PIK Report

No. 66

THE RISING TIDE OF GREEN UNILATERALISM IN WORLD TRADE LAW

OPTIONS FOR RECONCILING THE EMERGING NORTH-SOUTH CONFLICT

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POTSDAM, DEZEMBER 2000

SUMMARY

This paper argues that to reconcile the objectives of free trade and environmental protection, limited reforms of international trade law are required. There is a need to guarantee, first, that universally accepted international environmental agreements that mandate trade-restrictions remain compatible with international trade law, in particular with the General Agreement on Tariffs and Trade. Second, it is necessary to ensure that the interests of small and vulnerable states are protected against environmental unilateralism of the major trading nations.

This reform agenda could be realized, it is argued, through an authoritative interpretation of international trade law by the Ministerial Conference of the World Trade Organization (WTO). This interpretation should stipulate that environmentally-motivated trade restrictions which are related to processes and production methods, and which are intended to protect environmental goods outside the importing country, be compatible with WTO law, but only if mandated by international environmental agreements that have been previously accepted by the Ministerial Conference. This paper outlines the rationale for such authoritative interpretation and offers a possible legal draft (cf. page 30).

This clarification of the relationship between international environmental and international trade law would protect the sovereign right of smaller trading nations, particularly developing countries, to enact their own environmental standards as may be appropriate and feasible according to their specific situation. It would also maintain the supremacy of multilateralism in both international trade and environmental policies, as opposed to unilateral action. The principle of international co-operation and the rule of law would be strengthened, and attempts to use the international trade system for the enforcement of unilaterally decided environmental standards would be precluded.

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Acknowledgements

I owe my gratitude for valuable comments on earlier versions of this argument to Wilhelm Althammer, Markus Böckenförde, Susanne Dröge, Peter Fuchs, Carsten Helm, Georg von Koppenfels, Paul Klemmer, Michael Kohlhaas, Carsten Loose, Benno Pilardeaux, Armin Sandhövel, Udo E. Simonis and, in particular, Aarti Gupta. Parts of this text have been translated from German by Sumeeta Wadhera; valuable research assistance has been provided by Daniel Becker and Kerstin Löffler.

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ABBREVIATIONS

Basel Convention	Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989)
Biodiversity Convention	Convention on Biological Diversity (1992)
CFC	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
Dispute Settlement Agreement	Understanding on Rules and Procedures Governing the Settlement of Disputes (1994)
EU	European Union
GATT	General Agreement on Tariffs and Trade (1994 if not indicated otherwise)
IISD	International Institute for Sustainable Development
ILM	International Legal Materials
Montreal Protocol	Protocol to the Convention on the Protection of the Ozone Layer (1985) on Substances that Deplete the Ozone Layer (1987, 1990, 1992, 1997)
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
Rotterdam Convention	Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures (1994)
TBT Agreement	Agreement on Technical Barriers to Trade (1994)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
WTO Agreement	Agreement Establishing the World Trade Organization (1994)
WTO	World Trade Organization

I. INTRODUCTION

Both economic and ecological globalization have changed the nature of the state system, with broad areas of international relations having become subject to complex legal regulations. Regarding protection of the environment, more than nine hundred international treaties are in force. In economic relations, too, the range of domestic policy options for governments has been severely restricted by the General Agreement on Tariffs and Trade ("GATT"),[1] which has sparked off, over the last decades, a massive growth in world trade, reinforced by the creation of the World Trade Organization WTO.[2]

In view of this, it is not surprising that tensions between these policy areas abound. Whether free trade and environmental protection are reconcilable goals or conflicting policy arenas, has been extensively debated, fuelled by a host of intergovernmental disputes concerning issues as diverse as trade in tuna, shrimps, certain types of automobiles, furs, and meat of cattle treated with certain growth hormones.[3] In these and many other cases, some states wanted to ban the import on environmental grounds, while exporting states invoked their rights of nondiscrimination in trade granted under WTO law.

A central issue in this conflict is the legitimacy of unilateral action and national decision-making under WTO law, as opposed to multilateral decision-making. To what extent do governments have the right to determine the environmental qualities of imported goods, with the concurring right to ban the import of certain goods if deemed necessary? A second line of conflict—often indistinguishable from the first—runs between the governments of the large developed markets in the North, with their strong environmentalist movements, and the smaller trading nations, in particular in the developing world.

Many industrialized countries strive to place the environment and trade nexus on the agenda of future WTO negotiations, with the intention of bringing environmental standards into the WTO legal framework or of opening up additional avenues for unilateral action.[4] Some governments complain of a lack of clarity in the status of

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

2 *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"), in Final Act, supra, note 1.

3 For an overview, cf. C. Helm, "Transboundary Environmental Problems and New Trade Rules", 23 *International Journal of Social Economics* (1996), no. 8, 29–45.

4 European Commission, *The EU Approach to the Millennium Round: Communication from the Commission to the Council and to the European Parliament* (Brussels: European Commission, 1999), available at www.europa.eu.int/comm/trade/pdf/0807nr.pdf (printout of 8 Sept. 2000). On European nongovernmen-

multilateral environmental agreements vis-à-vis WTO law as well as the risk that the future evolution of global environmental governance will be hampered by an overly intrusive and restrictive WTO law.

In contrast, governments of developing countries object to any changes in the WTO regime in this field.[5] This is supported by many nongovernmental organizations of the South. An international conference entitled 'Southern Agenda for the Next Millennium—Role of the Civil Society' found in 1999 that

> Environmental and social issues are an integral part of any vision of sustainable development. Trade restrictive measures are neither appropriate nor effective mechanisms to address these problems. They need to be advanced through independent policy routes supported by international co-operation.[6]

Likewise, Principle 12 of the 1992 Rio Declaration on Environment and Development declares:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing countries should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Developing countries argue that WTO law has never hindered multilateral environmental agreements even where they were clearly trade-restrictive, and that such agreements have never been subject to dispute settlement under the GATT/WTO regime.[7] In recent discussions on establishing environmental standards within WTO law, developing countries feel threatened by an emerging environmental unilateralism and even "eco-colonialism" of industrialized countries. To them, the multilateral WTO dispute settlement procedure is an important safeguard to protect their economic and development interests and their options for choosing environmental standards adequate to their economic status.[8] The heated debates surrounding the 1999 Ministerial Conference in Seattle indicate that North-South conflicts may dominate future trade negotiations, also because of persistent disagreement on the environment and trade nexus.

How could these conflicts between unilateralism and multilateralism be resolved keeping in mind the double objective of global environmental protection and the further development of a multilateral trading regime? In this paper, I argue that there is indeed a need for a reform of WTO law regarding the trade and environment

tal organizations, see, e.g., the position of the Working Group on Trade of the German Nongovernmental Organizations Forum on Environment and Development, *epd-Entwicklungspolitik* (1999), no. 9, 28–30.

5 Cf. for instance the Declaration of the South Summit from the Group of 77, 12–14 April 2000, available at www.g77.org; and the Declaration of the Meeting of the "Group of 15"—which embraces 17 major developing countries—from 17 to 18 Aug. 1999 in Bangalore, reported in: 3 *Bridges Between Trade and Sustainable Development* (1999), no. 6, at 12. Cf. also *The Financial Times*, 18 Aug. 1999 ("India urges G15 to push for market access"), and of 9 Sept. 1999 ("Rich and poor clash over trade and environment").

6 Cited in: 3 *Bridges Between Trade and Sustainable Development* (1999), no. 6, at 19. A group of eminent scholars and representatives of nongovernmental organizations of developing countries has also argued against linking trade with environmental standards, cf. *The Financial Times* of 16 Sept. 1999.

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

8 *The Economist*, 25 Sept. 1999.

nexus. In section II, I will discuss some recent developments in WTO law that support my claim. In section III, I will present in some detail the outline of a possible authoritative interpretation of WTO law by the WTO Ministerial Conference that could reconcile different objectives and assist in maintaining a free and multilateral trading regime while not obstructing effective global environmental governance. Section IV will summarize the findings of the study and offer, on page 30, a possible legal draft of an "Understanding on the Interpretation of Certain Provisions Relating to the Protection of Human, Animal or Plant Life or Health, or the Environment".

II. MULTILATERALISM AND GREEN UNILATERALISM IN WTO LAW

Environmentally motivated trade restrictions have a long history. Many such restrictions have been included in multilateral agreements. As early as 1878, for example, governments adopted a treaty banning trade in certain grapes to guard against the spread of the plant insect *Phylloxera vastatrix*, and agreed on special packing and certification requirements.[9] In recent years, however, some governments have increasingly resorted to unilateral trade restrictions. This is evident from actions, in particular, by the United States, taken pursuant to its domestic legislation on endangered species protection, or those by the European Union relating to its legislation on food safety and animal welfare. These unilateral actions have raised concern among multilateralists as well as among smaller trading nations, which are generally the main victims of unilateral action by the larger world markets.

In the following, I will discuss recent developments in the interpretation of WTO law regarding the trade and environment nexus. In the first section, I will examine the legal status in WTO law of multilateral environmental agreements with a high degree of participation among governments ("quasi-universal multilateral environmental agreements"). In the second and third sections, I will analyze recent developments in the legitimacy of unilateral action by individual governments or of multilateral agreements with only a small degree of participation.

A. MULTILATERAL TRADE RESTRICTIONS

1. Legal Analysis

Many environmentalists, as well as some governments in industrialized countries, fear that the increasing discipline in trade policy brought about by WTO will undermine the effectiveness of multilateral environmental agreements. These fears have so far remained unfounded. A 1993 GATT study showed that 19 out of 140 multilateral

[9] S. Charnovitz, "Trade Measures and the Design of International Regimes", 5 *Journal of Environment and Development* (1996), 168–196, at 176.

environmental treaties had some relevance for the trading regime:[10] none has as yet been challenged or affected by WTO law.

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),[11] for instance, bans trade in protected species with nonparties unless they comply with treaty provisions. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention")[12] bans the import or export of wastes from states that are not party to the treaty. Likewise, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol")[13] restricts trade with nonparties, for example by requiring governments to ban the import of goods that have been produced in nonparties with ozone-depleting substances even if those goods no longer contain such substances.[14] Notably, trade in such goods amounted to 16 per cent of world trade before the Protocol entered into force.[15] In addition, the Montreal Protocol bans trade with nonparties in ozone-depleting substances and in goods containing such substances, and it requires parties to discourage the export of technologies for the production and consumption of ozone-depleting substances to nonparties.[16] Some recent environmental agreements will also affect WTO obligations of their parties, including the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("Rotterdam Convention")[17] and the 2000 Cartagena Protocol on Biosafety (to the 1992 Convention on Biological Diversity, hereafter "Biosafety Protocol")[18], both of

[10] GATT, *Trade Provisions Contained in Multilateral Environmental Agreements*, GATT Doc. TRE/W/1/Rev.1 of 14 Oct. 1993.

[11] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Washington, 3 March 1973, in force 1 July 1975, 12 ILM 1085 (1973), Article X.

[12] *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Basel, 22 March 1989, in force 24 May 1992, 37 ILM 22 (1998). Cf. J. Krueger, "What's to Become of Trade in Hazardous Wastes? The Basel Convention One Decade Later", *Environment*, Nov. 1999, 10–21.

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

[14] Montreal Protocol, Article 4.4. Parties decided in 1993 to postpone implementation of this provision because the Protocol was almost universally recognized. Cf. *Report of the V. Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Bangkok, 17–19 Nov. 1993*, UN Doc. UNEP/OzL.Pro. 5/12 of 19 Nov. 1993, Decision V/17.

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

[16] See also World Trade Organization, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol, UNEP*, WTO Doc. WT/CTE/W/115 of 25 June 1999, para. 5ff.

[17] *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* ("Rotterdam Convention"), Rotterdam, 10 Sept. 1998, not in force, in: *Annex 1 to the Final Act of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, UN Doc. UNEP/FAO/PIC/CONF/5 of 17 Sept. 1998. The Rotterdam Convention lays down the requirement of prior informed consent for pesticides and chemicals listed in an annex to the convention. This requires exporting states to inform importing states about their national law and about the operation, features and the risks of certain potentially hazardous substances. The importing states can thus take precautionary action.

[18] *Cartagena Protocol on Biosafety*, Montreal, 29 January 2000, not in force, available at www.biodiv.org/biosafe/protocol/pdf/cartagena-protocol-e.pdf (printout of 8 Sept. 2000). Cf. A. Gupta,

which are not yet in force.

These multilateral environmental agreements contradict at least some of the basic obligations under GATT,[19] especially the most-favoured nation principle under Article I (all advantages accorded to any WTO member are to be granted to all others);[20] the principle that imported goods must be treated similarly to like domestic goods under Article III,[21] and the prohibition of quantitative trade restrictions under Article XI.I.[22] Parties to these multilateral environmental agreements, however, could justify their action under WTO law by certain exemptions to WTO regulations.

First, essential global environmental standards could take precedence over WTO law through a dynamic interpretation of the concept of jus cogens, or peremptory norms of international law. The 1969 Vienna Convention on the Law of Treaties stipulates in Articles 53 and 64 that any international treaty, or any provision of a treaty, is void to the extent that it contradicts a peremptory norm of general international law.[23] Hence, any provision of WTO law will lose its effect once it runs counter to peremptory international law.[24] Governments have not yet specified those norms that have jus cogens status. The International Court of Justice, however, found in 1998 that essential international environmental standards could fall under the jus cogens injunction.[25] Likewise, when the UN International Law Commission provided a list of possible "international crimes", it included among them—together with wars of aggression and other prohibition norms of jus cogens—"a serious breach of an international obligation of essential importance for the safeguarding and

"Governing Trade in Genetically Modified Organisms: The Cartagena Protocol on Biosafety", 42 *Environment* (2000), no. 4, 23–33; A. Gupta, "Creating a Global Biosafety Regime", 2 *International Journal of Biotechnology* (2000), nos. 1/2/3, 205–230.

19 R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", 272 *Recueil des cours* (1998) (with further references).

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

21 GATT, Article III.1–2: "1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts of proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. … ."

22 GATT, Article XI.1: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

23 *Convention on the Law of Treaties*, Vienna, 23 May 1969, in force 27 Jan. 1980, 8 ILM 679 (1969).

24 A. Verdross, "Jus Dispositivum and Jus Cogens in International Law*", American Journal of International Law* (1966) 55; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker und Humblot, 1984), para. 524–531; I. Sinclair, *The Vienna Convention on the Law of the Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), 220–222.

25 *Gabcikovo-Nagymaros Case*, in: ICJ Reports (1998), para. 112.

preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."[26] The UN Security Council, too, observed in 1992 that the "non-military sources of instability in the … ecological fields have become threats to the peace and security."[27] This wording may imply a link to Article 39 of the UN Charter, which would authorize the Council to ask UN members for "complete or partial interruption of economic relations" with noncomplying states.[28]

Even though governments have yet to specify the body of jus cogens norms in the area of global environmental governance, it seems that at least the intentional emission of chlorofluorocarbons in violation of the—almost universally recognized—Montreal Protocol could be seen as a serious breach of a peremptory norm of general international law. This would entail that the Protocol's trade-restrictive parts would precede WTO law without recourse to its exception clauses.[29] Given the remaining haziness of jus cogens, however, reliance on this concept appears insufficient to resolve existing or prevent future conflicts between trade and environment.

As long as multilateral environmental agreements do not qualify as jus cogens, they will generally be justified under Article XX of GATT, the general exception clause. This proviso permits WTO members all trade restrictions that are "necessary to protect human, animal or plant life or health" (Article XX [b] GATT) or that are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption" (Article XX [g] GATT). Both exceptions are restricted by the chapeau of Article XX of GATT, which subjects exceptions to the requirement

> that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Even though no complaint has yet been filed against multilateral environmental agreements before WTO, it is important to consider how WTO dispute settlement panels would deal with such complaint. This question is salient, given the increasing number of multilateral environmental agreements and the inclusion of trade restric-

[26] International Law Commission, Draft Articles on State Responsibility, 37 ILM 440 (1998), Articles 19.2–3 and 53. Article 19 reads: "… 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime. 3. Subject to paragraph 2 above, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: … (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the sea." The United States and some other states, however, rejected the notion of "international crime", among others with a reference to the broad formulation in Article 19.2 (d). Cf. *United States Comments on the Draft Articles on State Responsibility*, 22 Oct. 1997, 37 ILM 468 (1998).

[27] United Nations Security Council, *Statement by the Council President on Behalf of the Members*, 31 Jan. 1992, UN Doc. A/47/253, also in 46 Yearbook of the United Nations (1992), at 33.

[28] *Charter of the United Nations*, Article 41.

[29] F. Biermann, " 'Common Concern of Humankind': The Emergence of a New Concept of International Environmental Law", 34 *Archiv des Völkerrechts* (1996), 426–481; J. Brunnée, " 'Common Interest'—Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law", 49 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1989), 791–808, at 804ff. For a different opinion, see P. Birnie and A. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992), at 156ff.

tions in them. Furthermore, in a number of issue areas, governments may choose to adopt certain policies that are not mandated by a multilateral environmental agreement but are implemented in order to comply with particular international rules, such as environmental taxation in formulation of domestic climate policies.

It seems, however, that most fears about the incompatibility of the core multilateral environmental agreements with WTO law are unfounded. First, Article XX (b) and (g) of GATT are quite broadly formulated. Parties are allowed to deviate from their obligations under GATT in order to protect the health of humans, animals and plants and to protect exhaustible natural resources, as long as they comply with the provisions of the chapeau of Article XX. It is important to note that the vast majority of WTO members have made use of this exception, in their support of multilateral environmental agreements. CITES, for example, has been ratified by 89 per cent of WTO members. Altogether, CITES has 152 members and is thus almost universally recognized as the general standard of behaviour in this issue area.

This situation is similar for most other multilateral environmental agreements:[30] 95 per cent of WTO members have ratified the United Nations Framework Convention on Climate Change ("Climate Convention");[31] 94 per cent the 1987 Montreal Protocol; 94 per cent the Convention on Biological Diversity ("Biodiversity Convention");[32] 80 per cent the Montreal Protocol as amended in 1990; 76 per cent the Basel Convention; and 60 per cent the Montreal Protocol as amended in 1992. Conversely, the 138 WTO members represent the overwhelming majority in environmental agreements: 82 per cent of the parties to the Montreal Protocol as amended in 1992 are also members of WTO; 81 per cent in case of CITES; 80 per cent in case of the Basel Convention; 79 per cent in case of the Montreal Protocol as amended in 1990; 74 per cent in case of the 1987 Montreal Protocol; 72 per cent in case of the Biodiversity Convention; and 71 per cent in case of the Climate Convention. Even 90 per cent of the current signatories of the Rotterdam Convention are members of WTO.

Following the interpretative rule that legal norms must be construed, if possible, in a way that they do not contradict their aims and objectives, one can safely assume

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

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

32 *Convention on Biological Diversity* ("Biodiversity Convention"), Rio de Janeiro, 5 June 1992, in force 29 Dec. 1993, 31 ILM 818 (1992). The Biodiversity Convention prescribes no trade restrictions, but is relevant insofar as it might result in conflict with treaties on intellectual property rights or conflicts regarding its first protocol, the Cartagena Protocol on Biosafety (cf. supra, note 18). The Biodiversity Convention asserts precedence over other agreements when biodiversity is seriously threatened. Cf. Article 22.1 of the Biodiversity Convention: "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."

that the many WTO members that are parties to these multilateral environmental agreements do not consider them as violating the spirit of GATT and being applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Thus, it seems clear that quasi-universal multilateral environmental agreements are fully justified under Article XX of GATT. This conclusion also holds in light of the fact that several GATT panels have chosen a restrictive interpretation of Article XX when examining trade restrictions imposed unilaterally by individual states (discussed below). Given that multilateralism is the overriding rationale of the free trade regime, it is obvious that unilateral actions of single states must be construed differently from multilateral action.[33]

2. Discussion

Hence, GATT is to be interpreted in such a way that trade restrictions required by quasi-universal multilateral environmental agreements fall under the purview of Article XX (b) and (g) of GATT as well as its chapeau. Yet the problem of definition persists, namely, under what circumstances a multilateral environmental agreement is sufficiently accepted to claim quasi-universal status and so be justifiably exempted under Article XX of GATT. Although multilateral environmental agreements have gone unchallenged in the WTO dispute settlement system so far, there is no guarantee that this tolerance will persist. For instance, when the Montreal Protocol entered into force in 1989, most developing countries were not party to it, including India and China. At that point of time, it could hardly be assumed that the Protocol enjoyed quasi-universal acceptance. If a comparable case was brought before the WTO dispute settlement mechanism today, eventually the Appellate Body[34] would have to determine whether the multilateral environmental agreement would be legitimately covered under the exception clause of Article XX of GATT.

Such reference to the Appellate Body, however, seems to be only the second-best solution in highly-contested policy arenas such as the trade and environment nexus. Essentially political questions call for a political procedure: they should not be left to the judiciary. Which quasi-universal multilateral environmental agreements

[33] R. Wolfrum, supra, note 19, with further references.

[34] The Appellate Body is part of the WTO dispute settlement system established in 1994. As under GATT, trade conflicts are first to be submitted to a dispute settlement panel. Under WTO, however, the defeated party may appeal to the Appellate Body which shall review the ruling of the panel. According to Article 17.6 of the Dispute Settlement Agreement, the Appellate Body is restricted to "issues of law covered in the panel report and legal interpretations developed by the panel." The Appellate Body comprises of seven experts in questions of law, trade and the WTO agreements, who are nominated by the WTO General Council. Decisions of the Appellate Body are binding if not unanimously rejected by the WTO Dispute Settlement Body, which is practically identical with the WTO General Council. Cf. *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("Dispute Settlement Agreement"), Annex 2 to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, supra, note 1, Article 17; and WTO Agreement, Article IV.3. Cf. on the Appellate Body, for example, S. Cone, "The Appellate Body, the Protection of Sea Turtles and the Technique of 'Completing the Analysis' ", 33 *Journal of World Trade* (1999), 51–61.

should be accepted under Article XX of GATT, and which smaller multilateral environmental agreements should rather be considered unilateral action—such questions should be resolved by the international community through negotiation and mutual agreement. This is the first need for reform suggested in this paper.

B. UNILATERAL TRADE RESTRICTIONS RELATED TO PRODUCT CHARACTERISTICS

1. Legal Analysis

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

WTO law permits any WTO member to ban the import of products it considers harmful to its citizens, provided that this ban relates to characteristics of the product. Moreover, the restrictions must apply equally to like domestic goods, they must not discriminate among different exporting countries, and must not represent a disguised trade barrier.[35] In quite a few cases, the exact application of this rule was contested before GATT and WTO dispute settlement panels, and some WTO members were accused of devising their product standards in a way that favoured domestic over foreign producers.[36]

Some WTO agreements are intended to provide guidance on this issue. First, the Agreement on Technical Barriers to Trade ("TBT Agreement")[37] shall minimize trade distortion caused by the introduction of national standards for products and product-related production standards (which are manifest in the product) by requiring WTO members to use international standards as a basis for their national technical regulations. To the extent that the TBT Agreement is applicable, its stipulations take precedence over GATT.[38]

The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")[39] shall facilitate the worldwide harmonization of sanitary and phy-

35 GATT, Article I quoted supra, note 20 and Article III quoted supra, note 21.

36 For example, this was the subject of a decision by a GATT panel regarding US legislation on automobiles aimed at raising their energy efficiency through taxes and a production-related fuel consumption regulation (Corporate Average Fuel Efficiency Regulation). The EU Commission argued that the formulation of this legislation favoured US automobile producers.

37 *Agreement on Technical Barriers to Trade* ("TBT Agreement"), in: Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, supra, note 1. Cf. S. W. Chang, "GATTing a Green Trade Barrier: Eco-Labelling and the WTO Agreement on Technical Barriers to Trade", 31 *Journal of World Trade* (1997), 137–159.

38 Cf. *General interpretative note to Annex 1A*, in: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, supra, note 1.

39 *Agreement on the Application of Sanitary and Phytosanitary Measures*, in: Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, supra, note 1.

tosanitary measures. The SPS Agreement has been much criticized following a decision by the WTO Appellate Body in the *EU Measures Concerning Meat and Meat Products (Hormones)* case.[40] For example, J. Caldwell of the US-based Community Nutrition Institute claimed that the European Union had lost the case because

> as a higher standard of protection, the EU measure is not based on an international standard … [and that] … the WTO suggests that a product must be determined to be dangerous beyond a shadow of doubt and the WTO's own satisfaction before the trade in that product may be restricted domestically and internationally.[41]

Such assertions, however, which are perhaps typical for the heated debate surrounding the *Hormones* decision, are far removed from both the wording of the SPS Agreement and the Appellate Body's decision.

Instead, the SPS Agreement does allow WTO members to strive for higher standards. According to Article 3.3, members may introduce or maintain sanitary or phytosanitary measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards,

> 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.[42]

A footnote to this norm explains that in this context,

> 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 … are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

The Appellate Body has interpreted this proviso in the *Hormones* case.[43] The Body found that if a government wishes to apply a higher standard of protection, relying on Article 3.3 of the SPS Agreement, then it has, according to Article 5.1 of the SPS Agreement,

> to ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

According to the Appellate Body, the term "based on" does not imply that the party has to slavishly follow its own risk assessment, but rather that it can proceed in a precautionary manner. The government need not accept the opinion of the majority of the experts consulted, and it may take a certain risk potential or the probability of its appearance into consideration. While every country is free to determine its own

40 *EU Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, AB-1997-4, WTO Doc. WT/DS26/AB/R and WT/DS48/AB/Rof 16 Jan. 1998.

41 J. Caldwell, "The WTO Beef Growth Hormone Ruling: An Analysis", in: *Dispute Settlement in the WTO: A Crisis for Sustainable Development*, ed. by World Wide Fund for Nature International, Oxfam-GB, and Community Nutrition Institute, available at www.panda.org/resources/publications/sustainability/wto-98/#index.htm# (printout of 8 Sept. 2000).

42 SPS Agreement, Article 3.3.

43 *EU Measures Concerning Meat and Meat Products (Hormones),* supra, note 40, especially para. 170ff.

level of acceptable risk, it must, however, undertake a risk assessment of those substances in which trade is to be restricted. In view of the Appellate Body, it was this condition that the European Union failed to meet.[44]

Moreover, the SPS Agreement explicitly includes the precautionary approach. Thus, Article 5.7 stipulates that

> In case where relevant scientific evidence is insufficient, a Member may 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.

In sum, the European Union lost the *Hormone* case because it could not furnish a scientific risk assessment pertaining to the hormones used in cattle fodder in the United States and Canada. Since then, the European Union has furnished the risk assessment for one of the hormones used in the United States in an interim report of May 1999, which asserted "a substantial body of recent scientific evidence that it has to be considered as a complete carcinogen."[45] In accordance with the ruling of the Appellate Body, once this argument is substantiated, the EU import ban has to be recognized as being consistent with the SPS Agreement.

2. Discussion

The SPS Agreement, including its rendition of the precautionary approach, relates only to sanitary and phytosanitary measures. As for other possible product standards, they remain under the purview of the general exception clause of Article XX of GATT. Therefore, environmentalists have argued that a precautionary approach should be either directly embodied in WTO law by way of a treaty amendment, or else be accepted as interpretative principle underlying Article XX of GATT.[46] The European Union, on its part, asserted in the *Hormones* case that a "precautionary principle" is either part of customary international law[47] or else a general legal principle,[48] which again would affect the interpretation of Article 5 of the SPS Agreement.[49] Similar positions are maintained by some international lawyers.[50]

44 *EU Measures Concerning Meat and Meat Products (Hormones),* supra, note 40, para. 178ff.

45 The European Union announced on 24 May 2000 that it would not lift the import ban on hormone-treated beef, because one of the incriminated hormones was seen as carcinogenic. Cf. 3 *Bridges Between Trade and Sustainable Development* (1999), no. 3, at 5, and 4 *Bridges Between Trade and Sustainable Development* (2000), no. 4, at 13.

46 For an overview, see K. von Moltke, "The Dilemma of the Precautionary Principle in International Trade", 3 *Bridges Between Trade and Sustainable Development* (1999), no. 6, 3–4.

47 Customary law is defined, in Article 38.1 (b) of the Statute of the International Court of Justice, as "international custom, as evidence of a general practice accepted as law". Cf. in more detail, for example, J. I. Charney, "The Persistent Objector Rule and the Development of Customary International Law", 56 *British Yearbook of International Law* (1985), 1; J. I. Charney, "Universal International Law", 87 *American Journal of International Law* (1993), no. 4, 529–551.

48 This refers to the third source of international law, the "general principles of law recognized by civilized nations". Cf. Statute of the International Court of Justice, Article 38.1 (c).

49 *EU Measures Concerning Meat and Meat Products (Hormones),* supra, note 40, para. 16.

On the other hand, the United States and Canada contested, in their submissions in the *Hormones* case, the existence of such a norm of customary international law, preferring instead the notion of a "precautionary approach" used as a policy tool by governments, with different renditions in each country.[51] Again, a number of international lawyers support this position.[52] The term precautionary "approach" – instead of the more demanding "principle" – is also used in the 1992 Rio Declaration on Environment and Development, which asserts in Principle 15:

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

Some multilateral environmental agreements—like the Montreal Protocol[53] or the Biosafety Protocol[54]—build explicitly on the precautionary approach, as do many national laws. Whether this suffices, however, to establish international custom appears questionable. First, it is unclear to what extent consistent practice exists in this field, since the individual treaties and national laws do not specify the content of a "precautionary principle" as a possible norm of customary international law. Second, many nations still contest the validity of a "precautionary principle" as customary international law, including the United States, Canada, and many developing countries.

Given this persisting disagreement, it is questionable whether incorporating a "precautionary principle" in WTO law without further safeguards would be either desirable or feasible. In particular, this could facilitate unilateral misuse and extraterritorial application of national environmental policy. In extreme cases, larger trading nations could exploit the lack of scientific evidence for protectionism or for an internationalising of their value systems. This would de facto lead to an intensification of the North-South conflict in the field of international trade as well as global environmental policy. Developing countries, therefore, have generally objected to any further strengthening of the precautionary approach in WTO law.[55]

50 P. Sands, *Principles of International Environmental Law*, vol. 1 (Manchester: Manchester University Press, 1995), at 212; J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in: *The Precautionary Principle in International Law*, ed. by D. Freestone and E. Hey (London: Kluwer Law International, 1996), at 52.

51 Cf. the North American arguments documented in *EU Measures Concerning Meat and Meat Products (Hormones),* supra, note 40, para. 43 (for the United States) and para. 60 (for Canada).

52 For example, Birnie and Boyle, supra, note 29, at 98.

53 Cf. the preamble of the Montreal Protocol (supra, note 14): "The Parties to this Protocol, … Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations, … Have agreed as follows …".

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

55 M. Shahin, *Trade and Environment in the WTO: Achievements and Future Prospects*, Third World Network, 1997, available at www.twnside.org.sg/title/ach-cn.htm (printout of 8 Sept. 2000).

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

The first approach has been adopted in ozone policy. Here, uncertainty about the risks involved with CFCs led to a joint action by the international community that eventually resulted in almost complete CFC phase-out, including the prohibition of CFC trade with nonparties to the Montreal Protocol.[56] Notably, the Protocol explicitly accounts for different responsibilities and capabilities of countries and grants developing countries a grace period of ten years, along with financial and technological transfer. The second approach has been adopted in the Biosafety Protocol.[57] Here, in an area of widely divergent risk perceptions regarding the safety of genetically modified organisms that precludes a global harmonization of standards, the Protocol defers to national "informed choice" regarding import of such organisms. However, the scope of national decision-making remains specified and restricted.

Both these approaches are consistent with the general objective of free trade, and both should take precedence over WTO law. Regarding the Biosafety Protocol, however, its relationship with WTO regulations remains disputed.[58] To ensure that both these approaches may uphold their precedence over WTO law, is thus the second reform objective suggested in this paper.

C. UNILATERAL TRADE RESTRICTIONS RELATED TO FOREIGN PROCESSES AND PRODUCTION METHODS

1. Legal Analysis

Certain trade restrictions do not concern the product itself but the type of production method abroad which the importing country seeks to influence. Regarding such measures, WTO law has undergone significant changes over the past few years following a series of decisions by dispute settlement panels and the WTO Appellate Body.[59] In its ruling on the *United States—Import Prohibition of Certain Shrimps and Shrimp Products* case of 12 October 1998,[60] the Appellate Body has clarified the previ-

56 Cf. Benedick, supra, note 13.

57 Cf. supra, notes 18 and 54.

58 Cf. Gupta, supra, note 18. The Protocol left this question deliberatively vague. Cf. the Protocol's Preamble: "The Parties to this Protocol, … *Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development, *Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements, Have agreed as follows".

59 On the Appellate Body, cf. supra, note 34.

60 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, AB-1998-4, WTO Doc. WT/DS58/AB/R of 12 Oct. 1998, 38 ILM 118 (1999). On this case, see for exam-

ously controversial interpretation of Article XX (g) of GATT regarding its extraterritorial application and its application to processes and production methods, thus revising the decision of an earlier dispute settlement panel.[61]

In this case, the United States had banned import of shrimps that were caught by Asian fishers through methods not corresponding to US environmental standards.[62] The United States argued that too many sea turtles were killed due to these fishing practices (as accidental catches since the nets hindered sea turtles from escaping). The Appellate Body conceded that the US import prohibition on shrimps was "relating to the conservation of exhaustible natural resources [and …] made effective in conjunction with restrictions on domestic production or consumption" and could thus fall under Article XX (g) of GATT. Based on this assessment, no observation was to be made on the first environmental exception clause, Article XX (b) of GATT ("necessary to protect human, animal or plant life or health").[63] In interpreting Article XX (g), the Appellate Body made three important findings:

First, the Appellate Body reaffirmed in the *Shrimp/Sea Turtle* case that living natural resources fall under the term "exhaustible natural resources".[64] India, Malaysia, Pakistan and Thailand, the plaintiffs in this case, had contested that the criterion of "exhaustibility" in Article XX (g) applied only to mineral ores and excluded reproducible living sources. They based their argument on the history of Article XX (g), which was meant, in 1947, to justify trade restrictions for the domestic protection of natural resources like manganese. The Appellate Body, however, chose a more dynamic interpretation of GATT, maintaining that the norm was to be interpreted in light of the more recent understanding in environmental policy. In addition, although sea turtles are reproducible in theory, they have been classified as threatened by extinction in Annex I of CITES.[65] Moreover, the Appellate Body cited other precedent where herring[66] and clean air[67] had been classified as "exhaustible" natural resources.

ple, Cone, supra, note 34; R. Howse, "The Turtles Panel: Another Environmental Disaster in Geneva", 32 *Journal of World Trade* (1998), 73–100; K. Jones, "Trade Policy and the Environment: The Search for an Institutional Framework", 53 *Aussenwirtschaft* (1998), 409–434; R. Wolfrum, supra, note 19.

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

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

63 The Panel in the *Shrimp/Sea Turtle* case did not examine either Article XX (b) nor (g) because the United States was found in violation of its chapeau. The Appellate Body found on the other hand that letters (a)-(j) were to be examined prior to the chapeau, and deemed the controversial US trade legislation to be justifiable according to Article XX (g) GATT. According to the Appellate Body, the United States had however violated the chapeau (see here in detail below, note 75). Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, supra, note 61; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, supra, note 60.

64 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, supra, note 60, para. 127ff.

65 Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, supra, note 61, para.1.

66 *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the Panel, adopted on 22 March 1988, GATT Doc. BISD 35S/98, para. 4.4.

Second, the Appellate Body covered new ground when ruling that measures concerning foreign processes and production methods fall under the purview of the exception clause of Article XX (g), which had earlier been controversial. The US trade restrictions did not discriminate between characteristics manifest in the product—that is, differences between Asian and North American shrimps—but only between fishing practices, that is, foreign processes and production methods.[68] In other words, the United States had banned the import of only such shrimps that had been produced with methods not consistent with US environmental standards. In view of this ruling, it now appears to be hardly possible to draw a line between the methods of fishing and other production methods in exporting countries.

Third, the Appellate Body found that the exception clause of Article XX (g) covers trade restrictions that seek to protect exhaustible natural resources outside the jurisdiction of the importing state. The Appellate Body supported the interpretation advanced in 1994 by a GATT panel in the *Tuna/Dolphin* case (Mexico v. United States),[69] which had in turn revised a previous panel report.[70] In the *Shrimp/Sea Turtle* decision, the Appellate Body found

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

67 "In view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. … Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX (g)." *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Panel, adopted on 20 May 1996, WTO Doc. WT/DS2/9, para. 6.37.

68 The violation of Article XI.1 GATT by the US legislation was not controversial. The United States justified this violation with Article XX (b) and (g) GATT. The plaintiffs alleged a violation of Article I.1 and Article XIII.1 GATT, which the Panel did not examine due to the breach of Article XI.1. Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, supra, note 61; para. 7.17 and 7.22.

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

70 *United States—Restrictions on Imports of Tuna*. Report of the Panel, submitted to the parties on 16 Aug. 1991, 30 ILM 1594 (1991).

> before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX (g).[71]

Thus, even though the Body did not explicitly endorse an extraterritorial application of Article XX (g), it recognized that in the case in question, there was sufficient connection between the United States and the South Asian sea turtles, because the species of migrating turtles in question lived in both Asian and US waters, no matter how questionable it might appear that sea turtles could actually wander from India to US waters. Despite its somewhat opaque language, it seems that the decision of the Appellate Body could be interpreted as offering an inroad for the extraterritorial application of Article XX (g) of GATT if there is some link between the importing state and an environmental good threatened by actions under the control of the exporting state. Should this ruling find wider application, it may well be used as justification for trade restrictions regarding the global climate, because any country will be naturally connected to any other country with regard to this resource.

The caveat is the chapeau of Article XX. Here, the Appellate Body found the United States in violation of the chapeau and considered the US legislation an arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[72] Hence, in the end the appeal of the Asian countries was upheld. Despite this, many developing country experts view the judgement with concern and consider their countries' success a "hollow victory" and a "bitter pill to swallow".[73] Pakistan, for instance, is pressing now for a reform of the Appellate Body's procedures because the approach of the Body is perceived as too friendly to Northern interests. Pakistan wants to forbid the Body to consider unsolicited suggestions—such as those from environmental organizations—and to oblige the Body to refer all cases which allow for a broader or different interpretation of WTO law to the General Council.[74]

71 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, supra, note 60, para. 133.

72 According to the Appellate Body, the US trade legislation violated the chapeau of Article XX for five reasons: The United States has failed to create a transparent process through which foreign producers could apply for certification of a "turtle friendly" catching method; to recognize foreign practices that had similar effects without being identical to US standards; to allow for turtle protection programmes of other states that did not prescribe comparative catching devices as laid down by the US law, but could have similar effects regarding the protection of turtles; to strive for serious negotiations to seek a solution of the problem with the plaintiff states; and to grant the four complaining states the same period for compliance with US legislation as had been granted to other shrimp exporting states in Latin America. Cf. in more detail also Cone, supra, note 34. Once the United States rectifies these five faults, it will be able to justify its trade restrictions with Article XX (g) GATT. Shrimp-catching nations will then have to adopt such methods that in effect correspond to standards prescribed by the United States, even though they may be allowed to adopt other methods as long as those produce results similar to those of US methods. The implementation of this ruling in the United States is still incomplete because US environmental organizations oppose changes to the present US legislation. See here 3 *Bridges Between Trade and Sustainable Development* 1999, no. 6, at 11, and 2000, no. 4, at 6.

73 Cf. Sandeep K. Tetarwal and Pradeep S. Mehta, *Process and Production Methods (PPM) Related Environmental Standards: Implications for Developing Countries* (Jaipur: Centre for International Trade, Economics and Environment [Briefing Paper no. 8], 2000).

74 Pakistan advanced this model during a session of the WTO General Council of WTO on 12 April 1999. Cf. 3 *Bridges Between Trade and Sustainable Development* (1999), no. 3, at 8.

2. Discussion

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

On the other hand, the finding of the Appellate Body equals a shift of balance in the trade and environment nexus that gives greater reign to unilateral policy and that will thus be opposed by smaller trading nations.[75] Given the *Shrimp/Sea Turtle* ruling, governments may now require their trading partners to adhere to certain environmental processes and production methods, as long as this trade-restrictive practice is consistent with the chapeau of Article XX, in particular with the test that the Appellate Body has developed in the *Shrimp/Sea Turtle* case. Exporting countries would then have to follow the production methods demanded unilaterally by importing countries without the right or possibility to participate in the elaboration of these standards.

This decision of the Appellate Body might force smaller trading nations to adopt environmental standards of larger economies in order to safeguard their export markets. This in turn may inflict costs on smaller nations—especially in the developing world—that will not necessarily correspond to their social and economic preferences. The Organisation for Economic Co-operation and Development (OECD) observes in this context:

> PPM [processes and production methods] requirements tend to compel producers to modify their way of operating. Such modifications raise technical and financial questions, which can be more or less difficult for individual producers to overcome particularly for small producers or less developed countries. Depending upon the circumstances, PPM requirements may prompt shifts in the location of production, in the level and in the cost of the goods produced. Changes in production patterns may result in changes in trade patterns.[76]

For instance, in a recently concluded research project on the consequences of the environmental policy of industrialized countries for developing countries, Tussie concludes that "environmental upgrading left to the market forces will reflect a

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

[76] Organisation for Economic Co-operation and Development (OECD), *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures* (Paris: OECD, 1997), at 9.

Northern-biased agenda."[77] The OECD, too, remarks:

> Countries with large markets upon which exporters are dependent (particularly when they can also mobilise political power) will be more successful in influencing the PPMs [processes and production methods] used by other countries, than will smaller nations whose market is proportionally less relevant. Thus, some argue that the United States and the European Union have been in a better position to influence environmental policy changes in other countries. For the most part, countries with small internal markets will not be able to impose trade restrictions successfully on large countries to which they export their products.[78]

As for economic efficiency in world trade, the new legal interpretation of GATT would lead to suboptimal results because potential exporters may have to consider in their investment decisions a range of different production standards in different countries. Even with respect to environmental policy, unilateralism of larger importing nations could lead to negative results. For example, to comply with the preferences of industrialized countries, South African firms introduced programmes for eco-labelling that resulted in the erosion of domestic nature conservation programmes.[79] It is problematic, too, that in a politically controversial area in which developing countries, the United States and the European Union represent different positions, the decision is left to an expert body which may not have the legitimacy to take such far-reaching decisions. Some writers have even accused the Appellate Body of judicial activism.[80] Given the high political resilience of the relationship of unilateralism and multilateralism in world trade law, it would appear preferable to resolve such conflicts through intergovernmental negotiation, not through decision-making by technical experts.

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

> in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development …[81]

The best political instrument to further these objectives are multilateral environmental agreements that can muster broad acceptance even if they may require trade restrictions based on processes and production methods in other WTO member states. Unilateral action by the larger importing nations, on the other hand, will

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

78 OECD, supra, note 76, 33.

79 Cf. Lael Bethlehem, "International Pressure and Environmental Performance: The Experience of South African Exporters", in: Tussie, supra, note 77, 73–91.

80 S. Cone, supra, note 34, at 60.

81 Cf. WTO Agreement, Preamble.

inevitably restrict the freedom of smaller trading nations to determine their own environmental policies, and it will undermine legal security in trade. The Appellate Body failed to demarcate this line between environmentally-motivated trade restrictions in multilateral environmental agreements, and those that are unilaterally imposed by single states. The extended interpretation of Article XX of GATT in the *Shrimp/Sea Turtle* case should thus be reassessed. This is the third need for reform suggested in this paper.

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

A. OUTLINE

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

These reform needs could be resolved by an authoritative interpretation of Article XX of GATT and other provisions of WTO law by the WTO Ministerial Conference, in form of an *Understanding on the Interpretation of Certain Provisions Relating to the Protection of Human, Animal or Plant Life or Health, or the Environment*. This interpretation would be based on Article IX.2 of the WTO Agreement, which grants the Ministerial Conference and the General Council the "exclusive authority to adopt interpretations" of the WTO Agreement and of the multilateral trade agreements.[82] The Ministerial Conference and the General Council shall take such decision by consensus or at least by a three-fourths majority. This guarantees that the interpretation of WTO law can build on a broad agreement of all major trading nations.

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

Such an authoritative interpretation of WTO law could achieve all three reform objectives identified in section II. It would clarify that Article XX does proscribe unilateral action by WTO members that aims to influence the production processes in other countries without their consent and without multilateral agreement. Thus, the Ministerial Conference would re-establish the primacy of multilateral agreement as opposed to unilateralism, which has been cast into doubt by recent decisions of the Appellate Body. At the same time, an authoritative interpretation could specify the relationship between multilateral environmental agreements and WTO law, which has been a matter of dispute and concern over the last years.

Finally, the interpretation could introduce precautionary decision-making into international trade law while subjecting it to multilateral consent of the majority of WTO members. The interpretation would allow the Ministerial Conference to grant precedence to any multilateral environmental agreement that is widely accepted by governments, but may fall short of the science-based risk-assessment test that the SPS Agreement prescribes for unilateral action. The interpretation would also allow the Ministerial Conference to exclude highly-contested regulative domains from multilateral harmonization by deferring decision-making to national and subnational actors in clearly defined areas. For example, the Ministerial Conference could specify the precedence of the Biosafety Protocol vis-à-vis WTO law.[83] This would allow WTO members to derogate from the predominantly science-based procedures established in the SPS Agreement by following other procedures that will be elaborated in the evolution of the Protocol once it enters into force.

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

By such an authoritative interpretation, the Ministerial Conference would accept any trade-restrictive measures that governments may find necessary to agree to in form of a multilateral environmental agreement. Thus, the uncertainty in the negotiation of environmental agreements regarding whether specific measures may run counter to WTO law would be resolved as long as it seems reasonable that a majority of the 138 WTO members—which now includes almost all major nations except for Russia and China—will later accept the specific trade restriction.

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

[83] Cf. supra, note 18.

B. AUTHORITATIVE INTERPRETATION VERSUS TREATY AMENDMENT

The first issue requiring discussion is that Article IX.2 restricts the right of the Ministerial Conference to interpret WTO law, because the conference must not use this right in a way that would undermine the amendment provisions of the WTO Agreement.[84] An authoritative interpretation of Article XX of GATT by the Conference must therefore not run counter to the wording of GATT, and it must not change rights and obligations of parties. Otherwise, the right of parties under Article X.3 of the WTO Agreement to object to amendments adopted by two thirds of the parties would be undermined.[85]

As has been demonstrated above, however, Article XX (b) and (g) of GATT has been formulated in a way that allows for different interpretations. In particular, it remains ambiguous whether the proviso applies to environmental goods outside the jurisdiction of the importing state and to foreign processes and production methods. Hence, an authoritative interpretation by the Ministerial Conference referring to both these questions does not amount to a treaty amendment, because rights and obligations of the parties are not changed. Instead, existing but unclear obligations are merely concretised in view of changed circumstances since conclusion of the treaty in 1947. Likewise, the decision of the Appellate Body in the 1998 *Shrimp/Sea Turtle* case cannot bind the Ministerial Conference as the latter is vested with exclusive interpretative authority. The authoritative interpretation proposed here would thus not violate the prohibition under Article IX.2, fourth sentence, of the WTO Agreement not to undermine Article X of the WTO Agreement through such interpretation.

Consequently, the more far-reaching proposals found in the literature, namely those in favour of formally amending WTO agreements,[86] lack justification unless they are meant to occasion other political reforms than those discussed in this paper. Moreover, an amendment would cause much delay because it would enter into force only after formal acceptance by two thirds of WTO members. An amendment would also bind only those parties that accept it.[87] The legal status of states rejecting the amendment would thus remain unsettled, which would undermine security in trade.

This argument holds *a fortiori* regarding alternative proposals to directly accom-

84 Cf. Article IX.2, fourth sentence, of the WTO Agreement (supra, note 82).

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

86 A model could be Article 104 of the North American Free Trade Agreement (NAFTA), stipulating that the trade-related aspects of CITES, the Montreal Protocol and the Basel Convention take precedence over NAFTA, in addition to any other multilateral environmental agreement that the three NAFTA parties may agree on by consensus. The European Union had at some point suggested an amendment of WTO law (for a critical view, cf. M. Shahin, supra, note 55). The Working Group on Trade of German Nongovernmental Organizations (supra, note 4) proposed an amendment of GATT by inserting a new paragraph (k) to Article XX justifying any trade restriction "undertaken in pursuance of obligations under any Multilateral Environmental Agreement which has the approval of the United Nations Environment Programme (UNEP)". Treaty amendments have been discussed in more detail in the literature, cf., for example, J. Nissen, "Achieving a Balance Between Trade and Environment: The Need to Amend and the WTO/GATT to Include Multilateral Environmental Agreements", 28 *Law and Policy in International Business* (1997), 901–928.

87 Cf. WTO Agreement, Article X.3 (cf. text supra, note 85).

modate environmentally-motivated trade restrictions through a "WTO Environment Code" or a "WTO Agreement on Environment".[88] Such schemes are likely to be both ineffective and not feasible. Environmentally-motivated trade restrictions with global application—like those prescribed under Article 4 of the Montreal Protocol—function as an integral part of a comprehensive environmental regime. They are linked to questions of emissions regulation, financial and technological transfer to developing countries, or the initiation of noncompliance procedures against parties or sanctions against nonparties. Such complex and interwoven regulatory obligations need to be dealt with simultaneously and with respect to all interactions. It would overstretch WTO if the organization had to accomplish this regulative task, for example if environmental standards would need to be regulated within the trade regime. On the other hand, it would be impossible to sever the trade restrictive parts from multilateral environmental regimes. Article 4 of the Montreal Protocol cannot be implemented in isolation from Article 2 (on the detailed phase-out programmes of parties), Article 5 (on special rights for developing countries), Article 10 (on financial and technology transfer to developing countries), or Article 8 (on noncompliance control). Thus striving for a separate WTO agreement on the environment appears to be an unhelpful option.

It could be contended that the reform objectives proposed in this paper could be achieved by a waiver granted by the Ministerial Conference in accordance with Article IX.3–4 of the WTO Agreement. This proviso states that "in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements …" It is further stipulated that the waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing its application, and the date on which it shall terminate. Moreover, waivers are time-bound; any waiver granted for a period of more than one year must be reviewed by the Ministerial Conference not later than one year after it is granted. The Ministerial Conference decides on waivers either by consensus or—after ninety days—by a three-fourths[89] majority.

[88] See here International Institute for Sustainable Development (IISD), *Report on the WTO's High-Level Symposium on Trade and Environment, 15–16 March 1999*, available at www.wto.org/english/tratop_e/envir_e/sumhlenv.pdf (printout of 8 Sept. 2000); W.-C. Shih, "Multilateralism and the Case of Taiwan in the Trade Environment Nexus", 32 *Journal of World Trade* (1996), 109–139; K. Jones, supra, note 55, at 411.

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

Although this provision covers trade restrictions motivated by environmental concerns, it seems inappropriate as a permanent solution to clarify the relationship between multilateral environmental agreements and WTO law. First, Article IX assumes exceptional circumstances of "a party", even though waivers for a group of countries—such as parties to an environmental agreement—are technically feasible. The additional requirements, however—that waivers must be time-bound, related to exceptional circumstances and be reassessed by the Ministerial Conference at least after one year—demonstrate that waivers in accordance with Article IX are a less than ideal solution to possible conflicts between WTO law and multilateral environmental agreements. Environmental agreements are intended to form part of an emerging system of global environmental governance. It would be wrong to grant WTO the privilege of revisiting each environmental agreement on a regular basis to appraise the persistence of exceptional circumstances. The best solution, therefore, remains an authoritative interpretation of WTO law by the Ministerial Conference.

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

A further crucial issue is how to define those multilateral environmental agreements that should be listed in the annex to the decision and that should fall under the exception of Article XX. The first version of this annex—namely the list of certain environmental agreements—would be an integral part of the decision of the Ministerial Conference. Among the entries in this list would be CITES, the Montreal Protocol with its amendments, the Basel Convention, as well as the Rotterdam Convention and the Biosafety Protocol as soon as they enter into force. The Climate Convention needs to be included, too, once possible conflicts between WTO law and the rules on emissions trading, joint implementation and the clean development mechanism—known as the Kyoto mechanisms—emerge. WTO members may also discuss whether certain, clearly defined environmental policies pursued in order to comply with environmental agreements could be exempted from WTO law by interpreting Article XX accordingly. The most relevant example would be environmental taxation schemes intended to implement the Climate Convention.

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

1. Automatic Revision of the List of Eligible Treaties

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

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

As for qualitative ex ante definitions, a multilateral environmental agreement would be required to show certain characteristics in order to be consistent with Article XX of GATT.[90] Nissen, for example, proposed a new paragraph (k) to Article XX of GATT that would exempt from WTO obligations certain multilateral environmental agreements that she defines by three criteria: (1) "extent of participation by countries concerned with the specific problem is adequate"; (2) "scientific evidence of the environmental problem being addressed is provided"; (3) openness of the environmental agreements.[91] It remains unclear what is exactly implied by termini such as "scientific evidence", "adequate extent of participation", "countries concerned with the specific problem" (who is concerned—the perpetrators of the problem or the affected?). Even if one could develop clearer terms than those suggested by Nissen, her proposal illustrates the problem inherent in qualitative ex ante definitions of multilateral environmental agreements. Similar problems will arise with other conceivable characteristics, namely, that a multilateral environmental agreement[92]

- must have been negotiated under the auspices of the United Nations or its specialized organizations (which does not warrant wide ratification);
- must have been approved by the United Nations Environment Programme (which requires complex interagency agreements);[93]
- must have included countries from different regions of the world and with different economic and social levels of development in its negotiation process (which is difficult to define);
- must cover only transboundary or global environmental problems (which

[90] Different suggestions of individual countries have been reported in Trade and Environment News Bulletin (ed. by GATT) of 8 Dec. 1995 (cited in: Nissen, supra, note 86) as well as M. Shahin, supra, note 55).

[91] Cf. Nissen, supra, note 86.

[92] For a proposal of several other conditions to be placed on unilateral trade restrictions, cf. C. Helm, *Sind Freihandel und Umweltschutz vereinbar? Ökologischer Reformbedarf des GATT/WTO-Regimes* (Berlin: edition sigma, 1995); and Helm, supra, note 3.

[93] According to the Working Group on Trade, supra, note 4.

raises definition problems, too); and
- must guarantee financial and technological transfer to developing countries (how much and on what terms?).

Such a qualitative ex ante definition must be broad enough that not only present but all comparable future multilateral environmental agreements could be covered. At the same time, however, it must be restricted enough to avoid misuse by a few states. To negotiate such a formula in the present climate of fundamental disputes about trade and environment, with highly divergent views and substantial mistrust particularly between North and South, would require considerable political resources—or would remain a *mission impossible*. Because the requirements of future environmental problems can never be foreseen in all detail, the Ministerial Conference needs to be granted, again, the right to exempt other agreements that fail the test.

A third option would be to leave the definition of multilateral environmental agreements unspecified, for instance by interpreting Article XX of GATT in a way that grants precedence to all "generally recognized standards and procedures for the prevention of transboundary environmental pollution and the protection of global environmental goods", in a way comparable to the distribution of responsibilities to be found in the UN Convention on the Law of the Sea.[94] Such a decision would eventually transfer the right to decide specific cases to the dispute settlement mechanism, in particular to the Appellate Body, which would have to lay down guidelines on which environmental agreements would fall under this broad definition. As shown above, however, the dispute settlement mechanism does not have the legitimacy to decide the precedence of important instruments of global environmental governance in relation to WTO law. This should be left to intergovernmental negotiation and the community of states, acting, in this case, in form of the WTO Ministerial Conference.

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

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

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

It could be objected that such an ex post approach would leave too much uncertainty for negotiators of multilateral environmental agreements, because it is initially unclear whether trade restrictions in environmental agreements would be later accepted by the WTO Ministerial Conference. The European Commission held the

[94] *United Nations Convention on the Law of the Sea*, Montego Bay, 10 Dec. 1982, in force 16 Nov. 1994, 21 ILM 1261 (1982).

view that WTO would then become the final authority over environmental agreements.[95] This argument, however, does not hold at least in the case of global environmental agreements. Most states in both North and South are either already members of WTO or are currently negotiating their accession, so that WTO has become an almost universal organization. Thus, it can be assumed that those states which negotiate multilateral environmental agreements will later agree on the conformity of the agreements with GATT. As long as trade restrictions in environmental agreements are passed by a broad consensus, it can be expected that in most cases this broad consensus will later persist in the WTO Ministerial Conference, since the same governments are represented there.

Moreover, the Ministerial Conference can decide ex post on only those provisions of multilateral environmental agreements through which environmental standards are enforced by means of trade restrictions. All further multilateral environmental agreements are outside, and remain outside, jurisdiction of WTO. Imposing environmental norms on individual states through trade restrictions is politically justified as long as these norms enjoy broad consensus and concern the common interests of the international community such as in case of ozone layer protection.[96] There should be an assessment, however, about whether this broad consensus actually exists within the international community. If individual governments wish to set international standards by means of trade restrictions vis-à-vis nonconsenting parties, then it appears reasonable that the WTO Ministerial Conference, with its almost universal membership, needs to examine and to endorse this action.

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

- a three-fourths majority, comparable to decisions under Article IX.2 WTO Agreement (authoritative treaty interpretation) and for several decisions under Article X WTO Agreement (certain amendments to the treaty);
- a two-thirds majority, comparable to decisions under Article VII of the WTO Agreement (budget and contributions) and for several decisions under Article X WTO Agreement (certain amendments to the treaty);
- a double-weighted majority as in Article 2.9 (c) of the Montreal Protocol (as amended in 1990[97]), that is, the requirement of a two-thirds majority of parties that must represent a simple majority of both the industrialized and the developing countries. (A similar procedure has been adopted for decisions of the Global Environment Facility.)

In all cases in which no consensus can be reached, this quorum would eventually determine which multilateral environmental agreements will precede WTO law. A

[95] Cf. Trade and Environment News Bulletin (ed. by GATT) of 8 Dec. 1995, 3, cited in: Nissen, supra, note 86.

[96] Cf. Biermann, supra, note 29.

[97] Cf. London Amendment, 29 June 1990, in force 10 Aug. 1992, 30 ILM 733 (1991).

three-fourths majority would place greater limitations on the use of environmentally-motivated trade restrictions since they could be thwarted by a coalition of only a fourth of WTO members. The second and third alternatives would require a larger veto alliance of opponents to multilateral trade restrictions and thus be more progressive from the environmentalist point of view. By the same token, however, alternatives two and three would infringe more on the functional sovereignty of parties and might thus be more difficult to achieve. All three options would require the consent of the majority of developing countries, which would also be required for any reform of WTO law, be it an authoritative interpretation, or a weightier change, such as a formal treaty amendment.

D. AUTHORITATIVE INTERPRETATION OF OTHER WTO AGREEMENTS

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

1. The TBT Agreement

The TBT Agreement[98] governs the introduction of national technical standards (which are manifest in the product) and takes precedence over GATT in its regulative area. The TBT Agreement grants WTO members the right to take trade-restrictive measures in order to protect a number of legitimate objectives such as "protection of human health or safety, animal or plant life or health, or the environment."[99] Members have not, however, full reign as to the type of trade restrictions they wish to enact for environmental protection. Instead, Article 2.2 of the TBT Agreement stipulates that "technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". Here, the TBT Agreement follows the necessity test as elaborated by GATT panels over the years in various legal disputes.[100]

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

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

98 Cf. supra, note 37.

99 Cf. TBT Agreement, Article 2.2. For the first time in international trade law, environmental protection ("or the environment") has been explicitly accepted here in addition to the three other legitimate concerns included in Article XX (b) of GATT ("human health or safety, animal or plant life or health").

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

states:

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

Article 2.5 establishes that

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

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

The restriction of Article 2.4 TBT Agreement "except when such international standards … would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems" targets specifically the developing countries and their particular circumstances. However, most of the environmental agreements already contain special regulations for developing countries. This has also been demanded in Principle 11 of the Rio Declaration on Environment and Development.[101] Likewise, the majority of developing countries in WTO—who have to approve the adoption of an environmental agreement in WTO law—would hardly agree to an international harmonization of environmental standards if their geographic and climatic peculiarities are not taken into account. The limitation of environmental agreements through the exception clause within Article 2.4 of the TBT Agreement could thus possibly dilute the compromises adopted in the environmental agreements. In all, it should be, however, maintained for ensuring some flexibility in harmonizing technical regulations related to environmental policy.

2. The SPS Agreement

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

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

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

Linked to this, Article 2.4 of the SPS Agreement stipulates that sanitary or phytosanitary measures which conform to the relevant provisions of the SPS Agreement "shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions or Article XX (b)." In other words, such measures of WTO members will most likely be justifiable under WTO law. Hence, the Ministerial Conference could interpret Article 3.2 of the SPS Agreement to the effect that sanitary or phytosanitary measures prescribed by certain multilateral environmental agreements shall be deemed to be international standards in the context of Article 3.1–3,[102] and presumed to be in accordance with Article 2.1–3, of the SPS Agreement.

Such solution gains importance especially after conclusion of the Biosafety Protocol that will, once it enters into force, provide for certain regulations in the trade of genetically modified organisms among its parties.[103] It is still contested whether the Biosafety Protocol will precede WTO law or vice versa; moreover, it remains uncertain when the United States, a major exporter of genetically modified organisms, will accede to the Protocol since the country has yet to ratify the parent Biodiversity Convention. The authoritative interpretation suggested in this paper would open up an avenue by which the WTO Ministerial Conference could accept all actions by members that are required by the Biosafety Protocol as legitimate exceptions under Article XX of GATT. Given that the overwhelming majority of WTO members have taken part in the negotiation of the Biosafety Protocol and have ratified the Biodiversity Convention, such a decision is not unrealistic.

There is, however, a perhaps crucial restriction on the freedom of the Ministerial Conference to authoritatively interpret the SPS Agreement, because this could interfere with the treaty wording and might thus equal an amendment of WTO law. Then, an authoritative interpretation would be impossible, and a formal amendment required. This would be the case, in particular, when a multilateral environmental agreement required certain sanitary and phytosanitary measures "without sufficient scientific evidence"[104] or when it contradicted the standards, guidelines and recom-

[102] Cf. SPS Agreement, Article 3.1–3: "1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3. 2. [cf. text above]. 3. Members may introduce or maintain sanitary or phytosanitary measures which result in higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. …"

[103] Cf. supra, note 18.

[104] Cf. SPS Agreement, Article 2.2: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific

mendations established by the Codex Alimentarius, the International Office of Epizootics, or the Secretariat of the International Plant Protection Convention, which have been defined as "international standards" in the SPS Agreement.[105]

IV. CONCLUSION

In sum, the most feasible option for reconciling conflicts between multilateralism and unilateralism in the trade and environment nexus is a WTO Ministerial Conference understanding on the authoritative interpretation of Article XX (b) and (g) of GATT and of the relevant provisions of the TBT and SPS Agreements, based on its competence under Article IX.2 of the WTO Agreement. In this understanding, relevant provisions of WTO law should be specified in such a way that they allow for environmentally-motivated trade restrictions regarding foreign processes and production methods and with extraterritorial influence, as long as those have been explicitly prescribed in a multilateral environmental agreement listed in the annex to the decision. Such a resolution could be passed—if no consensus can be reached—with a three-fourths majority of the parties. A possible rendition of such decision is provided in *Box 1*.

Box 1: Legal Draft of a Decision by the WTO Ministerial Conference

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

The Ministerial Conference,

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

Reaffirming that the relations of Parties 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

principles and is not maintained without sufficient evidence, except as provided for in paragraph 7 of Article 5."

[105] Cf. SPS Agreement, Annex A.3 in connection with Article 3.

of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

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

Hereby *decides* as follows:

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

2. Trade policy measures that aim at protecting human, animal or plant life or health, or the environment, and that are prescribed by any one of the multilateral environmental agreements listed in Annex I to this decision, shall be deemed to be necessary in the context of Article XX lit. b of the General Agreement on Tariffs and Trade.[106]

3. The provisions of any one of the multilateral environmental agreements listed in Annex I to this decision shall be deemed, to the extent that they prescribe technical regulations or standards, to be international standards in the context of Article 2, paragraphs 4 and 5, of the Agreement on Technical Barriers to Trade (1994).

4. Sanitary or phytosanitary measures which are prescribed by any one of the multilateral environmental agreements listed in Annex I to this decision shall be deemed to be international standards in the context of Article 3, paragraphs 1 to 3, and presumed to be in accordance with Article 2, paragraphs 1 to 3, of the Agreement on the Application of Sanitary and Phytosanitary Measures (1994).

5. a) Any Member of the World Trade Organization may initiate a proposal to amend Annex I to this decision by submitting such proposal to the Ministerial Conference.

b) The Ministerial Conference shall decide, at its next session, whether the Annex shall be amended accordingly. Such decisions shall be taken, if no consensus can be reached, by a three-fourths majority.

c) In its considerations, the Ministerial Conference shall take into account that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation where there are threats of serious or irreversible damage.[107]

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

[107] It is to be noted that this formulation does not open world trade law for a general application of the precautionary approach for unilateral decision-making. This paragraph, instead, is to be read as a commit-

Annex I

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

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

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

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

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

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

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

Would this authoritative interpretation find sufficient support among WTO members? Most industrialized countries support some changes in WTO law concerning the trade and environment nexus. Also, the instrument of an authoritative interpretation has already been brought up for discussion by some governments, in particular by Switzerland,[108] as well as by Finland, Canada, and the United States.[109] In addition, most WTO parties object to unilateral trade restrictions.

The majority of developing countries, however, have so far opposed any reform of Article XX of GATT. India, for instance, maintains that no multilateral environmental agreement has ever been hindered by WTO law.[110] In particular, most developing countries object to the extension of Article XX (b) and (g) to cover processes

ment of the WTO members, acting as the Ministerial Conference, to act in a precautionary manner when considering granting preference to a multilateral environmental agreement. This would be in line with past multilateral agreements, such as the Montreal Protocol, which was explicitly based on precautionary decision-making.

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

109 Cf. the report on the WTO High-level Symposium on Trade and Environment in March 1999, which reads: "Canada, supported by the US and Finland, stated that environmental considerations must necessarily feature in upcoming WTO negotiations. Key issues include: clarifying the relationship of MEAs and WTO rules through an interpretative statement; …". Cf. IISD, supra, note 88.

110 IISD, supra, note 88.

and production methods and to extraterritorial application.[111] Yet this position may soon be reconsidered in light of the Appellate Body's ruling in the *Shrimp/Sea Turtle* case, especially if this decision results in a further penetration of the multilateral WTO order by green unilateralism.

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

Some actors within the United States, however, could feel inclined to object to the solution proposed in this paper. Whereas the *Shrimp/Sea Turtle* ruling has upheld the US argument with merely attaching certain restrictions on its application,[112] the authoritative interpretation suggested here would render some parts of the present US trade legislation as impermissible under GATT. Especially the US policy against the import of tuna, shrimps and their products would be considered as violating WTO law as this has not been explicitly prescribed by corresponding agreements such as CITES or the Biodiversity Convention.

Taken together, the clarification of world trade law suggested here would fulfil several objectives. It would safeguard the freedom of smaller trading nations to determine environmental standards which they see as most appropriate given their own state of development. It would also promote the pre-eminence of multilateralism both in trade and environmental policies as opposed to unilateralism of larger and more powerful states. By this token, the protection of the global environment would remain the task of the international community through negotiation and mutual compromise.[113]

Other avenues of global environmental governance could be strengthened instead. The OECD, for example, recommended that

> in considering the relevant developing countries concerns, it will generally seem preferable to secure their co-operation through technology transfers, financial assis-

111 Cf. the position of the developing countries at the High Level Symposium of WTO on Trade and Development of 1999 (IISD, supra, note 88).

112 Cf. supra, note 72.

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

> tance or flexible provisions for the implementation of MEAs [multilateral environmental agreements] rather than resorting to trade measures.[114]

The Multilateral Fund for the Implementation of the Montreal Protocol, through which industrialized countries transferred one thousand million US-$ to developing countries to help them phase out CFC, could serve as an example of implementing the Rio principle of "common but differentiated responsibilities and capabilities"[115] of states. In the ozone case, the richer nations have been assisting the poorer ones in their environmental policies through financial and technological transfers, instead of unilaterally placing the environmental costs on developing countries.[116] As for the protection of marine biodiversity such as sea turtles, an international fund could be established to purchase and then to distribute the crucial environmental protection technology in the developing world.

Another way to ensure precedence of environmental and consumer interests over the trading system, without encouraging unilateralism of larger economies, would be a reform of the standard-setting international organizations, such as the Codex Alimentarius. Codex dates back to 1962 but has become more relevant since completion of the Marrakesh agreements. Although the SPS Agreement allows national standards to exceed international ones, it still aims at a worldwide harmonization at levels prescribed by bodies such as Codex. Developing countries, however, often lack capacities to fully participate in such standard-setting organizations. Moreover, Codex decisions are adopted by only a simple majority. In order to strengthen national decision-making in highly-contested domains without disintegrating the multilateral trading system, a reform of Codex decision-making might be justified. One option would be to introduce a higher quorum for standard-setting. This would soften the regulative grip of the SPS Agreement while strengthening at the same time the overall legitimacy of WTO law.[117]

The efficacy of international environmental organizations, too, could be improved. In 1999, Renato Ruggiero, the then WTO executive director, attracted much

[114] OECD, supra, note 76, 16.

[115] Cf. Principle 7 of the Rio Declaration: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

[116] Cf. Benedick, supra, note 13, and F. Biermann, "Financing Environmental Policies in the South: Experiences from the Multilateral Ozone Fund", 9 *International Environmental Affairs* (1997), 179–218.

[117] The Codex standard on permissibility of artificial growth hormones to be used in cattle-breeding was passed with only a small majority. The Codex committee on general principles has been examining options for making Codex standards more widely acceptable. In April 1999, however, the quorum for decisions could not be increased from a simple majority to a two-thirds majority. No consensus could also be achieved on whether other, "non-scientific" legitimate factors—such as consumer wishes or environmental protection—could be recognized in the Codex risk assessment. Similarly, consensus was impossible on the question of formal participation of consumer protection and environmentalist organizations. Some industrialized countries feared a dilution of the intergovernmental character of the Codex, whereas some developing countries feared an unfair advantage for the North in the participation of private organizations. Cf. "Codex Alimentarius: Setting Food Safety Standards for Global Trade", 3 *Bridges Between Trade and Sustainable Development* (1999), no. 4, 1–2, as well as 3 *Bridges Between Trade and Sustainable Development* (1999), no. 6, at 18; and 4 *Bridges Between Trade and Sustainable Development* (2000), no. 7, at 6.

attention when he spoke in favour of a world environment organization as a counterweight to the WTO. As early as 1997, Brazil, Germany, Singapore, and South Africa proposed creation of a global umbrella organization for environmental issues at the UN General Assembly Special Session on follow-up to the 1992 Rio Conference.[118] The French government has now taken the lead by announcing its intention to use its presidency of the European Union in the second half of 2000 for an initiative to replace UNEP with an "organisation mondiale de l'environnement."[119]

Although the initiative of these countries has not yet evoked much response from other governments, this does not rule out negotiations for the establishment of a world environment organization that would integrate existing programmes and bodies in the medium term. In past decades, the foundation of the UN Industrial Development Organization, the World Intellectual Property Organization, the WTO or the International Criminal Court, indicates that the state system is capable of further institutionalization. The creation of a world environment organization thus no longer seems unrealistic, and would significantly strengthen environmental protection within the United Nations.[120] It would be, together with the reform of WTO law proposed in this paper, a more appropriate means by which to further global environmental governance, rather than opening up the multilateral trading system to green unilateralism by the powerful few.

118 Cf. *Speech by Dr. Helmut Kohl, Chancellor of the Federal Republic of Germany, at the Special Session of the General Assembly of the United Nations*, June 23, 1997, New York (on file with author). In effect, this was identical to a Joint Declaration of Brazil, Germany, Singapore and South Africa issued on the same date and occasion.

119 See the speech of the French environment minister, Dominique Voynet, *Les priorités de la présidence française dans le domaine de l'environnement : Discours prononcé devant la commission environnement-sante-consommation du parlement européen le 6 juillet 2000, à Strasbourg.* Speech, 6 July 2000, (on file with author).

120 Cf. in more detail F. Biermann, "The Case for a World Environment Organization", *Environment*, vol. 42, no. 9 (November), 22–31; and F. Biermann, "The Emerging Debate on the Need for a World Environment Organization: A Commentary", *Global Environmental Politics* 1 (1), forthcoming.

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