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WHY MULTILATERALISM MATTERS IN RESOLVING TRADE-ENVIRONMENT DISPUTES

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I. INTRODUCTION

As the street scenes in Seattle in December 1999, and in Prague in September 2000, made clear, some environmental groups are demanding an end to free trade and globalization.1 They claim that trade liberalization and environmental degradation are linked in a direct cause-effect relationship.2 However, the WTO Secretariat’s Trade and Environment Report, published in October 1999, rejects sweeping generalizations on both sides of the issue. The report states that trade is neither good for the environment nor that it is bad for the environment.3 The WTO press release announcing the Secretariat’s Report notes, “[t]he real world linkages are a little bit of both, or a shade of grey.”4

Environmentalists argue that with free trade comes economic growth, and with economic growth comes unacceptable levels of pollution, habitat destruction, and species extinction. Further, because market mechanisms do not always take full account of environmental costs, a legal climate that promotes unbridled free trade could contribute to the unrestricted, transboundary movement of hazardous products and waste. While some commentators view

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1. Angry and Effective, THE ECONOMIST, Sept. 23, 2000, at 85. Not all environmental groups have demanded the end of free trade or the abolishment of the WTO. Cheryl Hogue, Environmental Groups Want Administration to Press for Reforms at WTO Ministerial, 16 Int’l Trade Rep. (BNA), No. 39, at 1606 (Oct. 6, 1999) (noting that National Wildlife Federation, the Sierra Club, Friends of the Earth, Defenders of Wildlife, and the Center for International Environmental Law support international trade); Why Greens Should Love Trade, THE ECONOMIST, Oct. 9, 1999, at 17; Embracing Greenery, THE ECONOMIST, Oct. 9, 1999, at 89 (noting that the Sierra Club wants to reform the WTO, not abolish it).


4. WTO, Trade Liberalization Reinforces the Need for Environmental Cooperation, Press Release 140 (Oct. 8, 1999). See also Embracing Greenery, supra note 1, at 89-90.
this interrelationship with concern, others, primarily environmentalists, view the poor fit between trade and the environment with alarm.5

Many environmentalists have been unrelenting in their WTO-bashing, casting the WTO in the role of environmental villain. Why are the WTO, and other free trade agreements, such as NAFTA, the target of environmentalists?6 The short answer is that the WTO is viewed, at best, as indifferent to legitimate environmental concerns, and, at worst, as hostile to them.7 The WTO has few, if any, friends among environmentalists, who vilify the WTO and have made it their bête noire.

Two events in the 1990s galvanized environmentalists in their antipathy toward the WTO and free trade. The first event was the 1991 GATT panel report in the Tuna/Dolphin dispute between Mexico and the United States.8 The second event was the 1998 WTO panel and Appellate Body reports in the Shrimp/Turtle dispute between India, Malaysia, the Philippines, and Thailand, as complainants, and the United States, as respondent.9


7. For a comparative analysis of the way in which trade and environment issues are resolved within the WTO, the EU, and NAFTA, see Richard H. Steinberg, Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 AM. J. INT’L L. 231 (1997).


For an overview of U.S. legislation that authorizes the imposition of unilateral trade sanctions on environmental grounds, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 131-35 (Comm. Print 1997).

What are environmentalists' specific misgivings about the WTO and free trade? The following is a non-exhaustive list of the grievances environmentalists have with the WTO:

- The WTO limits national sovereignty and thus restricts the environmental measures a country may wish to use.
- The WTO rejects production-based grounds as a reason for excluding an imported product.
- The WTO does not permit the imposition of countervailing duties on imports from countries with lax environmental laws.
- The WTO encourages harmonization of product standards, which will lead to a lowering of standards rather than a raising of the standards.
- The WTO prevents export bans on products (such as tropical timber), except in very narrowly defined circumstances.
- The WTO prevents the unilateral, extraterritorial imposition of environmental standards by one country on another.
- The most-favored-nation obligation prohibits countries from treating one country differently from another on the basis of different environmental policies in the two countries.
- The WTO's dispute settlement mechanism is secretive and does not permit environmentalists to intervene to present environmental considerations in the decision making process.

In a nutshell, environmentalists fear that countries with comparatively more stringent environmental standards will relax them under pressure from domestic industries. In an environmental version of Gresham's law, stringent environmental standards will be lowered so that domestic producers can remain competitive at home, relative to imports from countries with less demanding environmental standards, as well as remain competitive abroad in export markets.


countries, long the leaders in protecting the environment, will rollback their standards to discourage capital and job flight to "pollution havens" where environmental regulation is lax or non-existent. Developing countries, on the other hand, fear that the agenda of environmental groups will be taken up by developed countries and used as an excuse to adopt protectionist border measures.

The WTO Secretariat, in its 1999 study on trade and environment, responded directly and indirectly to some of these criticisms with the following conclusions of its own regarding the trade-environment relationship:

• Most environmental problems result from polluting production processes, certain kinds of consumption, and the disposal of waste products. Trade as such is rarely the root cause of environmental degradation, except for the pollution associated with transportation of goods.
• Environmental degradation occurs because producers and consumers are not always required to pay for the costs of their actions.
• Environmental degradation is sometimes accentuated by policy failures, including government subsidies to polluting and resource-degrading activities, such as subsidies to agriculture and fishing.
• Trade barriers generally make for poor environmental policy. Environmental problems are best addressed at their source.
• The competitive effects of environmental regulations are minor for most industries.
• Little evidence exists for the claim that polluting industries tend to migrate from developed to developing countries to reduce environmental compliance costs.
• Not all kinds of economic growth are equally benign for the environment. For example, economic growth based on energy-intensive industries is obviously not as benign to the environment as is economic growth driven by technological progress that saves inputs and reduces emissions.
• Effective international cooperation is essential to protect the environment, especially regarding transboundary and global environmental challenges.
• The cooperative model of the WTO, based on legal rights and obligations, could serve as a model for a new global architecture of environmental cooperation.12

The WTO Secretariat’s report concluded that, even within its current mandate, the WTO could do a few important things for the environment. The most obvious contribution would be to address remaining trade barriers on environmental goods and services in order to reduce the costs of investing in clean production technologies and environmental management systems. Another

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ECON. REV., at 18 (Nov. 1994); U.S. Int'l Trade Comm'n, Trade Liberalization and Pollution in Manufacturing, INT'L ECON. REV., at 18 (March 1995).
contribution would be to seek reductions in government subsidies that harm the environment, including energy, agriculture, and fishing subsidies. 13

The linkages and frictions, both legal and economic, between trade and the environment are undeniable. 14 Admittedly, the fit of international trade policy and international environmental policy is not well-tailored. Trade and environmental policies have proceeded at times on diverging tracks, at times on parallel tracks, and at other times on a collision course. 15 Trade and environmental policies co-exist against a backdrop of significantly different economic and legal philosophies. 16 The market economic model of government non-interference with the free flow of goods and services across national borders that is at the core of the GATT-WTO system has not found a niche in international environmental law. The market economy solution to the problem of pollution (i.e., "externalities," in economics terms) is to let the market, not the government, determine how and whether pollution is to be abated. But a market approach to abating environmental pollution has not worked well in practice. For that reason, international environmental law is more reflective of an economic model that invites and, arguably, requires government regulation of the market. 17 For example, one solution to the pollution problem is to adopt the


In its 1992 report, Trade and the Environment: Conflicts and Opportunities, the congressional Office of Technology Assessment notes that "[t]he potential for conflict between environmental concerns and international trade is increasing." U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 3 (1992).
17. See ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS (1995); John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?,
"Polluter Pays Principle." \(^{18}\) Under such a principle, firms that pollute should be required to pay for the clean up and either absorb the cost or pass it on to the buyer in the form of higher prices for their goods (\(i.e.,\) forcing the polluter to "internalize these costs"). \(^{19}\) However, polluters are not likely to abate their pollution or pay for the cost of pollution controls voluntarily for the simple reason that they cannot rely on their competitors to voluntarily do likewise. Consequently, the government must mandate that they do so. In short, disenchanted with market economy solutions to environmental problems, environmentalists challenge the assumption that markets are capable of protecting the environment effectively through setting prices. \(^{20}\)

This article challenges the view that the United States or other members of the WTO have a legal right to impose trade measures unilaterally in order to resolve environmental disputes. On the contrary, the comprehensive legal and dispute settlement regime, created under WTO auspices to regulate all governmental restrictions on cross-border trade in goods, precludes any WTO member from unilaterally imposing border measures to block imports of goods from other WTO members in response to conduct that allegedly threatens the environment or the global commons. The legality of such unilateral measures aside, this article further rejects the view that unilateral approaches to resolving international environmental disputes are desirable as a policy matter or are necessary as a practical matter.

This article also examines the precautionary principle in the context of the GMO controversy, as well as the interface of the WTO resolution of trade-environment disputes with developing-country interests. It concludes that developing countries benefit greatly from the governance structure of the WTO and offers some modest proposals for reform.

**II. Resolving Trade-Environment Disputes in the WTO**

Reeling from its setbacks in the Tuna/Dolphin dispute, the United States successfully lobbied in the late stages of the Uruguay Round for the inclusion of

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19. Id. at 578.
environment-friendly provisions in several Uruguay Round texts.21 Despite the many thorny and seemingly insoluble issues vying for their attention, the Uruguay Round negotiators managed to turn their attention to the issue of trade and the environment in the closing months of the Round. Several Uruguay Round documents reflect the negotiators' efforts.

First, the Preamble to the Agreement Establishing the World Trade Organization makes environmental protection a high priority for WTO members. The Preamble states:

[Members] [r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, 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.22

Second, the Ministerial Decision on Trade and Environment issued at the conclusion of the Uruguay Round reiterates the views expressed in the Preamble to the WTO Agreement, and adds the following:

[T]here should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other...23

In order to coordinate trade and environment policies, the ministers also established the Committee on Trade and Environment (CTE). Its terms of reference include identifying the relationship between trade and environmental measures and making recommendations on whether any modifications to the

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GATT-WTO system are required.\textsuperscript{24} The WTO Secretariat has also been active in analyzing the relationship between trade and the environment.\textsuperscript{25}

Third, the General Agreement on Tariffs and Trade 1994 (GATT 1994) strives for equal treatment of imported goods, regardless of their source of origin, through a nondiscrimination principle that operates at two levels: (1) nondiscrimination by an importing country among importers, and (2) nondiscrimination between imported goods and domestic like products. The unconditional most-favored-nation (MFN) obligation, codified in GATT Article I:1, requires that a WTO member treat imports from another WTO member on an equal, nondiscriminatory basis vis-a-vis all other members' imports. The MFN obligation is "unconditional" in the sense that MFN treatment must be accorded all imports from WTO members, regardless of country of origin, and regardless of whether the exporting member negotiated reciprocal trade concessions with the importing member. The national treatment obligation, codified in GATT Article III:4, generally prohibits discrimination against imports vis-a-vis domestic like products by WTO members. When an importing member's environmental standards discriminate against imported goods in favor of domestic like products, the exporting member may have a legitimate complaint under Article XXIII that a trade benefit has been nullified or impaired. Similarly, to the extent the importing member's environmental regulations purport to have an extraterritorial effect (for example, by targeting the production processes and methods by which the imported product was manufactured or processed in the exporting member), the national treatment obligation also may be violated.

In addition to GATT's two non-discrimination rules, the most important of the original GATT commitments respecting non-tariff barriers to trade is the Article XI commitment to eliminate quantitative restrictions (quotas) on imports and exports. Under the terms of Article XI, an import embargo on goods from another WTO member is illegal unless it satisfies one of the GATT Article XX exceptions.

Despite its commitment to the goal of liberal trade, GATT does permit WTO members to restrict imports on a number of specific grounds. Of the ten enumerated GATT Article XX general exceptions, the public health and safety exception and the exception for conservation of natural resources touch most

\textsuperscript{24} In July 2000, the Committee on Trade and Environment addressed the issue of the relationship between the WTO and multilateral environmental agreements. See WTO Press Release, \textit{CTE Holds Information Session with MEAs and Addresses the Relationship between the WTO and MEAs, the Export of Domestically Prohibited Goods, the TRIPS Agreement and Fisheries Subsidies}, PRESS/TE/033 (July 10, 2000), available at http://www.wto.org (last visited Sept. 20, 2000).

directly on the enforcement of environmental laws and regulations. These two GATT Article XX exceptions provide:

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

(b) necessary to protect human, animal or plant life or health; . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

In order for an importing country to impose a GATT-permissible health or safety border measure, that measure (1) must be necessary (i.e., no less trade restrictive alternative is available), (2) must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail (i.e., it must be consistent with the MFN and national treatment obligations), and (3) must not be a disguised restriction on international trade.

Considering the open-textured quality of the terms "necessary," "arbitrarily," and "unjustifiably," the public health and safety exception has the obvious potential for being a rich source of formidable nontariff barriers to trade. Given the vagaries of the public health and safety exception, the potential for abuse by economically powerful countries anxious to foist their own brand of environmental protection upon weaker trading nations is ever present. GATT practice generally has been to construe Article XX narrowly in favor of trade and against nontariff barriers to trade. In a highly instructive GATT panel report, Thai Cigarettes, the panel concluded that the Thai ban on imported cigarettes was not "necessary" within the meaning of the chapeau to GATT Article XX:

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

26. For an overview and inventory of GATT provisions dealing with environmental issues, see Housman & Zaelke, supra note 15, at 535.


This interpretation of "necessary" restates the minimum derogation principle. In other words, any measure taken under one of the Article XX exceptions must be the least trade restrictive measure available.

Equally instructive and more germane to the theme of this paper is the Appellate Body's ruling in the Shrimp/Turtle dispute. Article XX(g) exempts from the MFN and national treatment commitments, trade measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The Appellate Body concluded that textually Article XX(g) is not limited to non-living natural resources, but extends to living resources as well. Rejecting Malaysia's "original intent" argument that Article XX(g) was intended to cover non-living resources only, the Appellate Body stated:

The words of Article XX(g), "exhaustible natural resources," were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.

From the perspective embodied in the preamble of the WTO Agreement [explicitly acknowledging the objective of sustainable development], we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary."

Moreover, the Appellate Body added, two adopted GATT 1947 panel reports, United States—Prohibition of Imports of Tuna and Tuna Products from Canada, and Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, that found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). Accordingly, the Appellate Body held that measures to conserve exhaustible resources, whether living or non-living, may fall within Article XX(g). The Appellate Body further found that sea turtles are an exhaustible natural resource.

Turning next to the issue of whether the U.S. measure was one "relating to the conservation of" exhaustible natural resources, the Appellate Body found a substantial relationship between Section 609 of the Endangered Species Act and its implementing regulations, on the one hand, and the conservation of sea turtles, on the other. The Appellate Body stated that "[i]t means [i.e., turtle..."

34. Shrimp/Turtle Appellate Body Report, supra note 9, at 50, ¶ 131.

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excluder devices or TEDs] are, in principle, reasonably related to the ends [i.e., the conservation of sea turtles].

Addressing the last Article XX(g) criterion—that the measure is made effective in conjunction with restrictions on domestic production or consumption—the Appellate Body found that this requirement was easily satisfied. U.S. shrimpers who fail to use TEDs face serious civil and criminal penalties, including forfeiture of their trawlers. The Appellate Body concluded, "[w]e believe that, in principle, Section 609 is an even-handed measure."

Having concluded that Section 609 is provisionally justified under the Article XX(g) exception, the Appellate Body next tackled the thorny issue of whether Section 609 violates the Article XX chapeau. The Appellate Body, reflecting on the fact that the preamble to the Agreement Establishing the WTO calls for the "optimal use of the world's resources . . . in accordance with the objective of sustainable development," and the creation of the Committee on Trade and Environment and its terms of reference, noted that these developments "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994." Nevertheless, the Appellate Body found that:

[I]t is not acceptable . . . for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.

The Appellate Body added that the protection and conservation of highly migratory species of sea turtles demands concerted and cooperative efforts on the part of the many countries whose waters are traversed by sea turtles. In the Appellate Body's view, except for the Inter-American Convention for the Protection and Conservation of Sea Turtles, the United States had failed to exhaust multilateral efforts. Rather than attempt to exhaust international mechanisms, the United States instead pursued the unilateral application of Section 609. In a footnote, the Appellate Body underscored this point with the observation that the United States, a party to CITES, made no attempt to raise

36. Shrimp/Turtle Appellate Body Report, supra note 9, at 53, ¶ 141.
37. Id. at 55, ¶ 144.
38. Id. at 58, ¶ 153.
39. Id. at 65, ¶ 164.
40. Id. at 66-67, 70, ¶¶ 167-68, 171-72. Parties to the Inter-American Convention include Brazil, Costa Rica, Nicaragua, Venezuela, and the United States.
the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee. The Appellate Body also faulted the United States for acting in a discriminatory manner vis-a-vis shrimp exporting members (Central and South American shrimp exporters were given preferential treatment under Section 609 vis-a-vis shrimpers from the four complaining Asian members), as well as for the lack of adequate transparency in the administration of the Section 609 certification procedures.

Anticipating the firestorm of criticism that its decision would generate within the environmental community, the Appellate Body launched a preemptive first strike with the following closing observations:

In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally; either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

In sum, the Appellate Body found Section 609 flawed chiefly in the manner in which the United States administered it, not with the substance of the law per se or its objectives. It recognized a country’s right to protect sea turtles, provided that country did so by negotiating bilateral or multilateral species protection agreements rather than by imposing its preferences unilaterally.

III. WHY UNILATERALISM IS WRONG AS A MATTER OF LAW

Under customary international law, legislative jurisdiction may be grounded on five bases: territoriality, nationality, passive personality, national security (the protective principle), and effects. Of these five bases of legislative jurisdiction, the territoriality and effects principles are the two bearing most directly on the question of the application of national environmental laws. National enforcement authorities rely heavily, but not exclusively, on the territoriality principle as the legal basis on which to regulate unlawful acts of environmental


42. Shrimp/Turtle Appellate Body Report, supra note 9, at 70, n.174.

43. Id. at 75, ¶ 185 (emphasis in original). For additional analyses of the Shrimp/Turtle reports, see Neuling, supra note 9, at 1; Richards & McCrory, supra note 9, at 295.

degradation that occur within the territory of the enforcing state.\textsuperscript{45} The territoriality principle provides a sufficient basis for enforcing national environmental laws in most instances. The effects basis for legislative jurisdiction—in reality, merely an extension of the territoriality principle—extends the regulatory reach of national environmental laws to cases where adverse environmental effects occur within a country from acts that take place outside the territory of the country. Cross-border air and water pollution are two prime examples. However, the territoriality and effects principles, even if interpreted liberally, fall short as a legal basis for the exercise of extraterritorial jurisdiction in international environmental cases involving the global commons. Moreover, only if a state is the victim of a violation of an international obligation by another state may it resort to unilateral countermeasures that might otherwise be unlawful, short of the use of force.\textsuperscript{46} The killing of marine mammals and reptiles is not a violation of a customary international obligation.\textsuperscript{47}

Besides the customary international law prohibition against the extraterritorial application of national laws generally, the legal prohibition against unilateralism in the trade-environment context has a treaty-based or conventional foundation as well. The core GATT obligations not to discriminate against imports regardless of their origin (the Article I MFN commitment), the obligation not to discriminate against imports vis-a-vis the like domestic product (the Article III national treatment obligation), and the commitment not to impose quotas on imports (the Article XI prohibition on quotas) are, of course, binding international legal obligations.\textsuperscript{48} The panel report in the Tuna/Dolphin dispute, and the Appellate Body report in Shrimp/Turtle, make it clear that unilateral trade measures to force compliance with national environmental laws are GATT-illegal.

Beyond the core GATT obligations, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) puts flesh on the bare bones of the core GATT commitments, and the improved dispute resolution mechanism adds teeth. They establish a comprehensive legal regime that restricts

\textsuperscript{45} See Restatement, supra note 44, § 402; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (1990). The nationality principle can also be the basis for extending antitrust jurisdiction beyond national borders when nationals of the enforcing government engage in conduct overseas. A potential source of friction here is defining a firm's nationality. Prescriptive jurisdiction is to be distinguished from enforcement jurisdiction.

\textsuperscript{46} See Restatement, supra note 44, § 905.

\textsuperscript{47} Although the Restatement (Third) of the Foreign Relations Law of the United States declares that a state is responsible to other states for any significant injury to the environment of areas beyond the limits of national jurisdiction, see id. § 601, the introductory note and the commentary refer to cases of water and air pollution, not to cases of involving the killing of marine mammals or reptiles. See id. § 601, reporters' note 2; § 602 (remedies for pollution); § 603 (state responsibility for marine pollution); § 604 (remedies for marine pollution). Moreover, "significant" injury is required, such as massive pollution. See id. § 601, reporters' note 3.

and, in some cases, prohibits the imposition of border measures on the grounds of health, safety, and other environmental concerns. The binding dispute settlement mechanism established under the WTO Dispute Settlement Understanding (DSU) is currently the exclusive mechanism for resolving trade-environment disputes, failing a negotiated settlement. As a WTO member, the United States is bound to observe the legal obligations of this comprehensive international trade law regime in which all trade-environment disputes are to be resolved in a bilateral/multilateral forum under WTO auspices.

There once may have been a time when a colorable argument could have been made that unilateralism was permitted under GATT 1947, given the many defects in its dispute settlement mechanism. Criticisms of the dispute settlement process under GATT 1947 were legion and will not be recounted in depth here. The most frequently recurring complaints about dispute settlement under GATT 1947 included the following:

- GATT lacked an integrated dispute settlement procedure, with the Tokyo Round Codes containing independent dispute settlement provisions.
- GATT disputes were sometimes resolved through the grant of waivers.
- Small countries were handicapped in achieving effective results against large countries.
- The GATT panel process was lengthy and subject to delaying tactics.
- GATT contained no provision for the automatic establishment of a panel.
- Inadequate staff and experts often hamstrung panels in their fact finding.
- The insistence on approval of panel reports by consensus permitted the losing country to block adoption of reports.
- GATT panel decisions are not appealable.
- Effective enforcement and sanctions were almost nonexistent, with the exception of unilateral retaliation.
- GATT did not require notification of the implementation of a panel recommendation.

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding or DSU)

49. This statement assumes that no multilateral environmental agreement (MEA) to which both of the disputing parties are signatories exists that authorizes the imposition of trade measures in the event of a violation of the MEA.
50. See Arnold, supra note 48, at 199-203.
addresses almost all of these criticisms. As noted in DSU Article 3.2, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." To that end, the DSU establishes an integrated, rules-based dispute settlement process with a right of appellate review. The DSU virtually assures that all panel or Appellate Body reports will be adopted expeditiously and without modification. Such has been the practice to date.

Article 21.1 recognizes that prompt compliance with Dispute Settlement Body (DSB) recommendations is essential to the effective resolution of disputes. The DSB is the name given to the WTO General Council when it takes action under the DSU. The member found to have violated a multilateral trade agreement ("the Member concerned" is the term used in the DSU) must state its intentions regarding the implementation of the recommendations at a Dispute Settlement Body (DSB) meeting held within 30 days after a report has been adopted. If immediate compliance is impracticable, then a member may have "a reasonable period of time" within which to comply. A reasonable period of time can be the period of time proposed by the member with the approval of the DSB, generally not to exceed 15 months measured from the date of the establishment of the panel. In no event is it to exceed (1) 18 months, unless the parties so agree; (2) a period of time mutually agreed to by the parties to the dispute; or (3) a period of time determined through binding arbitration, generally not to exceed 15 months from the date of adoption of the report.

52. Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], WTO Agreement, Annex 2, art. 3.2, LEGAL TEXTS, supra note 22, at 354.


54. See DSU, supra note 52, art. 21.3.

55. See id. arts. 21.3(a)-(c), 21.4. See, e.g., Award of the Arbitrator, Japan—'Taxes on Alcoholic Beverages, Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS8/15, at 9, ¶ 27 (1997) (concluding that "reasonable period of time" within the meaning of DSU Article 21.3(c) is 15 months under the circumstances).
If there is a disagreement over whether a member has in fact complied with a DSB recommendation, the matter may be referred to the original panel for its determination of this issue. Its report is to be circulated within 90 days after referral. Until the matter is satisfactorily resolved, it is to remain on the DSB’s agenda with the member concerned giving a status report of its progress on the implementation of the recommendation.

Full implementation of a recommendation to bring a measure into conformity with an Uruguay Round multilateral trade agreement (MTA) is the DSU’s preferred method for resolving a WTO dispute. The rationale is that by removing the offending measure trade liberalization is promoted and trade equilibrium is restored. In terms of a complete remedy, however, the aggrieved member is not necessarily made whole solely by the removal of the offending measure. The specific remedy of removing the offending measure may not compensate the complaining member for any trade losses it may have suffered as a result of the responding member’s violation. However, in cases involving, for example, an improper assessment of ordinary customs duties, antidumping duties, or countervailing duties, refund procedures exist under national law.

Failing full implementation of a DSB recommendation, DSU Article 22 authorizes compensation to a complaining member from an offending member on terms mutually agreed to between the disputing members. Compensation might restore the overall balance of trade liberalization that existed prior to the dispute if, for example, the offending member offers to reduce tariffs on products of export interest to the complaining member. However, any compensation agreement in the form of improved market access for the complaining member’s goods must be “consistent with the covered agreements.” Specifically, it must be instituted on an MFN basis, thereby generalizing the benefit of the compensation to all WTO members.

Failing conclusion of a compensation agreement within 20 days after the expiration of a reasonable period of time for implementing a recommendation, a complaining member may request the DSB to authorize the suspension of concessions limited solely to the member concerned. The suspension need not occur on an MFN basis. This limitation is a form of damage control, thereby minimizing the negative trade impact of retaliation.

Regarding the suspension of concessions, the general principle is that the complaining member should first seek to suspend concessions with respect to the same sector in which the violation occurred, i.e., cross-sector retaliation is discouraged. For example, with respect to a trade-in-goods violation, a suspension of concessions may take place with regard to goods generally. If the

56. See DSU, supra note 52, art. 21.5.
57. See id. art. 21.6.
58. See id. art. 22.1.
59. See id. art. 22.2.
60. Id. art. 22.1.
General Agreement on Trade in Services (GATS) has been violated, then the suspension should focus on the principal service sector affected (there are eleven, including, for example, telecommunications and financial services). If the TRIPS Agreement has been violated, then the suspension should focus on the specific intellectual property right that was violated (e.g., patent, trademark, copyright).61

If a sector-specific suspension is not practicable or effective, then the suspension may be in other sectors under the same agreement (e.g., suspension of telecommunications trade benefits in retaliation for a financial services violation). If such retaliation is not practicable or effective, or the circumstances are serious enough, then suspension under another agreement may be authorized.62 The level of the suspension is to be equivalent to the level of the nullification or impairment. If the member concerned objects to the proposed level of suspension or to cross-sector retaliation, the matter is to be referred to binding arbitration, which is to be completed within 60 days.63

In a flank attack on unilateral actions taken by the United States under Section 301 of the Trade Act of 1974,64 DSU Article 23, Strengthening the Multilateral System, flatly prohibits members from making unilateral determinations on the following matters: (1) whether an Uruguay Round agreement has been violated, (2) whether another member has failed to implement a DSB recommendation within a reasonable period of time, or (3) whether the level of suspension of concessions is appropriate. The DSU is the exclusive mechanism for resolving these issues, absent the mutual agreement of the disputing members.65

In summary, the WTO MTAs and fundamental GATT obligations establish a legal framework that ensures that trade in goods will not be impeded because of government-sanctioned barriers. Regardless of whether this legal regime is now deemed to be harmful to the environment, the inescapable fact is that the United States and the other WTO members have made a commitment to these legal rules. Under Article 23 of the Dispute Settlement Understanding, the unilateral imposition of trade measures in response to a violation of a WTO member’s rights under GATT or a WTO agreement is impermissible. With the adoption of the DSU, the WTO has in place institutional structures and procedures designed to resolve trade disputes with an environment subtext. This institutional framework calls for the resolution of trade-environment disputes multilaterally through the panel and Appellate Body process, or bilaterally

61. See DSU, supra note 52, art. 22.3(f).
62. See id. art. 22.3. For example, Ecuador was authorized to cross-retaliate against the EU in the Bananas Case by cross-retaliating in the services and intellectual property sectors rather than being compensated in the goods sector. See Daniel Pruzin, Ecuador Gets WTO Go-Ahead to Retaliate Against European Union, 17 Int'l Trade Rep. (BNA), No. 21, at 832 (May 25, 2000).
63. See DSU, supra note 52, art. 22.6.
65. In lieu of DSU panel proceedings, authorizes disputing members to mutually agree to resolve their dispute through binding arbitration, see DSU, supra note 52, art. 25.
through consultation and negotiation. Unilateralism is totally rejected as an option.

The United States is obligated to perform its legal obligations under these international agreements in good faith. Its resort to unilateral trade measures to resolve environmental disputes, in the face of a binding international agreement that forbids such border measures except in limited circumstances and in the face of GATT and WTO dispute settlement reports that have consistently condemned unilateralism, is extraterritorial application of domestic law. Additionally, its use of border measures to enforce certain domestic environmental legislation that targets foreign production processes and methods, falls short of good faith performance. When a country commits to a multilateral rules-based regime with a binding dispute settlement mechanism such as the WTO, it forfeits the right to unilaterally impose trade measures to achieve an environmental goal, unless authorized to do so by the WTO.

IV. WHY UNILATERALISM IS WRONG AS A MATTER OF POLICY

Beyond the question of the legality of unilateral trade measures to resolve environmental disputes, the United States has learned the hard way that unilateralism is a double-edged sword. In a dispute in the mid-1990s with the EU over the use of leghold traps, the United States came close to being on the receiving end of a unilateral EU import ban on fur from animals caught with such traps. It was only after extensive bilateral negotiations that the parties were able to reach a mutually satisfactory settlement of their dispute. The recent, and as yet unresolved, GMO controversy (discussed below) is another lesson for the United States that unilateralism is not a one-way street.

Few will quarrel that protecting the environment should be a high priority for every country, and especially for the developed-country members of the WTO. However, with environmentalists portraying the WTO as being, at best, indifferent to environmental issues and, at worst, hostile to them, can environmental concerns be adequately accommodated under the GATT-WTO system?

66. Restatement, supra note 44, § 321; Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331 entered into force Jan. 27, 1988, (stating that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”).


The need for greater integration of trade and environmental policies is undeniable. As an initial matter, such policies need not be mutually exclusive. As one economist has observed, "[m]ost environmental policies are not in conflict with basic GATT rules." Environmentalists seem to have an endless list of grievances with the GATT-WTO system. If their real concern is that liberal trade may reduce worldwide environmental standards to the lowest common denominator, then the problem lies with the market's failure to reflect environmental costs in prices and in government subsidization of polluting industries.

Resorting to import bans to address environmental issues may be misguided for several reasons. First, import bans on goods produced by polluting production processes and methods rarely attack the root of the problem. Second, such import bans, when advocated by environmental groups with the support of domestic business and labor groups, may have as their primary aim trade protectionism, not environmental protection. Such advocacy can be especially pernicious because it is so socially respectable. Import bans can in turn lead to an escalation of trade tensions that trigger retaliatory trade responses by exporting countries.

Moreover, economic studies have shown that tough environmental standards at home do not, standing alone, cause companies to relocate abroad. As Professor Edith Brown Weiss points out, there is little empirical evidence to substantiate the claim that countries with lax environmental standards attract foreign industries that are heavily regulated. Environmental costs are just one factor among many that figure in the decision to make a foreign investment. Other factors, such as labor costs, transportation infrastructure, market access, political stability, tax and labor laws, joint venture laws, performance requirements, the ability to repatriate profits, currency stability, and compensation in the event of expropriation figure more prominently in either the location/relocation and investment decisions.

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71. See id., at 325 n.3.

72. See Anderson, supra note 11, at 441.


74. See Weiss, supra note 10, at 729.

75. See id.
It is not surprising that international trade measures have become the mechanism of choice for responding in a concrete way to other countries' behavior that threatens the environment. First, import bans are high profile and, therefore, potentially of great symbolic value. Second, trade measures do not involve or threaten the use of armed force (except, of course, "quarantines" such as the one imposed by the United States against Cuba during the Cuban missile crisis or against Iraq during the Gulf War). Third, building an international consensus on the need for, or the wisdom of, imposing import bans presents national policy makers with a tough challenge. It is undoubtedly easier to build a consensus at home on the merits of unilaterally initiating import bans than it is to build an international consensus.

Therefore, it comes as no surprise that environmentalists have implemented techniques similar to those used in the fields of national security and human rights by embracing import bans and restrictions as the preferred method for forcing nations that trade with the United States to adopt U.S.-style measures for protecting the environment. Indeed, the use of trade measures to enforce environmental standards can be compelling, particularly when international trade is the direct cause of the environmental damage as it is, for example, with trade in hazardous waste or in endangered species.

Although import bans have an obvious and understandable appeal, the one question environmentalists have either failed to ask or have ignored is whether import bans are effective. The symbolic value of import bans, highly touted in the human rights arena, should not be completely discounted even when the ends are environmental. But at the same time, the role of symbolism should not be overrated or overemphasized. Symbolism may be a necessary condition for imposing import bans against a country with a less-than-exemplary environmental track record, as measured by U.S. standards. But symbolism standing alone should never be a sufficient condition for imposing such sanctions.

Moving beyond symbolism, the primary focus should be on the effectiveness of import bans as a means for achieving certain environmental ends. The question that needs to be answered before unilateral import bans are imposed is whether the imposition of sanctions will cause the exporting country to change its environmental policies. The effectiveness of import bans ought to be the

76. Even doing so at the national level can be problematic. An example was the perennial tug-of-war between Congress and Presidents Bush and Clinton over whether China's most-favored-nation trade status should be renewed despite its human rights record. See China Reacts to U.S. Trade Decision, CHRISTIAN SCI. MONITOR, May 25, 1990, at 3; Senate Sustains President's Veto of Bill Conditioning MFN Status for China, 9 Int'l Trade Rep. (BNA), No. 13, at 518 (Mar. 25, 1992).


initial focus and, ultimately, the bottom line. Otherwise, legitimate environmental concerns, when coupled with strong trade protectionist pressures at home, can result in the imposition of import bans that are imposed ostensibly on environmental grounds, but which have the potential for hobbling the global economy. The imposition of unilateral trade measures without a resultant change in behavior of the target country means a net loss in world trade and a net loss for species preservation.

Environmental protection, in combination with trade protectionism, can lead to an undisciplined, indiscriminate use of import bans. Consequently, when import bans are invoked on environmental grounds, they need to be used in a very disciplined and discriminating fashion. Once a country imposes import bans, it may be impossible to avoid the downward spiral of retaliation and counter-retaliation, leading to an all-out trade war. In any such war, the environment could be the big loser. An importing country's use of trade restrictions to block imports in the name of environmental protection may actually be in conflict with the goal of environmental protection. Such restrictions may promote environmental degradation by protecting less efficient manufacturers and producers from more efficiently produced imports.

In the name of environmental protection, a substantial volume of import trade could be significantly affected through the use of trade measures imposed ostensibly to advance environmental goals, but which are in fact pretextual and nothing more than disguised nontariff barriers to trade. Domestic business interests and unions anxious to erect barriers to import competition from low-wage countries may drape themselves in the green flag and join forces with environmental groups. Together they may forge a coalition to pressure

79. For a 1990 case study on the use of economic sanctions as a foreign policy tool that offers some insights to this question, see Gary C. Hufbauer, et al., Economic Sanctions Reconsidered, History and Current Policy 38 (1990). To the question, "are economic sanctions effective?" Hufbauer, Schott, and Elliott give a guarded answer of "sometimes":

Although it is not true that sanctions 'never work,' they are of limited utility in achieving foreign policy goals that depend on compelling the target country to take actions it stoutly resists. Still, in some instances, particularly situations involving small target countries and relatively modest policy goals, sanctions have helped alter foreign behavior.

Id. at 92. The authors conclude that sanctions are seldom effective in bringing about major changes in the policies of the target country. For a critique of this work, see Parker, supra note 78.


81. See John Dillin, With US Jobs at Stake, Congress Takes Wary View of Trade Pact, Christian Sci. Monitor, Mar. 17, 1993, at 1A (reporting that "some Mexicans worry that the US will use environmental standards as a form of protectionism").

82. As reported in The Economist, "[o]ne recent attack on GATT by Public Citizen [headed by Ralph Nader] was signed by over 300 groups. They included the International Ladies' Garment Workers Union, the United Methodist Church, the American Cetacean Society and the Sierra Club,"
government regulators to keep the playing field level by restricting imported products that are manufactured or processed by heavily polluting industries in countries where environmental controls are either less stringent, loosely enforced, or non-existent.

One writer has compared this informal coalition among protectionist domestic business interests, unions, and environmental groups to an unholy alliance between the Baptists and the bootleggers. The environmentalists are the Baptists who support prohibition on grounds of morality and health. Business and labor groups are the bootleggers who support prohibition in order to preserve jobs and their share of the domestic market from import competition. The lesson to be drawn is beware of domestic manufacturers and unions who lament the state of the environment in other countries. They may be shedding crocodile tears for the environment.

Instead of viewing free trade and environmental protection as mutually reinforcing, environmentalists' working premise is that the GATT-WTO system is an obstacle to environmental protection. Short of a no-growth economic stance, this is a false premise. The GATT-WTO system and free trade are not environmental villains. As explained by one economist, "[e]nvironmental problems arise from various types of market (prices not reflecting environmental costs) and government failure (subsidies to polluting activities) or lack of clear property rights." In other words, if WTO disciplines were honored less in the breach and more in the observance, then the GATT-WTO system would be at least a partial solution to the world pollution problem. By opening markets and lifting government restrictions on trade as GATT directs, wealth will be generated, and wealth can be used to clean the environment. In the words of one commentator, "[i]f trade were responsible for environmental degradation, then presumably those countries that trade the least, such as Ethiopia and Sudan, would have the best environments. We know that is not the case."

In short, unilateralism that is extraterritorial in nature is not only illegal in the trade-environment context, but it is also bad policy. Unilateral import bans can be a "feel good" response to an environmental threat, but the real measure of their worth should be their effectiveness. Symbolic gestures can be morally important and spiritually uplifting, but if they do not promote meaningful, lasting change, then they are not worth the candle. A bilateral/multilateral approach to resolving environmental issues provides greater assurance that import bans ostensibly for environmental protection are truly for the purpose of

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The Greening of Protectionism, supra note 73, at 25.
84. Sorsa, supra note 70, at 325 n.3.
environmental protection, and not a pretext for trade protectionism. Moreover, unilateral import bans that address environmental issues rarely attack the root of a problem (e.g., banning the importation of goods produced by polluting production processes and methods usually will not stop the polluting production processes and methods). If the goal is to have durable and robust global environmental protection, then multilateral approaches are the obvious alternative to unilateral initiatives in the form of import bans. Unilateralism will meet with resistance, defiance, or, at best, begrudging acquiescence with chiseling at every turn. If a country heads down the unilateralism road, then other countries are free to do the same. A downward spiral could result, with everyone the loser, including the environment.

V. OTHER IMAGINED WTO FAILURES TO PROTECT THE ENVIRONMENT

A. Transparency and Democracy: WTO Relations with Civil Society

Many non-governmental organizations (NGOs) within the environmental community complain that the work of the WTO and the CTE is closed to them. The United States has pressed for making the work of the WTO and CTE, in general, more open and transparent to the public. In this connection, in July 1996, the WTO General Council adopted a decision, Guidelines for Arrangements on Relations with Non-Governmental Organizations. Recognizing the important contribution that NGOs can make in increasing public awareness regarding its activities, the WTO agreed to improve transparency and to develop better lines of communication with NGOs in several respects. First, the WTO agreed to derestrict documents more promptly than in the past and to make them available on the WTO's on-line computer network. Second, direct contacts with NGOs by the WTO Secretariat through symposia are also encouraged. Beginning in May 1997, the WTO Secretariat has organized a series of symposia with NGOs on trade, environment, and sustainable development. Another


87. The text of the decision can be found in Trade and Environment News Bulletin No. 16, Guidelines for Arrangements or Relations with Non-Governmental Organizations, TE/016 (Nov. 28, 1999), available at http://www.wto.org.


89. For a summary of the proceedings, see WTO Symposium on Trade, Environment and
A high-level symposium on trade and environment was organized by the Secretariat in March 1999. Third, observer status at CTE meetings has been extended to the Secretariats of CITES, the Montreal Protocol, the Basel Convention, the Framework Convention on Biological Diversity, and other international environmental organizations.

The WTO Secretariat periodically has held formal and informal meetings with NGOs concerned with matters relating to the WTO's work on trade, the environment, and sustainable development. Several of such meetings were held in 1995 and 1996. Many participants expressed disappointment with the WTO's Guidelines to the extent they fall short of the NGOs' goal of complete WTO transparency and public accountability. Of special concern was the lack of access for NGOs to WTO meetings and the number of documents that did not have to be de-restricted for up to six months. NGOs did, however, applaud the WTO's creation of the publication, *Trade and Environment Bulletin*, as a useful step toward increased transparency and improved dialogue.

Whether and how to accommodate the desires of NGOs for greater participation in the work of the WTO remains an unresolved issue, at least for NGOs. The WTO must resolve to what extent, if any, should NGOs participate in the policy work of the WTO and its committees. Also, the WTO must determine to what extent, if any, should NGOs participate in the WTO dispute settlement process, either as parties, intervenors, *amicus curiae*, witnesses, or observers.

If the model for greater NGO participation in the policy work of the WTO is the role played by NGOs in other international organizations, such as the United Nations, the International Labor Organization, or CITES, then NGOs have a valid argument for increased participation in that facet of the WTO's work. Also, NGOs insist on participatory rights in the WTO dispute settlement process, even to the point of having standing to initiate dispute settlement proceedings as complaining parties. Currently, NGOs have no right to participate formally in WTO dispute settlement proceedings. Being able to provide WTO panelists with additional information could hardly be a bad thing, if fully informed decision making is the desideratum. NGO participation in the...
WTO dispute settlement process as *amicus curiae* could prove useful. However, permitting NGO participation at the party or intervenor level could only have the effect of burdening an ever-growing WTO docket, delaying the dispute settlement process and worse, creating disenchantment with that process among its intended users, WTO members. Recalling that one of the major complaints about GATT 1947 was the impotence of its dispute settlement process, avoiding the mistakes of the past is critical to the future success of the WTO DSU. Thus, the argument for direct NGO participation in the WTO dispute settlement process is, on balance, not especially compelling.

In the WTO panel proceeding, *Regime for the Importation, Sale and Distribution of Bananas*, lawyers representing private parties attempted to attend the panel meetings but were excluded. Consistent with GATT practice and WTO dispute settlement proceedings, only representatives of governments may attend panel meetings. Because private lawyers are not subject to DSU disciplinary rules, their presence in panel meetings could give rise to concerns about breaches of confidentiality.

Although private parties representing private interests have no right to participate directly in WTO panel proceedings, in the *Shrimp/Turtle Case*, several environmental NGOs submitted unsolicited *amicus* briefs with the panel defending the U.S. import ban. The panel concluded that under Article 13.2 of the DSU, only information that the panel *seeks* (i.e., actually solicits) may be considered by a panel. Nevertheless, the panel invited the United States, if it so desired, to include the NGO submissions as part of its own submission. The Appellate Body affirmed the panel’s decision to permit the United States to include the NGO submissions as part of its own submission, but reversed the panel’s other conclusion, holding that a panel is free to accept unsolicited submissions from interested groups if such information would be helpful to the panel in reaching its decision. In connection with the NGO submissions, the Appellate Body found that the panel’s reading of Article 13.2 of the DSU was too narrow.

We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing

94. See *id.*, at 290, ¶ 7.11. See generally Schleyer, supra note 92, at 2275.
95. See *Shrimp/Turtle Appellate Body Report*, supra note 9, ¶ 7.8.
96. See *id.*, at 39, ¶ 110.
any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.\(^{97}\)

The Appellate Body thus concluded that a panel is free to accept unsolicited submissions from interested groups if such information would be helpful to the panel in reaching its decision. A panel does not have the power to disregard a private-party submission solely because it was not submitted by a disputing WTO member.\(^{98}\) The panel in European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,\(^{99}\) received amicus curiae submissions from four private sources. Two of those amicus submissions were appended to the EU’s submissions to the panel, which the panel in turn accepted.\(^{100}\) It declined to consider the other two amicus submissions that were not included in any of the disputing members’ submissions.\(^{101}\)

In short, the WTO has an image problem, especially on environmental issues. It is viewed by most environmental groups as secretive and closed. Meaningfully increasing the role of non-governmental organizations and civil society in the discussions will improve the WTO’s legitimacy, increase trust, polish its tarnished image, and reduce the WTO’s so-called “democracy deficit.”\(^{102}\) The participation of NGOs in the Shrimp/Turtle dispute via the U.S. submissions was a small step in the right direction. At the same time, however, the WTO must guard against the risk that isolationist NGOs want to hijack the WTO and use it for their own purposes, none of which coincide with the mission and objectives of the WTO.

B. Rejection of a Precautionary Principle As Some Would Have It: Whither GMOs?

Following consumer concerns over the safety of hormone-fed beef, in 1987 the EC imposed a ban on imports of animals and meat from animals fed six specific growth-promoting hormones.\(^{103}\) The United States objected to this ban

\(^{97}\) See Shrimp/Turtle Appellate Body Report, supra note 9, at 39, ¶ 110.  
\(^{100}\) See id.  
\(^{101}\) See id. at 399, ¶ 8.13. Amicus submissions were also made in United States—Impostion of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom. See WTO Appellate Body on United States—Impostion of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS/138/AB/R, ¶¶ 40-42 (adopted June 7, 2000), at WTO Website, supra note 9.  
\(^{103}\) For additional background on the dispute, see Kristin Mueller, Hormonal Imbalance: An Analysis of the Hormone Treated Beef Trade Dispute Between the United States and the European Union, 1
on the ground that the six hormones had been found safe for use in growth promotion by every country that has examined them. Canada brought a nearly identical complaint against the EC. Furthermore, not only did the Codex Alimentarius Commission (Codex) review five of the six hormones and find them to be safe, but the EC itself twice commissioned experts to review the same five hormones, and on both occasions the experts found the hormones to be safe. Three of the hormones are naturally occurring in animals and humans; the other three are artificially produced. The EC defended its measures in part on the ground that they were based on the "precautionary principle," i.e., that as long as there is some scientific basis for adopting a particular SPS measure, that such measure should pass muster under the SPS Agreement.

In the Hormone Beef dispute, the Appellate Body agreed that the precautionary principle, as reflected in Articles 3.3 and 5.7 of the SPS Agreement, declined


105. Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A, LEGAL TEXTS, supra note 22, at 59 [hereinafter SPS Agreement]. In tandem, Articles 3.3 and 5.7 of the SPS Agreement reflect the WTO's version of the precautionary principle. Article 3.3 provides:

Members may introduce or maintain sanitary or phytosanitary measures which result in a 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. (2) Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

Id. art. 3.3.

2. For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Id. art. 3.3 n.2.

Article 5.7 of the SPS Agreement in turn provides:

In cases where relevant scientific evidence is insufficient, a Member may
to state whether it was part of customary international law, and agreed with the panel that whatever its status, the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement dealing with risk assessment.\textsuperscript{106} Although the precautionary principle is reflected in Articles 3.3 and 5.7 of the SPS Agreement, it can only be invoked when scientific evidence is "insufficient." All the available scientific evidence pointed to the conclusion that the hormones in dispute are safe when used in conformity with good practice. The precautionary principle does not override the express provisions of Articles 2 and 5 of the SPS Agreement requiring that SPS measures be based on scientific evidence and a risk assessment. In this case, the EU had failed to carry out a proper risk assessment, so that reliance on the precautionary principle was misplaced.\textsuperscript{107}

Consumer and environmental concerns have also been raised over the safety of genetically-modified crops for humans and animals. The lesson of the Hormone Beef dispute for the GMO controversy is that to the extent that relevant scientific evidence is insufficient to show that genetically-modified organisms (GMOs) pose no health risk to humans, animals, and plants, importing countries may on a temporary basis exclude such products after conducting a risk assessment (i.e., an evaluation that GMOs are a potential source of adverse effects on human or animal health). There exists some scientific evidence that indicates that certain GMOs pose just such a threat to animal life,\textsuperscript{108} although in September 2000, the EU Scientific Committee found no scientific basis for an

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provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. 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.

SPS Agreement, supra art. 5.7; see also James F. Smith, \textit{From Frankenfood to Fruit Flies: Navigating the WTO/SPS}, 6 U.C. DAVIS J. INT'L L. & POL'Y 1 (2000).


Italian government ban on seven GM food products.\textsuperscript{109} Other GM products appear to pose no health risk.\textsuperscript{110}

What importing countries do with this science—risk management—is the next question. If they impose an import ban, it will be up to the United States and Canada, the chief producers of GM crops, to muster sufficient scientific evidence to show that exported products containing GMOs are safe.\textsuperscript{111} If they are unable to do so, then under the Article 5.7 precautionary principle importing countries may exclude their importation, provided they continue to gather additional information necessary for a more objective assessment of risk within a reasonable period of time.

In the absence of sufficient scientific evidence to show that exported products containing GMOs are either safe or unsafe, can importing countries insist that products containing GMOs be labeled as such? Opponents of labeling insist that the answer is "no," unless it can be shown that GMOs pose a health risk, pointing to Article 2.2 of the WTO Agreement on Technical Barriers to Trade, that labeling would fulfill a legitimate government objective only if GMO products are a human health or safety risk.\textsuperscript{112} In Europe, a survey conducted in 1999 revealed that 86 percent of those surveyed want products containing GMOs to be labeled as such. Consumer surveys in the United States, on the other hand, give mixed views on the desire for labeling, perhaps reflecting a more relaxed attitude toward food than that of Europeans.\textsuperscript{113}

In January 2000, 135 countries concluded a biosafety protocol to the Convention on Biological Diversity. Under the Cartagena Protocol,\textsuperscript{114} importing

\begin{thebibliography}{9}
\bibitem{Kirwin2000} See Joe Kirwin, \textit{EU Panel Finds No Scientific Basis For Ban on Corn Rapeseed Products}, 17 Int'l Trade Rep. (BNA), No. 37, at 1441 (Sept. 21, 2000); Eric J. Lyman, \textit{Italy Plans to Uphold Ban on Four Types Of GM Corn Despite EU Ruling, Officials Say}, 17 Int'l Trade Rep. (BNA), No. 37, at 1442 (Sept. 21, 2000).
\bibitem{FinalAct1999} See \textit{generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Technical Barriers to Trade [hereinafter Technical Barriers to Trade], art. 2.2. WTO Agreement, Annex 1A, LEGAL TEXTS, supra note 22, at 1.}
\bibitem{StickyLabels1999} See \textit{Sticky Labels}, \textit{THE ECONOMIST}, May 1, 1999, at 75.
\end{thebibliography}
countries have the right to block imports of live GMOs if there is a reasonable
doubt whether they could endanger public health or the environment. The
Protocol is limited to living modified organisms, excluding processed foods,
feeds, and commodities. Therefore, the impact of the Protocol is muted.
Further muting the impact of the Protocol is its preamble, which provides that
the Protocol shall not be interpreted as changing the rights and obligations of
countries under other international agreements.

Just over a year ago, in November 1999, the United States and the EU
discussed the formation of an *ad hoc* scientific panel to resolve GMO issues.115
In June, 2000, the two parties agreed to continue government-to-government
talks aimed at improving market access for U.S. biotechnology products by
establishing the U.S.-EU Biotechnology Consultative Forum.116 The Consultative
Forum is expected to finalize a report that will address issues such as health,
safety, economic development, food security, and the environment by the end of
2000.117

In the meantime, the EU extended its *de facto* ban on the approval of any new
GMOs through the end of the year.118 Biotech companies have extended an olive
branch, offering, *inter alia*, to label on a voluntary basis all GM products through
all processing stages.119 Canada has proposed that a voluntary standard for
labeling foods derived from biotechnology be developed.120 The Codex
Committee on Food Labeling will complete work on labeling proposals for food
derived from biotechnology in 2001.121 The United States supports a proposal
that would require food derived from biotechnology to be labeled if the altered
food or ingredients differs from the original.122 South Korea, on the other hand,
has issued guidelines for the mandatory labeling for crops and foodstuffs

(2000).

115. See Mark Felsenthal & Corbett B. Daly, Clinton, Plan Vow to Ease WTO Differences, Create
Temporary Scientific Panel on GMOs, 16 Intl Trade Rep. (BNA), No. 43, at 1776 (Nov. 3, 1999); U.S.,
EU to Begin Talks Aimed at Working Out Row Over EU Ban on GMO Imports, 16 Intl Trade Rep. (BNA), No.
45, at 1862 (Nov. 17, 1999).

116. See Gary G. Yerkey, U.S., EU Agree to Pursue High-Level Talks on Biotech Trade as New Group
Is Set Up, 17 Intl Trade Rep. (BNA), No. 23, at 886 (June 8, 2000).

117. See Kirwin, supra note 109, at 1441.

118. See Joseph Kirwin, EU's Ban on Products Containing GMOs Will Remain in Place for at Least
Six Months, 17 Intl Trade Rep. (BNA), No. 11, at 431 (Mar. 16, 2000).

119. See Biotech Companies Propose to EU Measures Aimed at Allowing of GMO Products, 16 Intl Trade
Rep. (BNA), No. 43, at 1775 (Nov. 3, 1999).

120. See WTO Committee on Technical Barriers to Trade, Communication from Canada, The
Development of a Voluntary Standard for the Labelling of Foods Derived from Biotechnology, G/TBT/W/134

121. See Peter Menyasz, Codex Committee on Food Labeling to Spend Year Developing GMO Proposals,
17 Intl Trade Rep. (BNA), No. 21, at 827 (May 25, 2000).

122. See id.
containing GMOs effective March 2001.\textsuperscript{123} Australia and New Zealand have also adopted a measure calling for mandatory labeling of GM foods beginning in September 2001.\textsuperscript{124} U.S. farmers for their part do not want any U.S.-EU negotiations to drag on indefinitely.\textsuperscript{125} Japan has proposed the creation of a forum in connection with the WTO agricultural negotiations that began January 2000, to address the issue of GMOs.\textsuperscript{126} The United States has urged WTO members to participate in the work of the Codex Alimentarius Commission to advance agreement on relevant international standards for GMOs.\textsuperscript{127}

Interestingly, the United States has refrained from initiating WTO dispute settlement panel proceedings over the GMO issue. Bearing in mind that the United States has not been shy in the past in using the WTO dispute settlement mechanism to resolve trade disputes that some might consider trivial (e.g., the complaint filed in the Bananas Case), the United States' hesitancy in demanding that a WTO panel be established suggests at least three things: (1) there is insufficient clarity in the SPS Agreement to ensure a U.S. victory;\textsuperscript{128} (2) the United States understands that the GMO controversy is highly politically charged in the EU;\textsuperscript{129} and (3) the United States realizes that the only way to ensure a favorable outcome in the GMO controversy is to proceed multilaterally. Despite U.S. reluctance to initiate dispute settlement proceedings, Thailand and Egypt were locked in a GMO dispute in September 2000 over an Egyptian ban on

\textsuperscript{123} See James Lim, South Korea Finalizes Guidelines for Labeling GMOs Starting Next Year, 17 Int'l Trade Rep. (BNA), No. 18, at 710 (May 4, 2000).
\textsuperscript{125} See Gary G. Yerkey, Farm Leader Urges U.S. to Establish Six-Month Deadline for Biotech Pact with EU, 16 Int'l Trade Rep. (BNA), No. 46, at 1904 (Nov. 24, 1999).
\textsuperscript{126} See generally Proposal of Japan on Genetically Modified Organisms (GMOs), Preparation for the 1999 Ministerial Conference, WT/GC/W/365 (Oct. 13, 1999).
\textsuperscript{127} See WTO, Committee on Technical Barriers to Trade, Submission from the United States, Genetically Modified Agricultural and Food Products, G/TBT/W/115 (June 17, 1999).
\textsuperscript{128} See Yerkey, supra note 125, at 1905 reporting that Isi Siddiqui, special assistant to the secretary of agriculture for international affairs, said . . . that, if the U.S.-EU discussions were to fail, the United States would be prepared to seek clarification of existing WTO rules to ensure that national import approval procedures for bioengineered products were transparent, science-based, and predictable.
\textsuperscript{129} See, e.g., Gary G. Yerkey, U.S. Says Media, Private Groups' Stirring Up Anti-GMO Climate in Europe, 17 Int'l Trade Rep. (BNA), No. 16, at 621 (Apr. 20, 2000); Daniel Pruzin, Thailand Seeks Talks with Egypt on Tuna Ban in GMO Dispute, 17 Int'l Trade Rep. (BNA), No. 16, at 1472 (Sept. 28, 2000).
imports of Thai canned tuna packed in oil made from GM beans. Thailand has requested consultations with Egypt under the DSU over the import ban.\textsuperscript{130}

On a related front, many countries have adopted or are considering adopting labeling requirements for all foods containing GMOs. Beginning in May 2000, the Codex Committee on Food Labeling is expected to spend a year working on labeling proposals for foods derived from GMOs.\textsuperscript{131} Canada has urged the adoption of a voluntary standard for labeling of foods derived from GMOs in an effort to derail the drive for mandatory labeling.\textsuperscript{132} Other countries are moving forward, however, with mandatory labeling requirements.\textsuperscript{133} In response to a proposed EU regulation requiring that all products containing GMOs be labeled for the benefit of consumers, the United States has objected that unless such labeling requirements are science-based, they are invalid under either the SPS Agreement or the Agreement on Technical Barriers to Trade.\textsuperscript{134} Yet, even as the United States was objecting to GMO labeling requirements proposed by its trading partners, a bill entitled, "Genetically Engineered Food Right to Know Act," was introduced in Congress in November 1999.\textsuperscript{135}

Finally, it is ironic that environmental groups are among the most vocal opponents of GMOs when it is indisputable that the cultivation of GM crops has direct and substantial benefits for the environment.\textsuperscript{136} GM corn and soybeans, for example, are designed to be drought, disease, weed, and pest resistant, meaning that fewer chemical pesticides, fungicides, and herbicides have to be applied to control pests, diseases, and weeds, and less water has to be used to irrigate GM crops.\textsuperscript{137}

In sum, the latest trade-environment dispute involving GMOs suggests that the SPS Agreement should be revised to more carefully articulate what the precautionary principle is. Articles 3.3 and 5.7 of the SPS Agreement refer vaguely to it, but, as the WTO dispute settlement decision in the Hormone Beef dispute makes apparent, clarification is needed. Against the backdrop of a communication from the EU in March 2000 on the precautionary principle and

\textsuperscript{130} See Pruizin, supra note 129, at 1472.
\textsuperscript{131} See Menyasz, supra note 121, at 827. See also Sticky Labels, supra note 113, at 75.
\textsuperscript{132} See WTO Committee on Technical Barriers to Trade, supra note 120.
\textsuperscript{133} See, e.g., Lim, supra note 123, at 710; Japan Agency to Require GMO Safety, Allergy Labeling on Foods in April 2001, 17 Intl Trade Rep. (BNA), No. 8, at 295 (Feb. 24, 2000).
\textsuperscript{134} Article 2.2 of the Agreement on Technical Barriers to Trade provides in part: "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective . . . . Such legitimate objectives are, \textit{inter alia}, . . . protection of human health or safety, animal or plant life or health, or the environment." Technical Barriers to Trade, supra note 112, art. 2.2.
\textsuperscript{135} See Bill Seeking Labeling, More Research on Genetically Altered Foods Expected Soon, 16 Intl Trade Rep. (BNA), No. 45, at 1877 (Nov. 17, 1999).
\textsuperscript{136} See Alexandra Marks, U.S. Poised for a Biotech Food Fight, CHRISTIAN SCI. MONITOR, Nov. 17, 1999, at 4.
\textsuperscript{137} See \textit{id}.
on guidelines for applying it, the United States and the EU a month later agreed to continue discussions over the course of the coming year on conflicting definitions and applications of the precautionary principle to food safety under Codex auspices. The 1992 Rio Declaration states that \\
"[w]here 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." Whether it will be possible to improve upon this articulation of the precautionary principle remains to be seen. 

In addition, risk analysis has three components: risk assessment, risk management, and risk communication. The role of risk communication needs to be elaborated, especially in connection with labeling of products containing GMOs to address consumer concerns about the safety of such products.

VI. MULTILATERALISM PROTECTS THE INTERESTS OF DEVELOPING COUNTRIES IN TRADE-ENVIRONMENT DISPUTES

A threshold observation is that developing and developed countries appear to be working at cross purposes in setting environmental priorities. Developing countries are focused on water, housing, and poverty reduction; and developed countries are focused on ozone depletion, biodiversity, deforestation, and desertification.

Two important points should be made in connection with the impact of the trade-environment debate on developing countries. First, in connection with WTO dispute settlement, recall that the complaining parties in the Tuna/Dolphin and Shrimp/Turtle disputes were Mexico, India, Malaysia, the Philippines, and Thailand, all developing countries. In another WTO trade-environment dispute involving EPA clean air regulations, United States — Standards for Reformulated Gasoline and Conventional Gasoline—the first dispute to be resolved under the Dispute Settlement Understanding—the complaining countries were Venezuela and Brazil. In each of those cases, developing countries defeated the most powerful country in the world through the rule of law. In order for global

governance to be stable and predictable, a rules-based, not power-based, legal regime is required. The WTO fulfills this requirement.

Environmentalists ask rhetorically, "who needs the WTO?" Among the immediate beneficiaries of a rules-based regime are developing countries when they make a legal challenge against a developed country. The experience of developing countries in WTO dispute settlement has generally been a good one. In addition to the Tuna/Dolphin, Shrimp/Turtle and Reformulated Gasoline disputes, in the Bananas dispute tiny Ecuador was authorized to cross-sector retaliate in the services and intellectual property sectors against the EU, a WTO first. None of these results would have been possible in a power-based regime.

Second, although most people are deeply troubled that dolphins and sea turtles are killed in the process of harvesting tuna and shrimp, had the Tuna/Dolphin and Shrimp/Turtle disputes been resolved ultimately in favor of the United States, the ability of poor people in developing countries to earn a livelihood would have been damaged. The action of the United States in those cases smacks of "eco-imperialism," i.e., demanding that developing countries either adopt excessively stringent, costly, and arguably inappropriate environmental standards that are based on developed-country value judgments or run the risk of import bans on shipments of goods to developed countries. One wonders if in the end it would not have been cheaper—and more enlightening—to give the shrimpers the TEDs that the United States demanded they use. In a conversation I had with delegates at the Thai embassy in Washington at the end of September, I learned Thailand has had a sea turtle protection program on one of its islands, which serves as a sea turtle sanctuary. I also learned that a single TED costs about $1,000, and that the Thai shrimper fleet consists of approximately 500 vessels. It seems that between the U.S. Agency for International Development and concerned environmental groups, $500,000 could have been scraped together to pay for the TEDs. Is it not better to light a candle than curse the darkness?

Third, apparently forgotten in the debate over the safety of GMOs is the fact that developing countries are the prime beneficiaries of the green revolution. Biotechnology and GM crops offer the potential for increasing both the yield and the nutritional value of food crops. An estimated 800 million people are malnourished, the overwhelming majority of whom live in developing countries. Fear mongers who raise the specter of "Frankenfoods" and proponents of a precautionary principle that is not science-based should bear this grim fact in mind. As one commentator has noted, "[T]he truly fatal flaw of the precautionary principle, ignored by almost all the commentators, is the unsupported presumption that an action aimed at public health protection cannot possibly

143. See Pruzin, supra note 62, at 832.
145. See Adler, supra note 114, at 200.
have negative effects on public health. In other words, there also are risks associated with maintaining the status quo. By focusing on just the risks that concern changing the status quo, the precautionary principle ignores the harm that will occur or that is exacerbated by putting the brakes on technological development.

VII. SOME MODEST—AND WILD-EYED—PROPOSALS FOR REFORM

Lest I leave the reader with the impression that all is well at the WTO or that I am a rabid WTO apologist, let me propose eight reforms that the WTO membership should consider in the trade-environment area. First, bridging the trade-environment gap may require a fresh look at WTO agreements, in particular GATT Article XX and the SPS Agreement. The SPS Agreement and/or GATT Article XX could be amended to clarify the status of multilateral environmental agreements, namely, in the event of a conflict, which prevails?

NAFTA Article 104 is a possible model. It provides that in the event of an inconsistency between NAFTA and one of three multilateral environmental agreements (i.e., the Convention on International Trade in Endangered Species, the Basel Convention on Transboundary Movements of Hazardous Wastes, and the Montreal Protocol on Substances that Deplete the Ozone Layer), the latter prevails. To date, no dispute involving a multilateral environmental agreement has arisen in the WTO. However, in the view of the United States, an amendment of WTO rules may be unnecessary in order for WTO members to enter into Multilateral Environmental Agreements (MEAs) authorizing the imposition of trade measures in the event there is a violation of the MEA. Nevertheless, WTO panel and Appellate Body reports determine the legal rights of the members who are parties to the dispute. They do not lay down a general rule on the relationship between GATT 1994 and MEAs. Accordingly, clarifying the situation by (1) amending GATT Article XX, (2) having the General Council issue an interpretation pursuant to Article IX:2 of the Agreement Establishing the WTO, or (3) amending Article V of the Agreement Establishing the WTO

147. See Adler, supra note 114, at 195.
148. See WTO, Committee on Trade and Environment, Submission by Switzerland, The Relationship between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements (MEAs), WT/CTE/W/139 (June 8, 2000).
149. See id.
151. An interpretation from the General Council requires a three-fourths majority vote of the WTO members. See Marrakesh Agreement Establishing the World Trade Organization supra note 22, at art. IX 2.
to establish the relationship of the WTO with MEAs might be an appropriate step to take.

Second, the precautionary principle as it currently stands in the SPS Agreement has not been a viable defense in WTO dispute settlement proceedings. The Appellate Body, although somewhat delphic in its pronouncements on this score, has signaled that the SPS Agreement will have to be amended if WTO members want to raise the precautionary principle as a legal defense in WTO dispute settlement. A number of environmental groups and the EU have advocated amending the SPS Agreement to permit reliance on a version of the precautionary principle that states, in essence, "better safe than sorry."152

In the context of GMOs, however, any revised or clarified version of the precautionary principle must also require that risk assessments take into account the downside risks of not adopting new technologies. In other words, risk assessments must take into account the importance of GMOs to agricultural productivity, to the millions of malnourished people in developing countries, to habitat conservation, and to reducing the use of pesticides and fertilizers that pollute the watershed. Whatever the outcome, a precautionary principle that is based on clear guidelines should be included in the SPS Agreement.153

The SPS Agreement should also be expanded to include animal welfare issues. In a decision that should bring this proposal to the fore, the EU banned the hormone, Bovine Somatotropin (BST), which enhances milk production in dairy cows, on October 26, 1999, on the ground that such a ban would promote animal health and welfare.154 On a smaller but voluntary scale, McDonald's now requires that farmers who supply it with eggs adopt humane methods of raising hens.155

Third, as part of the ongoing negotiations on trade in agricultural products, WTO members should agree to the elimination of environmentally damaging domestic and export subsidies for farming and fishing.156 Such subsidies encourage overfishing, overproduction, and excessive use of fertilizers, which results in depletion of fish stocks, degradation of the land, and pollution of rivers and streams.

Fourth, the expense alone of bringing a WTO complaint can deter a developing country from bringing an otherwise meritorious claim against a developed country. This cost can also be used by developed countries to harass developing countries. In order to strengthen the WTO as a forum that is more

152. See Environmental Groups Urge WTO to Allow Import Bans Based on Precautionary Rule, 16 Int'l Trade Rep. (BNA), No. 21, at 877 (May 26, 1999).
153. See EU Set to Unveil Plan to Defuse Dispute with U.S. Over Precautionary Principle; 16 Int'l Trade Rep. (BNA), No. 43, at 774 (Nov. 3, 1999).
154. See Joe Kirwan, EU Proposes Permanent Ban on BST; Expected to Heighten Tensions With U.S., 16 Int'l Trade Rep. (BNA), No. 43, at 1778 (Nov. 3, 1999).
155. See Peter C. Choharis, Global Firms Need Codes, not Lawsuits, CHRISTIAN SCI. MONITOR, Sept. 26, 2000, at 11.
156. See Embracing Greenery, supra note 1, at 89.
responsive to the financial limitations of its developing-country members, the WTO Dispute Settlement Understanding should be amended to provide for attorney fee shifting, so that the loser pays the winner’s attorneys’ fees and related costs of prosecuting or defending a WTO complaint. Alternatively, the WTO should create the equivalent of a legal aid attorney (or public defender) to represent developing countries in WTO disputes. This reform could also have the salutary effect of reducing the WTO dispute settlement caseload, although on this point I am less sanguine.

Fifth, the ability of developing countries to participate in the SPS process needs improvement. If and when a developing country is put into the WTO docket for allegedly violating the SPS Agreement, it will be economically hamstrung in meeting the scientific arguments that are an inherent part of such disputes. Article 11.2 of the SPS Agreement dealing with the appointment of experts should be amended by making the appointment of expert advisory panels mandatory, by making such expert panels exclusive, and by providing that these panels be paid out of the WTO’s budget. A related reform that could lift some of the burden on developing countries in this regard would be to allow NGOs with recognized scientific expertise to intervene on behalf of developing countries in a DSU panel proceeding.

Sixth, developed countries made a commitment to provide technical assistance to developing countries in Article 9 of the SPS Agreement. There needs to be a redoubling of that commitment. In addition, leveraging international standards-setting bodies is problematic for developing countries because they lack the scientific expertise and resources to influence the debate. The commitment that developed countries made in Article 10.4 of the SPS Agreement to encourage and facilitate the participation of developing countries in international standards-setting organizations has been largely hollow. Coalition building with developed countries perhaps offers a better alternative strategy for influencing the debate. In that connection, the Cairns Group of agricultural exporting countries should become more active in the international standards-setting process.¹⁵⁷

Seventh, risk analysis has three components: risk assessment, risk management (both of which are addressed in the SPS Agreement), and risk communication. The role of risk communication needs elaboration, especially in connection with labeling to allay consumer concerns about the safety and contents of products. If saving turtles is a high value to consumers in developed countries, then labeling will empower them so that they can make informed purchasing decisions. Again, however, developing countries worry that onerous eco-labeling requirements could be a disguised form of trade protectionism. Hong Kong and

¹⁵⁷. See, e.g., Gary G. Yerkey, Cairns Group Still Undecided on How to Approach Biotech Issue in WTO Talks, 16 Int’l Trade Rep. (BNA), No. 40 at 1646 (Oct. 13, 1999). The Cairns Group members are Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay. Bolivia, Costa Rica, and Guatemala joined as observers in 1999. Id.
Egypt have openly complained about inadequate participation in the preparation of international eco-labeling standards within the International Standards Organization. The United States likewise is concerned that eco-labeling could be a thinly-veiled ruse to exclude GMOs and hormone-treated beef.

Eighth, environmentalists suffer from DSU envy. The DSU is one of the few, if not the only, reasonably effective, non-violent, inter-governmental dispute settlement mechanisms in the world. But the WTO is about trade, not about the environment. It has no claim to expertise, and certainly no claim to legitimacy, when it comes to resolving environment disputes. At the risk of sounding like a pitch man for Al Gore, the time may be ripe for either establishing a World Environment Organization (WEO) or for reinvigorating the United Nations Environment Program and have it fulfill a WEO role.

VIII. SUMMARY AND CONCLUSION

Multilateralism matters in resolving trade-environment disputes for at least three reasons. First, unilateralism is not a legal option under customary international law or under conventional law, i.e., GATT 1994 and the WTO multilateral trade agreements. GATT 1994, the Dispute Settlement Understanding, and GATT panel and WTO Appellate Body reports make clear that WTO members may not apply their environmental laws extraterritorially by barring market access to imports originating from other WTO members, provided such imports do not pose a health or safety risk to humans, animals, or plants in the importing member. Second, multilateralism is the best policy option when the goal is to protect animals located in the global commons. Unilateral approaches, such as a ban on imported goods produced by disfavored production processes and methods, rarely, if ever, attack the root of the problem. The lesson of the GMO controversy for the United States is that unilateralism is a double-edged sword. Third, multilateralism, in contrast to unilateralism, is a rules-based, not power-based approach to international relations. For weak developing countries, a rules-based regime ensures that disputes with developed countries will be resolved in a predictable and consistent manner.

The debacle at the WTO's Seattle biennial meeting in December 1999 was in part fueled by myths and misinformation about the WTO, free trade, and globalization. It is true that accelerated trade liberalization worldwide has led to the increased globalization of business and the interdependence of national economies. Environmental fear mongers proclaim that we are on the brink of a global environmental collapse, thanks in large part to free trade. Labor unions


condemn the labor rights record of developing countries. But many environmental and labor rights groups view the world as a zero sum game: to the extent the WTO succeeds at promoting globalization, then in equal measure do the environment and labor rights suffer. One can only pause and wonder whether they silently fear global economic interdependence and wish sub rosa for autarchy. In the words of former presidential economic adviser Murray Weidenbaum:

If the full policy agenda of the anti-global activists were adopted, the long-run effect would be for the United States and other industrialized nations to lose the benefits of the specialization of labor, and suffer severe declines in standards of living. Ironically, the economic costs would soon be translated into environmental costs. Wealthier countries can afford to devote more resources to achieving a cleaner environment, and they do so. Poorer countries do far less to clean up the environment.160

Regardless of how wrong environmentalists and labor rights groups are about the WTO, free trade, and globalization, it does not inexorably follow that a multilateral approach to all cross-border issues is necessarily the right approach. Multilateralism matters, but it is no desideratum. I have argued elsewhere, for example, that WTO multilateral rules on competition policy would be a mistake. However, in the case of trade-environment issues, unilateralism simply is not a viable alternative to multilateralism.

The WTO is a fragile institution. If you visit the WTO’s web site, the WTO will remind you of its fragility with an image of an egg. The WTO’s prestige, reputation, and authority are at an all-time low. The United States, its most powerful member, has been ambivalent at times in its support of the WTO and its goal of promoting liberal trade. The commitment of the United States to U.S. participation in the WTO is less than whole-hearted.161 But even the most vocal government critics of the WTO have called for reform of the Organization, not

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for U.S. withdrawal. At the same time intemperate and pandering remarks by President Clinton at the WTO Seattle Ministerial Conference in late 1999, suggesting that the WTO conclude an agreement on core labor standards that would be enforced through import bans, steered the resolve of developing countries not to be steam rolled by the WTO’s developed-country members at any new WTO trade negotiation round.

All of these developments are unfortunate because the WTO sets rules that bind rich countries and poor countries alike. Jeffrey Schott has noted that “as the weaker partners in the trading system, developing countries benefit the most when the major trading powers play by a common set of rules.” A liberal trade policy is a policy of increased competition and opportunity. Such a policy holds great promise for the world’s developing countries. The big losers from the debacle in Seattle were developing countries. Forcing the bitter pill of unilateral regulation of the global commons and the environment down the throats of countries that are neither prepared nor willing to accept such rules is a prescription for failure. Developed countries can bully less-powerful developing countries into entering into such agreements, but adherence to the commitments made in them will be begrudging and cheating at the margins widespread. In order to be durable and robust, international environmental agreements must be perceived by the parties as being in their self-interest.

Although trade and the environment are clearly linked, to press the WTO into service as the forum for repairing the environment and saving the global commons would be misguided. The institutional costs to the WTO have been high. The WTO’s plate is full, its agenda unfinished, and its authority fragile. The WTO dispute settlement mechanism is under tremendous stress. Saddling the Organization with this hot-button issue—a virtual lightening rod planted on its institutional head—has done nothing but undermine the WTO’s status and drain valuable and scarce institutional resources away from its primary mission of promoting liberal trade by eliminating government barriers to trade. From a GATT-WTO perspective, maintaining the status quo in the area of trade/environment, coupled with further research on the subject, is the only unambiguously beneficial course of action for the WTO to pursue.


164. See Daniel Pruzin, WTO Chief Urges Budget Increase, Highlights Dispute Settlement Logjam, 17 Int’l Trade Rep. (BNA), No. 38, at 1469 (Sept. 28, 2000).