²⁹ the mere threat of its implementation has already been sufficient to bring into existence some of its objectives. Not only have the relevant parties, including Canada and the U.S., since engaged in multilateral negotiations, but some

²⁵ Unilateral trade measures are those initiated and applied solely at the discretion of the initiating party. ETMs that are brought about as a result of very limited international consensus may also be considered unilateral rather than multilateral.

²⁶ GATT, Minutes of Mtg, C/M/248 (3 April 1991) at 17–26 [hereinafter GATT April 1991]; GATT, Minutes of Mtg, C/M/250 (28 June 1991) at 2–22 [hereinafter GATT June 1991].

²⁷ Snape, *supra* note 17 at 784; S. Charnovitz, "Free Trade, Fair Trade, Green Trade: Defogging the Debate" (1994) 27 Cornell Int'l L. J. 459 at 493.

²⁸ EU, European Union Council, Regulation No. 3254/91, O.J. Legislation (1991) L308.

²⁹ The EU is planning to ban the import of all furs harvested in countries where leg-hold traps are still in use. Therefore, as the EU is not planning to make an exception for those furs gathered using the acceptable, more humane, techniques neither Article III or Article XX could be successfully applied.

trappers have already switched to more "humane" methods in anticipation of an outcome favouring the EU's position.³⁰

Perhaps the best example of a highly effective use of unilateral trade measures is the Tuna/Dolphin controversy. As previously mentioned, the U.S. trade restriction was found to be in violation of GATT. However, by no means was this the end of the story.

The U.S. made it clear that it would not remove the trade restriction and, as a result, the panel report was never adopted by the GATT Council.³¹ With no other choice, Mexico engaged the U.S. in bilateral discussions. After a lengthy negotiation, it appears that the dispute has been resolved not only to the satisfaction of both Mexico and the U.S., but also with the approval of the five environmental organizations that participated in the process.³²

The eventual outcome of the Tuna/Dolphin dispute leaves us with a crucial lesson to be learned. Simply put, the reality is that all too often unilateral action must be taken before an issue of importance can be brought to a head.

This point was apparently lost on the original panel. The panel noted that its report should not be seen as affecting "the rights of individual contracting parties to... cooperate with one another in harmonizing [environmental] policies, nor the right of the CONTRACTING PARTIES acting jointly to address international environmental problems."³³ However, the panel evidently failed to

³⁰ "Canadian Fur Trade Given Reprieve" *The Globe and Mail* (23 November 1995) A1, A9.

³¹ At the time, for a panel report to be binding, it had to be ratified by the full GATT Council. However, under new rules adopted by the Final Act, panel decisions *shall* be adopted unless decided otherwise by the entirety of the Dispute Settlement Body. See "Understanding on Rules and Procedures Governing the Settlement of Disputes," GATT Doc. MTN/FA II-A2 (15 December 1993) found in Final Act, *supra* note 4.

³² There is a bill, currently on its way through the U.S. Congress, that would implement the Panama Declaration. The Declaration was signed in October 1995 by the United States and other nations that fish the Eastern Tropical Pacific (ETP). The passage of this bill would lift the U.S. embargo for countries that participate in the agreement under the Inter-American Tropical Tuna Commission. In exchange, the La Jolla Agreement, which sets dolphin mortality limits in the ETP, would become a binding legal instrument between the complying nations. See "Senators Seek Compromise in Dispute Over New Tuna-Dolphin Bill" *Inside U.S. Trade* 3 (November 1995) at 4.

³³ Tuna/Dolphin case, *supra* note 6 para. 6.4.

consider the fact that the U.S. had tried for years to negotiate a mutually acceptable agreement on this matter before it imposed any restrictive trade measures.³⁴

Therefore, the Tuna/Dolphin dispute reveals a fundamental problem. In many instances where the environmental concern is generated by an extrajurisdictional PPM, there exists no incentive for the other party or parties to engage in negotiations or to accede to any compromise. To use an old euphemism, the offending party already has the "carrot;" the offending party is free to trade under the rules of the GATT. As a result, it is often necessary to first remove the "carrot" before any meaningful negotiation can take place. As noted, unilateral trade measures have been a direct and effective way of bringing about compliance with one's own agenda.

But then, this is where the problems begin. Who has the right to set another nation's environmental agenda? By requiring Mexico and the other ETP fishing nations to adhere to the U.S. protocol for tuna harvesting, the U.S. is, in effect, dictating the environmental standards of foreign nations. It is difficult to imagine how this could not offend the national sovereignty of the nation being forced into compliance.

Also, it is significant that only the major powers can successfully bring about change in foreign countries' environmental policies as a result of unilateral action.³⁵ Only the U.S. and the EU have large enough markets to make it necessary (from a business standpoint) for foreign producers to comply with their import conditions.

Hence, all of the world's environmental policies could conceivably come to be dictated by the U.S. and the EU. Certainly, since Canada does not have a large enough market so as to be able to employ this tactic in any meaningful way, it is not in Canada's interest to have this approach available for use against Canadian exports.³⁶

On the other hand, it has been correctly noted that the issue of sovereignty is a double-edged sword: "[i]f there is a danger in the United States telling other countries how to produce certain goods, there is at least an equal danger in the GATT requiring the United

³⁴ Snape, *supra* note 17 at 784.

³⁵ GATT April 1991, GATT June 1991, *supra* note 26; McCaskill, *supra* note 15 at 16.

³⁶ McCaskill, *supra* note 15 at 17.

States to accept products regardless of their environmental effect."³⁷ The issue then becomes whose sovereignty is more important, that of the importing or the exporting country.

Understandably, developing nations have expressed a great deal of solidarity over this matter. Many developing nations simply lack the resources at this time to institute environmentally friendly production methods.³⁸ They argue that if the developed nations wish to see more environmentally friendly PPMs put in place, the most effective way would be to permit an increase in their level of foreign trade so that they can generate the necessary revenue. Richard Elgin, Director of the Trade and Environment Division of the GATT Secretariat, stated:

Further liberalisation [sic] of international trade flows, both in goods and services, has a key role to play: as a generator of foreign exchange earnings and wealth that can be used to help pay for environmental clean-up; as a more efficient allocator of resources, including environmental resources, to allow the same level of output to be produced at less resource cost; and in removing restrictive trade policies that also impact adversely on the environment.³⁹

Similarly, the United Nations Committee on Trade and Development has empirically demonstrated that a higher burden was placed on developing countries when they have had to adjust their production processes in response to changing environmental requirements in developed countries.⁴⁰ It is perfectly understandable that developing countries will be reticent in allowing changes to the GATT that make their position any more precarious than it already is.

Perhaps the single most difficult problem to overcome in this area is, as Sir Leon Brittan of the EU has warned, there exists "a

³⁷ Snape, *supra* note 17 at 783.

³⁸ Peru and Pakistan have expressed the belief that countries that are as yet unable to meet the minimum needs of their citizenry should not be asked to assume the same level of responsibility for the environment as developed nations. GATT June 1991, *supra* note 26 at 10, 16.

³⁹ R. Elgin, "Trade, Environment and the WTO" (Paper presented to International Bar Association Seminar, 24-26 November 1994) [unpublished] at 2.

⁴⁰ GATT, Trade and the Environment, *Sub-Committee Completes Preparatory Work on Trade-Environment Issues*, TE 011, (6 January 1995) 9.

serious risk of protectionist interests donning the 'fashionable cloak of environmentalism.'"⁴¹ Almost every nation that has made a written submission to the GATT with respect to trade and environment has remarked that it is essential to ensure that environmental concerns not be used as a pretext for the creation of additional trade barriers.⁴²

While some may argue that this risk should be taken in the name of environmental conservation, in reality it is difficult to find a single environmental trade measure that has been challenged under the GATT that was not instituted for an ulterior protectionist motive.⁴³ Even the Tuna/Dolphin case, the decision that galvanized environmentalists against the GATT, appears almost certainly to have been an abuse of the system. The trade restriction enacted by the U.S. government was more likely a result of pressure being placed upon Congress by the strong Californian fishing lobby than a result of the actions of any environmental or animal rights groups. And, even if this observation is incorrect, the effect of the restriction was certainly to help the U.S. tuna fishing industry at the expense of Mexico and others.

So now to ground us again in the real question. Clearly, unilateral trade restrictions will continue to be employed. The question is whether the GATT/WTO should in any way adopt provisions that allow for the use of such measures or to even simply condone their use by not effectively sanctioning nations that take such unilateral action contrary to the rules of the GATT.

Although some commentators⁴⁴ wish to see the WTO turn into an environmental watchdog, the vast majority of GATT/WTO members would dislike to see the continued use of unilateral

⁴¹ McCaskill, *supra* note 15 at 17.

⁴² GATT April 1991, GATT June 1991, *supra* note 26.

⁴³ One of the only extrajurisdictional environmental action that does not appear to contain an element of protectionism was the recent threat of U.S. sanctions being taken against Japan with respect to hawksbill sea turtles and olive ridley. See S. Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX" (1991) 25: 5 J. World Trade 37 at 37.

⁴⁴ See e.g.: D. C. Esty, *Greening the Gatt: Trade, Environment and the Future* (Washington: Institute for International Economics, 1994). Esty proposes that a Global Environmental Organization be created to work along side the WTO in order to properly monitor and help settle disputes related to the use of environmental trade measures.

measures, even where they are undertaken in an attempt to safeguard the environment.⁴⁵ Ambassador H. Ukawa, Chair of the Group on Environmental Measures and International Trade, stated:

It has been widely agreed internationally (e.g., at UNCED, in the OECD and in the GATT discussions to date) that trade restrictions, even if used on a multilateral basis, are not the best or most appropriate means to achieve environmental objectives. Measures that deal directly with the root cause of the environmental problem and incentives that enable countries to cooperate, such as financial and technical assistance, will be more effective and efficient.⁴⁶

Why then would the Committee on Trade and Environment recommend that the WTO allow or regulate the use of unilateral trade measures, even those aimed at environmental protection? Environmental organizations cannot expect, nor maybe should even desire, that the WTO would ever sanction the use of unilateral trade measures.

III. MULTILATERAL ENVIRONMENTAL AGREEMENTS

In the preceding section, there was a brief discussion about how, on occasion, unilateral action has led to multilateral agreement. Today there exist over 150 multilateral environmental agreements (MEAs) and this number is growing larger every year. MEAs are considered to offer long-term stable solutions to environmental problems as a result of their consensual and multinational nature. As a result, it is widely argued that parties to the GATT should make every effort to negotiate such agreements rather than resort to the sort of unilateral action described above.⁴⁷

⁴⁵ GATT April 1991, Gatt June 1991, *supra* note 26.

⁴⁶ McCaskill, *supra* note 15 at 18.

⁴⁷ See generally Beacham, *supra* note 1 at 668–670, and McCaskill, *supra* note 15, 26. In the Report by the Group on Environmental Measures and International Trade, *infra* note 49 at 3, Ambassador Ukawa states that “[g]overnments’ efforts to seek co-operative, multilateral solutions to environmental problems of a transboundary or a global nature are very much welcomed by GATT contracting parties, for there are clear grounds for believing that this approach will prove more

Unfortunately, there is a problem. Restrictive extrajurisdictional trade provisions, even when contained within a MEA, are not technically permissible under the GATT. While the GATT has never ruled that any trade restriction applied through a MEA to be "GATT-illegal," environmentalists are still very concerned that such an outcome could still occur.⁴⁸ The resolution of this problem was a priority for the GATT Group on Environmental Measures and International Trade.⁴⁹ The group's work has been adopted by the WTO Committee on Trade and Environment.⁵⁰

At last count, only a dozen MEAs contained provisions for trade restrictions that could be held to be in violation of the GATT.⁵¹ While at first glance not a sizable number, some of the implicated treaties are among the most critically needed, from an environmentalist's point of view. In particular, implicated treaties include The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁵² the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),⁵³ and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).⁵⁴

The Tuna/Dolphin panel stated that, in its view, the adoption of its report would not effect "the right of the CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in conflict

effective and durable than *ad hoc* resort (sic) to unilateral trade measures to try to deal with such problems."

⁴⁸ S. Charnovitz, "The World Trade Organization and Social Issues" (1994) 28: 5 J. World Trade 17 at 28; Estey, *supra* note 45 at 218. Perhaps of even greater concern to the environmental community is that "GATT provisions could work to inhibit if not prevent a *desirable conclusion of a future MEA*" *infra* note 49 at 3 [emphasis added]. It is conceivable that there are so few MEAs with restrictive trade measures only because the negotiating parties realize that inclusion of such measures would run counter to their pre-existing GATT obligations and hence, refrain from their inclusion.

⁴⁹ Report by Ambassador H. Ukawa (Japan), Chairman of the Group on Environmental Measures and International Trade, to the 49th Session of the Contracting Parties, GATT Doc. L/7402, (2 February 1994) at 3, Annex 1.

⁵⁰ Final Act, *supra* note 4 at 469.

⁵¹ Beacham, *supra* note 1 at 670-75.

⁵² 3 March 1973, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

⁵³ 16 September 1987, S. Treaty Doc. No. 100-10, 26 I.L.M. 1550.

⁵⁴ 22 March 1989, 28 I.L.M. 657.

with the present rules of the General Agreement.”⁵⁵ Whether the parties to the WTO/GATT do in fact have a right of this sort or, if not, how this right can be entrenched in the rules of the WTO to the satisfaction of environmentalists shall form the basis of the following discussion.

Conflicts between treaties are governed by Article 30 of the Vienna Convention on the Law of Treaties.⁵⁶ Article 30 states that where a nation is subject to two treaties that contain incompatible provisions, the treaty entered into former in time will only apply to the extent that its provisions are compatible with the latter treaty.⁵⁷ Since the Final Act creating the WTO was signed in 1994, and since the Articles of the GATT were contained therein, the GATT would be held to trump all of the aforementioned MEAS under the rules of the Vienna Convention.

Short of re-ratifying all of the impugned MEAS, it would appear that the only means of ensuring MEA supremacy is through some measure of change to the WTO/GATT itself. So why then might the Director of the Trade and Environment Division of the GATT Secretariat state that “[t]he provisions of [an] environmental agreement, including its dispute settlement provisions, would surely prevail in the case of a conflict”?⁵⁸

One probable reason may be that, given the specific nature of the MEAS and the fact that they were agreed to in full knowledge of the member nations’ pre-existing obligations under the GATT, any GATT panel faced with deciding a conflict would find in favour of the MEA. To do otherwise would be to completely disregard the implicit approval previously given by the subscribing party to the MEA to have itself be subject to the imposition of the restrictive trade action contemplated in the MEA.⁵⁹

⁵⁵ Tuna/Dolphin case, *supra* note 6, para. 6.4.

⁵⁶ 23 May 1969, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (*Entered into force* 27 January 1980) [hereinafter Vienna Convention].

⁵⁷ *Ibid.* at Art. 30(3),(4).

⁵⁸ Elgin, *supra* note 39 at 3.

⁵⁹ In 1991, the CITES Standing Committee recommended that member nations prohibit all trade in endangered species with Thailand. Although Thailand was a party to the treaty, it was ignoring particular provisions of the agreement. The CITES recommendation has since been lifted but not until after the U.S. applied import restrictions. See S. Charnovitz, “Environmental Trade Measures: Multilateral or Unilateral?” (1993) 23 *Envtl. Pol’y & L.* 154 at 156.

However, the environmental community appears to want more concrete assurances. One suggestion has been to make use of the waiver provision existing in Article XXV of the GATT.⁶⁰ By a two-thirds majority vote the WTO/GATT membership can opt to waive GATT obligations.⁶¹ It is unlikely, though, that any MEA would be granted a waiver until after it had been challenged so, once again, it is uncertain that environmentalists would accept this route.

There are some advantages to using the waiver approach. If applied on a case-by-case basis, the merits of each impugned measure of the MEA could be analyzed by the broader GATT community. If the measure were found to be based on legitimate scientific evidence and have sincere, multilateral support, then many of the fears surrounding the use of extrajurisdictional trade restrictions would be eliminated.⁶² Concerns around disguised protectionism, effectiveness and necessity would all be addressed.

Nevertheless, there are a number of disadvantages to the waiver approach: waivers do not give a measure of predictability, are cumbersome and, most important of all, are time-limited.⁶³ Also, waivers were intended to be applied only in exceptional circumstances. Neither the WTO nor environmental organizations would or should wish to treat MEAs that address serious, long-term environmental problems as exceptions.

The last feasible way to validate MEAs is for the contracting parties to come to an agreement about the interpretation of, or simply make changes to, Article XX of the GATT. Some parties to the GATT have already positively responded to the possibility of allowing MEAs to be considered an exception under Article XX provided that certain conditions are met.⁶⁴

⁶⁰ S. Ostry & G. R. Winham, "The Post-Uruguay Round Trade Agenda" in S. Ostry & G.R. Winham, eds., *The Halifax G-7 Summit: Issues on the Table*, (Halifax: Centre for Foreign Policy Studies, 1995) 67.

⁶¹ The waiver provision has been successfully used in the past. See J. Jackson, *Changing GATT Rules, the Greening of World Trade*, (Washington: EPA, 1993) at 106.

⁶² Ukawa, *supra* note 49 at 5.

⁶³ *Ibid.*

⁶⁴ *Ibid.* Once again, the conditions would revolve around ensuring the necessity and validity of the restrictions contained within the MEA as well as securing against possible protectionist abuses.

Problems and concerns associated with making allowances in this regard appear to be the least difficult to overcome of all the varied options. Some fear that this approach would necessitate the WTO to become an environmental arbitrator, having to make judgments on environmental issues outside of its realm of expertise. Similarly, there is concern over the practical difficulty of finding and implementing a single approach to this problem.⁶⁵

However, it appears inevitable that the WTO/GATT is going to have to deal with the problem presented by MEAs in some form or other. If not the status quo, this option seems the most practicable. Importantly, a change of this sort would presumably satisfy the environmental community, at least with respect to the single issue of permitting the use of trade restrictions between parties to an MEA.

There still remains a stickier issue. MEAs, such as the Montreal Protocol, allow for the use of trade sanctions to be taken against non-parties to the MEA. Actions of this sort fall midway between purely unilateral measures and measures taken between subscribers to an MEA. Of course, all actions taken pursuant to an MEA are taken individually by member nations and hence can be considered to be essentially unilateral. However, when the action is condoned by the membership of the MEA, issues surrounding justification are greatly reduced.

There are still problems. Firstly, there remain difficulties with respect to the issues of sovereignty and the ability of developing nations to comply with heightened standards. Secondly, the Montreal Protocol, the Basel Convention and CITES, contain provisions requiring parties to apply even more severe trade restrictions to non-parties than to parties, which certainly could not be justified under the GATT. This leads to concerns that non-parties could be forced into joining particular MEAs in order to lessen potential sanctions.

Any exception to GATT rules for environmental objectives, whether in the form of a waiver or under an agreement or revision of Article XX, would have to account for the latter problem. No change can occur when the possibility exists of trade measures being used in ways incompatible with the GATT/WTO's principles of non-discrimination and freedom from protectionism.

⁶⁵ *Ibid.* at 6.

Nonetheless, it is highly unlikely, no matter what level of security can be offered against potential abuse, that developing nations would ever willingly permit changes to the GATT that could give environmentally inclined nations the power to compel reformation of PPM standards. But, given that it is entirely possible that MEA members will begin to apply ETMS to non-parties, regardless of the rules of the GATT, the developing nations may wish to seek an agreement on the issue that would give them at least some measure of control over the use of such ETMS.

Regardless, as many nations are still dogmatically opposed to allowing any form of ETMS, it is doubtful that an entrenched exemption to the non-party application of MEA-approved trade measures will be forthcoming in the near future. A more plausible scenario would see the adoption of an understanding between the GATT/WTO member nations to allow for MEA-approved trade measures to be applied between member nations. This understanding could be implemented through an express waiver or could simply take the form of an internal policy statement allowing for ETMS taken as a result of specifically negotiated multilateral agreements. In this way, environmental groups would be somewhat appeased while the GATT's fundamental precept of free trade would only be slightly undermined.

IV. OBSERVATIONS

The GATT/WTO must satisfactorily resolve the issue of extrajurisdictional application of ETMS. Unilateral and multilateral ETMS presently apply and will continue to be applied. The WTO can no longer stand by and watch its rules be broken. The longer that contracting parties are permitted to openly violate the rules of the GATT in this manner, the weaker the whole international trade system will become.

The WTO membership has three practical options. First, they could chose to strengthen the "teeth" of the GATT by allowing for the increased use of punitive measures against violators of GATT rules. The problems with this approach are twofold: One, there is the fundamental problem of getting the contracting parties to agree on stronger penalties; second, there is the possibility of an all out international trade war if such penalties ever came into widespread use.

A second option is for the WTO to try and persuade its members, particularly the U.S. and the EU, to stop applying prohibited ETMs. Unfortunately, regardless of any facts or logic that the WTO can bring forward in support of this position, there are two principle reasons why the position is likely doomed to failure: First, many environmental groups have no regard for national boundaries and little regard for the economic welfare that increased trade can generate. Hence, most of the arguments that the WTO could bring to bear would fall on deaf ears; second, in reacting to domestic environmental pressure, governments will on occasion find it politically expedient to enact ETMs rather than take internal actions that might offend other special interest groups. So, while particular governments care to varying extents about the environment in general, most nations will prefer to see other countries take action to preserve the global commons rather than impose measures that might have a negative impact upon the domestic economy.

The final option for the WTO is to make allowances for environmental interests. Simply put, environmental groups, particularly in the U.S. and the EU, must be given some avenue for bringing about their desired ends. The trick for the WTO is to minimize the damage of this concession to the international trade regime. As previously mentioned, this would probably take the form of an exemption of some sort to multilateral environmental agreements. Whether to explicitly allow MEA-endorsed trade measures to apply to non-parties may be where the line gets drawn. In this way, the WTO may be able to eliminate the destabilizing use of unilateral trade measures.

V. CONCLUSION

Within the year, the WTO's Committee on Trade and Environment should be coming forth with various proposals on how to resolve the growing conflict between environmental issues and the GATT. Given the inherent uncertainty of international relations, no one can yet be assured of the outcome. Nevertheless, the environment and international trade have become intertwined, and the mess created must eventually be untangled. Sustainable development may yet prove to be a more difficult goal to realize than many might think.