The 'Greening' of International Trade Law: Realistic Aim or Lost Cause?

GILLIAN WHITE*

The vital importance of issues concerning humanity's relationship to the natural environment, our use and misuse of natural resources, the threatened and actual extinction of yet more species of wild plants, land animals and fish needs no emphasis for any contemporary audience. The following assessment was made by the late Manfred Lachs of Poland, Judge of the International Court, in 1990:

> The novelty of the situation in which our generation finds itself lies in the fact that it is only within the past 50 years that man's powers to ruin and destroy the world around him have come to rival the elemental forces of nature—not perhaps in final magnitude and slow gathering effect, but quite certainly in swiftness and irrevocability.[1]

Lachs acknowledged that the peoples of ancient Rome and Babylon were aware of the damaging effects of some of their ways of life, and that the Victorians noticed 'the lamentable by-products of industrialisation'. But their problems remained confined within smaller geographical dimensions. We have the 'dubious privilege of graduating to the international and global scale'.

'Today', said Lachs in 1990, 'the world is almost everybody's backyard'. Lachs considered that the law had been inadequate to match these challenges, and move in directions beneficial to both humanity and nature.

But already by 1990 some positive achievements had been made, including several important multilateral environmental conventions or treaties, some of which will be considered in this article.

These include the Convention on International Trade in Endangered Species (CITES), concluded in 1973 and in force 1975; the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, amended in 1991; and the Basel Convention on Control of Trans-

* Emeritus Professor of International Law, University of Manchester, UK.
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1 (1990) 39 ICLQ 663

boundary Movement and Management of Hazardous Wastes and Their Disposal, concluded in 1989 and in force 1992. And in 1991 there was an African regional convention on the same subject: the OAU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa. It will be apparent from the titles of three of those treaties that they involve and impact upon international trade in certain plants, animals or substances.

A Brief Chronology

Among several intergovernmental conferences on the environment in the 1970s and 1980s, a landmark was the UN Stockholm Conference of 1972 which adopted the Stockholm Declaration of Principles, including the seminal Principle 21. This both acknowledges that States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and that they have the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States or areas beyond national jurisdiction, such as the high seas, or the upper atmosphere beyond national air space.

It may be helpful to have in mind a skeleton chronology of the principal developments in international environmental law and international trade law since the early 1970s.

- In 1971 the GATT Council established the Working Group on Environmental Measures and International Trade. This did not meet for over twenty years and has been replaced by the WTO Committee on Trade and Environment (CTE).
- In 1987 the fundamental principle of sustainable development was clarified and given prominence in the Report of the Brundtland Commission on Environnment and Development: Our Common Future.
- 1988 through 1994 saw the GATT Uruguay Round of trade negotiations, and negotiations for creation of the WTO.
- June 1992 Rio Earth Summit—UN Conference on Environment and Development. This produced two Conventions, and Declarations.
- In December 1992, NAFTA, the North American Free Trade Area Agreement was concluded between Canada, Mexico and the United States.

- In April 1994 the Marrakesh Ministerial Decision on Trade and Environment established the WTO Committee on Trade and Environment.
- In June 1994 a GATT Panel ruling in the second Tuna/Dolphin dispute, held that US import bans on tuna caught by methods which endanger dolphins were incompatible with its GATT obligations, principally because the measures applied in ways which exceeded the jurisdictional limits of the US according to established international law principles. The ruling will be given further consideration in this article.
- On 1 January 1995, the WTO Agreement and GATT 1994 entered into force. Over 120 States or territories are Parties to this GATT and the numerous accompanying agreements on particular aspects of international trade, including trade in services. All these States and territories are WTO Members, and Parties to the new and strengthened Dispute Settlement Understanding. A Panel and the new Appellate Body set up pursuant to this Understanding has already had to rule on a dispute about the GATT-legality of US Rules on quality standards of gasoline, rules aimed at conserving the natural resource of clean air, but which were held to discriminate against foreign gasoline refiners compared with US domestic refiners. This violation of a basic GATT obligation was further held not to be justified under an 'environmental' exception clause in Article XX of the GATT. The Appellate Body decided that the application of the US Rule amounted to 'unjustifiable discrimination' and a 'disguised restriction on international trade'.[2] Article XX is a key provision of international trade law viewed from the perspective of the extent to which this law allows for national measures enacted for 'good' environmental reasons, but which have some restrictive effect on international trade.
- November 1996: The Report of the CTE to the Singapore Ministerial Conference (first WTO Ministerial).
- On 7 December 1996, the Final Declaration adopted by Singapore Ministerial Conference.

Environmental Concerns and the World Trade Organisation.

The GATT of 1947 made no mention of the environment—an unsurprising omission given the more recent emergence of such awareness

2 *United States - Standards for Reformulated and Conventional Gasoline*, Panel ruling 29 January 1996; Appellate Body decision, 22 April 1996.

and concern. By contrast, the Preamble to the Agreement Establishing the World Trade Organisation (WTO Agreement) declares one of the aims of the new organisation to be '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'.

More concretely, the Marrakesh Decision adopted by governments on the occasion of the signing of that Agreement in April 1994, *considered* 'that there should not be, nor need be, any contradiction between upholding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment and the promotion of sustainable development on the other'.

The Committee on Trade and Environment established by the Decision is open to all WTO members. It has extensive and detailed terms of reference. Of the dozen or so items on its task-list,[3] attention will be focussed here on three matters. In the language of the Ministerial Decision, these are:

- the relationship between *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 *trade measures for environmental purposes*, including measures taken pursuant to *multilateral environmental agreements*;
- the issue of exports of *domestically prohibited goods.*

First it is appropriate to notice what the CTE has done so far. The Committee presented its first Report in November 1996 to the WTO

3 Other items on the CTE agenda include: relationship between provisions of the multilateral trading system (MTS) and charges or taxes for environmental purposes, or requirements for such purposes regarding product standards, packaging, labelling, etc.; transparency of trade measures for environmental purposes and environmental measures with significant trade effects; relationship of dispute settlement mechanisms in the MTS and those in multilateral environmental agreements (MEAs); effect of environmental measures on market access, especially for developing countries; relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and relations with, and input from relevant inter-governmental and non-governmental organisations.

Under the Agreement on Trade in Services (GATS) the CTE is asked to consider whether any modification of its Article XIV(b) is needed to take account of environmental measures which might conflict with the GATS. Article XIV(b) corresponds to Article XX(b) of the GATT. The CTE is to report on the relationship between services trade and the environment, including sustainable development, and the relationship between MEAs and the GATS.

Singapore Ministerial Conference held in December of last year. In its first two years of work the CTE has moved towards analysing and clarifying the complex issues covered by its terms of reference, and has collected differing views from many WTO Members. Environmental as well as trade experts from member governments took part in the Committee's work, and this aspect was commended by the Declaration adopted by the Singapore meeting. The Ministers directed the CTE to continue its work, under the existing terms of reference. It is anticipated that some important proposals will emerge from it in the next few years, for the consideration of all WTO member countries.

Environmental Measures with Significant Trade Effects, and GATT/WTO Law

Put another way, the topic is national laws made for environmental aims, broadly understood, which impact on international trade, or in their operation restrict such trade. Does international trade law, specifically the provisions of the GATT on trade in goods, accommodate such national laws, or does the GATT compel governments to renounce them in the interests of global trade liberalisation and compliance with their GATT/WTO obligations? As in many other areas of life, the answers are not simple either/or, mutually exclusive options. International trade law already goes a fair distance toward 'blessing' and permitting countries to adopt and apply laws and regulations for environmental purposes which can nevertheless operate to restrict trade.

Import Bans or Bans on the Sale of Harmful or 'Risky' Products

The first category to consider is the restriction or prohibition of the import or sale on the domestic market of products bearing risks to human, animal or plant life or health. This category is a legitimate and well-established exception to free trade regimes both in federal States such as Australia or the US, in regional common markets such as the European Union (EU), and under GATT law. In Australia, section 92 of the Constitution famously provides that 'trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. But it is settled law that regulation of such trade is valid, and that 'regulation' includes

'excluding from passage across the frontier of a State creatures or things calculated to injure its citizens'.[4]

A Tasmanian complete prohibition on the import of potatoes from Victoria to stop the spread of disease was struck down by the High Court in 1935, the Court holding that the connection between such import and the spread of any disease into Tasmania was, on the evidence, 'too remote and attenuated to warrant the absolute prohibition'. The High Court declined then to indicate 'the precise degree to which a State may lawfully protect its citizens against the introduction of disease'.[5]

More recently the High Court has formulated a test for permissible regulation of interstate trade. In *Permewan Wright Consolidated Pty Ltd v Trewhitt*, Stephen J said:

> For a law to be valid as permissible regulation for the purposes of section 92 its effects upon interstate trade must be no more restrictive than is reasonably necessary in all the circumstances, and if it is shown to discriminate against that trade it will forfeit its claim to be no more than regulatory.[6]

This test has been formulated in similar terms in the jurisprudence of the European Court on restrictions on free movement of goods in the European Community,[7] and in US jurisprudence on State laws affecting the internal market in that country.[8]

4 Per Lord Porter of the Privy Council in the *Bank Nationalisation Case: Commonwealth v Bank of NSW* [1950] AC 235 at 312.

5 *Tasmania v State of Victoria* (1935) 52 CLR 157 at 168-169.

6 (1979) 145 CLR 1 at 27.

7 For example, *Danish Bottles Case*, Case 302/86 *Commission v Denmark* [1988] ECR 4607, and the *Walloon Waste Import Ban Case*, Case 2/90 *Commission v Belgium* [1992] ECR I 4431. See the helpful analysis by M Coleman, 'Environmental Barriers to Trade and European Community Law', in A Boyle (ed) *Environmental Regulation and Economic Growth* (1994) pp 131-171. A briefer treatment is Lasok and Bridge, *Law and Institutions of the European Union*, (6th ed, D Lasok, 1994) pp 722-724.

8 Leading cases from the 1970s include *City of Philadelphia v New Jersey* 437 US 617 (1978); *Hunt v Washington State Apple Advertising* 432 US 333 (1977); and *Pike v Bruce Church Inc* 3967 US 137 (1970). For discussion of these and later cases see DA Farber and RE Hudec, 'GATT Legal Restraints on Domestic Environmental Regulations', in JN Bhagwati and RE Hudec, *Fair Trade and Harmonization Vol 2: Legal Analysis* (1996) pp 64-67. These authors conclude that if the State regulation 'bears the earmarks of protectionist motive', the State government will have the burden of proof to justify it. If it fails to satisfy the court, the regulation will be struck down under the Commerce Clause of the US Constitution.

In Australian case law, the High Court decision in *Cole v Whitfield*,[9] upholding a Tasmanian Regulation made in 1962 under the Sea Fisheries Act, nicely illustrates the inherent tension between environmental or conservation measures and free trade principles. The Court faced the issue of whether to allow what might be a bona fide conservation law which nevertheless has some protectionist impact. The Regulation prohibited the sale, possession or control of crayfish of less than 105mm length for females and 110mm for males. South Australia had a similar restriction, but allowing trade in smaller crayfish which could be caught harmlessly at a younger age and therefore smaller, in South Australia's warmer waters. Whitfield imported crayfish into Tasmania which were above the South Australian minimum but below the Tasmanian legal limit, and was prosecuted under the Regulation. The Court accepted that the Regulation protected the Tasmanian crayfish industry but found that it did not do so in a way which gave Tasmanian crayfish production or trade within Tasmania any competitive advantage over imported crayfish or trade in such fish. The Court said that even if the Regulation did advantage the local trade by eliminating undersized imported fish from the market, it was clear that:

> the extension of the prohibition against sale and possession to imported crayfish is a *necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters.*[10]

The State could undertake only random inspections, and obviously local crayfish were indistinguishable from imported specimens. So the Regulation imposed a burden on interstate trade, but not one which was 'relevantly discriminatory and protectionist'. The Court noted that the purpose of the regulation was to assist in the protection and conservation of a valuable natural resource.

In European Community law Article 36 of the EEC Treaty provides for exceptions from the fundamental rules on free movement of goods within the Community. Member States may prohibit or restrict the import or export of goods for, inter alia, 'the protection of health and life of humans, animals or plants'. Case law holds that, to be lawful, a restrictive national measure must be necessary to achieve the aim pursued, and must represent the means which least restricts free movement. In the mid-1990s a commentator was able to say that:

9 (1988) 165 CLR 360.

10 (1988) 165 CLR 360 at 409. Emphasis added.

> Community case-law to date would appear to show the scales tipping in favour of environmental protection ... these cases do appear to be part of a trend, affording precedence to safeguarding the environment over the principle of free movement of goods.[11]

As is happening in federal States, the EU is adopting harmonized environmental legislation 'in order to prevent barriers to trade between Member States caused by national environmental protection requirements'.

Article 36 of the EEC Treaty follows the precedent of the exceptions provision of the GATT, dating from 1947, some ten years before the founding of the EEC. Restrictions on the free movement of goods for the permitted purposes must not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The European Court is the final arbiter on whether any challenged national measure passes this test.

The Australia-New Zealand Closer Economic Relations Trade Agreement of 1983 established a free trade area between the two countries. Among the purposes for which either Party can take measures restricting such trade are the following:

- to protect human, animal or plant life or health, including the protection of indigenous or endangered animal or plant life; and
- to conserve limited natural resources.

But here again the measures must be *necessary* for such a purpose, and they must not be 'used as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade in the Area', as provided by Article 18.

Import or Sale Bans under GATT Law

Two main provisions of the GATT are relevant to the issue of the extent to which a GATT/WTO member country may lawfully restrict trade in goods for environmental reasons. Article III prescribes national treatment for imported products from other GATT Parties in respect of internal regulation of any kind. Specifically, it provides that:

> The products of ... any contracting party imported into ... 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,

11 M Coleman 'Environmental Barriers to Trade and European Community Law', in A Boyle (ed) *Environmental Regulation and Economic Growth* (1994), pp 140 and 167.

> regulations and requirements affecting their internal sale, offering for sale ... or use.

In other words, there is nothing incompatible with GATT if a member country enacts and applies laws or regulations on health or safety standards, pollution control and the like so long as these measures do not discriminate between domestic and imported 'like products'. To quote from the summary in a leading textbook:

> A nation could ban sale or importation of certain goods (domestically or foreign produced) which pose pollution hazards, and this non-discriminatory treatment would not conflict with GATT.[12]

If a national environmental measure cannot satisfy Article III, for example, because it has a discriminatory impact on imported as opposed to domestic goods, the country may be able to justify it nonetheless by invoking the General Exceptions provision, Article XX. This is the provision whose rationale and language have been followed so closely in the clauses of the EEC Treaty and the Australia-New Zealand Closer Economic Relations Agreement considered above.

Article XX opens with an introductory paragraph, or *chapeau* (hat) as it has been termed by GATT panels. This paragraph requires that any national measure seeking justification under the Article not be applied in a manner amounting to:

> a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

There follows a list of ten purposes for which countries may adopt and apply measures which would otherwise conflict with their GATT obligations. The ten purposes include, inter alia, measures:

> (b) *necessary* to protect human, animal or plant life or health; and
>
> (g) *relating to* the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Both these clauses were interpreted by a GATT Panel in the *Second US Tuna/Dolphin Dispute* referred to earlier.[13] With the laudable aim of protecting dolphins from death or serious injury caused by certain methods of harvesting tuna—a species which often swim below herds of dolphin swimming visibly near the surface—the US banned the

12 JH Jackson and WJ Davey, *Legal Problems of International Economic Relations*, (1986) p 514.

13 *US - Restriction on Imports of Tuna* (1994) 33 ILM 839.

import of yellowfin tuna from any country which maintained harvesting practices not comparable to those of the US. Further, in the so-called intermediary embargo, the US banned imports of tuna from any country which itself imported tuna from countries maintaining unacceptable harvesting practices. The trade bans applied irrespective of whether the particular tuna sought to be imported had itself been caught by a method illegal under US law. The Panel ruled quite properly that neither Article XX(b) nor (g) allowed a country to impose restrictions in a way which exceeded the limits which international law places upon the jurisdictional reach of any national laws. Article XX permits the application of trade measures to implement policies *within* the country's own jurisdiction. It does not allow parties 'to take trade measures so as to force other contracting parties to change their policies within their jurisdiction'.[14]

However, the Panel also ruled that it is permissible under Article XX(b) or (g) to take measures which apply extraterritorially in the sense of protecting living things located outside the territory of the state concerned, or conserving natural resources similarly located. It is now well established that all states have an international obligation to take reasonable measures to prevent damage to the environment of other states and areas beyond the limits of national jurisdiction.[15] Laws may be cast so as to apply outside the state's territory for protective or conservation purposes, but the state is not entitled to enforce its laws in ways and in relation to persons which are outside the international law limits on jurisdiction. The US could have enforced its dolphin protection laws only against its own nationals and vessels. For example, the 1990 Wellington Convention for Prohibition of Fishing with Long Driftnets in the South Pacific, authorises parties to take measures 'consistent with international law' to prohibit the landing or importation of fish and fish products taken with such nets.[16]

A final point on GATT Article XX(b) concerns the requirement that the measure must be shown to be 'necessary' to protect human, animal or plant life or health. GATT panels have ruled that to meet this test the national measure must be, from among measures reasonably available to address the particular risk to life or health, that which entails the least degree of inconsistency with other GATT provisions. In other words, that which is the least restrictive of international

14 (1994) 33 ILM 839 paragraphs 5.26 and 5.38.

15 Principle 2 of the Rio Declaration from the 1992 UN Earth Summit.

16 (1990) 29 ILM 1449, Article 3.2.

trade. Bearing in mind that ecological and environmental concerns were not at the forefront of the minds of the drafters in 1947, it would be appropriate if the test were now loosened to allow more flexibility to national policies and laws. One commentator has suggested a re-wording of Article XX(b) to read *'reasonably necessary* to protect *the natural environment* and human, animal or plant life or health'.[17]

Such a change seems eminently desirable. The criteria in the *chapeau* to Article XX are sufficiently stringent and clear to combat any abuse of a softened clause (b) for disguised trade protectionist purposes.

Import Bans on Products not Produced Domestically

Trade restrictions based on production methods or processes

Two other possible kinds of national measures taken for environmental aims can be considered briefly. First, let us suppose a discriminatory ban on a product which is not domestically produced, for example a ban on the import or sale of tropical timber products imposed by a country with no such resource in its own territory. It seems that such a measure might fall foul of the GATT even though taken for the best of environmental motives, to prevent the probable or even certain extinction of particular tree species.

The second type of national trade restriction which would be in clear breach of GATT is a unilateral ban on trade in goods on the basis of the environmentally harmful manner in which they are produced, for example the production process is contributing excessively to atmospheric or water pollution, or global warming. GATT/WTO law presently fails to allow trade restrictions aimed at preventing or penalising environmental damage caused by process and production methods (PPMs). Australia can lawfully keep out imports of motor vehicles whose emission controls do not meet Australia's high standards, but Australia would be in breach of its GATT obligations if it banned the import of vehicles because they were manufactured in a plant which used excessively polluting production methods or power sources.

Both these issues merit a closer look. First, some international developments relating to the depletion of rain forests and the trade in tropical timber will be outlined. Second, the steps taken by the three member countries of the North American Free Trade Area—Canada,

17 T Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation', (1997) 91 *AJIL* 268 at pp 276-277. Emphasis added.

Mexico, and the United States—to address PPM issues, are of considerable interest, even though they may not be translatable into general international trade law.

Forests and trade in tropical timber

The Rio Earth Summit in 1992 produced a non-binding 'soft law' Statement of Forest Principles.[18] Principles 13 and 14 speak to trade aspects. Principle 13(a) states that trade in forest products should be based on:

> non-discriminatory and multilaterally agreed rules and procedures consistent with international trade law and practices. In this context, open and free international trade in forest products should be facilitated.

Principle 13(b) urges the reduction or removal of tariff barriers and impediments to market access for higher value-added forest products. Local processing is to be encouraged to enable producer countries to better conserve and manage their renewable forest resources.

Principle 13(d) declares the aim of conservation and sustainable development policies being integrated with economic and trade policies. Crucially, Principle 14 states that:

> Unilateral measures, incompatible with international obligations or agreements, to restrict and/or ban international trade in timber or other forest products should be removed or avoided, in order to attain long-term sustainable forest management.

In a rather weak follow-up to the Forest Principles, a revised International Tropical Timber Agreement (ITTA) was concluded in 1994, to replace an earlier Agreement of 1983.[19] The ITTA's objectives are to provide a framework for consultation, co-operation and policy development among all members, which include producing and consuming countries, regarding all relevant aspects of the world timber economy. The Agreement is to provide a forum for consultation to promote *non-discriminatory* timber trade practices. Regarding international trade in tropical timber, the most precise objective in the ITTA is Article 1(d) which states the desire:

> to enhance the capacity of members to implement a strategy for achieving exports of tropical timber and timber products from sustainably managed sources by the year 2000.

This aim repeats the commitment made by the States concerned at Bali in May 1990. The Agreement establishes the Bali Partnership

18 (1992) 31 ILM 881.

19 The text of the 1994 ITTA is in (1994) 33 ILM 1014.

Fund to assist producing Parties to make the investments necessary to achieve this objective. The Fund is to be composed of voluntary contributions from donor members and other public or private concerns, and income earned from operations and projects related to a Special Account also set up by the ITTA.

Also related to achieving Objective (d) of Article 1 is the obligation of Parties under Article 29(2) to provide statistics and information on timber, its trade, and the activities they plan or are undertaking to secure sustainable management of forests.

The approach taken here by the States concerned, whether producers or consumers of tropical timber, focuses on cooperation to develop sustainable management of the resource, and to steer the export trade in this direction. Any trade measures adopted by any State, whether or not Party to the ITTA, would have to be non-discriminatory, and it is hard to see how this could be done and yet produce measures with any practical effect on unsound and unsustainable exploitation of this resource.

Trade restrictions based on production methods or processes

As noted, such restrictions are not compatible with the GATT as it stands. The WTO Committee on Trade and Environment will probably have to look at this difficult issue in the coming years. It has been addressed in the NAFTA Agreement on Environmental Cooperation. As Esty rightly pointed out, governments will have to recognise that the distinction in the present GATT law between regulation of products, which is permitted, and regulation of production processes, not permitted, 'breaks down in a world of ecological interdependence; how things are produced is as important as what is produced'.[20]

Esty gave an example of the deficiency in this respect of existing GATT law. The Montreal Protocol on Substances that Deplete the Ozone Layer obliges States Parties to control and finally to eliminate the use of specified substances, mainly chlorofluorocarbons (CFCs).

Esty posits a product, a semiconductor, produced using CFCs in violation of the Protocol, and argues that States must be able to bar such a product from entering their market. At present, such a trade ban would in theory violate the importing country's GATT obligations. Probably such a case is now unlikely to occur, given the wide acceptance of the Montreal Protocol, but Japan did consider restricting the

20 D Esty in ASIL Proceedings, 1994, at 493.

import of South Korean semiconductors made by the use of CFCs before South Korea became a Party to the Protocol.[21]

In any event, one would expect any future GATT provision to deal with trade restrictions on products based on their environmentally damaging production methods, to distinguish between internationally agreed PPMs and unilateral, purely national standards. International trade law should not be used to allow States to impose their national regulations on PPMs on to other States with whom they trade.

The environmental 'side agreement' to the NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), concluded in 1992 prior to the admission of Mexico to the existing Canada-US Free Trade Agreement, tackles this problem of damaging PPMs in an innovative way.[22] The three States were prepared to acknowledge that there could be, perhaps almost certainly would be, problems of failure to enforce national laws and regulations controlling PPMs with the aim of protecting or improving the environment. The NAAEC allows the government of any of the three Parties to use the NAFTA dispute settlement process to challenge another Party's 'persistent pattern of failure ... to effectively enforce its environmental law'.[23] A monetary fine may be imposed on a party found to be at fault, and if the pattern of failure to enforce its laws is not remedied, the Agreement allows for trade retaliation as a last resort.

This procedure is partially open also to non-governmental organisations in the environmental field, which may submit to the tri-national Commission for Environmental Cooperation (CEC) that a Party is failing to enforce its domestic laws. The CEC may then prepare a factual report which can serve as a basis for action by Party governments under the dispute settlement procedure. The CEC has already received petitions from non-government organisations (NGOs). It procured a report on the death of thousands of migratory birds in a reservoir 200 miles from Mexico City. The scientific panel found botulism attributable to untreated sewage to have caused the deaths. The panel's proposal for a new treatment facility to be constructed with some costs shared by the three countries is reported to be under consideration.[24] Another petition from an environmental NGO alleged Mexican failure to comply with its laws in authorising the con-

21 Per B Kingsbury, in AE Boyle (ed), *Environmental Regulation and Economic Growth*, (1994), p 197.

22 Text in (1993) 32 ILM 1480.

23 Article 22.

24 Per Steinberg in (1997) 91 *AIJL 231*, pp 249-50

struction of a pier and cruise ship terminal which would have destroyed part of a famous coral reef. During the ensuing CEC investigation, the Mexican Government abandoned the project. While neither of these instances concerns PPMs, one can see how these provisions work in practice. But anything along these lines is unlikely to be accepted by the WTO membership at large. Multilateral policy negotiation and law-making involving so many countries with differing economic priorities, social and legal cultures, is not comparable to the bargaining among three countries forming a free trade area which offers a large incentive to the applicant for membership to accept such disciplines.

Relationship between Multilateral Trading System, and *Trade Measures* for Environmental Purposes

So far this article has examined the relationship between national environmental laws and international trade laws, principally GATT/WTO provisions. The second of the three issue areas on the agenda of the CTE to be considered is the relationship between national trade measures taken for environmental purposes and GATT/WTO law, focussing on national trade measures taken pursuant to multilateral environmental agreements (MEAs). Of the more than 180 MEAs, not all of which are in force, some 19 contain provisions authorising or even requiring trade sanctions as a means of securing compliance. A couple of these agreements are of regional interest:

- The ASEAN Agreement on Conservation of Nature and Natural Resources, 1985[25] would authorise Parties to impose trade sanctions, but leaves them with a wide measure of discretion as to whether to use this means of implementation.
- The Wellington Convention on Prohibition of Driftnet Fishing in the South Pacific was mentioned above. Australia and New Zealand are Parties, as are most of the South Pacific countries. Parties undertake to prohibit their nationals and vessels from engaging in driftnet fishing, widely defined to cover transporting and processing catch, within the Convention Area. A Party may take 'measures consistent with international law' to prohibit landing of driftnet catches within its territory, and the importation of any fish or fish product caught using a driftnet.

Of the remaining MEAs, three Agreements are particularly representative of the problems of possible conflict with trade laws, and also are

25 Still not in force.

among the most important MEAs, in the sense of the magnitude of the environmental threats or problems which they address. These three MEAs are:

- The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and 1991;[26]
- The Convention on International Trade in Endangered Species (CITES), 1973;[27]
- The Basel Convention on Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989.[28]

All are in force, with many States being Parties to all three.

The Montreal Protocol was referred to in connection with possible trade restrictions on products made using CFCs. The Protocol phases out consumption and production of certain ozone-depleting chemicals, and adopts trade controls. Article 4 obliges all Parties to ban the import of controlled substances from any non-Party state and, as from 1 January 1993, no developing State Party is permitted to export any such substance to any non-Party State. Strictly, a non-Party to the Protocol which was a WTO/GATT member country could say that such trade restrictions violated that State's rights under the GATT. But the more than 120 signatories to the Montreal Protocol include nearly all the GATT countries of any trade significance. So the problem is theoretical rather than real, in that Parties to Montreal have consented to the possibility of trade restraints.

Nevertheless, the three NAFTA countries considered the question of inconsistency between their GATT obligations and the trade obligations of certain MEAs, including the Montreal Protocol, sufficiently problematic to justify including a 'trumping' provision in the NAFTA Agreement, Article 104:

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
>
> a) CITES;
>
> b) Montreal Protocol;
>
> c) Basel Convention; or
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> d) other agreements listed in an Annex,[29]

26 (1987) 26 ILM 1550, and (1991) 30 ILM 539.

27 (1973) 12 ILM 1085.

28 (1989) 28 ILM 649.

such obligations shall prevail to the extent of the inconsistency.

Our old friend, the least trade-restrictive measure, has come in to this provision. Where a NAFTA Party has a choice among effective and available means of complying with these trade obligations in the MEA, the Party must choose the option that is least inconsistent with NAFTA.[30]

CITES received some publicity in 1997 when the Conference of Parties relaxed the ban on trade in elephant ivory imposed under the Convention in 1989. The trade provisions of CITES relate only to restrictions on trade in the *products* of endangered species. Australia ratified CITES in 1976, and its implementing legislation was strengthened in 1982 by the *Wildlife Protection (Regulation of Exports and Imports) Act* (Cth). The Act goes further than the Convention, prohibiting trade in some species as well as products. It regulates trade in other species under a permit system. Breaches of the Act can lead to severe financial penalties or up to five years imprisonment. Normal commercial trade in agriculture, forestry and fishery products is unaffected. Regulated trade between bona fide zoos and scientific institutions is permitted even for threatened species. Commercial trade in wildlife and related products (fauna and flora) is allowed only if the traders demonstrate that such trade will not adversely affect Australian wildlife. The legislation allows Australia to prevent the importation of live animals and plants which might adversely affect Australian wildlife and its habitat—lessons have been learned from history, such as the introduction of rabbits and lantana.

The ban on trade in ivory was eased in June 1997 by vote of more than the required two-thirds majority of States Parties. The relaxation will take effect after 18 months, by the end of 1998, if sufficient controls are deemed to then be in place. The decision will allow Botswana, Namibia and Zimbabwe to sell specified quantities of ivory from their stockpiles to Japan under an international reporting and monitoring system. The delay of 18 months is intended to prevent poachers laundering illegal ivory through the approved system. The ban was eased to allow some culling of elephants in these three countries, where numbers are growing too great for the habitat. Allowing

29 To date, the Annex lists a Canada-US bilateral agreement of 1986 on Transboundary Movement of Hazardous Waste, and a 1983 Mexico-US bilateral on Co-operation for Protection and Improvement of the Environment in the Border Area.

30 Article 104.1.

limited legal trade may also be a more effective way to control illegal trade.

The third MEA to be considered is the Basel Convention on Transboundary Movements of Hazardous Wastes which has been ratified by over 100 States, and entered into force in May 1992. Transboundary movements of hazardous and other wastes between Parties is tightly regulated, requiring advance notification by the State of export to the importing or any transit States, and the prior consent of the State of import, which can refuse consent. Movement must not begin until the State of import has confirmed to the notifying State or trader that there is a contract between exporter and disposer specifying environmentally sound management of the wastes to be exported. There is a duty to re-import the wastes if the movement cannot be completed according to this contract, and no environmentally sound alternative arrangements can be made.

Article 4 paragraph 5 expressly prohibits exports and imports of hazardous and other wastes to and from non-Party States. 'Hazardous wastes' and 'other wastes' are listed by category in Convention Annexes. Wastes defined as hazardous by the legislation of a Party of export, import or transit are also included in the Convention's hazardous category.

In September 1995 the Conference of Parties amended the Convention to ban completely the export of hazardous wastes from all OECD countries, including Australia, to developing countries. The ban applies now to such wastes intended for disposal, and from the end of 1997, to such wastes intended for reuse or recycling.

How do these trade bans sit with WTO/GATT law? 'Waste' is a commercial product coming within GATT provisions. In EEC law it has been held to be 'goods' for the law on free movement of goods within the Community. US courts have held that waste is a product subject to the Commerce Clause of the Constitution. In principle, a ban on export from or import into a GATT member would be contrary to GATT provisions, probably even if the State concerned is a Party to the Basel Convention. The issue has not been tested in the former GATT or the present WTO dispute settlement process. Several experts in international trade law have suggested that, for the removal of doubt, and to demonstrate that WTO law is not intended to operate as an obstacle to the application and enforcement of widely supported and necessary international environmental agreements, the GATT should be modified to allow the key MEAs with trade sanction provisions to prevail over GATT rights and obligations.

This would resemble the 'trumping' provisions in the NAFTA. It might be done by a waiver under Article XXV, needing the approval of a two-thirds majority of votes cast, such majority representing more than half of WTO members.

Proposals now circulating among governments within the WTO CTE mostly involve amending GATT Article XX by adding a new, environmental item to the list of permitted exceptions to GATT trade obligations. Article XX(h) already allows for trade restrictions taken pursuant to obligations under international commodity agreements. Either these agreements must conform to criteria approved by the WTO Council, or they must be submitted ad hoc to WTO and not be disapproved. A rather narrowly drawn proposal on these lines has been made by the experts, requiring MEAs to be negotiated under the auspices of the United Nations Environment Programme (UNEP), with accession open to all States. The author is persuaded by the arguments of Schoenbaum that the UNEP requirement is too limiting, and that to be valid under a new Article XX(k), a MEA need not deal with a global problem and be open to all States. Some problems are regional, and regional MEAs have a legitimate role. The new clause should allow for MEAs that are open to all parties having a legitimate interest in the environmental problem addressed. Certainly, any trade restrictions authorised or mandated under a MEA must bear a reasonable relation to the particular environmental problem, and following the ruling in the *Second Tuna/Dolphin* case, a MEA must comply with the jurisdictional principles of general international law.[31] Of course, the requirements of the *chapeau* to Article XX would apply to all MEAs brought within the new provision:

> measures must not be applied so as to constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

However, nothing has been agreed as yet, and some major developing countries within WTO such as Brazil, Egypt and India, oppose any such amendment to the GATT. These States see 'no reason to abandon or weaken their right to challenge such measures as WTO-inconsistent'. The CTE reported in November 1996 that these three countries, together with the ASEAN members and other developing States, urged improved market access for developing country prod-

31 T Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation', (1997) 91 *AJIL* 268 at 276-277.

ucts, arguing that this in itself would lead to more efficient and hence more environmentally friendly use of resources.[32]

In practice the GATT has not been a serious obstacle to the effectiveness of the main MEAs, particularly the three considered here. It has been observed that:

> the significance of actual inhibition of worthwhile environmental measures attributable to GATT has been limited: major multilateral treaties on wildlife, hazardous wastes, ozone-depleting substances, and climate change have been concluded and operated without serious practical difficulties of GATT-compatibility.[33]

Exports of Domestically Prohibited Goods (DPGs)

This is the third and final item from the CTE's agenda to be considered here. The idea is that States should be allowed to prevent the export or import of goods or substances that are environmentally harmful and are prohibited from being placed on the market in the exporting country.[34] A prior informed consent regime such as has been agreed in the Basel Convention on Hazardous Wastes seems to be the way forward. In relation to chemicals, a number of States have accepted non-binding guidelines establishing a prior informed consent procedure.[35] The London Guidelines for Exchange of Information on Chemicals in International Trade, as amended in 1989, apply to exporting States which have acted to ban or severely restrict a chemical on their own market. Importing governments must be given prior notice of the export of such chemicals, and informed of the reasons for their restriction or ban in the country of origin. The Guidelines, which are a form of 'soft law' but were adopted by the UNEP Governing Council in a 1989 Decision, apply only to traded chemicals, excluding from that definition pharmaceuticals, radioactive materials and food additives. Measures proposed but not adopted in GATT on domestically prohibited goods would cover trade in chemi-

32 Per Steinberg in (1997) 91 *AJIL* 231 at 243.

33 B Kingsbury, 'Environment and Trade: The GATT/WTO Regime in the International Legal System', in AE Boyle (ed), *Environmental Regulation and Economic Growth*, (1994) p 231.

34 Principle 14 of the Rio Declaration declares:

> States should effectively co-operate to discourage or prevent the relocation and transfer to other states of any activities or substances that cause severe environmental degradation or are found to be harmful to human health.

35 In Agenda 21 adopted at the Rio Conference there is support for consideration of a legally binding instrument to create a prior informed consent procedure for international trade in chemicals.

cals and toxins, and a wider range of products excluded from the present informal regime.[36]

The problem is a real one. Nigeria reported to a GATT Working Group on this subject in 1989 that several West African countries had unknowingly received a million kilograms of beef contaminated by radioactive fallout from the Chernobyl explosion in 1986. And some European countries apparently tried to export powdered milk and chicken products originating in the fallout area. There are no GATT rules on DPGs, so these importing States had no way of knowing in advance the condition of the foodstuffs being shipped. This matter of DPGs is on the agenda of the CTE.[37]

The UN has made some progress on the issue, UNEP and the FAO producing in 1996 a Draft Proposal for a Prior Informed Consent Instrument. A related draft treaty under consideration would ban trade in twelve persistent organic pollutants, including DDT and dioxin. The PIC Instrument, or treaty, would cover banned or restricted chemical products or hazardous pesticides that may cause health or environmental problems. Shipment of such items would be barred without prior notice to, and explicit consent of, a designated authority in the country of destination. Existing GATT law is probably adequate to allow GATT countries to ban trade in products or substances harmful to health; Article XX(b) might suffice, providing the import or export restriction or ban meets the tests in the *chapeau* to the Article. And GATT Agreements on Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT), apply to export restraints on DPGs. The SPS Agreement applies to pharmaceuticals and food, whilst the TBT Agreement applies to other products.

However, clarification would be desirable. Schoenbaum suggests that the CTE should adopt a formal Interpretation or Understanding on DPGs, saying expressly that the current GATT provisions apply to such goods. He also proposes that the CTE should adopt a transparency requirement. Trade-restricting States should have to notify WTO and publish their relevant laws and decisions on the products concerned. The WTO dispute resolution procedures would of course be available for independent ruling on any disputes between member States on these as on all other aspects of WTO/GATT law.

36 See J Schultz, 'The GATT/WTO Committee on Trade and Environment Toward Environmental Reform', (1995) 89 *AJIL* 425 at 434.

37 Ibid.

Conclusions

The title of this article refers to the 'greening' of international trade law, and asks whether this is a realistic aim or a lost cause. An attempt has been made to describe some of the main issues involved in the co-existence of bodies of law, both national and international, which are separate but which 'bump-up' against one another: legislation or treaties enacted or concluded for environmental aims, and international provisions (or national laws in federal States) which seek to achieve trade liberalisation.

It has perhaps been sufficiently demonstrated that the accommodation of bona fide environmental aims and concerns has not been made impossible by international trade law. The cause is certainly not lost. Many of the problems of conflict between the two kinds of legal provision involve unilateral national measures which cannot be applied without violating the country's international, specifically GATT/WTO obligations. The instruments adopted by the more than 170 countries attending the Rio Earth Summit in 1992, indicate a broad consensus on the circumstances in which national environmental standards and laws may operate to limit free trade rights. The consensus is that 'unilateral measures should be avoided but that they are not, per se, prohibited'.[38]

To illustrate, Principle 12 of the Rio Declaration which has four parts states:

(1) States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable developmenmt in all countries, to better address the problem of environmental degradation.

(2) Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

(3) Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.

(4) Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on international consensus.

Here are internationally agreed policy principles, many of which are already reflected in GATT/WTO law and in the major MEAs. Principle 12(1) urges states to co-operate for linked economic and environ-

38 P Sands, 'International Law in the Field of Sustainable Development', (1994) 65 *BYBIL* 303 at 368.

mental aims. Principle 12(2) on limits to the use of trade measures for environmental purposes uses the language of GATT Article XX, the *chapeau*. Principle 12(3) was followed in the GATT Panel ruling in the *Second Tuna/Dolphin* case. And Principle 12(4) emphasises that consensus should be the basis for measures to tackle trans-boundary or global environmental issues.

The Forest Principles also adopted at Rio urge the adoption of non-discriminatory and multilaterally agreed rules, consistent with international trade law, to facilitate open and free trade in forest products. This has been followed up in the International Tropical Timber Agreement. In this area, it appears that the balance favours exploitation of and increased trade in the resource, albeit supposedly in a sustainable way, rather than concerns for the depredation of rain forests and the threat to certain species.

A third instrument adopted at Rio was the celebrated, if not notorious, Climate Change Convention. Article 3, headed 'Principles', echoes in paragraph 5 the link between economic and environmental aims seen in Principle 12(1) of the Rio Declaration, and it uses the familiar language of the *chapeau* to GATT Article XX:

> The parties should co-operate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[39]

In concluding, it is appropriate to recall the firm statement in the Marrakesh Ministerial Declaration made at the birth of the WTO, that there neither should nor need be any policy contradiction between upholding an open, non-discriminatory and equitable international trading system, and acting for the protection of the environment and the promotion of sustainable development. The WTO member countries have some difficult decisions to make in future years if they are to abide by the Rio principles and produce fair, workable and acceptable trade rules which respect both of these objectives, endorsed as non-contradictory by the overwhelming majority of States. The challenge is great. These aims and objectives must continue to be viewed as realistic. They must not be abandoned by the international community, because they are of fundamental impor-

39 (1992) 31 ILM 849.

tance to planet earth itself. The process of achieving them will be lengthy and difficult, requiring long-term commitment by WTO members. As Jennifer Schultz of Monash University has aptly said, the challenge is 'to make international trade a supportive factor in sustainable development'.[40]

40 (1995) 89 *AJIL* 423 at 437.