SUSTAINING THE DEVELOPMENT OF INTERNATIONAL TRADE AND ENVIRONMENTAL LAW*

Ronald A. Brand**

INTRODUCTION

International trade and environmental law have become inextricably linked through the concept of development. The *Agreement Establishing the World Trade Organization*, in its first paragraph, admits the need for attention to environmental concerns by exhorting that we allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so."[1] The Rio Declaration on Environment and Development similarly acknowledges trade limitations on international environmental law by promoting "a supportive and open international economic system that would lead to economic growth and sustainable development," and discouraging "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country."[2]

Despite these reciprocal acknowledgments, public debate raises questions about whether international legal developments in each of these two areas can continue without increasing tensions fueled by apparently divergent goals. A continuing Malthusian approach on the part of some environmentalists seems to view the concept of sustainable development as an oxymoron, and characterizes recent trade law developments as assaults on environmental protection.[3] At the same time, others view certain

---

* © 1996 Ronald A. Brand

** Professor of Law, University of Pittsburgh. The author thanks Robert E. Hudec, Kurt Riechenberg, and Thomas Walde for helpful comments on earlier drafts. This article is a revised version of a presentation by the author at an AALS/ASIL Workshop on International Law, at Washington, D.C. on June 13-15, 1996. Notwithstanding such comments, responsibility for the content of this article and all opinions expressed in it remain the author's.

1. Agreement Establishing the World Trade Organization, Preamble, *done* at Marrakesh, 15 Apr. 1994.

2. Principle 12, Rio Declaration on Environment and Development, adopted 14 June 1992, at the United Nations Conference on Environment and Development, U.N. Doc. A/CONF/151.5/Rev. 1, *reprinted in* 31 I.L.M. 874, 878 (1992).

3. Nowhere has this been better demonstrated than in the "Sabotage!" advertisement against the Uruguay Round Agreements placed in U.S. newspapers by groups including the Sierra Club, Public Citizen, Greenpeace, Clean Water Action and others. *See* N.Y. TIMES, Apr. 20, 1992, at B5.

national environmental regulations as thinly-veiled, illegitimate means for the unfair protection of domestic industries against foreign competition.[4]

Both international trade law and international environmental law have seen rapid development in the late twentieth century. This concurrent development raises questions about continued progress in the legal order, and whether development can continue with proper respect for the interests so far championed by each of the trade and environmental camps.

This Article approaches the trade and environment discussion by considering the impact of each on the development of the international legal order generally. It begins with a brief review of the history of international legal development in trade and environmental law. The goals and strengths of each of the environment and trade movements are then considered in light of the established international legal frameworks. Finally, the convergence of trade and environment policies as represented in legal structures is discussed to determine whether the international law growth that has occurred separately can continue in tandem. In this regard, the records of both the European Union and the General Agreement on Tariff and Trade (GATT/WTO) system are considered as instructive of the manner in which this tandem development may occur. Ultimately, reconciliation of the two areas of law within the international legal framework is considered, suggesting the continued development of GATT jurisprudence and negotiation of further multilateral environmental agreements.

I. HISTORY

A. International Trade Law

1. Multilateral Development

Multilateral developments of the twentieth century were preceded, for both trade and environmental law, by bilateral arrangements. While domestic trade law can trace its history back through centuries of waxing and waning tariffs, the current framework for international trade is usually traced to the Cobden-Chevalier Treaty of 1860 between France and Britain.[5] The real significance of the Cobden-Chevalier Treaty was not so much in its opening up of French markets to the British, as in its influence on subsequent treaties with France, all of which contained most-favored

---

4. *See, e.g.*, Charles T. Haag, *Legitimizing "Environmental" Legislation Under the GATT in Light of the CAFE Panel Report: More Fuel for Protectionists?*, 57 U. PITT. L. REV. 79 (1995).

5. GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 15 (1965).

nation clauses. Between 1862 and 1867, France entered similar commercial treaties with at least a dozen other states.[6] Through this system of most-favored-nation provisions, the concessions granted by France to one country were generalized to all, thus multilateralizing the process.[7]

The beginning of the twentieth century saw a return to protectionism that was further exacerbated after World War I. The United States was a leader in this protectionist movement, enacting the Smoot-Hawley Tariff Act of 1930, which raised tariffs to their highest rates in U.S. history.[8] This was followed by reciprocal increases throughout the world.

Realizing the need for agreements to reduce tariffs, Congress enacted the 1934 Reciprocal Trade Agreements Act, authorizing the negotiation of tariff reduction agreements.[9] Although this Act called for negotiation based on the concept of reciprocity, the resulting bilateral agreements all contained unconditional most-favored-nation clauses generalizing concessions on a multilateral basis. History was repeating the results of the Cobden-Chevalier Treaty of 1860.

The success of the bilateral agreements program led to a new look at the multilateral system as the world was coming out of World War II. This ultimately resulted in the GATT,[10] which has served as the foundation upon which international trade law has been built in the twentieth century.[11]

---

6. *Id.*

7. L.C.A. KNOWLES, ECONOMIC DEVELOPMENT IN THE NINETEENTH CENTURY, FRANCE, GERMANY, RUSSIA AND THE UNITED STATES 250 (1932).

8. Pub. L. No. 71-361, 46 Stat. 590 (1930).

9. Pub. L. No. 316, 48 Stat. 943 (1934) (current version at 19 U.S.C. §§ 1351-1354).

10. Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round Final Act].

11. The General Agreement on Tariffs and Trade (GATT) had its origins in a U.S. State Department publication of 1945. *Proposals for the Expansion of World Trade and Employment*, Dept. of State Pub. 2411 (Washington 1945). "The earliest glimmerings of the GATT were in discussions from 1942 onward between the United States, the United Kingdom and Canada on carrying out the provisions of Article VII of the February 1942 Lend-Lease Agreement, on planning for the postwar economic and trade system." Amelia Porges, *GATT Law: A User's Guide*, AM. SOC'Y OF INT'L LAW, PROC. OF THE 83RD ANNUAL MEETING 111, 112 (1990). *See also* James Meade, *A Proposal for an International Commercial Union of 25 July 1942, reprinted in* 10 WORLD ECON. 400 (1987). Included in that pamphlet was a "Proposal for Consideration by an International Conference on Trade and Employment." The document focused on the elimination of quantitative restrictions in international trade, which had become the major focus of protectionism by the end of World War II. The process of development of the U.S. initiative was fostered through the Economic and Social Council of the newly-formed United Nations, which appointed a Preparatory Committee of nineteen nations in February 1946, to draft a convention to be considered at an International Conference on Trade and Employment. The draft convention was considered at sessions in London in late 1946, (*Report of the*

The GATT was never ratified as a treaty by the United States,[12] was adopted by all the contracting parties on a "provisional" basis,[13] contained no detailed provisions for a body to administer what rules it did contain, provided only vague provisions on the resolution of disputes, and contained none of the International Trade Organization (ITO) Charter's provisions on employment or restrictive business practices. Further, the bulk of the provisions of the GATT are contained in Part II which sets out the general commercial policy rules, and, pursuant to the Protocol of Provisional Application under which the GATT was adopted, applied only "to the fullest extent not inconsistent with existing legislation."[14]

First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. Doc. E/PC/T/33 (1946), *reprinted as Preliminary Draft Charter for the International Trade Organization of the United Nations*, Department of State Pub. 2728, Commercial Policy Series 98 (1946)) and Geneva from April to August 1947. *Report of the Second Session of the Preparatory Committee, Conference on Trade and Employment*, U.N. Doc. E/PC/T/186 (1947), *reprinted as Draft Charter for the International Trade Organization of the United Nations*, Department of State Pub. 2927, Commercial Policy Series 106 (1947). This Draft had seen a prior revision of the "London Draft" by the Drafting Committee of the Preparatory Committee in New York in January and February 1947. *Report of the Drafting Committee of the Preparatory Committee, Conference on Trade and Employment*, U.N. Doc. E/PC/T/34/Rev. 1 (1947). A final conference in Havana from November 1947 to March 1948 produced the "Havana Charter," the Charter for an International Trade Organization. *Reports of Comms. and Principal Sub-Comms. of the United Nations Conference on Trade and Employment*, U.N. Doc. ICITO 1/8 (1948); *United Nations Conference on Trade and Employment, Final Act and Related Documents*, U.N. Doc. E/Conf. 2/78 (1948).

In part as a result of the coming deadline on U.S. negotiating authority, and in part as a provisional implementation of concepts basic to the trade provisions of the International Trade Organization (ITO) Charter, the General Agreement was first submitted by the U.S. at the end of the London negotiating session of the ITO. GERARD CURZON, THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 32 (1965). Reacting in part against what was perceived as a disappointing beginning for the United Nations, and in part to disappointment in the rules-riddled-with-exceptions nature of the Charter, U.S. business interests objected to its terms. In 1950, the Truman Administration decided against submitting the Charter to the U.S. Senate for its consent.

12. The General Agreement was adopted by agreement to the Protocol for Provisional Application of October 30, 1947. 61 Stat. Part 5 at A2051 (1947); T.I.A.S. No. 1700; 55 U.N.T.S. 308 (1950). Consequently, both the GATT and the Protocol received their original authority in U.S. law, not as a result of any direct congressional act, but rather through Presidential agreement to and proclamation of the Protocol of Provisional Application. Proclamation 2761A, Dec. 30 1947, 12 Fed. Reg. 8863, 8866. Proclamations also accompanied the major amendments to the GATT text in 1948 and 1955, specifically stating that "GATT and agreements supplementary thereto shall be applied." Proclamation 2829, Mar. 10, 1949, 14 Fed. Reg. 1151, 1153; Proclamation 3513, Dec. 28, 1962, 28 Fed. Reg. 107, 115.

13. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

14. *Id.*

The contracting parties amended the original GATT provisions in 1955,[15] and added Part IV providing special treatment for developing countries in 1964.[16] With the growth of membership making further amendments difficult, the parties turned, in the Tokyo Round negotiations of the 1970s, to a series of "Codes" that both expanded the coverage of GATT rules and elaborated on existing rules.[17] The GATT became both the Agreement itself, with its rules for international trade, and an organization filling the void left in the absence of the ITO. As an organization, it provided both a forum for trade negotiations and an organ for conciliation and settlement of disputes.[18]

Tariff reductions were the focus of the first six rounds of GATT multilateral trade negotiations, from the initial round in Geneva in 1947 through the Kennedy Round in the second half of the 1960s. By the Tokyo Round of the 1970s, tariffs had been reduced to the point where they were no longer the principal barriers to free trade in industrial products throughout the world. Although negotiations to reduce tariffs were continued, the emphasis shifted in the Tokyo Round to negotiation of the reduction of non-tariff barriers.[19] Much of the progress of the Tokyo Round was contained in codes ratified by far less than all the contracting parties. This left an "a la carte" system with different obligations on the part of different states. It also led to the "all-or-nothing" requirement at the end of the Uruguay Round. No longer could a state become a member of one agreement without becoming a member of the entire package of agreements.

---

15. GATT, *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, Mar. 10, 1955, 278 U.N.T.S. 168, B.I.S.D. 6th Supp. 13 (1958).

16. B.I.S.D. 13th Supp. 1 (1964). This Protocol was implemented on a *de facto* basis on Feb. 8, 1965. *Id.* at 10. A Protocol Amending Part I, and Articles XXIX and XXX, Mar. 10, 1955, never achieved the unanimous acceptance required by GATT Article XXX. B.I.S.D. 15th Supp. 65 (1968).

17. The Tokyo Round codes were the Agreement on Technical Barriers to Trade, April 12, 1979, 1186 U.N.T.S. 276, GATT B.I.S.D. 26th Supp. 8 (1980) [Standards Code]; Agreement on Government Procurement, B.I.S.D. 26th Supp. 33 (1980); Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, GATT B.I.S.D. 26th Supp. 56 (1980), [Subsidies Code]; Arrangement Regarding Bovine Meat, B.I.S.D. 26th Supp. 84 (1980); International Dairy Arrangement, B.I.S.D. 26th Supp. 91 (1980); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, B.I.S.D. 26th Supp. 116 (1980); Agreement on Import Licensing Procedures, B.I.S.D. 26th Supp. 154 (1980); Agreement on Trade in Civil Aircraft, B.I.S.D. 26th Supp. 162 (1980); and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code), B.I.S.D. 26th Supp. 171 (1980).

18. *See* O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 5 (1985).

19. *See supra* note 17 for the list of nontariff barrier codes resulting from the Tokyo Round.

The focus on reducing non-tariff barriers continued in the Uruguay Round, when the GATT rules governing trade in goods were joined by rules covering trade in services, trade-related investment, and intellectual property rights. Eight years of negotiations were brought to a conclusion with the signing of the Final Act of the Uruguay Round in Marrakesh on April 15, 1994.[20] In addition to strengthening and developing the General Agreement on Tariffs and Trade (now the "GATT 1994," as opposed to the former "GATT 1947"),[21] the Round brought the creation of the World Trade Organization (WTO), a new General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights, and a new Understanding on the Rules and Procedures Governing the Settlement of Disputes.

The GATT 1994, like the GATT 1947, is largely defined by the rules set forth in its first three articles. These rules are the foundation upon which the rest of the document—and the further agreements of the Uruguay Round—are built. The most-favored-nation principle of Article I provides that a contracting party may not discriminate against trade with one contracting party in favor of another contracting party; all contracting parties must be treated as favorably as any other state in the application of tariffs and basic commercial policy rules.[22] Article II sets up a system of tariff schedules based on concessions,[23] thus expressing the preference of the GATT system for tariffs as the accepted means for restraining trade,

---

20. Uruguay Round Final Act, *supra* note 10.

21. Improvements in rules governing trade in goods include Agreements on Agriculture, the Application of Sanitary and Phytosanitary Measures, Textiles and Clothing, Technical Barriers to Trade, Trade-Related Investment Measures, Antidumping, Customs Valuation, Preshipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures, and Safeguards. *Id.*

22. Paragraph 1 of Article I sets out the general rule as follows:

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

23. This framework is set in paragraph 1(a) of Article II, which provides that, "[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." The schedules prepared at the successive rounds of negotiations thus become an integral part of the Agreement.

and as the focus for reducing existing trade restrictions through the reduction of those tariffs.[24]

The basic rule of Article III is the principle of non-discrimination.[25] Whereas the most-favored-nation principle of Article I requires equality of treatment among competing foreign products, the principle of non-discrimination requires equality of treatment between domestic products and foreign products in regard to internal taxes and other laws.

One of the principal criticisms of the GATT has been that its basic rules are often negated by exceptions. Among others, the GATT contains exceptions for increasing duties in response to dumping and subsidies,[26] exceptions for the maintenance of preferences existing when the GATT came into effect;[27] "safeguard" exceptions applicable when substantially increased imports threaten "serious injury" to a domestic industry;[28] exceptions for public policy purposes;[29] exceptions for national security purposes;[30] exceptions for customs unions and free trade areas;[31] and preferences for developing countries.[32]

Trade measures for environmental purposes often run afoul of one or more of the basic tenets of the GATT framework. They may treat products from one country differently than like products from another country, thus infringing the most-favored-nation obligations of Article I. They may create quotas that violate the tariff schedules set under Article II and the prohibition on quantitative restrictions found in Article XI. Or they may treat foreign products differently from domestic products, thus infringing the national treatment obligations of Article III. If trade

---

24. While Article II sets up the use of tariffs to quantify and then negotiate reductions in trade barriers, Article XI works in concert with this focus by providing for the general elimination of quantitative restrictions, thus allowing the focus on tariffs to operate.

25. The non-discrimination language is set out in several paragraphs of Article III. Paragraph 4 illustrates the concept as follows:

> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

26. GATT arts. VI and XVI.

27. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 13, 1947, IV B.I.S.D. 77 (1969).

28. GATT art. XIX.

29. GATT art. XX.

30. GATT art. XXI.

31. GATT art. XXIV.

32. GATT Part IV (arts. XXXVI-XXXVIII).

measures are to be allowed for environmental purposes, then inconsistencies with the obligations of Articles I, II, III, and XI are likely to occur. The ultimate question is the nature, extent, and application of exceptions to these basic trade liberalization rules.

2. National and Regional Incorporation

The GATT system provides the framework for national and regional (*e.g.*, European Union) trade regulation measures.[33] United States trade relief measures that existed prior to GATT have been continued, modified, and expanded in a manner that parallels GATT developments through the Uruguay Round. These measures provide private party access not only to traditional U.S. trade rules, but to some of the rules of the GATT itself. The Uruguay Round antidumping and subsidies agreements authorize the establishment by member states of domestic administrative procedures under which industries may bring complaints.[34] In each case, rules are established governing national dispute settlement mechanisms considering both the question of dumping or subsidy (and its injurious effect) as well as the question of relief, ultimately allowing the imposition of offsetting duties. Private industry complaints may result in the imposition at the border of additional duties on the importation of goods of a foreign competitor.[35]

In addition to antidumping and countervailing duty procedures, the principal U.S. instrument for responding to other unfair trade practices by foreign governments is section 301 of the Trade Act of 1974.[36] A petition may be filed with the United States Trade Representative (USTR) by any "interested person,"[37] on behalf of an industry, showing that either the

---

33. *See, e.g.*, Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101 (1992).

34. Agreement on Interpretation and Application of Article VI of the General Agreement on Tariffs and Trade (Antidumping Agreement), Uruguay Round Final Act, *supra* note 10, at 145; Agreement on Subsidies and Countervailing Measures, (Subsidies Agreement), Uruguay Round Final Act, *supra* note 10, at 229.

35. U.S. antidumping laws are found at 19 U.S.C.§ 1673 and U.S. countervailing duty (anti-subsidy) laws are found at 19 U.S.C. § 1671. For the European Community, the rules on antidumping and countervailing duties are found in Council Regulation 2423/88, 1988 O.J. (L209) 1, as amended by Council Regulation No. 522/94, 1994 O.J. (L 66) 10.

36. The full coverage is contained in the Trade Act of 1974, §§ 301-06, Pub. L. No. 93-618, tit. III, *codified at* 19 U.S.C. §§ 2411-2416, *as amended*, Pub. L. No. 96-39, tit. IX, 93 Stat. 295 (1979); Pub. L. No. 98-573, §§ 304, 306, 98 Stat. 3002 (1984); Pub. L. No. 100-418, §§ 1301-07, 102 Stat. 1107 (1988); Pub. L. No. 103-465, §§ 311-22, 108 Stat. 4809 (1994). Section 301 replaced § 252 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 75 Stat. 879 (1962).

37. 19 U.S.C. § 2412(a)(1).

rights of the United States under a trade agreement are being denied, or that the act or practice of a foreign country is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce.[38]

Although the language of section 301 allows challenges to foreign government actions other than violations of GATT rules, its use has focused primarily on the rules of the GATT. It provides private industry with the means to bring to the U.S. government allegations of violations of GATT rules by foreign governments. The procedural mechanism then requires that the U.S. government initiate contact with the foreign government involved within the WTO dispute resolution framework.[39] If the USTR finds that the rights of the United States under a trade agreement are being denied, or that the act or practice of a foreign country is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce, she is authorized to suspend or withdraw concessions under trade agreements, impose duties or other import restrictions, or enter into agreements to eliminate the act, policy, or practice that is the subject of the action.[40]

In addition to these administrative mechanisms for addressing unfair trade practices upon private party complaint, the U.S. has established procedures for determining when "escape clause" or "safeguard" relief is appropriate under Article XIX of the GATT. Section 201 of the Trade Act of 1974 allows relief when "an article is being imported into the U.S. at such increased quantities as to be a substantial cause of serious injury" to a domestic industry.[41] The U.S. also has maintained section 337 of the Tariff Act of 1930, providing for relief from unfair trade practices, particularly in the area of intellectual property rights.[42] Similar measures have been adopted in other countries.[43]

---

38. 19 U.S.C. § 2411(a)(1).

39. Section 303(a)(1) provides that, "[o]n the date on which an investigation is initiated under section 302, the Trade Representative, on behalf of the United States, shall request consultations with the foreign country concerned regarding the issues involved in such investigation." 19 U.S.C. § 2413(a)(1). Section 302(a)(2) then ties this consultation in to the procedure of any appropriate international agreement to which the U.S. is a party. *Id.* § 2413(a)(2).

40. 19 U.S.C. § 2411(c).

41. 19 U.S.C. § 2251. A second provision for relief from market disruption caused by fairly-traded imports is section 406 of the Trade Act of 1974, which is similar to section 201 but applies only to imports from communist countries and contains a lower threshold on the injury test. 19 U.S.C. § 2436.

42. 19 U.S.C. § 1337.

43. *See, e.g.*, the discussion of the trade mechanisms established by the European Community in Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, 24 J. WORLD TRADE 5, 14 (June 1990).

3. Dispute Resolution

Dispute settlement in the GATT framework deserves special attention. The dispute resolution procedures established through practice and now codified in the Uruguay Round Understanding on the Rules and Procedures Governing the Settlement of Disputes,[44] are one of the most successful aspects of the GATT process. Parties have successfully resolved numerous disputes, with consistently increasing use of formal dispute settlement through the years.[45] No other dispute resolution mechanism in public international law has equaled the success of the GATT and the new WTO system.

B. International Environmental Law

Like trade law, international environmental law is largely a creature of the twentieth century. It also brings with it issues and concepts that challenge traditional notions of the development and application of international law. Transborder pollution tests traditional notions of territorial sovereignty, and harm to individuals tests notions that states are the only actors on the international law stage.

As it was with trade law, international environmental law began with bilateral agreements and moved to multilateral cooperation.[46] The seeds of agreements on transborder pollution can be found in the 1909 United States-United Kingdom Boundary Waters Treaty, providing that water "shall not be polluted on either side to the injury of health or property on the other."[47] Also like trade law, the development of environmental law exploded onto the international scene with a major United Nations conference. The 1972 Stockholm Conference on the Human Environment

---

44. Understanding on the rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 (1993), Uruguay Round Final Act, *supra* note 10 (hereinafter Dispute Settlement Understanding).

45. *See* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991 and supplements).

46. For an excellent history of international environmental law, *see* Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 675-84 (1993) [hereinafter *Contemporary Issues*]. For a chronological list of international environmental agreements, see EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES 160-404 (1992) [hereinafter BASIC INSTRUMENTS].

47. Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448.

resulted in the important Stockholm Declaration,[48] and coincided closely in time with the establishment of the United Nations Environment Programme (UNEP),[49] the negotiation of the Convention on International Trade in Endangered Species (CITES),[50] the London Ocean Dumping Convention,[51] and the World Heritage Convention.[52] What has not resulted in the environmental area, however, is the establishment of a single governing agreement and single institution within which the negotiation of rules, conciliation process and actual dispute settlement have coalesced. While some agreements have set up institutional systems for application of their rules, there is no single organization in which international environmental law has developed.

UNEP has demonstrated success in keeping the environmental agenda alive, and the 1992 United Nations Conference on Environment and Development in Rio de Janeiro provided a forum for discussion of major environmental policy as well as the development of an agenda for the future.[53] Over the past two-and-a-half decades, the number of international environmental agreements has grown almost exponentially.[54] This success has brought with it the problem of treaty congestion.[55] The lack of a single coordinating organization requires that each negotiation proceed differently, with "the grave risk that on each occasion the wheel must be reinvented."[56]

The absence of a single multilateral environmental organization also has meant that each new agreement must receive separate attention at the national and regional level. While the European Union has established its

---

48. *Report Of United Nations Conference On The Human Environment, Stockholm*, 5-16 June 1972, pt. 1, ch I (UN Pub. Sales No E.73.II.A.14), 11 I.L.M. 1416 (1972).

49. *Id.*

50. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

51. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

52. Convention for the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

53. United Nations Conference on Environment and Development, *supra* note 2.

54. Edith Brown Weiss notes growth from less than three dozen multilateral agreements in 1972, to "nearly nine hundred international legal instruments that are either primarily directed to international environmental issues or contain important provisions on them." *Contemporary Issues*, *supra* note 46, at 675. *See also* BASIC INSTRUMENTS, *supra* note 46.

55. *Contemporary Issues*, *supra* note 46, at 697.

56. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 263 (1992), *quoted in Contemporary Issues*, *supra* note 46, at 698.

own European Environmental Agency,[57] coordination is otherwise limited.[58] This not only has created problems in the development of multilateral environmental law generally, but has meant that in the intersection of environment and trade the most significant functioning institution is the World Trade Organization. Thus, environmental positions on issues of overlap must rely on the decisions of a forum devoted to the international law of trade.

While measures taken pursuant to Multilateral Environmental Agreements (MEAs) may violate a trade agreement, the reverse is not likely to be the case. MEAs, by their nature do not prohibit measures otherwise required by trade agreements. Thus, even if a single environmental forum did exist, it would be unlikely that disputes involving the convergence of international trade and environmental law would be taken to that forum rather than to the WTO.

II. THE ENVIRONMENTAL IMPACT OF TRADE LIBERALIZATION

A. Environmental Measures in Trade Law

The drafters of the GATT realized the need to allow measures enacted by contracting parties for the protection of human, animal and plant life, and to conserve natural resources, even if such measures were otherwise contrary to the substantive rules of the GATT. Article XX includes two important exceptions in this regard, which read as follows:

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

57. Council Regulation 1210/90 of 7 May 1990 on the Establishment of the European Environmental Agency and the European Environment Information and Observation Network, 1990 O.J. L/120 1.

58. The Organization of American States proposed the creation of a Sustainable Development Unit in early 1996. *See*, Organization of American States, "The Environment and Sustainable Development Unit" (press release, February 1996) (on file with author).

> (g) related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;[59]

This attention to environmental concerns heightened with the completion of the Uruguay Round, when the Ministers meeting in Marrakesh on April 15, 1994, specifically directed the General Council of the WTO to establish at its first meeting "a Committee on Trade and Environment . . . to report to the first biennial meeting of the Ministerial Conference after the entry into force of the WTO."[60] The Committee on Trade and Environment (CTE) is charged with identifying "the relationship between trade measures and environmental measures, in order to promote sustainable development," and making appropriate recommendations regarding whether modifications of the provisions of the multilateral trading system are required.[61] The Singapore Ministerial Declaration of December 13, 1996, acknowledges the CTE Report, but does little more than request additional reports in the future.[62]

The Uruguay Round Agreement on Technical Barriers to Trade establishes rules designed to prevent disguised barriers through the use of product standards.[63] Article 2.2 provides that technical regulations are not to be "prepared, adopted or applied with a view to or with the effect of

---

59. GATT art. XX.

60. Trade and Environment, Ministerial Decision of 14 April. 1994, 33 I.L.M. 1125 (1994).

61. *Id.* at 1268.

62. World Trade Organization, SINGAPORE MINISTERIAL DECLARATION of 13 December 1996, Doc. WT/MIN(96)/DEC/W, *available at* http://www.wto96.org/wto-dec.html. Paragraph 16 of the Declaration reads as follows:

> The Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, *inter alia*, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development. The work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment. In this connection, the work of the Committee has been enriched by the participation of environmental as well as trade experts from Member governments and the further participation of such experts in the Committee's deliberations would be welcomed. The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.

The REPORT OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT is available on the same website as document PRESS/TE 014 of 14 November 1996.

63. Agreement on Technical Barriers to Trade, Nov. 12, 1979, GATT B.I.S.D. 26th Supp. 117 (1979); Uruguay Round Final Act, art. 2.2, *supra* note 10, at 117.

creating unnecessary obstacles to international trade," or to be "more trade-restrictive than necessary to fulfil a legitimate objective."[64] Legitimate objectives specifically include "protection of human health or safety, animal or plant life or health, or the environment."[65]

The Agreement on the Application of Sanitary and Phytosanitary Measures similarly provides for measures "necessary for the protection of human, animal or plant life or health."[66] In doing so, it calls for efforts to harmonize measures, base them on international standards where possible, and seek transparency in the application of such measures. Like other trade measures, sanitary and phytosanitary measures may not arbitrarily or unjustifiably discriminate between WTO member states, or constitute a disguised restriction on international trade.[67]

Similar language regarding protection of life is contained in Article XIV of the General Agreement on Trade in Services (GATS):

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> . . .
>
> (b) necessary to protect human, animal or plant life or health;[68]

While the GATS contains no language equivalent to Article XX(g) of the GATT, a separate "Decision on Trade in Services and the Environment" asks the CTE to examine and report on whether any further language is necessary.[69]

The CTE held its first meeting on February 16, 1995, taking up the issue of exports of domestically prohibited goods.[70] The Committee is

---

64. *Id.* at 118.

65. *Id.*

66. Agreement on the Application of Sanitary and Phytosanitary Measures, Uruguay Round Final Act, art. 2(1), *supra* note 10, at 69.

67. *Id.* at art. 2(3).

68. General Agreement on Trade in Services, art. XIV(b), Uruguay Round Final Act, *supra* note 10, at 294-95.

69. Uruguay Round Final Act, *supra* note 10, at 409: "[S]ince measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Article XIV."

70. WORLD TRADE ORGANIZATION, TRADE AND THE ENVIRONMENT PRESS/TE 001 (22 Mar. 1995).

participating regularly in the meetings of the U.N. Commission on Sustainable Development (CSD), in an effort to coordinate the work of the WTO with that of the CSD and with UNEP.[71] The work of the Committee is focused on ten issues:

> (1) the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
> (2) the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
> (3) the relationship between the provisions of the multilateral trading system and:
>
> (a) charges and taxes for environmental purposes; and
> (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
>
> (4) the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
> (5) the relationship between dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
> (6) the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
> (7) the issue of exports of domestically prohibited goods;
> (8) trade-related aspects of intellectual property rights and the environment;
> (9) services and the environment; and
> (10) appropriate arrangements for relations with non-governmental organizations referred to in Article V of the WTO and transparency of documentation.[72]

---

71. WORLD TRADE ORGANIZATION, TRADE AND THE ENVIRONMENT PRESS/TE 002 (8 May 1995).

72. WORLD TRADE ORGANIZATION, TRADE AND THE ENVIRONMENT PRESS/TE 006 Annex I (8 Dec. 1995). These are the issues the Committee on Trade and Environment was instructed to address in the Decision of 14 Apr. 1994, *supra* note 60.

Whether the CTE will be successful in its mandate is yet to be seen. The Report of the CTE to the Singapore Ministerial in December 1996 received substantial criticism for its lack of progress.[73]

B. The Environmental Implications of Trade

The international trading rules administered by the WTO are built on the economic theory of comparative advantage.[74] That theory concludes that each state has a comparative advantage in certain goods and services, and that all states (and thus the citizens of all states) will benefit most if borders are free of trade restraints so that open trade may occur. It thus emphasizes development of the resources available in each state for the economic benefit of its citizens.

Economic development has not always been seen as consistent with environmental goals. Economic development and resulting increased incomes bring an acceleration of the consumption of resources. As trade increases, the incentives for creating competitive advantages (rather than pure comparative advantages) also increase, bringing with them the fear that states will adopt lower environmental standards in order to attract industry. Open borders are seen by some as allowing the transfer of industry to states with lower environmental standards, resulting in "environmental dumping."

At the same time, however, economic development and higher standards of living generate an increased focus on environmental protection. As incomes rise, so does the desire for life in a cleaner environment. Economists argue the existence of the "J curve" effect of the combination of increased use of resources at the beginning of the development process (resulting in declining environmental protection) followed by increased focus on environmental issues as incomes rise, with higher levels of development ultimately bringing higher levels of environmental awareness and protection.[75] Similarly, multinational businesses can bring with them facilities and practices common in their developed home countries, thereby improving environmental practices in developing countries.

---

73. *See, e.g.*, *Senators, Green Groups Blast Report of WTO Environmental Committee*, INSIDE U.S. TRADE 20 (1996); *Ministers Voice Disappointment with Weakness of CTE Report*, 13 INT'L TRADE REP. 1925 (1996).

74. *See* Brand, *supra* note 33, at 104-06.

75. *See, e.g.*, Michael Hart & Sushma Gera, *Trade and the Environment: Dialogue of the Deaf or Scope for Cooperation?*, 18 CAN.-U.S. L.J. 207, 213 (1992).

III. THE INTERNATIONAL TRADE IMPACT OF ENVIRONMENTAL REGULATION

A. Trade Measures in Multilateral Environmental Agreements

As the number of MEAs has grown, so has the number of provisions in those agreements that relate directly to trade. Three agreements are particularly significant in this regard. The Montreal Protocol, the Basel Convention, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora all contain provisions authorizing (and in some cases requiring) measures that restrain trade across borders.

The Montreal Protocol on Substances that Deplete the Ozone Layer obligates the parties to limit and reduce the use of chlorofluorocarbons and other chemicals that deplete the ozone layer.[76] Article 2 and Annex A set up a system of reduced production and consumption for each party to the convention. Ultimately, chlorofluorocarbons are to be phased out by the year 2000.[77] In order to coordinate importation with domestic consumption, Article 4 then provides that each party "shall ban the import of controlled substances from any State not party to this Protocol."[78] The remainder of Article 4 provides for bans on the export of chlorofluorocarbons and restrictions on the export of technology or provision of aid to be used in producing such substances.

The provisions of the Montreal Protocol clearly are designed to restrain trade. On their face, by requiring a ban on imports from non-parties, they also appear to be inconsistent with GATT most-favored-nation obligations. However, since each party to the Protocol has obligated itself to cut its own production, imports from states party to the agreement are unlikely. Thus, the provisions of the Protocol are unlikely to lead to measures that would be challenged under the GATT. The import ban does, however, conflict with the prohibition on quantative restrictions contained in GATT Article XI.

A product of UNEP, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal sets

---

76. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 100th Cong., 1st Sess. 2 (1987), 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989). The Montreal Protocol applies to the earlier Convention for the Protection of the Ozone Layer, Mar. 22, 1985, S. TREATY DOC. NO. 9, 99th Cong. 1st Sess. 22 (1985), 26 I.L.M. 1529 (1987) (entered into force Sept. 22, 1988).

77. *Id.* art. II. *See also* the amendments to the Protocol in *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer*, U.N. Environment Programme, 2d Sess., Annex 1, Agenda Item 5, U.N. Doc. UNEP/OzL.Pro.2/3 (1990).

78. *Id.* art. 4(1).

up rules designed to encourage safe transport of toxic wastes across borders.[79] Its provisions require limitations on both the importation and exportation of hazardous wastes in order to reduce the production of hazardous wastes and insure their safe transport and disposal. While such provisions clearly restrain trade, they do so in a manner that, once implemented, will be the product of multilateral agreement and thus be likely to satisfy the requirements of GATT Article XX(g) if challenged.[80] While the Basel Convention contains language on the settlement of disputes in its Article 20, those provisions require only negotiation, with submission of the dispute to the International Court of Justice, or to arbitration in accordance with Annex VI to the Convention, "if the parties to the dispute agree."[81] Thus, there is no dispute resolution on the level of that provided in the WTO system.

The Convention on International Trade in Endangered Species (CITES) is designed specifically to place trade restrictions on species of plants and animals considered endangered.[82] It does so by setting up a system of export and import certificates required for the transborder shipment of species included on the endangered list.[83] Like the Basel Convention, the CITES provides for dispute settlement first through negotiation between the parties involved and then if both parties consent they may submit the dispute to arbitration, "in particular that of the Permanent Court of Arbitration at The Hague."[84]

The consistency of these agreements with provisions of the GATT has not been the subject of formal dispute resolution. Commentators have suggested that the terms of an MEA, including those governing dispute settlement, would prevail over GATT terms in the event of a conflict.[85] If this were the case, then the solution to any such conflicts may be to establish MEAs so as to prevent the matter from being considered in a trade forum. "Therein lies an indicator of a route that is available in all cases where multilateral harmonisation of environmental policies, whether product or process-based, is considered a matter of international

---

79. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. Treaty Doc. No. 5, 102d Cong., 1st Sess. (1991), 28 I.L.M. 657 [Basel Covention].

80. *See supra* note 59 and accompanying text.

81. Basel Convention, *supra* note 79, art. 20(2).

82. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

83. *Id.* art. III.

84. *Id.* art. XVIII.

85. *See, e.g.*, Richard Eglin, *Trade and Environment in the World Trade Organization*, 18 WORLD ECON. 769, 776 (1995).

concern."[86] Even if this assumption is incorrect, the existence of a multilaterally supported environmental rule on a subject is more likely to bring about application of the GATT Article XX exceptions, thus justifying measures that are consistent with that rule.

B. The Trade Implications of Environmental Protection

Many aspects of environmental protection are compatible with basic trade goals. For example, while environmental regulation results in diminished trade in environmentally hazardous goods and goods produced by environmentally hazardous processes, in appropriate cases such restrictions add the "sustainable" element to sustainable development. It is, however, when domestic environmental standards are used as disguised trade barriers and applied extraterritorially that problems arise. These conflicts make necessary the consideration of whether such issues can be dealt with in a manner consistent with the goals of both trade and environment regimes.

Professor Hudec appropriately points out the need to avoid what he refers to as "the battle for the rhetorical high ground."[87] Neither trade nor environmental advocates may deny the existence of the international legal framework that has developed in the other realm. Environmentalists will gain nothing by referring to a trade regime with some fifty years of consistent and continuous development as "obscure," and trade jockeys will gain nothing by denying the strength of the environmental movement. In the end, it is reasoned legal analysis that must prevail in order to determine the existence and application of international norms to specific circumstances, and to develop the future norms appropriate to coordinated sustainable development practices.

IV. MATCHING GOALS AND STRENGTHS: CAN TRADE AND ENVIRONMENTAL LAWYERS LEARN FROM EACH OTHER?

A. Determining the Goals of Each

One of the difficulties in assessing the current status and future potential for trade and environmental law is in determining whether apparent conflicts are real or imagined. If they are real, it is the province

---

86. *Id.*

87. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 95, 107 (Jagdish Bhagwati & Robert E. Hudec eds., 1995).

of international lawyers to consider whether there is common ground upon which to build, and common goals at which to aim. States have declared sustainable development to be a common goal in their multilateral proclamations in both the trade and environment context. Thus, it is worth considering whether arguably separate goals of the trade and environment movements provide common elements around which this process can coalesce. In doing so, it is also worth considering the strengths of the two movements. The following discussion suggests common goals as well as complementary strengths upon which to build.[88]

While there is no one agreed-upon list of the goals of the multilateral trading system, such a list can be derived from the language and purposes of the existing agreements. The fundamental goal of the WTO system is the reduction of trade barriers through rules consistent with the underlying theory of comparative advantage (*i.e.*, the package of MFN, national treatment, tariff bindings, and prohibitions on quantitative restrictions).[89] Through these measures, it is assumed that economic conditions will be improved for the citizens of the member states. The preamble to the GATT specifically lists this goal:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of

---

88. This analysis diverges from that of previous commentators. For example, Jeffrey Dunoff focuses on the "primary interests" served by international trade rules, which he finds to be economic efficiency, sovereignty, and international political harmony. Jeffrey L. Dunoff, *Reconciling International Trade With Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1409 (1992).

89. Professor Hudec provides an eloquent statement of the goal of the GATT:

> The GATT's economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies. Effective economic performance makes a contribution to the well being of all economic participants, but it is especially important for the alleviation of human poverty. The GATT regime has made a major contribution to alleviating poverty in the postwar era. The GATT trading system provided the base for the recovery from the wartime devastation of Europe and Japan. Later on, it provided the foundation for the spectacular growth of many third-world economies. Most recently, the GATT trading system has served as the engine for yet another burst of vigorous, export-led economic growth in still other countries, many of them still very poor. Poverty remains a critical problem affecting the quality of human life on this planet. Those who would minimize the importance of the GATT's economic work are either ignoring that poverty or else are taking for granted the economic processes that have done so much to reduce it.

Hudec, *supra* note 87, at 108.

> the resources of the world and expanding the production and exchange of goods . . . .[90]

The GATT/WTO system seeks to accomplish these goals through a process of balance. Thus, even violations of the rules are dealt with in a manner that focuses on re-establishing balance in trade relations. Examples of this focus include Article VI(2) and (3) (providing that antidumping and countervailing duties may be levied, but only in amounts not greater than the margin of dumping or estimated subsidy, respectively), Article XIX(3)(a) (providing for the suspension of equivalent concessions when a contracting party takes emergency action regarding imports), Article XXIII(2) (providing for authorization of the suspension of concessions as appropriate in response to a finding of a nullification or impairment of GATT benefits), and Article XXIV(5)(a) and (b) (providing that the creation of customs unions and free-trade areas shall not result in duties "higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation" of the customs union or free-trade area). Thus, the trade regime seeks to encourage economic development as a means of increasing human welfare. Its methods take into account sovereign authority and the need to negotiate toward open trade goals and to protect the balance of relationships so negotiated.

The general goal of the multilateral environmental movement is to enhance human welfare over the long term through the preservation and protection of the environment that supports us all. More specific goals include: (1) the reduction of transborder pollution; (2) the protection of endangered species of flora and fauna; (3) the protection of health and safety of humans; (4) the protection of the global commons (hydrosphere, atmosphere, and biosphere); (5) the preservation of resources for future generations; and (6) improved transparency and access to information regarding the effects of specific conduct on the environment.

There are two extreme approaches to the negotiation of agreements, whether international or otherwise. One is to focus on specific details and begin by insisting that the other party satisfy demands dealing with those details. The other is to consider common positions and objectives and begin with efforts to work from common ground toward resolution of other issues consistent with the common goals. If we are to assume that the latter of these approaches is generally more productive, then we should begin by acknowledging that the convergence of trade and environmental

---

90. The General Agreement on Tariffs and Trade, Preamble, GATT, IV B.I.S.D. 1, 55 U.N.T.S. 194 (1969).

policy is found in the belief that both increased trade and increased environmental protection enhance human welfare. Thus, there exists a common goal toward which to work in the process of negotiating a system of international legal rules designed to take account of both trade and environmental concerns. In moving forward in this process, rather than getting trapped by specific demands dealing with specific issues, it is worthwhile to consider the strengths of each movement in the creation and application of its rules. If those strengths can be combined in a manner that enhances both sets of rules, and the procedures by which they are applied, then a coordinated system consistent with the common goal of sustainable development should be possible.

B. Strengths of the International Trade and Environmental Law Movements

The international trade law system has developed into the most effective near-constitutional institution in international law.[91] The Uruguay Round creation of the WTO formalized the institutional structure that had developed *ad hoc* under the GATT system, strengthening it in the process. This institutional framework now has both *de jure* and *de facto* status as the source and the arbiter of international trade rules. It is a forum for the discussion and development of substantive legal rules as well as the institution for the application of those rules once developed.

The success of the WTO system has had implications for national legal systems as well. Through its status, the GATT has served as a source of authority in domestic legal debates. The mere existence of a multilateral rule administered by the WTO system, accompanied by the now-formalized dispute resolution mechanism, provides authority to those who champion international law in the domestic context. The support of a strong international trade law system has been useful in overcoming protectionist national tendencies.[92] The Trade Policy Review Mechanism

---

91. *See* ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

92. An example is the role played by the GATT panel report on the Manufacturing Clause in the U.S. Congress of the 1980s over whether to renew the clause. Despite legislation introduced by Senator Strom Thurmond that would have made the clause permanent, the administration was successful in arguing that such legislation would be inappropriate in light of the panel report finding it inconsistent with U.S. GATT obligations. *See* GATT Dispute Settlement Panel, *United States Manufacturing Clause*, GATT B.I.S.D. 31st Supp. at 74 (1985).

of the WTO furthers the role of administration of the rules, assessing compliance with the rules even when no specific dispute is addressed.[93]

This strength of the WTO system would not exist without the significant dispute settlement system codified in the Uruguay Round Dispute Settlement Understanding.[94] With the common practice of panel reports citing previous reports as authority, and the permanent Appellate Body serving as a check on misguided panels, that system has come to look more-and-more like national judicial systems, and thus has become the subject of greater respect as a legal institution.

There is another aspect of the visibility of the WTO system that provides strength in a sometimes ironic manner. The recent trade decisions of the GATT and WTO in the *Tuna-Dolphin* and *Reformulated Gasoline* cases have been seen by some as anti-environmental.[95] Those decisions found domestic environmental regulations of the United States to be inconsistent with U.S. obligations under the GATT. At the same time, however, the decisions may actually further the environmental cause by bringing attention to the need for an enhanced multilateral approach to international environmental rules. No environmental conference or agreement has managed to bring the same level of publicity to these issues. Law (whether domestic or international) often is molded by events, including decisions considered by some to be inappropriate. Highly-publicized decisions often serve to prod lawmakers to act to advance the law. In this manner, recent trade law decisions emphasize the need for further development of multilateral environmental agreements.

International environmental law also brings strengths to the international law scene, despite its relative youth. In perhaps no other area have non-governmental organizations (NGOs) served so effectively as catalysts for international legal development. The private sector, through coalitions of NGOs, has had significant impact on the development of international environmental law, often being present at official negotiations of international agreements.[96] The rules of MEAs often govern the conduct of private parties as well as states. If trade in endangered species or hazardous goods is restricted, that has direct implications for private parties. If gasoline must meet certain formulation requirements, that affects both the producer and the consumer. If emissions from industrial facilities will be regulated, that directly affects the private operator of the

---

93. *See, e.g.*, the recent reviews of the trade policies of Venezuela and the Czech Republic summarized at 9 WTO FOCUS 6-7 (Mar.-Apr. 1996).

94. Dispute Settlement Understanding, *supra* note 44.

95. *See infra* notes 122-173 and accompanying text.

96. *See Contemporary Issues*, *supra* note 46, at 693.

facility as well as the resident living near the facility. The idea that the private sector has a role in the development of the rules that will govern private sector conduct, and provide private sector benefits, is consistent with developing international norms of democratic conduct.

This tie to the private sector has implications for the application of the rules as well. It is in the environmental context that private sector conduct has proved not only effective in the creation of the rules, but also in sanctioning conduct determined to be inconsistent with those rules. While state restrictions on trade may be inconsistent with obligations in international trade agreements, such agreements cannot control the decisions of private consumers. Where state boycotts are not allowed, the possibility of "democratic trade measures" through consumer boycotts is significant. Thus, despite a GATT panel report against the application of the U.S. Marine Mammal Protection Act to imported tuna,[97] the goal of reduced consumption of tuna caught in a manner dangerous to dolphins was in fact accomplished in the private sector. The GATT panel held that allowing a "Dolphin safe" label to be placed on tuna caught within protection standards was not inconsistent with GATT provisions, because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.[98]

V. CODIFYING PRACTICE: THE NATURAL DEVELOPMENT OF INTERNATIONAL LAW

A. The Organic Development of Law

One of the most consistent aspects of the development of international trade law in the twentieth century has been the way in which practice has resulted in subsequent codification. The rules found in international agreements often reflect what parties already have agreed to through their conduct. While this should not surprise those who have studied the development of customary international law, its implications too often are overlooked.

Many of the rules of the Uruguay Round Agreements are the codification of practice. Nowhere is this more true than in the Dispute Settlement Understanding.[99] The panel process was created by practice, not by written agreement. The number of panelists, the terms of reference, and the procedures followed by panels developed through

---

97. *Infra* note 122.

98. *Infra* note 139.

99. Dispute Settlement Understanding, *supra* note 44.

practice, with the assistance of the GATT Secretariat and, later, the separate GATT Legal Service. Thus, the process was organic. While the Dispute Settlement Understanding set significant new time limits, changed the consensus voting practice, and added an Appellate Body, the basic structure of dispute settlement was developed in practice, not born of the words in a single formal international agreement.

B. The Natural Absorption of Environmental Law into the Trade Law System

1. The Regional Experience of the European Union

This organic process is also true of the development of international environmental law within the trade law system. Two sets of developments demonstrate this fact: the process by which European Union law came to include environmental rules, and the process by which WTO law is developing in a similar manner.

The European Union now has a significant body of environmental law.[100] This was not always the case. The original Rome Treaty of 1957 did not mention the word "environment," and had no express provisions dealing with environmental issues.[101] It did, however, have provisions equivalent to those found in the GATT. Article 30 of the Rome Treaty, like Article XI of the GATT, contains a prohibition on quantitative restrictions "and all measures having equivalent effect."[102] Thus, the prohibition on import of a good because of its environmental impact, or the environmental impact of the process by which it was created, would be such a prohibited quantitative measure.

Article 36 of the Rome Treaty, like Article XX of the GATT, contains exceptions to the prohibition on quantitative restrictions, including measures "justified on grounds of . . . the protection of health and life of humans, animals or plants."[103] While environmental protection does not appear explicitly in Article 36, the language is similar to that found in

---

100. *See, e.g.*, Tamara L. Joseph, *Preaching Heresy: Permitting Member States to Enforce Stricter Environmental Laws Than the European Community*, 20 YALE J. INT'L L. 227 (1995).

101. *See* Kurt Riechenberg, *The Case Law of the European Court of Justice on Free Trade and the Environment*, CURRENTS : INT'L TRADE L.J. 50 (Winter 1995); Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 J. TRANSNAT'L L. & POL. 141,162-90 (1993).

102. *Treaty Establishing the European Community* art. 30, I EUROPEAN UNION: SELECTED INSTRUMENTS TAKEN FROM THE TREATIES 141 (1995).

103. *Id.* art. 36.

several places in the WTO system.[104] Environmental measures often are designed to protect the health and life of humans, animals, and plants. Even so, early environmental cases of the European Court of Justice did not refer specifically to Article 36.[105] In the *Waste Oils* case,[106] the Court evaluated French legislation implementing Directive 75/439, dealing with transport and disposal of waste oils.[107] The Court noted the impact of environmental concerns on the principle of free movement of goods:

> The principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantially impaired . . . . There is no reason to conclude that the Directive has exceeded these limits. *The Directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives.*[108]

The further development of environmental law in the European Community was based largely on the "rule of reason" principle emanating from the *Cassis de Dijon* case, in which the Court tested national measures against Article 30 of the European Community Treaty.[109] German law setting a minimum alcohol content for fruit liqueurs was challenged as a restraint on trade by the French makers of Cassis de Dijon, which had a lower alcohol content. After acknowledging that Member States had primary authority over laws relating to the production and marketing of alcoholic beverages, the Court stated:

---

104. *See supra* notes 59-69 and accompanying text.

105. In its May 23, 1990 decision in the *Van den Burg* case, the Court of Justice considered the interplay of a Council Directive on the conservation of wild birds, Dutch law, U.K. law and Article 36. Case 169/89, Criminal Proceedings against Gourmetterie Van den Burg, 1990 E.C.R. 2143. A red grouse killed in the U.K., consistent with U.K. law, was confiscated from a delicatessen owner in The Netherlands. The Dutch judge asked the Court whether the more stringent Dutch law implementing the Directive was a prohibition justified under Article 36 of the EC Treaty. The Court concluded that Member State legislation could be stricter than the Directive for listed endangered species, but not for the red grouse, which was not on the endangered list. *Id.* at 2164.

106. Case 240/83, Procureur de la Republique v. Association de Defense des Bruleurs d'Huiles Usagees, 1985 E.C.R. 531,549.

107. Council Directive No. 75/439, 1975 O.J. (L 194) 23, as amended by Council Directive 87/101, 1987 O.J. (L 42) 43 (on the disposal of waste oils).

108. 1984 E.C.R. at 549 (emphasis added). The Commission had earlier emphasized the possibility of an environmental protection limitation on Article 30 in its *Communication from the Commission Concerning the Consequences of the Judgement Given by the Court of Justice on 20 February 1979 in Case 120/78 (Cassis de Dijon)*, 23 O.J. Eur. Comm. (No. C 256) 2 (1980) [hereinafter *Communication concerning Cassis de Dijon*].

109. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 ("*Cassis de Dijon*").

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.[110]

The Court held the German law in violation of Article 30 as a measure "having an effect equivalent to quantitative restrictions on imports."[111] The effect of the law, which the Court found actually "to promote alcoholic beverages having a high alcohol content,"[112] was not justified. The claimed goal of reduced alcohol consumption could have been accomplished by less stringent measures, including alcohol content labelling, that would serve the goals of protection of health, fair trade, and consumer interests.

Thus, while *Cassis de Dijon* struck down the national measure, the decision recognized the authority of Member States to enact measures based on motives other than those specifically set forth in Article 36, so long as they apply equally to domestic and imported products. This added a "rule of reason," exception to the free movement principles of Article 30. Further case law developed the principle of proportionality as a gloss on the rule of reason, such that

> measures justifiable under the "rule of reason" or under Article 36 of the EC Treaty must be reasonable and, in particular, are subject to the proportionality test. They must not restrict trade between Member States any more than is absolutely necessary for the attainment of their legitimate purpose and they must be the least restrictive method of attaining that purpose.[113]

In the *Danish Bottles* case,[114] the Court confirmed environmental protection as a *Cassis* exception, specifically applying the principle of proportionality to Denmark's law requiring that beer and soft drinks be sold only in reusable containers approved by the National Agency for the Protection of the Environment (NAPE). The Court upheld the deposit-and-return system established by the Danish law as compatible with Article

---

110. *Id.* at 662.

111. *Id.* at 665.

112. *Id.* at 664.

113. Geradin, *supra* note 101, at 181.

114. Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607.

30, but struck down the NAPE approval system as incompatible and "disproportionate to the objective pursued."[115]

The Single European Act of 1986 added specific provisions dealing with environmental protection. Article 130r sets out Community environmental policy objectives, and Article 130s authorizes the Council to take action to achieve these objectives. Further addressing the "race to the bottom" fears of such harmonization, Article 100a(3) provides that Commission proposals concerning the environment "will take as a base a high level of protection," and Article 130t provides that Community measures adopted pursuant to Article 130s "shall not prevent any Member State from maintaining or introducing more stringent protective measures."[116]

The development of European Union law thus has come through judicial decision as well as through the constitutional framework of the European Community Treaty and legislation adopted pursuant to it. In addition, this process has taken into account developments in multilateral environmental agreements. In its judgment of November 29, 1990,[117] the Court dealt with the Council Regulation implementing the CITES.[118] France was held to have breached the Regulation by issuing import permits for more than 6000 wild cat skins from Bolivia. Thus, the Community legislation implementing obligations under the CITES was the source of rules applied to a Member State by the Court.

In the *Belgian Waste* case,[119] the Court made specific reference to the Basel Convention in rejecting the claim of the Commission that a Decree of the Walloon Regional Executive imposing a ban on the importation of waste products into Wallonia violated Article 30 of the EC Treaty. While the import ban was clearly discriminatory, the Court upheld it in light of the new Article 130r(2) and the responsibility of each region "to take the

---

115. *Id.* at 4632. Case C-5/94, Regina v. Ministry of Agriculture, Fisheries and Food, *ex parte* Hedley Lomas (Ireland) Ltd., 1996 E.C.R. I-2553, [1996] 2 C.M.L.R. 1 (1996), addressed further the relationship between Articles 30 and 36 in the context of the protection of animals, holding that, where a Community harmonizing directive providing rules on the treatment of animals destined for slaughter exists, it is not for a Member State to determine unilaterally the non-compliance of another member state, and that Article 36 protection of the health and life of animals does not excuse a refusal to issue an export license in breach of Article 34.

116. For a more detailed discussion of developments under Articles 130r, 130s and 130t, see Geradin, *supra* note 101, at 165-72.

117. Case C-182/89, Commission v. French Republic, 1990 E.C.R. I-4337.

118. Council Regulation 3626/82, 1982 O.J. (L 384) 1, as later amended by Commission Regulations 1970/92, 1992 O.J. (L 201) 1, and 3675/91, 1991 O.J. (L 349) 13.

119. Case 2/90, Commission v. Belgium, 1992 E.C.R. I-4431, [1993] 1 C.M.L.R. 365.

appropriate measures necessary to assure the reception, treatment and elimination of its own waste."[120] The Court went on to state:

> Furthermore this principle accords with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous waste and the disposal thereof, to which the Community is a party.
>
> It follows that, having regard to the differences between waste produced in one place and that in another and its connection with the place where it is produced, the contested measures cannot be considered to be discriminatory.[121]

Thus, the law of the European Union has developed from the limited exceptions for "the protection of health and life of humans, animals, or plants," in Article 36 of the 1957 European Community Treaty, to specific treaty provisions on environmental protection and the incorporation into case law of the provisions of multilateral environmental agreements.

2. Trade Law Absorption of Environmental Protection Measures on the Multilateral Level

In many ways, the regional system developed in the European Union has served as a laboratory for multinational developments in the WTO setting. It is thus worth asking if the experience of the EU in developing environmental protection measures in what began as a trade law framework (1) has been mirrored in any way in the GATT/WTO system and (2) provides any guidance for the future of multilateral developments. The two Tuna/Dolphin panel reports of the GATT and the WTO Appellate Body decision in the United States Reformulated Gasoline case indicate striking similarities in this regard.

a. *Tuna I*

In the first *Tuna-Dolphin* decision, Mexico requested dispute settlement under Article XXIII of the GATT, alleging that embargoes on the importation of tuna caught other than in compliance with the U.S. Marine Mammal Protection Act (MMPA) were quantitative restrictions prohibited by GATT Article XI or internal regulations contravening the

---

120. *Id.* [1993] C.M.L.R. at 397, ¶ 34.

121. *Id.* ¶¶ 35-36.

national treatment provisions of Article III(4).[122] The MMPA allows the taking and importation of tuna only if the methods used do not result in the death of more dolphins than occurs through the implementation of the best available safety techniques that are economically and technologically practicable.[123] A permit is required upon qualification of the fishing procedures.[124] Not only do the provisions of the MMPA apply to fishing in U.S. waters,[125] they apply also to fishing on the high seas by persons or vessels subject to U.S. jurisdiction.[126] Most important for foreign parties, the MMPA requires that tuna exported to the United States be caught in a manner that results in a dolphin mortality rate no greater than that of the U.S. tuna fleet.

The GATT panel found that the restrictions placed on tuna imports from countries whose fishing fleets did not comply with the MMPA were quantitative restrictions in violation of Article XI.[127] The United States then argued that the measures were justified under Article XX(b) and XX(g).[128] As to Article XX(b), the panel first considered the extraterritorial nature of the MMPA embargo, noting that "the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."[129] The panel then applied a proportionality test to the necessity requirement of Article XX(b), finding that the tuna ban was not "necessary to protect human, animal or plant life or health," because the U.S. (1) had not demonstrated the exhaustion of all options reasonably available which were consistent with the GATT, and (2) imposed limitations based on U.S. fleet dolphin mortality records in the same year, which could not be known by the Mexican fishermen until after they had taken the tuna.[130]

The panel considered the Article XX(g) requirement that measures relating to the conservation of exhaustible natural resources be taken "in

---

122. GATT Dispute Settlement Panel, *United States—Restrictions on Imports of Tuna*, GATT B.I.S.D. 39th Supp. at 155 (1991), *reprinted at* 30 I.L.M. 1594 [hereinafter *Tuna I*].

123. 16 U.S.C. § 1371(a)(2).

124. 16 U.S.C. § 1371(a)(3)(A).

125. 16 U.S.C. § 1372(a)(2).

126. 16 U.S.C. § 1372(a)(1).

127. *Tuna I*, *supra* note 122, at ¶ 5.18. The MMPA import restrictions purported to regulate the process by which tuna were taken and not the product (the tuna) itself. Concluding that Article III "covers only those measures that are applied to the product as such," the panel found the tuna import prohibitions of the MMPA not covered by Article III. *Id.* ¶ 5.11.

128. *See supra* note 59.

129. *Tuna I*, *supra* note 122, at ¶ 5.26.

130. *Id.* ¶ 5.28.

conjunction with restrictions on domestic production or consumption."[131] Citing the *Canadian Herring and Salmon* case,[132] it was determined that "a measure could only be considered to have been taken 'in conjunction with' production restrictions 'if it was *primarily aimed at* rendering effective these restrictions.'"[133] "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."[134] The extraterritorial nature of the import ban's effect on Mexican production, the fact that the measure was not "primarily aimed at" controlling domestic production restrictions, and the uncertain nature of the rate of dolphin mortality that was allowable, all led the panel to find the measure could not be justified by Article XX(g).[135]

While the panel found the direct embargo on Mexican tuna to be in violation of Article XI, and not justified under any provision of Article XX, it did open room for environmental protection in its analysis of the Dolphin Protection Consumer Information Act of 1990 (DPCIA).[136] The DPCIA makes it a violation of the Federal Trade Commission Act[137] to label any tuna product "dolphin safe" if purse seine nets or driftnets (which cause harm to dolphins) were used in harvesting the tuna.[138] The panel found the labelling provisions of the DPCIA consistent with the most-favored-nation requirements of GATT Article I:

> [T]he labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the "Dolphin Safe" label.[139]

Ultimately, the panel concluded that the MMPA prohibitions on import of Mexican tuna from Mexico were contrary to Article XI:1 and not justified

---

131. *Id.* at ¶ 5.31.

132. *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT B.I.S.D. 35th Supp. at ¶ 4.6 (1989).

133. *Tuna I*, *supra* note 122, at ¶ 5.31.

134. *Id.*

135. *Id.* ¶ 5.34.

136. 16 U.S.C. § 1385.

137. 15 U.S.C. § 45.

138. 16 U.S.C. § 1385(d)(1).

139. *Tuna I*, supra note 122, at ¶ 5.42.

by Article XX(b) or XX(g),[140] and that the MMPA's indirect prohibitions on import of tuna products of "intermediary nations" were contrary to Article XI:1 and not justified by Article XX(b), XX(d) or XX(g),[141] and the DPCIA labelling provisions were not inconsistent with U.S. obligations under Article I:1.[142]

While the *Tuna I* decision upheld the GATT challenge to import restrictions based on environmental purposes, it did so only to measures aimed at production methods and not at the product, and applied to production methods of foreign citizens outside the territorial jurisdiction of the state applying the measures. The decision found measures requiring labels that allow consumers themselves to act in a manner creating "legal" quantitative restrictions to be GATT consistent. When "Dolphin Safe" tuna is available, consumers can make the choice and effectively use the marketplace to make the importation of other tuna products unprofitable.

b. *Tuna II*

Despite efforts to resolve the conflict between the U.S. and Mexico over the Marine Mammal Protection Act, the import ban continued in place.[143] In 1992 the European Union and the Netherlands initiated further GATT proceedings challenging also the indirect embargo provisions.[144] Like *Tuna I*, *Tuna II* found that GATT Article III did not apply, and that the MMPA indirect or "secondary" embargo violated the prohibition on

---

140. *Id.* ¶ 7.1(a).

141. *Id.* ¶ 7.1(b).

142. *Id.* ¶ 7.2. The panel also found Section 8 of the Fishermen's Protective Act (the "Pelly Amendment") to be not inconsistent with the GATT because, even though it authorizes unilateral action, it does not require that such action be taken. *Id.* ¶¶ 5.21 & 7.2.

143. Legislation proposed in 1996 would have lifted the embargo against states that implement the Panama Declaration on dolphin protection. H.R. 2823 was passed by the House of Representatives on July 31, 1996, but a floor vote was blocked in the Senate. *See* 13 INT'L TRADE REP. (BNA) 1276 (1996). President Clinton pledged in a letter to Mexican President Ernesto Zedillo on October 7, 1996, that legislation to implement the Panama Declaration (providing for international cooperation and changing the import ban) was "a top priority" for his Administration and that he would work with Congress "to introduce implementing legislation in the first 30 days of the new [1997] Congress and to pass such legislation as soon as possible thereafter." *Clinton Pledges Early, Renewed Effort to Pass Tuna-Dolphin Bill*, 14 INSIDE U.S. TRADE 10 (1996). Early in 1997, there were indications that the matter would not be easily resolved. *See, Special Report: 1997 Trade Outlook: The Administration Weaves the "World Network of Commerce,"* 14 INT'L TRADE REP. (BNA) 132 (1997). Bills were introduced in both the House (H.R. 408) and Senate (S. 39) in January 1997 that would lift the embargo for nations that are part of the Panama Declaration. *Stevens, Gilchrest Reintroduce Controversial Tuna-Dolphin Bill*, 15 INSIDE U.S. TRADE 17 (1997).

144. GATT Dispute Settlement Panel, *United States – Restrictions on Imports of Tuna*, 33 I.L.M. 839 [hereinafter *Tuna II*].

quantitative restrictions found in Article XI.[145] This once again required the consideration of Article XX exceptions.

In considering the Article XX(g) exception for "conservation of exhaustible natural resources," the panel provided two openings not found in the *Tuna I* decision. First, the panel accepted the U.S. argument that a policy to conserve dolphins was designed to conserve an exhaustible natural resource, and "did not depend on whether at present their stocks are depleted."[146] Thus, the U.S. did not have to prove that dolphins were an endangered species in order to invoke the Article XX(g) exception. Second, the panel rejected the argument that Article XX(g) cannot apply to measures aimed at practices outside the implementing country's own territory:[147]

> [T]he Panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g).[148]

Despite this opening to environmental measures, the panel went on to conclude "that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be *primarily aimed* either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g)."[149] Thus, the import

---

145. *Id.* ¶ 5.10.

146. *Id.* ¶ 5.13.

147. *Id.* ¶ 5.15.

> The Panel observed, first, that the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved . . . . The Panel noted that two previous panels have considered Article XX(g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision.

Id. citing GATT Dispute Settlement Panel, *Canada—Measures affecting the exports of unprocessed herring and salmon*, B.I.S.D. 35th Supp. 98 (1989); GATT Dispute Settlement Panel, *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT B.I.S.D. 29th Supp. at 91 (1983).

148. *Tuna II*, supra note 144, ¶ 5.20.

149. *Id.* ¶ 5.27.

restrictions violated Article XI:1 and "were not justified by Article XX(g)."[150]

Noting that "protection of dolphin life or health was a policy that could come within Article XX(b),"[151] the panel found that Article XX(b), like Article XX(g), "does not spell out any limitation on the location of the living things to be protected."[152] Noting again the Article XX(b) requirement that the measure otherwise inconsistent with the GATT be "necessary" to the protection of human, animal or plant life, the panel quoted the proportionality test stated in the *Section 337* case:

> [a] contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[153]

Ultimately, the panel found that the intermediary embargo was not necessary for the protection of animal life or health under Article XX(b), because the nation affected by the embargo was not the nation in which the U.S. was seeking changes in policies and practices.[154] In short, the panel found it inappropriate for one nation to force another nation to change its domestic policies; hardly a surprising result in an international legal system based on concepts of consent.

Like many of the important cases in the development of European Union law, both *Tuna I* and *Tuna II* can be seen as giving the decision to the traders and language to the environmentalists. For those looking to the future of the development of environmental issues in the context of trade law, this is not an insignificant development. The *Tuna II* panel specifically denied that it could create international trade law through

---

150. *Id.*

151. *Id.* ¶ 5.30.

152. *Id.* ¶ 5.31.

153. *Id.* ¶ 5.35, quoting GATT Dispute Settlement Panel, *United States Section 337 of the Tariff Act of 1930*, GATT B.I.S.D. 36th Supp. at 345, 392 (1990), *cited in Tuna II, supra* not 144. This proportionality test had been applied to Article XX(b) in GATT Dispute Settlement Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT B.I.S.D. 37th Supp. at 200, 223 (1991).

154. *Tuna II, supra* note 144, ¶¶ 5.36-5.39.

common law development.[155] Still, it effectively overruled the *Tuna I* panel in stating that extraterritorial measures are acceptable under Article XX(b) and XX(g). Like *Tuna I*, by acknowledging that dolphin conservation is a legitimate conservation of an exhaustible natural resource, it gave an expansive interpretation to that concept, rather than limiting it to already depleted species of animal life.

c. The Appellate Body Report on U.S. Reformulated Gasoline

The first Appellate Body Report of the new World Trade Organization builds on the developments of *Tuna I* and *Tuna II*.[156] The Report reviewed the panel report[157] issued when Brazil and Venezuela challenged regulations on reformulated gasoline implementing provisions of the Clean Air Act of 1990.[158] Those regulations established domestic producer baselines for refining gasoline, based on 1990 production, and required that subsequent production be as clean or cleaner than the baseline standards. Foreign refiners were not allowed individual 1990 baselines, but were subject to a statutory baseline. The panel found the baseline establishment methods inconsistent with GATT Article III:4, and not justified by Articles XX(b), XX(d), or XX(g).[159]

The Appellate Body Report demonstrates the judicialization of the WTO dispute settlement process. It begins with a strict application of the Body's Working Procedures, finding that issues raised by Venezuela and Brazil only at the oral argument stage, and not in the appeal documents, were not properly before the Appellate Body.[160] The opportunity to raise relevant issues on appeal was in the written submissions under Rule 23(1) of the Working Procedures. In addition, the general tone of the Appellate Body Report is much like that of a decision of a national appellate court. In these two respects, the Report confirms the adjudication-style, rule-based orientation of the Dispute Settlement Understanding and the subsequent Working Procedures for Appellate Review. For lawyers, this portends a future of legal documents appropriate to the development of a

---

155. *Id.* ¶ 5.43: "The Panel further observed that the dispute settlement procedures cannot add to or diminish rights of contracting parties under the General Agreement."

156. Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, Apr. 29, 1996, 35 I.L.M. 603 (1996) [hereinafter Appellate Body Report].

157. WTO Dispute Settlement Panel, *United States Standards for Reformulated and Conventional Gasoline*, 29 Jan. 1996, 35 I.L.M. 274 [hereinafter Gasoline Panel Report].

158. See Regulation of Fuel and Fuel Addititves: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716 (Feb. 16, 1994) (codified at 40 C.F.R. § § 80.40-.90) (1995).

159. Gasoline Panel Report, *supra* note 157, ¶ 8.1.

160. Appellate Body Report, *supra* note 156, at 13.

legal system providing transparency and predictability. In addition, the reliance on a previous, unadopted panel report[161] takes the judicial approach one step further, adding additional credence to past panel reports, and signaling the age of reverse consensus. The Appellate Body appears unconcerned with any process of negotiation that might take place as a result of its decision.

This judicialization process encompasses more than the WTO agreements when the Appellate Body applies the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties.[162] This aspect has special relevance for at least two reasons. First, in its application of the rule of interpretation, the Appellate Body Report recognizes "that the *General Agreement* is not to be read in clinical isolation from public international law."[163] The natural corollary is that public international law cannot be read in isolation from the General Agreement. Thus, the Appellate Body will logically serve as a source of interpretation of various aspects of public international law, and not just of the Uruguay Round Agreements. This aspect of the decisions is buttressed by the Appellate Body's own use of citations to decisions of the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights.[164]

Second, in applying the "ordinary meaning" and "context" elements of Article 31 of the Vienna Convention,[165] the Appellate Body Report emphasizes the contextual relationship between the substantive national treatment rule of Article III:4 and the exception of Article XX(g):

> [T]he phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies.[166]

This contextual relationship, and the manner in which it is developed in the Report, naturally emphasizes the contextual link between trade and environment. One can paraphrase the language of the Report to conclude:

---

161. The Appellate Body quotes extensively from the *Tuna II* panel report and its references to the 1987 *Herring and Salmon* case. *Id.* at 16.

162. *Id.* at 17.

163. *Id.* at 18.

164. *Id.* at 18 n.34.

165. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, (1969), *reprinted in* 8 I.L.M. 679 (1969).

166. Appellate Body Report, *supra* note 156, at 19.

> Measures intended to facilitate the goal of conservation of exhaustible natural resources may not be read so expansively as seriously to subvert the purpose and object of the General Agreement and its related agreements. Nor may the General Agreement be given so broad a reach as effectively to emasculate international environmental measures and the policies and interests they embody.

Rather than a conundrum (as many who challenge the "imposition" of trade rules on the environmental stage might argue), the trade and environment relationship is contextual in the same way that GATT Articles III and XX (or European Community Treaty Articles 30 and 36) are contextual. Given human needs and the manner in which today's society addresses them, trade is the natural context for consideration of the environment. Given the world in which we live and address human needs in today's society, the environment is the natural context for consideration of trade. When we deal with rules to promote goals important to either trade or environment, we must do so in context; that is, with appropriate recognition of the influence of those rules on the framework for development of rules dealing with the other. We cannot simply deny the fact that issues of trade and environment are interminably intertwined. One will consistently define the context for the other.

In its discussion of Article XX(g), the Appellate Body built upon the *Tuna I* and *Tuna II* decisions. In quoting from the *Herring and Salmon* panel report, the Appellate Body extends the opening for environmental measures:

> as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely *to ensure that the commitments under the General Agreement do not hinder the pursuit of policies* aimed at the conservation of exhaustible natural resources.[167]

While the panel report terminated its analysis of Article XX(g) upon a finding that the gasoline rule requirements were not "primarily aimed at" the conservation of natural resources, the Appellate Body effectively reversed on this issue, deciding that "the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g)."[168] Rather than remand the matter for further determinations of

---

167. *Id.* at 19, quoting GATT Dispute Settlement Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, B.I.S.D. 35th Supp. 98, ¶ 4.6 (1989).

168. Appellate Body Report, *supra* note 156, at 20.

the panel, however, the Appellate Body continued the legal analysis on its own. The Appellate Body provided further framework for the development of environmental measures by stating that in meeting the Article XX(g) exceptions, there is "no textual basis for requiring identical treatment of domestic and imported products."[169] Thus, the rules imposed on foreign refiners were "made effective *in conjunction with* restrictions on domestic production or consumption" under Article XX(g).[170]

Ultimately, the Appellate Body agreed with the panel that the U.S. measures failed the proportionality test: "the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4."[171] While the Appellate Body agreed in result with the panel that the U.S. measures were inconsistent with Article III and failed to find justification in Article XX, it also continued to open greater room for the application of domestic environmental rules in the future. This element is clear in two aspects of the Report. First is the finding of panel error in the conclusion that the baseline establishment rules did not fall within the terms of Article XX(g).[172] By finding that the rules *did* fall within Article XX(g), the Appellate Body opens the field for environmental measures. Second, in the final sections of the Report the Appellate Body takes care to acknowledge "the ability of any WTO Member to take measures to control air pollution, or, more generally, to protect the environment."[173] This is consistent with the final paragraphs of the *Tuna I* and *Tuna II* decisions, both of which took care to note concern for and the need for environmental measures guiding the application of GATT and related trade law rules.

VI. LESSSONS LEARNED AND THE MULTILATERAL LEGAL CONTEXT FOR THEIR APPLICATION

The development of Articles 30 and 36 of the European Community Treaty and that of Articles III, XI, and XX of the GATT provide an interesting comparison. Both the European Court of Justice and the GATT panels began with agreements containing no explicit reference to the environment. Nonetheless, in each case the appropriate body used language that did exist to bring environmental protection into the

169. *Id.* at 22.

170. *Id.* (emphasis added).

171. *Id.* at 27, quoting from Gasoline Panel Report, *supra* note 157, at ¶ 6.28.

172. *Supra* note 59 and accompanying text.

173. Appellate Body Report, *supra* note 156, at 31.

framework of trade rules. Just as the European Court in the *Waste Oils* decision stated that environmental protection "is one of the Community's essential objectives,"[174] each of *Tuna I*, *Tuna II*, and *Reformulated Gasoline* provide specific language acknowledging the importance of environmental measures, and *Reformulated Gasoline* specifically recognizes "the ability of any WTO Member to take measures to control air pollution, or, more generally, to protect the environment."[175]

It is not a stretch to see the three GATT/WTO decisions discussed above as moving the WTO regime into the "common law" development of environmental law similar to that of the earlier history of the European Union. Just as the Single European Act codified the authority of Community institutions to legislate in the environmental realm, the Trade and Environment Committee may well determine it is time for further development of explicit environmental rules in the WTO. Moreover, just as the case law of the European Union has recognized that multilateral environmental agreements are to be interpreted and applied in determining when trade measures are appropriate, it is proper to seek such application of MEA rules in the WTO system.

If development within the GATT framework is both possible and likely, then it is worthwhile to consider the situations in which GATT law will be applicable. Various methods of categorization of possible trade/environment conflicts have been proposed, often basing distinctions on the nature of the trade sanction selected for environmental purposes, or on the severity of that sanction.[176] The method of dividing the subject for analysis depends upon the purpose of the analysis.[177] The purpose here is not to propose what should occur, but rather to consider where we stand in the development of international law, and just how we can continue to move forward within the existing legal framework.

For this purpose, it seems logical to anchor the analysis in existing concepts of international law—at least until a new structure of international law replaces the existing regime. This requires that we acknowledge the

---

174. *See Communication concerning Cassis de Dijon*, supra note 108 and accompanying text.

175. *See* Appellate Body Report, *supra* note 156 and accompanying text.

176. *See, e.g.*, DANIEL C. ESTY, GREENING THE GATT 114-30 (1994) (applying a balancing test and various levels of scrutiny based on (1) the intent and effect of the measure, (2) the "environmental legitimacy" of the measure, and (3) whether the measure results in unjustifiable trade disruption, by analogy to U.S. Supreme Court jurisprudence on the dormant commerce clause); Hudec, *supra* note 87, at 95 (distinguishing among domestic environmental regulations, measures designed to "level the playing field," and externally-directed trade restrictions).

177. For example, Professor Hudec has sought to determine "whether governments should be allowed to impose externally-directed trade restrictions for environmental purposes," by focusing on what he considers to be unilateral trade restrictions designed to change policies in other states. Hudec, *supra* note 87, at 96.

requirement of consent in international law, primarily as demonstrated in written agreements between and among states.[178] With this starting point, when one state imposes (or proposes to impose) a trade sanction against another state for environmental purposes, there are a limited number of possible relationships between the two states. Table 1, on the following page, charts out these possibilities, assuming that each of the two states (dealing within the multilateral framework) can be a party to (1) no relevant treaty, (2) the GATT,[179] (3) a relevant MEA, or (4) both the GATT and a relevant MEA. The following discussion considers the resulting relationships in the context of trade measures for environmental purposes imposed by one state against another.

178. In this regard, this discussion diverges from the approach suggested by many favoring a strong environmental focus:

> The environmental side seems to begin with a belief that there is a need for very broad change in environmental behavior, and that the changes that can be wrought by agreed multilateral instruments fall quite a bit short of what is needed. In their view, it falls to individual governments to make up the shortfall. Since change is needed on a large number of fronts, individual governments must have fairly broad freedom to create pressures for such change. Viewed from this perspective, unilateral trade measures are seen as a positive contribution to international welfare, to be applauded rather than punished. Proponents of such measures acknowledge that they may work a radical change in the existing international system, but they answer that environmental problems cannot be solved in time by the existing system.

Hudec, *supra* note 87, at 157.

179. "GATT" here is used to include all the agreements of the Uruguay Round.

Table 1
Possible relationships when
State A implements trade measures
against State B for environmental purposes

	A	B	C	D
STATE A:	No Treaty	MEA	GATT	GATT and MEA
STATE B:				
No Treaty	1. (1)	2. (1)	3. (1)	4. (1)
MEA	5. (1)	6. (2)	7. (1)	8. (2)
GATT	9. (1)	10. (1)	11. (3)	12. (3)
GATT and MEA	13. (1)	14. (2)	15. (3)	16. (4)

Key:

(1) In this category, the relationship between the two states is governed by customary international law. Thus, each state is allowed to do that which is not otherwise prohibited by a norm to which it has demonstrated its consent through practice.

(2) The MEA governs the relationship between the two states in this category.

(3) GATT governs the relationship between the two states in this category (*i.e.*, Articles XX(b) and XX(g) may be applied).

(4) This is the "true conflict" category, in which rules of treaty construction must be applied to determine the relationship between the GATT rules and the rules of the MEA.

Some basic conclusions:

(a) Situations in columns A and B present no restrictions for State A, because no obligation prohibits the use of trade measures for environmental purposes.

(b) Situations in columns A and C will involve purely unilateral measures (*i.e.*, measures not authorized by an MEA).

(c) Situations in columns B and D may involve multilaterally authorized measures consistent with international obligations to other states (possibly including State B).

As Table 1 demonstrates, there are sixteen possible bilateral relationships between the state implementing the trade measure (State A) and the state against whom the measure is implemented (State B). Seven of these are category (1) relationships in which neither state is party to a relevant multilateral trade or environmental agreement. In this group of relationships, State A's conduct is not limited by international law. Absent a treaty, no customary international law norm prevents State A from imposing trade sanctions for environmental purposes, even if that purpose is to influence the internal environmental policy of State B (*e.g.*, to encourage the imposition of restrictions on the use of purse seine nets by the State B fishing industry within State B waters). By implementing such a measure, State A may deny its consumers the opportunity to purchase a product produced in State B. Similarly, by not responding to the State A measure, State B may deny its producers the opportunity to sell their products in State A. Such conduct of either state is not restricted by international law in the absence of a treaty.[180]

---

180. *See, e.g.*, Hudec, *supra* note 87. "Under customary international law, a state is free to deny market access to any other state for any reason or for no reason at all. Likewise, a state is free to impose trade restrictions discriminatorily." *Id.* at 116. Customary international law generally places the burden on the state claiming that actions of another state are in violation of international law. Thus, if there is no prohibitory rule, state conduct is permitted. *See, e.g.*, The Case of S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 18-19. The principle limitation on the rule of general permission was stated in the *Lotus* case as follows:

> [T]he first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Id. Thus, a state may not act within the territory of another. This does not prevent a state from taking border measures that restrict access to its markets for products from another state based on the production process. While the *Lotus* language prohibits direct challenge to the territorial sovereignty of another state, it does not prohibit indirect efforts to influence another state's internal policy decisions through denial of market access.

Customary international law also governs the relationships in boxes 7 and 10. In these circumstances, although each state is party to a multilateral agreement, they are not parties to the same agreement. Thus, like the other category (1) relationships in the "no treaty" column and row, State A's conduct is not restricted by treaty obligations owed to State B.

The category (2) relationships in boxes 6, 8, and 14 all involve situations in which both states are parties to the same MEA, and no GATT treaty obligations exist in the bilateral relationship. To the extent a trade measure for environmental purposes is authorized by the relevant MEA, State A is not limited by international law in its ability to implement such a measure. Thus, category (2) relationships involve situations in which international environmental law trumps international trade law, because no conventional trade law obligations run between the two states. As with category (1) relationships, in category (2) relationships international law allows State A to implement trade measures against State B for environmental purposes, even if those measures are designed to affect internal policy choices in State B.

So far, we have seen that in twelve of the sixteen possible types of trade/environment relationships in international law, State A may implement trade measures for environmental purposes, even when those measures are "externally-directed trade measures"[181] designed to influence internal policy decisions in State B. Given the global importance of GATT, however, including the fact that most major trading nations are member states of the post-Uruguay Round WTO system of agreements,[182] most relationships in which friction is created by trade measures enacted for environmental purposes will involve states who are both parties to the GATT. Thus, the remaining four relationships, represented by boxes 11, 12, 15, and 16 in Table 1, are the relationships most likely to exist in any trade/environment conflict.

The category (3) relationships (boxes 11, 12, and 15) all involve situations in which both states are party to the GATT, and no MEA obligation exists in the bilateral relationship. Each of the two states has undertaken the standard most-favored-nation, national treatment, and tariff concession obligations toward the other state.[183] At the same time, no

---

181. *See*, Hudec, *supra* note 87, at 96.

182. Some 130 states were Member States of the WTO system as of January 31, 1997, having ratified or acceded to the Uruguay Round Agreements. For updated information on WTO membership, *see* the WTO homepage at http://www.wto.org. Obvious exceptions include China and the Russian Federation, but even they have asked to join the WTO. *Id.*

183. *See supra* notes 22-25 and accompanying text.

MEA relationship creates a mutually acknowledged right to impose trade sanctions for environmental purposes. The result is the most severe limitation on environmental regulation through trade measures by State A. Quotas, tariff increases, and discriminatory treatment of State B products in State A all would violate State A's GATT obligations. While in box 12 State A may have an obligation to other states to implement trade sanctions for environmental purposes under the applicable MEA, in its bilateral relationship with State B, the GATT treaty obligation would control.[184]

The implications of category (3) emphasize two important aspects of the prior discussion in this Article. First, the absence of specific MEA obligations or authorizations makes even more important the development of a jurisprudence of Article XX environmental exceptions to GATT prohibitions on trade-restrictive measures (similar to that developed under Article 36 of the European Community Treaty).[185] Category (3) situations will be governed by the developing jurisprudence of GATT Articles XX(b) and XX(g) discussed above.[186]

Second, the absence in category (3) situations of any MEA obligation (or authorization) to implement trade sanctions indicates the importance of MEAs to the ability of a state to impose trade sanctions for environmental purposes. So long as we are to have a liberal trading system governed by a set of multilaterally accepted rules, MEAs authorizing trade sanctions for specific environmental purposes will be the most certain method by which to reconcile international trade and environmental law.

The box 12 relationship also indicates the potential for better coordination of trade law with environmental law. Without a GATT provision specifically excepting trade measures required or authorized by

---

184. The situation in box 12 raises a possibility of conflicting treaty obligations on the part of State A. For instance, if State A became bound to the GATT and later to the relevant MEA, and State B is only a party to the GATT, then State A may have conflicting treaty obligations. McNair suggests the second treaty may be void by reason of conflict with the earlier treaty:

> If the first treaty is a multipartite law-making treaty clearly intended to create permanent rules and containing no power of denunciation, it is probable that a treaty made between two or more parties in derogation of its provisions . . . would be null and void.

LORD MCNAIR, THE LAW OF TREATIES 221 (1961). Given the myriad of opportunities for derogation from the basic rules of the GATT, however, and in particular the provisions of Article XX, this seems unlikely in the type of conflict dealt with here. Further, it appears this suggestion of nullity of the second treaty was specifically rejected in the discussions leading up to the Vienna Convention on the Law of Treaties. SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 94 (2d ed. 1984): "As between a party to both treaties and a party to only one of them, the treaty to which both are parties will govern the mutual rights and obligations of the States concerned."

185. *See supra* notes 122-173 and accompanying text.

186. Hudec suggests amending Article XX to add a new provision excepting from GATT obligations measures specifically required by MEA's, similar to the exemption for international commodity agreements found in current Article XX(h). Hudec, *supra* note 87, at 125-42.

MEAs, the fact that State A is party to a relevant MEA will not by itself resolve the conflict between its GATT obligations to State B and its MEA commitments to third parties. Amending the GATT to provide an exception like that for international commodity agreement obligations in Article XX(h) of the GATT,[187] would change the box 12 relationship, making the environmental obligations contracted by State A applicable even though State B is not a party to the relevant MEA.[188] This would also avoid the free rider problem arising when a GATT party is not a party to a significant MEA. Such a GATT provision would multiply the importance of MEA trade measures by making them available against states party to the GATT as well as those party to the MEA. This mechanism would require a clear definition of the type of MEA covered by the exception, but would otherwise seem possible.

The suggestion that states focus on the negotiation and implementation of further MEAs, authorizing trade measures in appropriate situations, leads to the final category of possible bilateral relationships demonstrated in Table 1. In the category (4) relationship (represented by box 16), both State A and State B are party to the GATT and the relevant MEA. Thus, State A, in its implementation of any measure, must consider both its trade obligations under the GATT and its MEA obligations. This is the category in which true conflicts between international agreements may arise.

The later-in-time, or *lex posterior* rule of treaty interpretation provides that when obligations under two treaties between the same parties are in conflict, the provisions of the most recent treaty prevail.[189] Given the rather constant development of both trade and environmental law, this can be a problematic rule of interpretation. For example, does GATT's Article XI prohibition on quotas run from GATT's entry into force on January 12, 1948, or from its restatement in "GATT 1994" after the

---

187. *See supra* note 186.

188. The same result could be reached by reviewing each MEA and granting case-by-case waivers under GATT art. XXV. *See infra* note 197 and accompanying text.

189. *See* Vienna Convention on the Law of Treaties, arts. 30(3) & 30(4), opened for signature May 23, 1969, UNTS Regis. No. 18,232, U.N. Doc. A/CONF. 39/27, (1969), 63 *reprinted in* 8 I.L.M. 679 (1969); RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 323(3) (1986); Hudec, *supra* note 87, at 121; Thomas J. Schoenbaum, *Agora: Trade and Environment, Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 AM J. INT'L L. 700, 719 (1992). McNair states this proposition as follows:

> Where the parties to the two treaties said to be in conflict are the same, an allegation of conflict raises a question of interpretation rather than a question of a rule of law; the parties are masters of the situation and they are free to modify one treaty by a later one.

MCNAIR, *supra* note 184, at 219.

Uruguay Round,[190] when it is considered in relationship to provisions authorizing or requiring trade measures for environmental purposes in the CITES, the Montreal Protocol, or the Basel Convention?

The more helpful approach is to apply the *lex specialis* principle, which presumes that, when provisions of two treaties between the same parties apply to the same situation, the more specific provision prevails over the more general one.[191] An MEA provision *requiring* a trade measure for specific environmental purposes would likely meet the specificity test, as it would apply to a much more limited set of circumstances than would the more general prohibition on certain types of trade measures (*e.g.*, a provision calling for a ban on the importation of rhinoceros horns is more specific than a provision generally prohibiting any type of quota). There seems no good reason not to apply the same rationale to a trade measure imposed for environmental purposes that is *authorized* (but not required) by an MEA. While perhaps not as specific in a mandatory sense as a provision that would require the same measure, it is more specific than a GATT provision prohibiting such trade measures generally.

The WTO Committee on Trade and Environment has the opportunity to shape the future of the relationship between international trade law and environmental law, but failed to provide any specific recommendations in its Report to the December 1996 Ministerial Meeting in Singapore.[192] In that Report, the CTE notes that most delegations "consider the provisions of GATT Article XX do not permit a Member to impose unilateral trade restrictions that are otherwise inconsistent with its WTO obligations for the purpose of protecting environmental resources that lie outside its jurisdiction,"[193] that "MEAs based on international consensus are viewed by the international community as the best way of coordinating policy

---

190. Article 30 of the Vienna Convention on the Law of Treaties focuses on the date of entry into force. Sir Ian Sinclair takes the position that "the relevant date is that of the adoption of the text and not that of its entry into force. Adoption of the second treaty manifests the new legislative intent." SINCLAIR, *supra* note 184, at 98.

191. *See* SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 93-98 (2d ed. 1984) ("The principle of the *lex specialis* is not expressed as such in Article 30 [of the Vienna Convention on the Law of Treaties], but is widely supported in doctrine."); 1 OPPENHEIM'S INTERNATIONAL LAW 1280 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); Hudec, *supra* note 87, at 121. McNair approaches this rule as a modification of the later-in-time rule: "If the provisions of the earlier [treaty] are general and those of the later one are special and detailed, that fact is some indication that the parties intended the special one to prevail." MCNAIR, *supra* note 184, at 219.

192. World Trade Organization, *Report of the WTO Committee on Trade and Environment* of 14 November 1996, *available at* http://www.wto.org/Trade+Env/.

193. *Id.* ¶ 7.

action to tackle global and transboundary environmental problems cooperatively,"[194] and that "[n]o GATT or WTO trade dispute has arisen so far over the use of trade measures applied pursuant to an MEA."[195] Specific approaches considered within CTE discussions include: dealing with measures taken for achieving environmental objectives within the scope of Article XX of GATT 1994,[196] granting case-by-case waivers from WTO rules under Article IX of the WTO for new MEA provisions calling for trade measures,[197] and amending GATT Article XX to provide a specific exception for trade measures used to enforce MEAs.[198] The U.S. and some developing countries have indicated an unwillingness to accept any modification of WTO agreements that would allow the use of trade restrictions to enforce MEAs.[199] The European Union, on the other hand, is interested in amendments that would allow MEA authorization of trade measures for environmental purposes.[200]

The CTE debate delays any clear resolution of whether trade measures pursuant to MEAs are appropriate under international law when aimed at a state that is a WTO Member State, but not a party to the relevant MEA. Without amendment to GATT/WTO agreements, the obligations of the state imposing the trade measure include only its GATT/WTO obligations to the target state not to impose such measures. The relationship between two states, both of which are parties to the GAT/WTO agreements and the applicable MEA, is not changed by the CTE debate, remaining subject to the analysis set forth above.[201]

---

194. *Id.* ¶ 8.

195. *Id.*

196. *Id.* ¶11.

197. *Id.* ¶ 12. *See also U.S. Seen as Opposing Progress on Key Environment Issue for WTO,* 14 INSIDE U.S. TRADE 3 (1996) [hereinafter *Key Environment Issue*].

198. *Report of the WTO Committee on Trade and Environment,* supra note 192, at ¶¶ 15-19. *See also, Key Environment Issue, supra* note 197. Professor Hudec has developed further the possibility of an art. XX exception similar to the existing art. XX(h) exception for otherwise illegal trade measures imposed by international commodity agreements. Hudec, *supra* note 80, at 125 *et seq.* Further discussion of the various proposals submitted to the CTE are contained in the reports of its meetings found at http://www.wto.org/trade+env/. *See* especially, PRESS/TE 006 of 8 Dcember 1995, PRESS/TE 008 of 29 April 1996, PRESS/TE 010 of 1 July 1996, PRESS/TE 011 of 9 August 1996, and PRESS/TE 013 of September 1996.

199. *Id.*

200. *Id. See also* Speech by Mrs. Ritt Bjerregaard, Member of the European Commission, at the Conference on EU Policy and Global Trade and Environment, Brussels, June 24, 1996, EU Commission Doc. SPEECH/96/171 ("In my view it can only be that trade measures taken on the basis of multilateral environmental agreements are compatible with WTO rules. Any other result would be totally unacceptable.").

201. *Supra* notes 189-191 and accompanying text.

This analysis indicates the importance of the continued development of both international trade law and international environmental law. It also indicates that these two areas of international law are on track to develop in a complementary fashion. GATT law is perhaps best left to continue the jurisprudence of the Article XX(b) and XX(g) exceptions to prohibitions on trade measures, and to consider in the CTE possible amendments to the Uruguay Round Agreements. At the same time, further MEAs are appropriate on the environmental front, seeking traditional development through the consent of the parties governed by the rules thus created.

While some may find this resort to traditional international law methods uncomfortable, there exist few rational alternatives. Discussions of the interplay between international trade and environmental law often seem to begin with the assumption (generally implicit) that the speaker (or the political institution favored by that speaker) is the appropriate source for new international legal norms. This assumption generally is accompanied by a preference for strong environmental measures.[202] Such assumptions generate problems in any discussion of international law. There is not yet an accepted (or even broadly supported) theory of international law that delegates the creation of international norms to single persons or interest groups. Neither has any proposed international environmental law norm reached the status of *jus cogens* necessary to its application in the absence of the consent of the state against which it would be applied.[203] Thus, like proponents of any other new international norm throughout modern history, those championing norms of expanded environmental protection (especially norms authorizing trade sanctions against other states in contravention of existing international agreements) are faced with a difficult legal argument. Substantial moral zeal has not been accepted as justification for the creation and application of new international norms against those of differing persuasions.

CONCLUSION

Each of the international trade and environmental law systems has strengths to offer to the process of international legal development. That each area has grown so successfully in the latter half of the twentieth century is a tribute to the international legal system generally and the states

---

202. Hudec refers to this as the assumption of the rhetorical high ground in the debate. *See* Hudec, *supra* note 87, at 107.

203. *See generally* RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k and reporters' note 6 (1986).

functioning within it. We should not expect such growth without some pain and disagreement. If the solutions were always clear, the problems would likely not be terribly important. The significance of the decisions guarantees that the solutions will not always be easy. Both international trade law and international environmental law deal with the fundamental welfare of mankind.

That there is no preeminent international environmental law institution on the scene should not be considered a problem; perhaps it is a blessing in disguise. The WTO is leading the multilateral system in the same direction the European Union has traveled on the road to increased environmental protection. That direction is a positive one, even if the specific outcomes of decisions are not what some might desire. In the end, it is more important to develop a legal framework that brings with it the consent of the states involved and the respect of all participants than to legislate before the system is ready for the rules enacted.

Despite the speed of developments in international trade and environmental law in the latter half of the twentieth century, lasting international law has never developed overnight. That we must await careful and reliable development of the law is not a bad thing. In the end, a rule of international law must be just that. It cannot be the dictate of a single state or interest group, no matter how much academics, environmentalists or anyone else favors such an approach. *De lege ferenda* is not *de lege lada*. The foundation of international law remains consent on the part of states as represented by their governments. While democratization of international institutions may come in the future, we remain far from it at the end of the twentieth century. It may be that the future will bring a system by which individuals and non-governmental organizations will have greater influence on the development and application of international law. Until then, we must work within the system we have.

For the time being, there are three channels for developing the relationship between trade and environmental law. The first is the already existing case law development under GATT Articles XX(b) and XX(g), by which environmental concerns are being brought into the authorized exceptions to trade obligations. The second is the continued negotiation of MEAs in order to establish clear mutual commitment to environmental protection, sometimes enforced through specific trade measures the targeted state has obligated itself to endure. The third is the negotiation of a specific MEA exception to trade agreement obligations within GATT Article XX and the comparable provisions of other Uruguay Round Agreements. This final channel would provide the most significant trade law acknowledgment of concern for environmental protection, avoid free

rider problems when important trading states stay outside relevant MEAs, and substantially increase the potential application of trade law measures for environmental purposes.