

# The Rising Tide of Green Unilateralism in World Trade Law

## *Options for Reconciling the Emerging North–South Conflict*

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### I. INTRODUCTION

In recent years, tensions between environment and trade policies have significantly increased, fuelled by a host of trade disputes over issues as diverse as tuna, shrimps, automobiles, furs, or meat of cattle treated with certain growth hormones.<sup>1</sup> In these and many other cases, some States wanted to ban the import on environmental grounds, while exporting States invoked their rights of non-discrimination in trade granted under the General Agreement on Tariffs and Trade (GATT)<sup>2</sup> and other agreements under the World Trade Organization (WTO).<sup>3</sup> A central issue in this conflict is the legitimacy of unilateral action and national decision-making under WTO law, as opposed to multilateral decision-making. A second line of conflict—often indistinguishable from the first—runs between the governments of the large developed markets in the North, with their strong environmentalist movements, and the smaller trading nations, in particular in the developing world.

Many industrialised countries want to place the environment and trade nexus on the agenda of future WTO negotiations, with the intention of bringing environmental standards into the WTO legal framework or of opening up additional avenues for unilateral action.<sup>4</sup> In contrast, many governments and non-governmental organisations

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<sup>1</sup> For an overview see S. Charnovitz, *Trade Measures and the Design of International Regimes*, 5 *Journal of Environment and Development* (1996), 168–196, at 176.

<sup>2</sup> *General Agreement on Tariffs and Trade*, Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, in World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: WTO, 1995); also in 33 *International Legal Materials* (ILM) 13 (1994). GATT 1994 covers the provisions of GATT 1947 along with the amendments, affiliated agreements and a protocol. In the following, GATT refers to GATT 1994 if not noted otherwise.

<sup>3</sup> *Agreement Establishing the World Trade Organization* (WTO Agreement), in Final Act, note 2, above.

<sup>4</sup> European Commission, *The EU Approach to the Millennium Round: Communication from the Commission to the Council and to the European Parliament* (Brussels: European Commission, 1999), available at [www.europa.eu.int/comm/trade/pdf/0807nr.pdf](http://www.europa.eu.int/comm/trade/pdf/0807nr.pdf) (printout of 8 September 2000). On European non-governmental organisations, see, e.g., the position of the Working Group on Trade of the German Non-Governmental Organizations Forum on Environment and Development, *epd-Entwicklungspolitik* (1999), No. 9, 28–30. For an academic discussion, see, for example, D. Esty, *Greening the GATT: Trade, Environment, and the Future* (Washington, D.C., Institute for International Economics, 1994); S. Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 *Cornell International Law Journal* (1994), 459–525.

of developing countries object to any changes in the WTO regime in this field.<sup>5</sup> Developing countries argue that WTO law has never hindered multilateral environmental agreements even where they were trade-restrictive, and that such agreements have never been subject to dispute settlement under the GATT/WTO regime.<sup>6</sup> In recent discussions on establishing environmental standards within WTO law, developing countries often feel threatened by what they perceive as an emerging environmental unilateralism and even “eco-colonialism” of industrialised countries. To them, the multilateral WTO dispute settlement procedure is an important safeguard to protect their economic and development interests and their options for choosing environmental standards adequate to their economic status.<sup>7</sup> The heated debates surrounding the 1999 Ministerial Conference in Seattle indicate that North–South conflicts may dominate future trade negotiations, also because of this persistent disagreement about environment and trade.

How could these conflicts be resolved keeping in mind the double objective of global environmental protection and the further development of a multilateral trading regime? In this article, it is argued that there is indeed a need for a reform of WTO law regarding the trade and environment nexus. Section II discusses recent developments in WTO law and identifies three major reform needs. Section III presents the outline of a possible authoritative interpretation of WTO law by the WTO Ministerial Conference that could reconcile different objectives and assist in maintaining a free and multilateral trading regime while not obstructing effective global environmental governance. Section IV summarises the findings of the study and offers a possible legal draft of an “Understanding on the Interpretation of Certain Provisions Relating to the Protection of Human, Animal or Plant Life or Health, or the Environment”.

## II. MULTILATERALISM AND GREEN UNILATERALISM IN WTO LAW

The following section will discuss recent developments in the interpretation of WTO law and outline three reform needs regarding the rising tide of green unilateralism in world trade law. Section A below addresses the legal status in WTO law of multilateral environmental agreements with a high degree of participation by governments, and sections B–C below examine the legitimacy of unilateral action by individual governments (or of multilateral agreements with only a limited degree of participation).

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<sup>5</sup> Cf. for instance the Declaration of the South Summit from the Group of 77, 12–14 April 2000, available at [www.g77.org](http://www.g77.org), and the Declaration of the Meeting of the “Group of 15”—which embraces 17 major developing countries—from 17 to 18 August 1999 in Bangalore, reported in 3 Bridges Between Trade and Sustainable Development (1999), No. 6, at 12. Cf. also The Financial Times of 18 August 1999 (“India urges G15 to push for market access”), and of 9 September 1999 (“Rich and poor clash over trade and environment”). On non-governmental actors, see 3 Bridges Between Trade and Sustainable Development (1999), No. 6, at 19; The Financial Times of 16 September 1999.

<sup>6</sup> Cf. in more detail World Trade Organization, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT: Note by the Secretariat*, WTO Doc. WT/CTE/W/53/Rev. 1 of 26 October 1998.

<sup>7</sup> The Economist, 25 September 1999.

## A. MULTILATERAL ENVIRONMENTAL AGREEMENTS: THE NEED TO DEFINE MULTILATERALITY

### 1. *Legal Analysis*

Many environmentalists, as well as some governments in industrialised countries, fear that the increasing discipline in trade policy brought about by the WTO will undermine the effectiveness of multilateral environmental agreements. These fears have so far remained unfounded. A 1993 GATT study showed that 19 out of 140 multilateral environmental treaties had some relevance for the trading regime:<sup>8</sup> none has as yet been challenged or affected by WTO law.

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>9</sup> for instance, bans trade in protected species with non-parties unless they comply with treaty provisions. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)<sup>10</sup> bans the import or export of wastes from States that are not party to the treaty. Likewise, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)<sup>11</sup> restricts trade with non-parties, for example by requiring governments to ban the import of goods that have been produced by non-parties with ozone-depleting substances even if those goods no longer contain such substances.<sup>12</sup> Notably, trade in such goods amounted to 16 percent of world trade before the Protocol entered into force.<sup>13</sup> The trend of establishing multilateral environmental rules with trade effects continues, as evidenced by the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)<sup>14</sup> and the 2000 Cartagena

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<sup>8</sup> GATT, *Trade Provisions Contained in Multilateral Environmental Agreements*, GATT Doc. TRE/W/1/Rev.1 of 14 October 1993.

<sup>9</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Washington, D.C., 3 March 1973, in force 1 July 1975, 12 ILM 1085 (1973), Art. X.

<sup>10</sup> *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Basel, 22 March 1989, in force 24 May 1992, 37 ILM 22 (1998). Cf. J. Krueger, *What's to Become of Trade in Hazardous Wastes? The Basel Convention One Decade Later*, Environment, November 1999, 10–21.

<sup>11</sup> *Protocol [to the 1985 Vienna Convention on the Protection of the Ozone Layer] on Substances that Deplete the Ozone Layer*, Montreal, 16 September 1987, in force 1 January 1989, 26 ILM 1550 (1987). The various amendments are discussed in the seminal study on the ozone regime, R. Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet*, second enlarged edition (Cambridge, Mass.: Harvard University Press, 1998). On trade, cf. also W. Lang, *International Environmental Agreements and the GATT: The Case of the Montreal Protocol*, 40 *Wirtschaftspolitische Blätter* (1993), 364–372.

<sup>12</sup> Montreal Protocol, Art. 4.4. Parties decided in 1993 to postpone implementation of this provision because the Protocol was almost universally recognised. Cf. *Report of the V. Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Bangkok, 17–19 November 1993, UN Doc. UNEP/OzL.Pro. 5/12 of 19 November 1993, Decision V/17. See also World Trade Organization, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol*, UNEP, WTO Doc. WT/CTE/W/115 of 25 June 1999, paras 5 ff.

<sup>13</sup> A. Enders and A. Porges, *Successful Conventions and Conventional Success: Saving the Ozone Layer*, in *The Greening of World Trade Issues*, edited by K. Anderson and R. Blackhurst (New York: Harvester Wheatsheaf, 1992), 130–144, at 132.

<sup>14</sup> *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, Rotterdam, 10 September 1998, not in force, in *Annex 1 to the Final Act of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, UN Doc. UNEP/FAO/PIC/CONF/5 of 17 September 1998.

Protocol on Biosafety to the 1992 Convention on Biological Diversity (Biosafety Protocol),<sup>15</sup> both of which are not yet in force.

These multilateral environmental agreements contradict at least some of the basic obligations under GATT,<sup>16</sup> notably Articles I, III and XI. Nonetheless, parties to these agreements will generally be able to justify their action under Article XX of GATT, the general exception clause. This proviso permits WTO members all trade restrictions that are “necessary to protect human, animal or plant life or health” (Article XX(b) GATT) or that are “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption” (Article XX(g) GATT). Both exemptions are restricted by the chapeau of Article XX, which subjects exceptions 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”.

Because no complaint has yet been filed against multilateral environmental agreements before the WTO, no guidance for the interpretation of this provision exists from panel decisions or rulings from the WTO Appellate Body. It seems, however, that most fears about the incompatibility of the core multilateral environmental agreements with WTO law are unfounded. First, Article XX(b) and (g) of GATT are quite broadly formulated. Parties are allowed to deviate from their obligations under GATT in order to protect the health of humans, animals and plants and to protect exhaustible natural resources, as long as they comply with the provisions of the chapeau of Article XX. In interpreting this provision, it is important to note that the vast majority of WTO members have already made use of this exception in their support of multilateral environmental agreements. CITES, for example, has been ratified by 90 percent of WTO members. Altogether, CITES has 152 members and is thus almost universally recognised as the general standard of behaviour in this issue area.

The situation is similar for most other multilateral environmental agreements:<sup>17</sup> 97 percent of WTO members have ratified the United Nations Framework

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<sup>15</sup> *Cartagena Protocol on Biosafety*, Montreal, 29 January 2000, not in force, available at [www.biodiv.org/biosafe/protocol/pdf/cartagena-protocol-e.pdf](http://www.biodiv.org/biosafe/protocol/pdf/cartagena-protocol-e.pdf) (printout of 8 September 2000). Cf. P.W.B. Phillips and W.A. Kerr, *Alternative Paradigms: The WTO Versus the Biosafety Protocol for Trade in Genetically Modified Organisms*, 34 J.W.T. 4 (August 2000), 63–75; C.F. Runge and L.A. Jackson, *Labelling, Trade and Genetically Modified Organisms: A Proposed Solution*, 34 J.W.T. 1 (February 2000), 111–122; A. Gupta, *Governing Trade in Genetically Modified Organisms: The Cartagena Protocol on Biosafety*, 42 *Environment* (2000), No. 4, 23–33; A. Gupta, *Creating a Global Biosafety Regime*, 2 *International Journal of Biotechnology* (2000), Nos 1/2/3, 205–230.

<sup>16</sup> R. Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 *Recueil des cours* (1998) (with further references).

<sup>17</sup> This quantitative data must be interpreted, however, in light of the fact that the minorities include some major countries that are either not party to the WTO (like China and the Russian Federation) or not party to the multilateral environmental agreement (like the United States in case of the Biodiversity Convention).

Convention on Climate Change (Climate Convention);<sup>18</sup> 96 percent the 1987 Montreal Protocol; 95 percent the Convention on Biological Diversity (Biodiversity Convention);<sup>19</sup> 84 percent the Montreal Protocol as amended in 1990; 81 percent the Basel Convention; and 69 percent the Montreal Protocol as amended in 1992.<sup>20</sup>

Following the interpretative rule that legal norms must be construed, if possible, in a way that they do not contradict their aims and objectives, and considering the broad wording of Article XX, one can safely assume that the many WTO members that are parties to these “quasi-universal” multilateral environmental agreements do not view them as violating the spirit of GATT and being applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

## 2. Discussion

Hence, GATT is to be interpreted in such a way that trade restrictions required by quasi-universal multilateral environmental agreements fall under the purview of Article XX(b) and (g) of GATT as well as its chapeau.<sup>21</sup> Yet the problem of definition persists, in particular the circumstances under which a multilateral environmental agreement is sufficiently accepted to claim quasi-universal status and so be justifiably exempted under Article XX of GATT. Although multilateral environmental agreements have gone unchallenged in the WTO dispute settlement system so far, there is no guarantee that this tolerance will persist. For instance, when the Montreal Protocol entered into force in 1989, most developing countries were not party to it, including India and China. At that point in time, it could hardly be assumed that the Protocol enjoyed quasi-universal acceptance. If a comparable case were brought before the WTO dispute settlement mechanism today, the Appellate Body would eventually

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<sup>18</sup> Neither the Climate Convention nor its Kyoto Protocol of 1997 require trade restrictions. WTO law may become relevant here given the planned emissions trading regime and the domestic tax schemes that are currently introduced in several countries. Cf. *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, in force 21 March 1994, 31 ILM 849 (1992); *Kyoto Protocol*, Kyoto, 10 December 1997, not in force, 37 ILM (1998) 22. On trade aspects cf. D. Brack with M. Grubb and C. Windram, *International Trade and Climate Change Policies* (London: Earthscan, 2000); Z.X. Zhang, *Greenhouse Gas Emissions Trading and the World Trading System*, 32 J.W.T. 5 (October 1998), 219–239.

<sup>19</sup> *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 ILM 818 (1992). The Biodiversity Convention prescribes no trade restrictions, but is relevant insofar as it might result in conflict with treaties on intellectual property rights or conflicts regarding its first protocol, the Cartagena Protocol on Biosafety (cf. note 15, above). The Biodiversity Convention asserts precedence over other agreements when biodiversity is seriously threatened. Cf. Art. 22.1 of the Biodiversity Convention: “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”.

<sup>20</sup> For additional quantitative analysis, cf. W. Althammer, F. Biermann, S. Dröge and M. Kohlhaas in collaboration with D. Becker and K. Ballerstedt, *Handelsliberalisierung kontra Umweltschutz? Ansätze für eine Stärkung umweltpolitischer Ziele in der Welthandelsordnung* (Berlin: Analytica, 2001).

<sup>21</sup> R. Wolfrum, note 16, above, with further references.

have to determine whether the multilateral environmental agreement is legitimately covered under the exception clause of Article XX of GATT.

Such reference to the Appellate Body, however, seems to be only the second-best solution in highly contested policy arenas such as the trade and environment nexus. Essentially political questions call for a political procedure: they should not be left to the judiciary. Which quasi-universal multilateral environmental agreements should be accepted under Article XX of GATT, and which environmental agreements with limited participation should rather be considered unilateral action—such questions should be resolved by the international community through negotiation and mutual agreement.

This is the first need for reform suggested in this article.

#### B. UNILATERAL TRADE RESTRICTIONS RELATED TO PRODUCT CHARACTERISTICS: INCORPORATING THE PRECAUTIONARY PRINCIPLE?

What is the legal position of WTO members wishing to restrict their trade on environmental grounds with other WTO members without relying on a multilateral environmental agreement? International trade law differentiates here between trade restrictions addressing characteristics of the product, and trade restrictions addressing characteristics of the production process in the exporting country (the latter is discussed in section C below).

##### 1. *Legal Analysis*

WTO law permits any WTO member to ban the import of products it considers harmful to its citizens, provided that this ban relates to characteristics of the product. Moreover, the restrictions must apply equally to like domestic goods, they must not discriminate among different exporting countries, and must not represent a disguised trade barrier. In quite a few cases, the exact application of this rule has been contested before GATT and WTO dispute settlement panels, and some WTO members have been accused of devising their product standards in a way that favours domestic over foreign producers. A major conflict revolves around the definition of “like” products, including the question of whether importing States must base their distinctions between domestic and “like” foreign products on “sound science” or whether they can apply precautionary decision-making.

Some WTO agreements are intended to provide guidance on this issue, including the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>22</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS

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<sup>22</sup> *Agreement on Technical Barriers to Trade*, in Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, note 2, above. Cf. S.W. Chang, *GATTing a Green Trade Barrier: Eco-Labeling and the WTO Agreement on Technical Barriers to Trade*, 31 J.W.T. 1 (February 1997), 137–159.

Agreement),<sup>23</sup> which is of particular relevance for the trade and environment debate. Whereas the SPS Agreement strives for a global harmonisation of standards, it still permits members in Article 3.3 to introduce or maintain sanitary or phytosanitary measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards.

The Appellate Body has interpreted this proviso in the *EU Measures Concerning Meat and Meat Products (Hormones)* case, in which the European Union banned the import of meat of North American cattle that had been treated with certain hormones which European authorities believed to be harmful to human health.<sup>24</sup> The Body found that if a government wishes to apply a higher standard of protection, relying on Article 3.3 of the SPS Agreement, then it has, according to Article 5.1 of the SPS Agreement, “to ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health ...”.

According to the Appellate Body, the term “based on” does not imply that the party has to slavishly follow its own risk assessment, but rather that it can proceed in a precautionary manner.<sup>25</sup> The government also need not accept the opinion of the majority of the experts consulted, and it may take a certain risk potential or the probability of its appearance into consideration. Yet while every country is free to determine its own level of acceptable risk, it must, however, undertake a risk assessment of those substances in which trade is to be restricted. In view of the Appellate Body, it was this condition that the European Union failed to meet,<sup>26</sup> since it could not furnish a scientific risk assessment pertaining to the hormones used in cattle fodder in the United States and Canada.<sup>27</sup>

## 2. Discussion

The SPS Agreement, including its rendition of precautionary decision-making, relates only to sanitary and phytosanitary measures. As for other possible product

<sup>23</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures*, in Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, note 2, above.

<sup>24</sup> *EU Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, AB-1997-4, WTO Doc. WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998.

<sup>25</sup> In addition, the European Union could have relied on Art. 5.7 which stipulated that in a case “where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information ... In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time”.

<sup>26</sup> *EU Measures Concerning Meat and Meat Products (Hormones)*, note 24, above, paras 178 ff.

<sup>27</sup> Since then, the European Union has furnished the risk assessment for one of the hormones used in the United States in an interim report of May 1999, which asserted “a substantial body of recent scientific evidence that it has to be considered as a complete carcinogen”. The European Union announced on 24 May 2000 that it would not lift the import ban on hormone-treated beef, because one of the incriminated hormones was seen as carcinogenic. In accordance with the ruling of the Appellate Body, once this argument is substantiated, the EU import ban has to be recognised as being consistent with the SPS Agreement. Cf. 3 Bridges Between Trade and Sustainable Development (1999), No. 3, at 5, and 4 Bridges Between Trade and Sustainable Development (2000), No. 4, at 13.

standards, they remain under the purview of the general exception clause of Article XX of GATT. Therefore, environmentalists have argued that a precautionary approach should be either directly embodied in WTO law by way of a treaty amendment, or else be accepted as interpretative principle—for example as part of customary international law—that underlies Article XX of GATT.<sup>28</sup> On the other hand, the United States and Canada contested, in their submissions in the *Hormones* case, the existence of such a norm of customary international law, preferring instead the notion of a “precautionary approach” used as a policy tool by governments, with different renditions in each country.<sup>29</sup> The term precautionary “approach”—instead of the more demanding “principle”—is also used in the 1992 Rio Declaration on Environment and Development, which asserts in Principle 15:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Some multilateral environmental agreements—like the Montreal Protocol<sup>30</sup> or the Biosafety Protocol<sup>31</sup>—build explicitly on the precautionary approach, as do many national laws. Whether this suffices, however, to establish international custom appears questionable. First, it is unclear to what extent consistent practice exists in this field, since the individual treaties and national laws do not specify the content of a “precautionary principle” as a possible norm of customary international law. Secondly, many nations still contest the validity of a “precautionary principle” as customary international law, including the United States, Canada and many developing countries.

Given this persisting disagreement, it is questionable whether incorporating a “precautionary principle” in WTO law without further safeguards would be either desirable or feasible. In particular, this could facilitate unilateral misuse and extraterritorial application of national environmental policy. In extreme cases, larger trading nations could exploit the lack of scientific evidence for protectionism or for an

<sup>28</sup> For an overview, see K. von Moltke, *The Dilemma of the Precautionary Principle in International Trade*, 3 *Bridges Between Trade and Sustainable Development* (1999), No. 6, 3–4. See also P. Sands, *Principles of International Environmental Law*, Vol. 1 (Manchester: Manchester University Press, 1995), at 212; J. Cameron and J. Abouchar, *The Status of the Precautionary Principle in International Law*, in *The Precautionary Principle in International Law*, edited by D. Freestone and E. Hey (London: Kluwer Law International, 1996), at 52.

<sup>29</sup> Cf. the North American arguments documented in *EU Measures Concerning Meat and Meat Products (Hormones)*, note 24, above, para. 43 (for the United States) and para. 60 (for Canada).

<sup>30</sup> Cf. the preamble of the Montreal Protocol (note 12, above): “The Parties to this Protocol, ... Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations, ... Have agreed as follows ...”.

<sup>31</sup> Cf. Biosafety Protocol, Art. 1: “In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.”

internationalising of their value systems. This would *de facto* lead to an intensification of the North–South conflict in the field of international trade as well as global environmental policy. Developing countries, therefore, have generally objected to any further strengthening of the precautionary approach in WTO law.<sup>32</sup>

The solution here is to take recourse to multilateralism which embraces both industrialised and developing countries. The international community proved that it could deal collectively and adequately with scientific uncertainty in line with the precautionary approach. Two forms of multilateralism are conceivable: multilateral regulation based on precaution, and deference to national decision-making in specified areas of extreme uncertainty or dispute.

The first approach has been adopted in ozone policy. Here, uncertainty about the risks involved with CFCs led to a joint action by the international community that eventually resulted in almost complete CFC phase-out, including the prohibition of CFC trade with non-parties to the Montreal Protocol.<sup>33</sup> Notably, the Protocol explicitly accounts for different responsibilities and capabilities of countries and grants developing countries a grace period of ten years, along with financial and technological transfer.<sup>34</sup> The second approach has been adopted in the Biosafety Protocol.<sup>35</sup> Here, in an area of widely divergent risk perceptions regarding the safety of genetically modified organisms that precludes a global harmonisation of standards, the Protocol defers to national “advance informed agreement” regarding import of such organisms. However, the scope of national decision-making remains specified and restricted to living modified organisms.

Both these multilateral approaches are consistent with the general objective of free trade, and both should take precedence over WTO law. Regarding the Biosafety Protocol, however, its relationship with WTO regulations remains disputed.<sup>36</sup> To ensure that both these multilateral approaches maintain precedence over WTO law, is thus the second reform objective suggested in this article.

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<sup>32</sup> M. Shahin, *Trade and Environment in the WTO: Achievements and Future Prospects*, Third World Network, 1997, available at [www.twinside.org.sg/title/ach-cn.htm](http://www.twinside.org.sg/title/ach-cn.htm) (printout of 8 September 2000).

<sup>33</sup> Cf. Benedick, note 11, above.

<sup>34</sup> Cf. F. Biermann, *Financing Environmental Policies in the South: Experiences from the Multilateral Ozone Fund*, 9 International Environmental Affairs (1997), No. 3, 179–218.

<sup>35</sup> Cf. notes 15 and 31, above.

<sup>36</sup> Cf. the articles by Gupta, by Phillips and Kerr, and by Runge and Jackson, cited in note 15, above. The Protocol left this question deliberately vague. Cf. the Protocol’s Preamble: “The Parties to this Protocol, ... *Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development, *Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements, Have agreed as follows ... ” (emphasis added).

C. UNILATERAL TRADE RESTRICTIONS RELATED TO FOREIGN PROCESSES AND PRODUCTION METHODS: REVERSING SHRIMP–TURTLE?

1. *Legal Analysis*

Certain trade restrictions do not concern the product itself but the type of production method abroad which the importing country seeks to influence. Regarding such measures, WTO law has undergone significant changes over the past few years following a series of decisions by dispute settlement panels and the WTO Appellate Body. In its ruling on the *United States—Import Prohibition of Certain Shrimps and Shrimp Products* case of 12 October 1998,<sup>37</sup> the Appellate Body has clarified the previously controversial interpretation of Article XX(g) of GATT regarding its extraterritorial application and its application to foreign processes and production methods, thus revising the decision of an earlier dispute settlement panel.<sup>38</sup>

In this case, the United States had banned import of shrimps that were caught by Asian fishers through methods not corresponding to US environmental standards.<sup>39</sup> The United States argued that too many sea turtles were killed due to these fishing practices (as accidental catches since the nets hindered sea turtles from escaping).

The Appellate Body found, first, that measures concerning foreign processes and production methods could fall under the purview of the exception clause of Article XX(g), which had earlier been controversial.<sup>40</sup> The US trade restrictions did not discriminate between characteristics manifest in the product—that is, differences between Asian and North American shrimps—but only between fishing practices.<sup>41</sup> In other words, the United States had banned the import of only such shrimps that had

<sup>37</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, AB-1998-4, WTO Doc. WT/DS58/AB/R of 12 October 1998, 38 ILM 118 (1999). On this case, see for example, S. Cone, *The Appellate Body, the Protection of Sea Turtles and the Technique of “Completing the Analysis”*, 33 J.W.T. 2 (April 1999), 51–61; R. Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 J.W.T. 5 (October 1998), 73–100; K. Jones, *Trade Policy and the Environment: The Search for an Institutional Framework*, 53 *Aussenwirtschaft* (1998), 409–434; P.C. Mavroidis, *Trade and Environment after the Shrimps-Turtles Litigation*, 34 J.W.T. 1 (February 2000), 73–88; R. Wolfrum, note 16, above.

<sup>38</sup> Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WTO Doc. WT/DS58/R of 15 May 1998, 37 ILM 832 (1998).

<sup>39</sup> The US Endangered Species Act of 1973 and later regulations required US shrimp fishers to use certain devices that would reduce accidental catch of sea turtles. In 1989, the United States banned the import of shrimps caught by ships that did not use such devices. At first, this ban applied only to Latin American countries. Some US environmentalists, however, filed a complaint in a US court to the effect that this legislation be applied worldwide. In 1995, a US court ordered the US administration to apply the ban to all other shrimp fishing nations. This led to a complaint by India, Malaysia, Pakistan and Thailand under WTO law.

<sup>40</sup> The Panel in the *Shrimp–Turtle* case did not examine either Art. XX(b) nor (g) because the United States was found in violation of its chapeau. The Appellate Body found on the other hand that letters (a)–(j) were to be examined prior to the chapeau, and deemed the controversial US trade legislation to be justifiable according to Art. XX(g) GATT. According to the Appellate Body, the United States had however violated the chapeau (see here in detail, note 45, below). Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, note 38, above; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, note 37, above.

<sup>41</sup> The violation of Art. XI.1 GATT by the US legislation was not controversial. The United States justified this violation with Art. XX(b) and (g) GATT. The plaintiffs alleged a violation of Art. I.1 and Art. XIII.1 GATT, which the Panel did not examine due to the breach of Art. XI.1. Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, note 38, above, paras 7.17 and 7.22.

been produced with methods not consistent with US environmental standards. Notably, the Appellate Body does not seem to draw a line between these fishing techniques and other production methods in exporting countries, such as production methods that affect the global climate or cause transboundary pollution.

Secondly, the Appellate Body held that the exception clause of Article XX(g) covers trade restrictions that seek to protect exhaustible natural resources outside the jurisdiction of the importing State. The Appellate Body supported the interpretation advanced in 1994 by a GATT panel in the *Tuna–Dolphin* case (*Mexico v. United States*),<sup>42</sup> which had in turn revised a previous panel report.<sup>43</sup> In the *Shrimp–Turtle* decision, the Appellate Body found:

“that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. ... The sea turtle species here at stake ... are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claim any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat—the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature and extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).”<sup>44</sup> (emphasis added).

Thus, even though the Body did not explicitly endorse an extraterritorial application of Article XX(g), it recognised that in the case in question, there was sufficient connection between the United States and the Asian sea turtles, because the species of migrating turtles in question lived in both Asian and US waters, and in the high seas. Despite its somewhat opaque language, it seems that the decision of the Appellate Body could be interpreted as offering an inroad for the extraterritorial application of Article XX(g) of GATT if there is some link between the importing State and an environmental good which is threatened by actions under the control of the exporting State. Should this ruling find wider application, it may well be used as justification for trade restrictions regarding the global climate, because any country will be naturally connected to any other country with regard to this resource.

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<sup>42</sup> *United States—Restrictions on the Imports of Tuna*, Report of the Panel, submitted to the Parties on 20 May 1994, 33 ILM 839 (1994). The conflict has not yet been resolved. On 6 August 2000, Mexico called for consultations with the United States, arguing that the United States would not comply with its prior commitments to lift the trade ban against Mexico. Mexico reserved the right to take the issue to the WTO should it not be resolved (see Bridges Weekly Trade News Digest 4, No. 31, 2000; 4 Bridges Between Trade and Sustainable Development 2000, No. 6, at 1). The panel decisions are discussed in J. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 Washington and Lee Law Review (1992), 1407–1454, and B. Kingsbury, *The Tuna–Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Yearbook on International Environmental Law (1994), 1–40.

<sup>43</sup> *United States—Restrictions on Imports of Tuna*, Report of the Panel, submitted to the parties on 16 August 1991, 30 ILM 1594 (1991).

<sup>44</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, note 37, above, para. 133.

The caveat is the chapeau of Article XX. Here, the Appellate Body found the United States in violation of the chapeau and considered the US legislation an arbitrary or unjustifiable discrimination between countries where the same conditions prevail.<sup>45</sup> Hence, in the end the appeal of the Asian countries was upheld. Despite this, many developing country experts view the judgment with concern and consider their countries' success a "hollow victory" and a "bitter pill to swallow".<sup>46</sup>

## 2. Discussion

A clarification of the limits of Article XX of GATT by the Appellate Body in the *Shrimp–Turtle* case was certainly needed. The current wording of Article XX dates back to 1947, when environmental policy was hardly a subject of State interest and interstate conflict. Thus, now decisive issues—especially whether Article XX(b) and (g) can be used extraterritorially and whether it covers foreign processes and production methods—cannot be answered from the mere wording of the Article. This has resulted in substantial uncertainty for trading partners and in significant potential for trade conflicts. In this respect, the decision of the Appellate Body is to be welcomed.

On the other hand, the finding of the Appellate Body equals a shift of balance in the trade and environment nexus that gives greater reign to unilateral policy and that will thus be opposed by smaller trading nations.<sup>47</sup> Given the *Shrimp–Turtle* ruling, governments may now require their trading partners to adhere to certain environmental processes and production methods, as long as this trade-restrictive practice is consistent with the chapeau of Article XX, in particular with the test that

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<sup>45</sup> According to the Appellate Body, the US trade legislation violated the chapeau of Art. XX for five reasons. The United States had failed: (1) to create a transparent process through which foreign producers could apply for certification of a "turtle friendly" catching method; (2) to recognise foreign practices that had similar effects without being identical to US standards; (3) to allow for turtle protection programmes of other States that did not prescribe comparative catching devices as laid down by the US law, but could have similar effects regarding the protection of turtles; (4) to strive for serious negotiations to seek a solution of the problem with the plaintiff States; and (5) to grant the four complaining States the same period for compliance with US legislation as had been granted to other shrimp exporting States in Latin America. Cf. in more detail also Cone, note 37, above. Once the United States rectifies these five faults, it will be able to justify its trade restrictions with Art. XX(g) GATT. Shrimp-catching nations will then have to adopt such methods that in effect correspond to standards prescribed by the United States, even though they may be allowed to adopt other methods as long as those produce results similar to those of US methods. The implementation of this ruling in the United States is still incomplete because US environmental organisations oppose changes to the present US legislation. See here 3 Bridges Between Trade and Sustainable Development (1999), No. 6, at 11, and (2000), No. 4, at 6.

<sup>46</sup> Cf. Sandeep K. Tatarwal and Pradeep S. Mehta, *Process and Production Methods (PPM) Related Environmental Standards: Implications for Developing Countries* (Jaipur: Centre for International Trade, Economics and Environment (Briefing Paper No. 8), 2000).

<sup>47</sup> For another view, cf. K. Liebig, who argues that in the *Shrimp–Turtle* ruling, the Appellate Body "moves away from a very restrictive, trade centred interpretation of GATT law and towards a position in which trade and environmental objectives are more carefully weighed against one another". Cf. K. Liebig, *The WTO and the Trade Environment Conflict: The (New) Political Economy of the World Trading System*, Intereconomics (March/April 1999), 83–90, at 84. In general, one finds that developing countries—especially the plaintiffs, India, Malaysia, Pakistan and Thailand—object to the new legal development, whereas many environmental organisations of industrialised countries welcome it. Some environmentalists, however, have also sharply criticised the Appellate Body because the United States nonetheless lost the case. Cf. on this case the literature cited in note 37, above.

the Appellate Body has developed in the *Shrimp–Sea Turtle* case. Exporting countries would then have to follow the production methods demanded unilaterally by importing countries without the right or possibility to participate in the elaboration of these standards.

This decision of the Appellate Body might force smaller trading nations to adopt environmental standards of larger economies in order to safeguard their export markets. This in turn may inflict costs on smaller nations—especially in the developing world—that will not necessarily correspond to their social and economic preferences. For instance, in a recent research project on the consequences of the environmental policy of industrialised countries for developing countries, Tussie concluded that “environmental upgrading left to the market forces will reflect a Northern-biased agenda”.<sup>48</sup> The Organisation for Economic Co-operation and Development (OECD), too, remarked:

“Countries with large markets upon which exporters are dependent ... will be more successful in influencing the PPMs [processes and production methods] used by other countries, than will smaller nations whose market is proportionally less relevant. Thus, some argue that the United States and the European Union have been in a better position to influence environmental policy changes in other countries. For the most part, countries with small internal markets will not be able to impose trade restrictions successfully on large countries to which they export their products.”<sup>49</sup>

As for economic efficiency in world trade, the new legal interpretation of GATT would lead to suboptimal results because potential exporters may have to consider in their investment decisions a range of different production standards in different countries. It is problematic, too, that in a politically controversial area in which developing countries, the United States and the European Union represent different positions, the decision is left to an expert body which may not have the legitimacy to take such far-reaching decisions. Some writers have even accused the Appellate Body of judicial activism.<sup>50</sup> Given the high political salience of the relationship of unilateralism and multilateralism in world trade law, it would appear preferable to resolve such conflicts through intergovernmental negotiation, not through decision-making by technical and legal experts.

This does not, however, imply that trade restrictions concerning processes and production methods and with extraterritorial application shall have no place under WTO law at all. Free trade must not be seen as absolute. Therefore, WTO member States have explicitly recognised, in the preamble to the Marrakesh agreements, that trade must be conducted:

“in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ... .”<sup>51</sup>

<sup>48</sup> D. Tussie, *The Environment and International Trade Negotiations: Open Loops in the Developing World*, 22 *The World Economy* (1999), 535–545, at 544. See also the case studies in *The Environment and International Trade Negotiations: Developing Country Stakes*, edited by Diana Tussie (New York: St. Martin's Press, 2000).

<sup>49</sup> Organisation for Economic Co-operation and Development, *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures* (Paris: OECD, 1997), 33.

<sup>50</sup> S. Cone, note 37, above, at 60.

<sup>51</sup> Cf. WTO Agreement, Preamble.

The best political instrument to further these objectives are multilateral environmental agreements that can muster broad acceptance even if they may require trade restrictions based on processes and production methods in other WTO member States. Unilateral action by the larger importing nations, on the other hand, will inevitably restrict the freedom of smaller trading nations to determine their own environmental policies, and it will undermine legal security in trade. The Appellate Body failed to demarcate this line between environmentally-motivated trade restrictions in multilateral environmental agreements, and those that are unilaterally imposed by single States. The extended interpretation of Article XX of GATT in the *Shrimp-Turtle* case should thus be reassessed.

This is the third need for reform suggested in this article.

### III. THE CASE FOR AN AUTHORITATIVE INTERPRETATION OF WTO LAW BY THE WTO MINISTERIAL CONFERENCE

#### A. OUTLINE

To reconcile the objectives of the multilateral trading system with effective environmental policy, a reform of WTO law is called for. Such reform is needed, in particular, to limit the use of unilateral trade restrictions that aim at influencing production processes in foreign countries without the consent of those countries and without multilateral agreement. Some restrictions in international trade are clearly required to support the objectives of global environmental policy. Such restrictions, however, must be based on multilateral consent, not unilateral decree.

These reform needs could be resolved by an authoritative interpretation of Article XX of GATT and other provisions of WTO law by the WTO Ministerial Conference, in the form of an “Understanding on the Interpretation of Certain Provisions Relating to the Protection of Human, Animal or Plant Life or Health, or the Environment”. This interpretation would be based on Article IX.2 of the WTO Agreement, which grants the Ministerial Conference and the General Council the “exclusive authority to adopt interpretations” of the WTO Agreement and of the multilateral trade agreements.<sup>52</sup>

Such an authoritative interpretation of WTO law could achieve all three reform objectives identified in section II. It would clarify that Article XX does proscribe unilateral action by WTO members that aims at influencing the production processes

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<sup>52</sup> Cf. Art. IX.2 of the WTO Agreement: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.” As for GATT, the TBT Agreement, the SPS Agreement and other multilateral trade agreements listed in Annex 1A of the WTO Agreement, the supreme bodies of WTO shall exercise their interpretative authority following a recommendation by the Council for Trade in Goods. Cf. WTO Agreement, Art. IX.2 in connection with Art. IV.5.

in other countries without their consent and without multilateral agreement. Thus, the Ministerial Conference would re-establish the primacy of multilateral agreement as opposed to unilateralism, which has been cast into doubt by recent decisions of the Appellate Body. At the same time, an authoritative interpretation could specify the relationship between multilateral environmental agreements and WTO law, which has been a matter of dispute and concern over the last years.

Finally, the interpretation could introduce precautionary decision-making into international trade law while subjecting it to multilateral consent of the majority of WTO members. The interpretation would allow the Ministerial Conference to grant precedence to any multilateral environmental agreement that is widely accepted by governments, but may fall short of the science-based risk-assessment test that the SPS Agreement prescribes for unilateral action. The interpretation would also allow the Ministerial Conference to exclude highly-contested regulative domains from multilateral harmonisation by deferring decision-making to national and subnational actors in clearly defined areas. For example, the Ministerial Conference could specify the precedence of the Biosafety Protocol *vis-à-vis* WTO law.<sup>53</sup> This would allow WTO members to derogate from the predominantly science-based procedures established in the SPS Agreement by following other procedures that could be elaborated in the evolution of the Protocol once it enters into force.

All these issues could be linked in a carefully drafted understanding of interpretation of Article XX that permits any WTO member to enact trade policy measures addressing transboundary or global environmental problems—including measures that provide for standards related to the production of goods—provided that these measures are prescribed by certain multilateral environmental agreements listed in an annex to this decision which is to be further developed by the Ministerial Conference.

By such an authoritative interpretation, the Ministerial Conference would accept any trade-restrictive measures that governments may find necessary to agree to in the form of a multilateral environmental agreement. Thus, the uncertainty in the negotiation of environmental agreements regarding whether specific measures may run counter to WTO law would be resolved as long as it seems reasonable that a majority of the 140 WTO members—which now includes almost all major nations except for Russia and China—will later accept the specific trade restriction.

The following sections will discuss some of the more detailed questions that need be resolved if WTO members agreed on an authoritative interpretation of the trade law.

## B. AUTHORITATIVE INTERPRETATION VERSUS TREATY AMENDMENT

The first issue requiring discussion is that Article IX.2 of the WTO Agreement restricts the right of the Ministerial Conference to interpret WTO law insofar as the

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<sup>53</sup> Cf. note 15, above.

interpretation must not undermine the amendment provisions of the WTO Agreement.<sup>54</sup> In particular, an authoritative interpretation of Article XX of GATT by the Conference must not run counter to the wording of GATT, and it must not change rights and obligations of members. Otherwise, the right of members under Article X.3 of the WTO Agreement to object to amendments adopted by two-thirds of the members would be undermined.<sup>55</sup>

As has been demonstrated above, however, Article XX(b) and (g) of GATT has been formulated in a way that allows for different interpretations. In particular, it remains ambiguous whether the proviso applies to environmental goods outside the jurisdiction of the importing State and to foreign processes and production methods. Hence, an authoritative interpretation by the Ministerial Conference referring to both these questions does not amount to a treaty amendment, because rights and obligations of the members are not changed. Instead, existing but unclear obligations are merely concretised in view of changed circumstances since conclusion of the treaty in 1947. Likewise, the decision of the Appellate Body in the 1998 *Shrimp–Turtle* case cannot bind the Ministerial Conference as the latter is vested with exclusive interpretative authority.

Consequently, the more far-reaching proposals found in the literature—namely those in favour of formally amending WTO agreements to improve environmental protection<sup>56</sup>—lack justification unless they are meant to occasion other political reforms than those discussed in this article. Moreover, an amendment would cause much delay because it would enter into force only after formal acceptance by two-thirds of WTO members. An amendment would also bind only those members that accept it.<sup>57</sup> The legal status of States rejecting the amendment would thus remain unsettled, which would undermine security in trade.

It could be contended that the reform objectives proposed in this article could be achieved by a waiver granted by the Ministerial Conference in accordance with Article IX.3–4 of the WTO Agreement. This proviso states that “in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements ...”. It

<sup>54</sup> Cf. Art. IX.2, fourth sentence, of the WTO Agreement (note 52, above).

<sup>55</sup> Cf. WTO Agreement, Art. X.3: “Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C [which includes GATT], ... of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each other Member upon acceptance by it ...”

<sup>56</sup> A model could be Art. 104 of the North American Free Trade Agreement (NAFTA), stipulating that the trade-related aspects of CITES, the Montreal Protocol and the Basel Convention take precedence over NAFTA, in addition to any other multilateral environmental agreement that the three NAFTA parties may agree on by consensus. The European Union has at some point suggested an amendment of WTO law (for a critical view, cf. M. Shahin, note 32, above). The Working Group on Trade of German Nongovernmental Organizations (note 4, above) proposed an amendment of GATT by inserting a new para. (k) to Art. XX justifying any trade restriction “undertaken in pursuance of obligations under any Multilateral Environmental Agreement which has the approval of the United Nations Environment Programme (UNEP)”. Treaty amendments have been discussed in more detail in the literature, cf., for example, J. Nissen, *Achieving a Balance between Trade and Environment: The Need to Amend and the WTO/GATT to Include Multilateral Environmental Agreements*, 28 *Law and Policy in International Business* (1997), 901–928.

<sup>57</sup> Cf. WTO Agreement, Art. X.3 (see note 55, above).

is further stipulated that the waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing its application, and the date on which it shall terminate. Moreover, waivers are time-bound; any waiver granted for a period of more than one year must be reviewed by the Ministerial Conference not later than one year after it is granted. The Ministerial Conference decides on waivers by consensus or—after ninety days—by a three-fourths<sup>58</sup> majority.

Although this provision could be applied for trade restrictions motivated by environmental concerns, it seems inappropriate as a permanent solution to clarify the relationship between multilateral environmental agreements and WTO law. First, Article IX assumes exceptional circumstances of “a party”, even though waivers for a group of countries—such as parties to an environmental agreement—are technically feasible. The additional requirements, however, demonstrate that waivers in accordance with Article IX are a less than ideal solution to possible conflicts between WTO law and multilateral environmental agreements. Environmental agreements are intended to form part of an emerging permanent system of global environmental governance. It would be wrong to grant the WTO the privilege of revisiting each environmental agreement on a regular basis to appraise the persistence of “exceptional circumstances”.

The best solution, therefore, remains an authoritative interpretation of WTO law by the Ministerial Conference.

### C. WHICH MULTILATERAL ENVIRONMENTAL AGREEMENTS SHOULD TAKE PRECEDENCE, AND WHO SHALL DECIDE?

A further crucial issue is how to define those multilateral environmental agreements that should be listed in the annex to the decision and that should fall under the exception of Article XX. The first version of this annex—namely the list of certain environmental agreements—would be an integral part of the decision of the Ministerial Conference. Among the entries in this list would be CITES, the Montreal Protocol with its amendments, the Basel Convention, as well as the Rotterdam Convention and the Biosafety Protocol as soon as they enter into force. The Climate

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<sup>58</sup> The quorum for waivers granted by WTO remains ambiguous in the treaties. Art. XXV.5 of GATT (1947) stipulates that waivers require a two-thirds majority of the CONTRACTING PARTIES (capital letters refer to the parties acting as the conference of parties to GATT 1947) that must include half of the GATT parties. Art. IX.3 of the WTO Agreement, however, stipulates a three-fourths majority of the Ministerial Conference for waivers that may be granted regarding any Multilateral Trade Agreement such as GATT. There are no other provisions that could shed light on this discrepancy, neither in the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* (in: Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, note 2, above), nor in the *General interpretative note to Annex 1A* (ibid.), nor in Art. 2(b) of the *Explanatory Note to GATT* (which transfers tasks of the CONTRACTING PARTIES to the WTO Ministerial Conference, ibid.). Hence it is to be assumed that Art. IX.3 of the WTO Agreement—stipulating a three-fourths majority—precedes Art. XXV.5 GATT (two-thirds majority) according to the *lex posterior derogat legi priori* rule, because both the provisions prescribe norms “relating to the same subject-matter” (cf. Art. 30.1 of the Vienna Convention on the Law of Treaties) and with the same level of precision, which precludes the application of the *lex specialis derogat legi generali* rule.

Convention needs to be included, too, once possible conflicts between WTO law and the rules on emissions trading, joint implementation and the clean development mechanism—known as the Kyoto mechanisms—emerge. WTO members may also discuss whether certain clearly defined environmental policies pursued in order to comply with environmental agreements could be exempted from WTO law by interpreting Article XX accordingly. The most relevant example would be environmental taxation schemes intended to implement the Climate Convention.

To ensure that this list can be extended when future environmental problems require regulation, the Ministerial Conference needs to lay down procedures for amending the list. Several options exist which are set out below.

### 1. *Automatic Revision of the List of Eligible Treaties*

One option would be to provide for a built-in adjustment procedure that would automatically modify the list of eligible environmental treaties. This would require the Ministerial Conference to agree on an *ex ante* definition of possible future environmental agreements that would be considered as falling under the exception clause of Article XX of GATT. This definition could use quantitative or qualitative criteria, or a combination of both.

Quantitatively, a quorum could be fixed according to which trade-restrictive provisions of a multilateral environmental agreement would take precedence over WTO law (in the form of “if x percent of WTO members are party to a multilateral environmental agreement, this agreement shall be considered as being in accordance with the requirements of Article XX of GATT”). Such a rigid rule, however, may not do justice to all possible cases. In particular, some trade restrictions in multilateral environmental agreements could encompass only a fraction of WTO members but may be fully acceptable to the majority of WTO members, for instance in case of the trade-restrictive regional 1973 Agreement on Conservation of Polar Bears. Though it is possible to replace a global quorum with a regional one, this would require the demarcation of the regions in question. Such regions, however, would need to differ depending on the environmental problem at issue. In sum, quantitative *ex ante* definitions of permissible multilateral environmental agreements will only be feasible if the Ministerial Conference is granted the right to overrule the quorum in individual cases.

As for qualitative *ex ante* definitions, a multilateral environmental agreement would be required to show certain characteristics in order to be consistent with Article XX of GATT.<sup>59</sup> Nissen, for example, proposed a new paragraph (k) to Article XX of GATT that would exempt from WTO obligations certain multilateral environmental agreements that she defines by three criteria: (1) “extent of participation by countries

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<sup>59</sup> Different suggestions of individual countries have been reported in Trade and Environment News Bulletin (ed. by GATT) of 8 December 1995 (cited in Nissen, note 56, above) as well as M. Shahin, note 32, above).

concerned with the specific problem is adequate”; (2) “scientific evidence of the environmental problem being addressed is provided”; and (3) openness of the environmental agreements.<sup>60</sup> It remains unclear what exactly is meant by termini such as “scientific evidence”, “adequate extent of participation”, or “countries concerned with the specific problem” (who is concerned—the perpetrators of the problem or the affected?). Even if one could develop clearer terms than those suggested by Nissen, her proposal illustrates the problem inherent in qualitative *ex ante* definitions of multilateral environmental agreements. Similar problems will arise with other conceivable characteristics, for example, that a multilateral environmental agreement:<sup>61</sup>

- must have been negotiated under the auspices of the United Nations or its specialised organisations (which does not warrant wide ratification);
- must have been approved by the United Nations Environment Programme (which requires complex interagency agreements);<sup>62</sup>
- must have included countries from different regions of the world and with different economic and social levels of development in its negotiation process (which is difficult to define);
- must cover only transboundary or global environmental problems (which raises definition problems, too); and
- must guarantee financial and technological transfer to developing countries (how much and on whose terms?).

Any qualitative *ex ante* definition must be broad enough that not only present but all comparable future multilateral environmental agreements could be covered. At the same time, however, it must be restricted enough to avoid misuse by a few States. To negotiate such a formula in the present climate of fundamental disputes about trade and environment, with highly divergent views and substantial mistrust particularly between North and South, would require considerable political resources—or would remain a mission impossible. Because the requirements of future environmental problems cannot be foreseen in all detail, the Ministerial Conference needs to be granted, again, the right to exempt other agreements that fail the test.

A third option would be to leave the definition of multilateral environmental agreements unspecified, for instance by interpreting Article XX of GATT in a way that grants precedence to all “generally recognised standards and procedures for the prevention of transboundary environmental pollution and the protection of global environmental goods”, to some extent comparable to the distribution of responsibilities to be found in the UN Convention on the Law of the Sea.<sup>63</sup> Such a

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<sup>60</sup> Cf. Nissen, note 56, above.

<sup>61</sup> For a proposal of several other conditions to be placed on unilateral trade restrictions, cf. C. Helm, *Sind Freihandel und Umweltschutz vereinbar? Ökologischer Reformbedarf des GATT/WTO-Regimes* (Berlin: edition sigma, 1995); and Helm, *Transboundary Environmental Problems and New Trade Rules*, 23 *International Journal of Social Economics* (1996), No. 8, 29–45.

<sup>62</sup> According to the Working Group on Trade, note 4, above.

<sup>63</sup> *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, in force 16 November 1994, 21 ILM 1261 (1982).

decision would eventually transfer the right to decide specific cases to the dispute settlement mechanism, in particular to the Appellate Body, which would have to lay down guidelines on which environmental agreements would fall under this broad definition. As shown above, however, the dispute settlement mechanism does not have the legitimacy to decide the precedence of important instruments of global environmental governance in relation to WTO law. This should be left to intergovernmental negotiation and the community of States, acting, in this case, in the form of the WTO Ministerial Conference, which includes almost all governments.

In sum, a quantitative *ex ante* definition would not do full justice to the individual cases whereas a qualitative *ex ante* definition would require considerable political resources, if it were to succeed at all. In all three options, the Ministerial Conference must be allowed a certain degree of flexibility.

## 2. *Revision of the List of Eligible Treaties by the WTO Ministerial Conference*

Therefore, it appears preferable to transfer the decision to the Ministerial Conference right from the outset. The Ministerial Conference could assess, on a regular basis, the appropriateness of the list of environmental treaties that shall be deemed as consistent with Article XX, and amend the list accordingly.

It could be objected that such an *ex post* approach would leave too much uncertainty for negotiators of multilateral environmental agreements, because it would be unclear whether trade restrictions in environmental agreements would be later accepted by the WTO Ministerial Conference. The European Commission held the view that the WTO would then become the final authority over environmental agreements.<sup>64</sup> This argument, however, does not hold at least in the case of global environmental agreements. Most States in both the North and South are either already members of the WTO or are currently negotiating their accession, so that the WTO has become an almost universal organisation. Thus, it can be assumed that those States which negotiate multilateral environmental agreements will later agree on the conformity of the agreements with GATT. As long as trade restrictions in environmental agreements are passed by a broad consensus, it can be expected that in most cases this consensus will later persist in the WTO Ministerial Conference, since the same governments are represented there.<sup>65</sup>

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<sup>64</sup> Cf. Trade and Environment News Bulletin (ed. by GATT) of 8 December 1995, 3, cited in Nissen, note 56, above.

<sup>65</sup> Of course, conflicts between environmental and trade ministries within governmental bureaucracies abound in many countries, which might seem to contradict the assumption of consistent State behaviour in international treaty-making. For example, in the field of global biosafety regulation, domestic conflicts between ministries in many nations are currently being transferred to the international level and transformed, to some extent, into potential conflicts between the Biosafety Protocol and WTO. The authoritative interpretation as suggested here would not abolish these domestic conflicts between environmentalists and free traders but shift the locus of negotiation and compromise *de facto* back to the respective domestic political context by providing strong incentives for consistent national positions.

Moreover, the Ministerial Conference can decide *ex post* on only those provisions of multilateral environmental agreements through which environmental standards are enforced by means of trade restrictions. All further multilateral environmental agreements are outside, and remain outside, the jurisdiction of the WTO. Imposing environmental norms on individual States through trade restrictions is politically justified as long as these norms enjoy broad consensus and concern the common interests of the international community such as in the case of ozone layer protection.<sup>66</sup> There should be an assessment, however, about whether this broad consensus actually exists within the international community. If individual governments wish to set international standards by means of trade restrictions *vis-à-vis* non-consenting parties, then it appears reasonable that the WTO Ministerial Conference, with its almost universal membership, needs to examine and to endorse this action.

In general, the WTO functions by a consensus procedure. However, the WTO agreements provide for detailed voting procedures for all decisions by the members, and the Ministerial Conference needs to define a voting procedure for the further development of the list of multilateral environmental agreements that precede WTO law. Different options are feasible:

- a three-fourths majority, comparable to decisions under Article IX.2 of the WTO Agreement (authoritative treaty interpretation) and for several decisions under Article X of the WTO Agreement (certain amendments to the treaty);
- a two-thirds majority, comparable to decisions under Article VII of the WTO Agreement (budget and contributions) and for several decisions under Article X of the WTO Agreement (certain amendments to the treaty);
- a double-weighted majority as in Article 2.9(c) of the Montreal Protocol (as amended in 1990),<sup>67</sup> that is, the requirement of a two-thirds majority of parties that must represent a simple majority of both the industrialised and the developing countries. (A similar procedure has been adopted for decisions of the Global Environment Facility.)

In all cases in which no consensus can be reached, this quorum would eventually determine which multilateral environmental agreements will precede WTO law. A three-fourths majority would place greater limitations on the use of environmentally-motivated trade restrictions since they could be thwarted by a coalition of only a fourth of WTO members. The second and third alternatives would require a larger veto alliance of opponents to multilateral trade restrictions and thus be more progressive from the environmentalist point of view. By the same token, however, alternatives two and three would infringe more on the functional sovereignty of members and might thus be more difficult to achieve. All three options would require the consent of

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<sup>66</sup> Cf. F. Biermann, “*Common Concern of Humankind*”: *The Emergence of a New Concept of International Environmental Law*, 34 *Archiv des Völkerrechts* (1996), 426–481.

<sup>67</sup> Cf. London Amendment, 29 June 1990, in force 10 August 1992, 30 *ILM* 733 (1991).

the majority of developing countries, which would also be required for any reform of WTO law, be it an authoritative interpretation, or a weightier change, such as a formal treaty amendment.

#### D. AUTHORITATIVE INTERPRETATION OF OTHER WTO AGREEMENTS

Multilateral environmental agreements are affected not only by GATT but also by other WTO agreements. Some of those need to be reinterpreted, too, to allow for the precedence of multilateral decision-making in environmental policy.

##### 1. *The TBT Agreement*

The TBT Agreement<sup>68</sup> governs the introduction of national technical standards (which are manifest in the product) and takes precedence over GATT in its regulative area. The TBT Agreement grants WTO members the right to take trade-restrictive measures in order to protect a number of “legitimate objectives” such as “protection of human health or safety, animal or plant life or health, or the environment”.<sup>69</sup> Members have not, however, full reign as to the type of trade restrictions they wish to enact for environmental protection. Instead, Article 2.2 of the TBT Agreement stipulates that “technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”. Here, the TBT Agreement follows the necessity test as elaborated by GATT panels over the years in various legal disputes.<sup>70</sup>

The TBT Agreement may jeopardise multilateral environmental agreements, since it would, in case of doubt, authorise the WTO dispute settlement mechanism to assess whether trade-restrictive technical regulations contained in multilateral environmental agreements contradict WTO law. Thus, the TBT Agreement needs to be construed such that multilateral environmental agreements take precedence.

The entry-port for this would be Article 2.4 of the TBT Agreement, which states:

“Where technical regulations are required and relevant international standards exist ... , Members shall use them ... as a basis for their technical regulations except when such international standards ... would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”

<sup>68</sup> Cf. note 22, above.

<sup>69</sup> Cf. TBT Agreement, Art. 2.2. For the first time in international trade law, environmental protection (“or the environment”) has been explicitly accepted here in addition to the three other legitimate concerns included in Art. XX(b) of GATT (“human health or safety, animal or plant life or health”).

<sup>70</sup> Cf. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, adopted on 7 November 1990, GATT Doc. BISD 36S/200, para. 75: “The import restrictions imposed by Thailand could be considered as ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”

Article 2.5 establishes that:

“Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 [which includes environmental protection], and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”

Consequently, the Ministerial Conference could authoritatively interpret these provisions in a way that the provisions of certain multilateral environmental agreements shall be deemed, to the extent that they prescribe technical regulations or standards, to be international standards in the context of Article 2.4–5 of the TBT Agreement. This would ensure that those multilateral environmental agreements would not be negatively affected by the TBT Agreement.

The restriction of Article 2.4 of the TBT Agreement “except when such international standards ... would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems” targets specifically the developing countries and their particular circumstances. However, most environmental agreements already contain special regulations for developing countries, which has also been demanded in Principle 11 of the Rio Declaration on Environment and Development.<sup>71</sup> The limitation of environmental agreements through the exception clause within Article 2.4 of the TBT Agreement could thus possibly dilute the compromises adopted in the environmental agreements. In all, it should be, however, maintained for ensuring some flexibility in harmonising technical regulations related to environmental policy.

## 2. *The SPS Agreement*

The SPS Agreement, too, may in certain circumstances constitute a problem for multilateral environmental agreements. Again, the Ministerial Conference would need to interpret the SPS Agreement in a way that ensures that multilateral environmental agreements are not affected by the Agreement but will be strengthened instead. The link would be Article 3.2 of the SPS Agreement, which states:

“Sanitary or Phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”

Linked to this, Article 2.4 of the SPS Agreement stipulates that sanitary or phytosanitary measures which conform to the relevant provisions of the SPS

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<sup>71</sup> Cf. Principle 11 of the Rio Declaration on Environment and Development: “States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be appropriate and of unwarranted economic and social costs to other countries, in particular developing countries.”

Agreement “shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b)”. In other words, such measures of WTO members will most likely be justifiable under WTO law. Hence, the Ministerial Conference could interpret Article 3.2 of the SPS Agreement to the effect that sanitary or phytosanitary measures prescribed by certain multilateral environmental agreements shall be deemed to be international standards in the context of Article 3.1–3,<sup>72</sup> and presumed to be in accordance with Article 2.1–3, of the SPS Agreement.

Such a solution gains importance especially after conclusion of the Biosafety Protocol that will, once it enters into force, provide for certain regulations in the trade of genetically modified organisms among its parties.<sup>73</sup> It is still contested whether the Biosafety Protocol will precede WTO law or vice versa; moreover, it remains uncertain when the United States, a major exporter of genetically modified organisms, will accede to the Protocol since the country has yet to ratify the parent Biodiversity Convention. The authoritative interpretation suggested in this article would open up an avenue by which the WTO Ministerial Conference could accept all actions by members that are required by the Biosafety Protocol as legitimate exceptions under Article XX of GATT.<sup>74</sup> Given that the overwhelming majority of WTO members have taken part in the negotiation of the Biosafety Protocol and have ratified the Biodiversity Convention, such a decision appears not unrealistic in the medium term.

There is, however, a perhaps crucial restriction on the freedom of the Ministerial Conference to authoritatively interpret the SPS Agreement, because this could interfere with the treaty wording and might thus equal an amendment of WTO law. Then, an authoritative interpretation would be impossible, and a formal amendment required. This would be the case, in particular, when a multilateral environmental agreement required certain sanitary and phytosanitary measures “without sufficient scientific evidence”<sup>75</sup> or when it contradicted the standards, guidelines and recommendations established by the Codex Alimentarius, the International Office of

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<sup>72</sup> Cf. SPS Agreement, Art. 3.1–3: “1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.2. [cf. text above]. 3. Members may introduce or maintain sanitary or phytosanitary measures which result in higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5 ... .”

<sup>73</sup> Cf. note 15, above.

<sup>74</sup> Such a decision would raise questions about what form of action is exactly required by the Biosafety Protocol, and who decides in cases of conflict. These legal conflicts could be resolved either by the WTO dispute settlement mechanism, by the conference of the parties to the Biosafety Protocol, or, preferably, by a joint committee of both institutions.

<sup>75</sup> Cf. SPS Agreement, Art. 2.2: “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient evidence, except as provided for in paragraph 7 of Article 5.”

Epizootics, or the Secretariat of the International Plant Protection Convention, which have been defined as “international standards” in the SPS Agreement.<sup>76</sup>

#### IV. CONCLUSION

In sum, the most feasible option for reconciling conflicts between multilateralism and unilateralism in the trade and environment nexus is a WTO Ministerial Conference understanding on the authoritative interpretation of Article XX(b) and (g) of GATT and of the relevant provisions of the TBT and SPS Agreements, based on its competence under Article IX.2 of the WTO Agreement. In this understanding, relevant provisions of WTO law should be specified in such a way that they allow for environmentally-motivated trade restrictions regarding foreign processes and production methods and with extraterritorial influence, as long as those have been explicitly prescribed in a multilateral environmental agreement listed in the annex to the decision. Such a resolution could be passed—if no consensus can be reached—with a three-fourths majority of the members. A possible rendition of such decision is as follows:

“Understanding on the Interpretation of Certain Provisions Relating to the Protection of Human, Animal or Plant Life or Health, or the Environment.

*The Ministerial Conference,*

*Recalling* Principle 12 of the Rio Declaration on Environment and Development that trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, that unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided and that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus,

*Reaffirming* that the relations of Members 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, and expanding the production of and trade in goods and services, while allowing 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 in a manner consistent with their respective needs and concerns at different levels of economic development,

*Concerned* that disputes about the interpretation of Article XX lit. b and lit. g of the General Agreement on Tariffs and Trade have given rise to conflicts which may threaten both effective environmental policy and the expansion of world trade,

Hereby *decides* as follows:

1. Article XX lit. g of the General Agreement on Tariffs and Trade may allow any Member of the World Trade Organization to enact trade policy measures that address transboundary or global environmental problems, including such measures that may provide for standards related to processes and the production of goods, provided that these measures are prescribed by any one of the multilateral environmental agreements listed in Annex I to this decision.

<sup>76</sup> Cf. SPS Agreement, Annex A.3 in connection with Art. 3.

2. Trade policy measures that aim at protecting human, animal or plant life or health, or the environment, and that are prescribed by any one of the multilateral environmental agreements listed in Annex I to this decision, shall be deemed to be necessary in the context of Article XX lit. b of the General Agreement on Tariffs and Trade.<sup>77</sup>
3. The provisions of any one of the multilateral environmental agreements listed in Annex I to this decision shall be deemed, to the extent that they prescribe technical regulations or standards, to be international standards in the context of Article 2, paragraphs 4 and 5, of the Agreement on Technical Barriers to Trade (1994).
4. Sanitary or phytosanitary measures which are prescribed by any one of the multilateral environmental agreements listed in Annex I to this decision shall be deemed to be international standards in the context of Article 3, paragraphs 1 to 3, and presumed to be in accordance with Article 2, paragraphs 1 to 3, of the Agreement on the Application of Sanitary and Phytosanitary Measures (1994).
5. (a) Any Member of the World Trade Organization may initiate a proposal to amend Annex I to this decision by submitting such proposal to the Ministerial Conference.  
 (b) The Ministerial Conference shall decide, at its next session, whether the Annex shall be amended accordingly. Such decisions shall be taken by consensus or, if no consensus can be reached, by a three-fourths majority.  
 (c) In its considerations, the Ministerial Conference shall take into account that lack of full scientific certainty shall not be used as a reason for postponing multilateral cost-effective measures to prevent environmental degradation where there are threats of serious or irreversible damage.

#### Annex I

Cartagena Protocol (to the 1992 Convention on Biological Diversity) on Biosafety, done Montreal, 29 January 2000, on the ninetieth day after it has entered into force.

Convention on International Trade in Endangered Species of Wild Fauna and Flora, done Washington, D.C., 3 March 1973.

Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, done Basel, 22 March 1989.

Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, done 10 September 1998, on the ninetieth day after it has entered into force.

Protocol (to the Convention on the Protection of the Ozone Layer of 22 March 1985) on Substances that Deplete the Ozone Layer, done Montreal, 16 September 1987, as modified by the Amendment adopted in London, 29 June 1990, and the Amendment adopted in Copenhagen, 25 November 1992, according to the rules laid down in the Montreal Protocol.

United Nations Framework Convention on Climate Change, done New York, 9 May 1992, and its Kyoto Protocol, with respect to the implementation of Articles 6, 12 and 17 of the Kyoto Protocol.

*[Note: Regional treaties with trade-restrictive provisions will need to be added, too, such as the 1973 Agreement on Conservation of Polar Bears and others].*"

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<sup>77</sup> Paragraph 2 of this authoritative interpretation extends the application of Art. XX of GATT to health and environmental problems that are (i) not transboundary or global and/or (ii) do not cover "exhaustible natural resources" but may still need regulation by multilateral agreements. The Basel Convention would fall in the latter category, as well the Rotterdam Convention and the Biosafety Protocol.

Would this authoritative interpretation find sufficient support among WTO members? Most industrialised countries support some changes in WTO law concerning the trade and environment nexus. Also, the instrument of an authoritative interpretation has already been brought up for discussion by some governments, in particular by Switzerland,<sup>78</sup> as well as by Finland, Canada, and the United States.<sup>79</sup> In addition, most WTO members object to unilateral trade restrictions.

The majority of developing countries, however, have so far opposed any reform of Article XX of GATT. India, for instance, maintains that no multilateral environmental agreement has ever been hindered by WTO law.<sup>80</sup> In particular, most developing countries object to the extension of Article XX(b) and (g) to cover processes and production methods and to its extraterritorial application.<sup>81</sup> Yet this position may soon be reconsidered in light of the Appellate Body's ruling in the *Shrimp–Turtle* case, especially if this decision results in a further penetration of the multilateral world trade order by green unilateralism.

The authoritative interpretation suggested in this article might thus find support among developing countries. It would effectively prohibit all those environmentally-motivated trade restrictions that seek to influence foreign processes and production methods, and that are intended to protect environmental goods outside the importing country, unless these restrictions are explicitly required by a multilateral environmental agreement that has been endorsed by a majority of WTO members. Hence, such trade restrictions would never be legitimate without prior agreement by the majority of developing countries. In addition, the authoritative interpretation as suggested here would repeal the extension of Article XX of GATT that the Appellate Body has supported in its *Shrimp–Turtle* ruling. Given this, developing countries, including the plaintiffs in the *Shrimp–Turtle* case, might support this proposal.

Some actors within the United States, however, could feel inclined to object to the solution proposed in this article. Whereas the *Shrimp–Turtle* ruling has upheld the US argument with merely attaching certain restrictions on its application,<sup>82</sup> the authoritative interpretation suggested here would render some parts of the present US trade legislation as impermissible under GATT. Especially, the US policy against the import of tuna, shrimps and their products would be considered as violating WTO law

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<sup>78</sup> Cf. Switzerland, *The Relationship between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements (MEAs): Submission to the Committee on Trade and Environment*, WTO Doc. WT/CTE/W/139 of 8 June 2000.

<sup>79</sup> Cf. the report on the WTO High-level Symposium on Trade and Environment in March 1999, which reads: "Canada, supported by the US and Finland, stated that environmental considerations must necessarily feature in upcoming WTO negotiations. Key issues include: clarifying the relationship of MEAs and WTO rules through an interpretative statement; ...". Cf. International Institute for Sustainable Development (IISD), *Report on the WTO's High-Level Symposium on Trade and Environment, 15–16 March 1999*, available at [www.wto.org/english/tratop\\_e/envir\\_e/sumhlevn.pdf](http://www.wto.org/english/tratop_e/envir_e/sumhlevn.pdf) (printout of 8 September 2000).

<sup>80</sup> IISD, note 79, above.

<sup>81</sup> Cf. the position of the developing countries at the WTO High-level Symposium on Trade and Environment of 1999 (IISD, note 79, above).

<sup>82</sup> Cf. note 45, above.

as this has not been explicitly prescribed by corresponding agreements such as CITES or the Biodiversity Convention.

Taken together, the clarification of world trade law suggested here would fulfil several objectives. It would safeguard the freedom of smaller trading nations to determine environmental standards which they see as most appropriate regarding their respective state of development. It would also promote the pre-eminence of multilateralism in trade and environmental policies as opposed to unilateralism of larger and more powerful States. The protection of the global environment would not necessarily be hindered: instead of unilateral extraterritorial norm-setting, it would remain the responsibility of the international community, through negotiation and mutual compromise, to agree on the appropriate standards of global environmental governance.<sup>83</sup>

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<sup>83</sup> Cf. F. Biermann, *Justice in the Greenhouse: Perspectives from International Law*, in *Fair Weather? Equity Concerns in Climate Change*, edited by F. Tóth (London: Earthscan, 1999), 160–172; F. Biermann, *Linking Trade with Environment: The False Promise*, in *Environmental Diplomacy*, edited by The American Institute for Contemporary German Studies and The Heinrich Böll Foundation (Washington, D.C.: American Institute for Contemporary German Studies, 1999), 39–46.