

INTERNATIONAL TRADE AND THE ENVIRONMENT

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Summary

The trade and environment debate now has a familiar ring to it. It refers to the need for, and the challenges of, reconciling increasingly free international trade with the prerequisites of environmental protection. The debate has its origins in the apparent contradiction between two premises. Some argue that free international trade is a precondition for realizing environmental protection and social progress. In this view, the fruits of the economic axiom of free trade—the doctrine of comparative advantages—will free up the necessary means to ensure sustainable development.

The opposite view holds that unlimited free trade damages the environment, *inter alia* through a lack of internalization of the environmental costs caused by manufacturing. In this view, corrective mechanisms are necessary, if not to limit trade, then at least to ensure its environmental outlook. It argues that environmental protection is a main task for humanity that requires far-reaching cooperation in the international community, including the possible use of trade sanctions to encourage environmentally friendly behavior. Trade and the environment emerged in the 1980s, as states' and people's awareness for environmental issues grew. It led to a wide spectrum of analysis in the 1990s.

1. Institutional Framework within the General Agreement on Tariffs and Trade/World Trade Organization

The World Trade Organization (WTO) Committee on Trade and Environment (CTE), established by the WTO General Council (January 31, 1995) held its first meeting on February 16, 1995. It has become the focus of the international trade community's attempts to solve the trade and environment conundrum. The CTE was preceded, within the General Agreement on Tariffs and Trade (GATT), by the group on Environmental Measures and International Trade (EMIT), which was established in November 1971 by decision of the General Council. It was instructed to examine, upon request, any specific matters relevant to the trade policy aspects of measures to control pollution and protect the human environment (see *International Trade Law and International Trade Agreements*).

EMIT was not activated until October 1991. This gap between the establishment of the EMIT group and its eventual realization illustrates the importance attached to the issue in the 1990s. Three items were dealt with: trade provisions of existing multilateral agreements (MEA) vis-à-vis GATT principles and provisions; the transparency of trade-related environmental measures; and possible trade effects of packaging and labeling requirements.

The chairman of EMIT concluded that the group proved useful as a forum for the exchange of information. In his view, the group had reached two important conclusions.

Firstly, the delegations seemed convinced that the GATT offered room for environmental considerations, either within the GATT rules or as an exception to those rules. Secondly, delegations stressed that GATT does not seek to impose its free-trade goals over environmental protection, nor to boycott international initiatives in protecting the global environment.

During the negotiation of the agreement establishing the WTO, a forum was sought at which consultations on trade-related environmental issues could be pursued. It was decided to set up a sub-committee of the preparatory committee of the WTO. This sub-committee held five meetings pending the establishment of the WTO Committee. Finally, included in the adoption of the Uruguay Round Final Act in Marrakech on April 15, 1994, ministers agreed to insert a decision on trade and environment. It called for the establishment of a WTO CTE and includes the committee's terms of reference, which give it a broad assignment. Within the framework of the terms of reference, any relevant issue may be raised.

2. The Committee on Trade and Environment's Agenda: Flashpoints of the Trade and Environment Debate

The CTE adopted the following agenda items, which are included in the terms of reference as provided by the ministerial decision on trade and environment:

- The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEA;
- The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- The relationship between the provisions of the multilateral trading system and
 - charges and taxes for environmental purposes
 - requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling, and recycling;
- The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements that have significant trade effects;
- The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral agreements;
- The effect of environmental measures on market access, especially in relation to developing countries, in particular the least developed among them, and environmental benefits of removing trade restrictions and distortions;
- Exports of domestically prohibited goods;
- Trade-related intellectual property rights (TRIPs);
- Services;
- Appropriate arrangements for relations with nongovernmental organizations referred to in Article V of the WTO and transparency of documentation.

The agenda provides for a bullet-point list of international trade and environment issues, a selection of which will be explored in more detail below.

3. Trade-Related Measures in International Environmental Agreements

3.1. Context

There are quite a number of provisions in MEAs that challenge the international trade law regime of the GATT/WTO. Legal commentary has focused on three such MEA: the Convention on the International Trade in Endangered Species in Wild Fauna and Flora (CITES); the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; and the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer.

The three treaties concerned are not just relevant because they represent the best-known example of MEAs deploying trade sanctions. They each represent one of the three categories of MEA that contain trade provisions: agreements protecting wildlife; agreements protecting the territory of a state against the import of harmful organisms and/or products; and agreements to protect the global commons.

Under the GATT of 1947, around 250 formal dispute settlement proceedings were brought before its panels. Only 10 concerned environmental issues (*sensu stricto*), none of these with respect to an MEA. However, all 10 have arisen since the 1980s. Moreover, given the sharp criticism of the international community about unilateral initiatives, the development of treaties is being encouraged, and the likelihood of formal challenges to these MEA is therefore growing. There are indications that the current uncertainty with respect to the relationship between MEAs and the GATT/WTO has a “chilling effect” on the use of trade measures in new environmental treaties.

3.2. Multilateral Environmental Agreement Flashpoints under the General Agreement on Tariffs and Trade

There is not sufficient space to offer an in-depth analysis of exactly how these MEAs clash with GATT principles. GATT principles themselves are summarized in *International Trade Law*. This author suggests that readers seek detailed analysis of this issue elsewhere, given that the approach of the WTO CTE in dealing with the tensions would seem more poignant in the context of this overview. The following observations will, however, provide a brief insight.

3.2.1. Convention on the International Trade in Endangered Species in Wild Fauna and Flora

CITES has an elaborate permitting regime, enlisting species in three different types of annexes (depending on the degree of threat to their survival), including some species in quota regimes, and making import and export permits dependent upon wildlife management findings by the importing and exporting nations. The compatibility of this regime with the GATT is precarious. Much seems to depend on the approach of the WTO panel involved. Relations with non-parties are, of course, the most vulnerable for a WTO challenge. For all permit requirements, CITES parties would be obliged to have recourse to GATT’s Article XX regime of general exceptions to GATT obligations. This regime does harbor a number of conditions and pitfalls that CITES may not be able to meet. For instance, the condition of least trade restrictiveness under Article XX(b)

could be met only if a WTO panel were to adopt wildlife conservation rationale in its decision. This is by no means certain but it should not be excluded, since the WTO Understanding on Dispute Settlement, and the approach of the Appellate Body (A.B.) clearly underline the non-isolationist nature of the new dispute settlement mechanism.

The requirement of non-arbitrariness and non-discrimination in Article XX's headnote would stand a better chance of being met were the CITES secretariat to issue concrete guidelines in this respect. So far, too much leeway is given to individual states in applying this condition.

3.2.2. Basel

As for the Basel Convention, it is likewise quite vulnerable for challenges under the GATT/WTO. The absolute prohibition of trade with non-parties is bound to fail the Article XX test, especially its headnote, given that similar trade with parties may be allowed. Basel allows its parties to conclude agreements with non-parties, which will then trigger the Basel regime of trade with parties. In such cases, the same objections apply as for the trade with parties. The following elements seem to be the most precarious.

In the event of absolute import prohibitions by a Basel party, GATT Article XI is violated. Where import is allowed but only certain operations limited and/or forbidden, the regime could be compatible with GATT Article III, provided like domestic waste receives the same treatment.

Where recourse to Article XX will be necessary, it would seem safe to say that a WTO panel would be sympathetic to particularities of the importing state involved. They would certainly serve to argue the necessity of import restrictions.

The prohibition of exports that would not be handled in an environmentally sound manner is at odds with Article XX's headnote, given that the parties have so far failed to issue authoritative guidelines on what constitutes "environmentally sound waste management."

The blind application of the decision to ban waste shipments from Organization for Economic Cooperation and Development (OECD) to non-OECD countries would almost certainly fail GATT requirements.

3.2.3. Vienna and Montreal

Finally, with respect to the Vienna Convention and the Montreal Protocol, the protocol's import restrictions would be difficult to uphold in the light of the absence of immediate trade restrictions between parties. The same is true on the export side. Trade restrictions between parties are indirect only. This would seem to jeopardize recourse to GATT Article XX, particularly in light of that article's headnote.

3.3. The International Trade Community's Conceptual Approach to the Multilateral Environmental Agreement Issue

The crucial question in the WTO CTE with respect to MEAs is whether there is a need to amend GATT and WTO rules to harbor the environmental considerations of MEAs. The international community has expressed its will to seek solutions to ensure the legality of MEAs, even if they employ trade measures. This attitude has been influenced by a rather negative approach vis-à-vis unilateral initiatives. Since unilateral trade sanctions are to be rejected, the international community seems to have reached consensus that internationally agreed principles need to be developed to “guide the use of trade measures within the context of MEAs while avoiding protectionism and disruptions of the trading system.” The CTE noted in its 1996 report that “the CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both.”

Environmental instruments developed in the framework of the Rio process likewise express a preference for multilateral initiatives.

3.4. Need for Clarification of General Agreement on Tariffs and Trade/World Trade Organization Concepts and Principles

It would seem that in any event, a number of GATT articles needs to be clarified vis-à-vis elements that play a particular role in the trade and environment debate. For instance, the headnote *Ad Article XX* does not as such prohibit discrimination between countries were the same conditions prevail; it prohibits such discrimination only where it is arbitrary or unjustifiable. GATT and WTO practice so far has failed to come up with a clear test of what is “arbitrary” or “unjustifiable.” Under all the MEAs analyzed above, the discrimination that occurs where import or export from non-parties is not allowed results directly from the non-compliance of the non-parties concerned with a set of rules and standards on which the parties to the agreement have reached consensus. The WTO needs to determine whether these “internationally agreed” production processes and methods (PPM) could render the discrimination non-arbitrary and/or justified, or could indeed lead to the qualification of the countries involved as states where the same conditions do *not* prevail. It would seem that this is a task that cannot be undertaken by the dispute settlement proceedings. WTO members themselves ought to specify whether this is the case.

3.5. The World Trade Organization’s Stance vis-à-vis Multilateral Environmental Agreements

A total of four main options have been put forward *inter alia* in the WTO CTE to clarify the stance of the GATT with respect to trade measures emanating from MEAs: members could consider including an “environmental window” in Article XX, through the express recognition of environmental protection as a legitimate policy objective; the classic route of GATT waivers for the MEAs concerned; the introduction of a trumping clause in Article XX; and/or the introduction of an Article XX(h)-like exception for MEAs, subject to a number of conditions.

3.5.1. An Environmental Window in the General Agreement on Tariffs and Trade

The most common suggestion to install such a window is to issue an authoritative interpretation by the Ministerial Conference and the General Council of the WTO, as provided for in Article IX:2 of the WTO Agreement.

The advantage of this approach is that it would provide a clear brief for negotiators of MEAs. On the down side, it may be precarious to develop general criteria that would accommodate all legitimate requirements, present and future, for using trade measures in MEAs. Parties have also stressed the importance of not upsetting the existing balance of GATT rights and obligations. Generally, countries have warned that an *ex ante* approach should not lead to a broadened definition of Article XX exceptions, thereby increasing the threat of protectionist abuse.

The European Communities (E.C.) favor the collective interpretation of Article XX. In a 1992 submission to the EMIT Group, the E.C. considered, first, the elements needed for the application of Article XX and its headnote to MEAs. Next, it suggested a number of elements with respect to the concept of an MEA.

The E.C. suggested that any intervention should confirm that environmental protection falls within the range of objectives covered by Article XX. The E.C. did not favor the simple incorporation of the word “environment” in Article XX, since this could expand the article’s scope to unilateral extraterritorial trade restrictions, which the E.C. wanted to avoid. Secondly, one had to consider the headnote *Ad* Article XX. For the E.C., the real issue was whether the countries involved have adopted the same environmental protection commitments. It considered the provision in existing MEAs (that non-parties could be considered parties where their environmental guarantees are considered equivalent) to be a good tool for complying with the headnote.

Further, the E.C. suggested, along the lines of previous panel decisions, that the requirement of “no disguised restriction to trade” would be violated where it appears from the context in which a measure was adopted or from the way in which it is applied that the objective or effect is to afford protection to domestic producers in circumstances where such protection is not necessary to achieve the environmental objectives concerned. The E.C. suggested that such would hardly be the case where an MEA is involved. However, as pointed out above, MEAs do leave parties quite a margin of assessment in applying essential elements of the regime installed by the treaty concerned. In these cases, the possibility of protectionist measures should not be excluded.

With respect to the “necessity” test, the E.C. considered two elements as fundamental in the interpretation of the concept of “necessity.” First, it favored a “least trade restrictive test,” stating that the trade measure concerned should not be more restrictive than is necessary to achieve a public policy goal as legitimized by Article XX. Secondly, the life or health standard chosen by the GATT party should itself not come under GATT scrutiny. Others would like the WTO to fulfill a more proactive role, which would bring the MEAs concerned under closer scrutiny. They insist that specific analysis is needed to identify the particular circumstances in which trade provisions in MEAs are

warranted based on scientific evidence that makes trade measures necessary, the actual effectiveness of the trade measure in addressing the underlying cause of the environmental problem, and economic analysis of the costs and benefits of the trade measure to determine its proportionality.

The E.C. emphasized that a specific exemption under Article XX is justified only when the environmental agreement is genuinely multilateral in nature. The E.C. put forward the following criteria:

- The agreement should have been negotiated under the aegis of the United Nations (U.N.) (or a specialized agency, such as the United Nations Environment Programme (UNEP)), or the procedures for negotiation should have been open for participation of all GATT members.
- The agreement should be open for later accession by GATT parties on terms that are equitable in relation to those applying to original members.
- Where the issue at stake is of a regional nature, any agreement cannot apply extra jurisdictional trade measures vis-à-vis countries outside the region.

The E.C. also referred to the pressing issue of the level of participation in the agreement. It pointed to the limited authority of the GATT in deciding what sort of participation an MEA should have to be considered truly multilateral. On the other hand, with respect to the trade element of the exercise, the E.C. hinted that positive consideration to trade measures used in MEAs could be given only where the level of participation is sufficiently representative of the producers of the specific product subject to restriction. This refers to the “quantitative assessment” of MEA participation. Overall, however, it would seem that the E.C. attached more weight to the qualitative criteria.

All of these elements seem to enjoy broad support from most WTO members. Some members added to the E.C. list the requirement that the MEA sufficiently address the needs of developing countries, and/or that countries at different stages of economic development be a party to it.

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Biographical Sketch

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