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THE INTERNATIONAL TRADE REGIME AND THE MUNICIPAL LAW OF FEDERAL STATES: HOW CLOSE A FIT?

DAVID A. WIRTH*

Professor Stewart invites us to draw an analogy between the international legal regime and federal or federalizing systems like the United States and the European Community (EC). Certainly the United States and the EC, particularly after the adoption of the Single European Act,¹ have the capacity to effectively reconcile the twin goals of trade and environmental quality. Although there are counterexamples,² it is remarkable how seldom these dual aims, both of which promote public welfare, have come into conflict in either system with the vehemence they recently have exhibited on the international level. While law and practice in federal or federalizing systems may provide informative and helpful perspectives about the international legal system, we need to be extremely careful not to overextend the comparison. Unless Professor Stewart is advocating the creation of a supranational world government—a proposition he does not seem to assert—recent developments suggest the limits of the correlation between the international regime and federal systems.

The international system contains no rulemaking authority with sovereign powers analogous to the Congress of the United States or the Council of the European Communities.³ Instead, the principal “legislative” process, the negotiation of multilateral treaties⁴ like the General Agreement on Tariffs and Trade (GATT)⁵ and international environmental agreements, proceeds

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1. Single European Act, Feb. 17 & Feb. 28, 1986, art. 25, 19 BULL. EUR. COMM. Supp. (No. 2) at 16 (1986), reprinted in 25 I.L.M. 506 (1986) [hereinafter Single European Act] (adding title VII, articles 130R-130T to Treaty of Rome, and establishing authority of European Economic Community “to preserve, protect and improve the quality of the environment”).

2. See *infra* note 15.

3. As added by the Single European Act, *supra* note 1, article 130S of the Treaty of Rome anticipates that at least some actions pertaining to environmental protection may be taken by qualified majority and not by consensus.

4. Despite considerable academic writing on the subject, customary international law plays relatively little practical role in interactions among states on international environmental issues. See David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 380 (1992) [hereinafter Wirth, *A Matchmaker's Challenge*]; *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1521-50 (1991). Customary law has played a similarly small role in the law of international economic relations. See, e.g., 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, introductory note to part VIII (1987) [hereinafter RESTATEMENT].

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All, 55 U.N.T.S. 187 [hereinafter GATT].

according to the related principles of consensus and consent. As demonstrated by the GATT Uruguay Round⁶ and the climate change convention opened for signature at the United Nations Conference on Environment and Development (UNCED)—the so-called “Earth Summit”—in Rio de Janeiro, Brazil in June 1992,⁷ a single powerful nation like the United States can in some cases dictate the terms of a multilateral agreement or prevent its adoption altogether. When multiplied by the number of participating states, this dynamic can produce least common denominator results⁸ that are not responsive to real-world problems like excessive trade barriers or threats from environmental externalities. In other cases, as demonstrated by the United States’ decision not to sign the UNCED biodiversity convention,⁹ states need not accept the obligations even in supposedly universal instruments. Other states, although signing a multilateral treaty, may encounter domestic political obstacles that prevent acceptance of the international obligations. The necessity for signature and, especially, ratification can delay¹⁰ or, in extreme cases, preclude¹¹ the entry into force of a multilateral agreement.

6. See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations in GATT, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]. As of this writing, the Uruguay Round has not been completed. See Stuart Auerbach & Richard M. Weintraub, *World Trade Talks Again at an Impasse; U.S., Europe Can't Agree on Farm Subsidies*, WASH. POST, Oct. 22, 1992, at D11.

7. United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 851 [hereinafter Climate Change Convention]. After the conclusion of the UN conference, the head of the United States delegation acknowledged that “the United States stood alone in resisting a commitment to targets and timetables for reducing CO₂ emissions.” Memorandum from William K. Reilly, Administrator, Environmental Protection Agency, to all EPA Employees (July 15, 1992) [hereinafter Reilly Memorandum]. See generally David A. Wirth & Daniel A. Lashof, *Beyond Vienna and Montreal: A Global Framework Convention on Greenhouse Gases*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 79 (1992) (discussing negotiations).

8. See, e.g., PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 6 (1990).

9. Convention on Biological Diversity, May 22, 1992, 31 I.L.M. 822. “The United States [*sic*] decision not to sign [*this agreement*] was the subject of intense controversy and criticism.” Reilly Memorandum, *supra* note 7.

10. E.g., SAND, *supra* note 8, at 14-18 (describing “slowest boat” phenomenon resulting from delay required for ratification and additional lag resulting from need for minimum number of ratifications required by many multilateral agreements). For most trade agreements and some environmental agreements, the need for implementing legislation in the United States can create further delays. The “fast track” procedures that establish deadlines and timetables and limit amendments to implementing legislation address this problem, but not necessarily without raising additional criticisms. See, e.g., Joan Claybrook, *Fast Track Can be Hazardous to Your Health*, WASH. POST, May 17, 1991, at A25 (arguing that fast track process is undemocratic). *But see* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992) (arguing that fast track improves efficiency without compromising democratic values).

11. A good example is the Convention on the Regulation of Antarctic Mineral Resource Activities, June 2, 1988, 27 I.L.M. 868 (not in force). This agreement will probably never become effective because of domestic environmental opposition in a number of states, including

International enforcement mechanisms are of limited availability and efficacy. Professor Jackson suggests that GATT dispute settlement has "developed into a remarkably full procedure that has been largely, but not totally, effective."¹² Unfortunately, the same cannot be said with respect to international environmental obligations. Whatever reservations there may be about the efficacy of dispute settlement in trade agreements are magnified many times over in the environmental field.¹³ In short—although we do not often admit it—the international system as currently structured invites the proliferation of holdouts, free riders, laggards, scofflaws, and defectors.

This situation is not necessarily good or bad, right or wrong. It is, however, a practical reality that creates dynamics that are totally different from those in a federal or federalizing system. Professor Stewart notes¹⁴ that there is no precedent in federal systems for the use of countervailing duties to offset disparities among national production processes. The reason for this is obvious. In a federal system, there are effective law-making and law-enforcement mechanisms that provide alternatives to unilateral measures that disrupt trade flows enacted by subsidiary governmental units. Indeed, federal systems like the United States and the EC can and do invalidate rules adopted by their constituent components that impede trade.¹⁵ This phenomenon, however, reveals relatively little about the appropriate use of trade measures in an international system in which the mechanisms for defining and implementing law to address such issues as environmental externalities are considerably less effective and less responsive than in a

France and Australia, which are necessary for the convention's entry into force. See Christopher C. Joyner, Remarks, 85 PROC. AM. SOC'Y INT'L L. 464 (1991); Brian R. Murphy, Note, *Antarctic Treaty System—Does the Minerals Regime Signal the Beginning of the End?*, 14 SUFFOLK TRANSNAT'L L.J. 521 (1991).

12. John H. Jackson, *World Trade and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1251 (1992). The current proposal in the Uruguay Round, for instance, would strengthen dispute settlement procedures by specifying that panel reports shall be adopted by the GATT Council within sixty days of issuance and by establishing a standing appellate body, whose reports must be adopted by the Council within thirty days of issuance unless rejected by consensus. Dunkel Draft, *supra* note 6, § S (draft understanding on rules and procedures governing settlement of disputes under GATT articles XXII and XXIII); cf. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1988) (recommending improvements in GATT dispute settlement procedures).

13. See David A. Wirth, *Reexamining International Decision-Making Processes* (forthcoming 1993) (on file with David Wirth); David A. Wirth, Book Review, 2 Y.B. INT'L ENVTL. L. 479, 481-82 (1991) (reviewing *International Law and Pollution* edited by Daniel B. McGráw).

14. Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992).

15. *E.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992) (invalidating state hazardous waste disposal statute as inconsistent with Commerce Clause); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (same); *City of Phila. v. New Jersey*, 437 U.S. 617 (1978) (same); Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607, 1 C.M.L.R. 619 (1989) (quantitative restrictions on imported beverages sold in containers not approved by Danish government for reuse inconsistent with Treaty of Rome).

federal system. In a smoothly functioning federal system, there is little or no need for self-help. But on the international level, as the GATT and other international trade agreements at least implicitly recognize, at-the-border adjustments and countervailing duties may be the only remedy available. The question then becomes not *whether* unilateral trade measures are appropriate, but *under what circumstances* they are warranted.

The international trade system, whatever its flaws, is a considerably more mature regime than the totality or any part of international environmental law. The GATT came into existence soon after World War II. By contrast, the first binding, substantive, and potentially universal multilateral agreements on such pressing environmental problems as exports of hazardous wastes¹⁶ and depletion of the stratospheric ozone layer¹⁷ have been concluded only in the last five years. Negotiations on the only international legal norms designed to safeguard the integrity of the Earth's climate¹⁸ and the first comprehensive attempt to provide *in situ* protection for the planet's biological diversity¹⁹ have only just concluded with the opening of new multilateral conventions for signature at the Earth Summit.

But for the formalities, the GATT is effectively an international organization with a secretariat housed in Geneva that potentially has jurisdiction over the entire range of trade-related issues. The ongoing Uruguay Round is the eighth in a more or less linear sequence of international attempts to overcome impediments to free trade in a unified fashion by establishing a reasonably well-developed set of norms in a setting of considerable organizational continuity. These rules govern an increasingly wide array of substantive issues, including in the proposed Uruguay Round not only food safety laws but also intellectual property rights.²⁰ As noted above, the GATT's dispute settlement provisions, while perhaps not as effective as they might be, are generally more efficacious than in other areas of international law. Bilateral or regional trade agreements, like the recently-completed North American Free Trade Agreement,²¹ generally rely on fundamental GATT principles and are consciously structured to be consistent with the global regime.

16. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 [hereinafter Basel Convention].

17. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, *amended and adjusted* 30 I.L.M. 539 (1991) [hereinafter Montreal Protocol].

18. Climate Change Convention, *supra* note 7. See generally Wirth & Lashof, *supra* note 7.

19. Convention on Biological Diversity, June 5, 1992, 42 I.L.M. 822 [hereinafter Biodiversity Convention].

20. Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, in Dunkel Draft, *supra* note 6, at 58.

21. North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., available in LEXIS, GENFED-EXTRA Database; WL, NAFTA Database (not in force) [hereinafter NAFTA].

In the environmental area, there is no similar central focal point. Besides the United Nations Environment Programme (UNEP)²² which is headquartered in Nairobi, the International Maritime Organization (IMO)²³ in London, the Economic Commission for Europe (ECE)²⁴ in Geneva, the Organization for Economic Co-operation and Development (OECD)²⁵ in

22. Among others, the Biodiversity Convention, *supra* note 19, and the Basel Convention, *supra* note 16, and the Montreal Protocol, *supra* note 17, were negotiated under UNEP auspices.

23. The following major multilateral agreements were negotiated under IMO auspices: Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL), Feb. 17, 1978, 17 I.L.M. 546 (incorporating by reference 1973 International Convention for the Prevention of Pollution from Ships, 12 I.L.M. 1319); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

24. The following important multilateral environmental agreements were adopted under the auspices of the ECE: Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), Feb. 25, 1991, 30 I.L.M. 802; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, Nov. 18, 1991, 31 I.L.M. 568 (not in force); Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes (Sofia Protocol), Oct. 31, 1988, 28 I.L.M. 212; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulfur Emissions or Their Transboundary Fluxes by at Least Thirty Per Cent (Helsinki Protocol), July 8, 1985, 27 I.L.M. 698; Convention on Long-Range Transboundary Air Pollution (LRTAP), Nov. 13, 1979, 18 I.L.M. 1442.

25. Besides the 1972 Polluter-Pays Recommendation, *infra* note 60, the OECD has adopted the following important recommendations: *Council Decision-Recommendation Concerning Provision of Information to the Public and Public Participation in Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances*, O.E.C.D. Doc. C(88)85 (Aug. 8, 1988), *reprinted in* 28 I.L.M. 278 (1989); *Recommendation on Measures Required to Facilitate the Environmental Assessment of Aid Projects and Programmes*, O.E.C.D. Doc. C(86)26 (Nov. 21, 1986); *Recommendation on Environmental Assessment of Development Assistance Projects and Programmes*, O.E.C.D. Doc. C(85)104 (June 20, 1985), *reprinted in* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 30 (1986) [hereinafter OECD AND THE ENVIRONMENT]; *Recommendation on the Assessment of Projects With Significant Impact on the Environment*, O.E.C.D. Doc. C(79)116 (May 5, 1979), *reprinted in* OECD AND THE ENVIRONMENT, *supra*, at 29; *Recommendation for Strengthening International Co-operation on Environmental Protection in Frontier Regions*, O.E.C.D. Doc. C(78)77 (Sept. 27, 1978), *reprinted in* 17 I.L.M. 1530 (1978); *Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, O.E.C.D. Doc. C(77)28 (May 23, 1977), *reprinted in* 16 I.L.M. 977 (1977); *Recommendation on Equal Right of Access in Relation to Transfrontier Pollution*, O.E.C.D. Doc. C(76)55 (May 18, 1976), *reprinted in* 15 I.L.M. 1218 (1976); *Recommendation on Principles Concerning Transfrontier Pollution*, O.E.C.D. Doc. C(74)224 (Nov. 21, 1974), *reprinted in* 14 I.L.M. 242 (1975); *Recommendation on the Implementation of the Polluter-Pays Principle*, O.E.C.D. Doc. C(74)223 (Nov. 14, 1974), *reprinted in* OECD AND THE ENVIRONMENT, *supra*, at 26; *Recommendation on the Analysis of the Environmental Consequences of Significant Public and Private Projects*, O.E.C.D. Doc. C(74)216 (Nov. 14, 1974), *reprinted in* OECD AND THE ENVIRONMENT, at 28. Recommendations express nonbinding undertakings for those OECD members that agree to them. See Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, art. 5, para. b, 12 U.S.T. 1728, 888 U.N.T.S. 179.

Paris, and the UN Food and Agriculture Organization (FAO)²⁶ in Rome, play major roles in environmental issues. The negotiation of the recently-adopted climate change convention²⁷ was entrusted to another, new body, the Intergovernmental Negotiating Committee (INC).²⁸ The INC's work built on that of yet another specially-created institution, the Intergovernmental Panel on Climate Change (IPCC), a cooperative undertaking of UNEP and still another international organization, the World Meteorological Organization. By comparison with the GATT, international environmental agreements are largely unconnected and uncoordinated attempts to deal with discrete problems like protection of the stratospheric ozone layer,²⁹ conservation of endangered species,³⁰ and environmental harm from international shipments of hazardous wastes.³¹

Just as environmental measures may be subject to the constraints established by a trade regime, environmental standards may govern trade in commodities such as chlorofluorocarbons,³² endangered species,³³ hazardous wastes,³⁴ industrial chemicals,³⁵ and pesticides.³⁶ However, as described above, the enforcement mechanisms in most environmental agreements are thin, and there is nothing comparable to the GATT dispute settlement process to encourage compliance with those agreement's standards on a more or less routine basis.³⁷ Consequently, environmental measures are

26. For example, the FAO's International Code of Conduct on the Distribution and Use of Pesticides, F.A.O. Sales No. M/R8130/E/5.86/1/3000, art. 9 (1986) [hereinafter FAO Code of Conduct], establishes good practice standards for government and industry with respect to commerce in, and use of, pesticides.

27. See *supra* note 7.

28. See generally Wirth & Lashof, *supra* note 7.

29. Montreal Protocol, *supra* note 17.

30. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

31. Basel Convention, *supra* note 16.

32. Montreal Protocol, *supra* note 17, art. 4, at 1554-55.

33. CITES, *supra* note 30.

34. Basel Convention, *supra* note 16.

35. *London Guidelines for the Exchange of Information on Chemicals in International Trade*, U.N. Doc. UNEP/WG.155/L.1 Annex I (1987), adopted G.C. Dec. 14/27, 42 U.N. GAOR Supp. (No. 25) at 79, U.N. Doc. A/42/25 (1987), amended U.N. Doc. UNEP/PIC/WG.2/4 app. (1989), adopted as amended G.C. Dec. 15/30, 44 U.N. GAOR Supp. (No. 25) at 156, U.N. Doc. A/44/25 (1989), reprinted in 19 ENVTL POL'Y & L. 125 (1989).

36. FAO Code of Conduct, *supra* note 26.

37. While most international environmental agreements do not provide for binding, third party dispute resolution, there have recently been attempts to craft informal, multilateral processes to encourage implementation and compliance that are somewhat analogous to the GATT panel procedures. See Climate Change Convention, *supra* note 7, arts. 10, 13 at 863-64, 866 (establishing subsidiary body for implementation of conference of parties and directing conference of parties at its first meeting to "consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention"); *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP/

considerably more likely to be subjected to a trade discipline than the other way around. And from an environmental point of view, the trade dispute settlement process provides only one remedy: a conclusion that the offending measure should be eliminated.

One effect of this disparity has been a gradual but persistent tightening of the trade constraints on unilateral or even multilateral environmentally motivated trade measures to fill the gaps in global regimes that do not necessarily respond sufficiently quickly or effectively in addressing environmental externalities. The GATT creates an explicit exemption for measures designed to protect human, animal, or plant life or health, provided that those measures are "necessary."³⁸ Last year's tuna panel report³⁹ interpreted "necessary" to imply a requirement that a state "exhaust[] all options reasonably available . . . through measures consistent with the General Agreement."⁴⁰ A second exemption applies to exhaustible natural resources "if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁴¹ One GATT panel interpreted this provision as requiring a demonstration that the measures in question were "primarily aimed at the conservation of exhaustive natural resources."⁴² A panel convened under the auspices of the United States-Canada Free Trade Agreement, which incorporates GATT Article XX by reference, suggested in addition that a trade measure would have to satisfy a cost-benefit test to qualify for the exemption.⁴³ Moreover, both exceptions are interpreted narrowly.⁴⁴ Not surprisingly, barely a single trade measure whose validity turns on the application of one or the other of these exemptions has ever been held to be consistent with the GATT.⁴⁵

OzL.Pro.2/3, Annex III (June 1990) (establishing five-member Implementation Committee to rule on cases of asserted failure to implement Montreal Protocol), *reprinted in* 1 Y.B. INT'L ENVTL. L. 591, 630 (1990).

38. GATT, *supra* note 5, art. XX(b), 61 stat. at A61, 55 U.N.T.S. at 262; see Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 212-14 (1992) (in press) (criticizing "the mutating 'necessary' test").

39. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna/Dolphin Panel Report].

40. *Id.*, para. 5.28, at 1620.

41. GATT, *supra* note 5, art. XX(g), 61 stat. at A61, 55 U.N.T.S. at 262.

42. *Report of the GATT Panel, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, para. 4.6, GATT Doc. L/6268 (Mar. 22, 1989), BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD] 35th Supp. 98, 114, see also Tuna/Dolphin Panel Report, *supra* note 39, para. 5.33, at 1621.

43. *In re Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Panel No. CDA-89-1807-01, 1989 FTAPD LEXIS (Binational Panel Oct. 16, 1989) (requirement that fish caught in Canadian waters be "landed" in Canada under Article XX(g), incorporated by reference into article 1201 of United States-Canada Free Trade Agreement, 27 I.L.M. 281 (1988), not justified in light of available less burdensome alternatives as judged by whether measure would have been adopted if all its costs fell on Canadian nationals).

44. See Tuna/Dolphin Panel Report, *supra* note 39, para. 5.22, at 1619.

45. See Wirth, *A Matchmaker's Challenge*, *supra* note 4, at 408 n.113.

The tuna panel report concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not permissible.⁴⁶ This conclusion is clearly new law. As Professor Stewart notes,⁴⁷ this rule has obvious and significant implications for the Montreal Protocol on Substances That Deplete the Ozone Layer⁴⁸ which restricts trade in ozone-depleting chlorofluorocarbons, certain products containing those chemicals, and potentially products manufactured with such products with states not party to the agreement. During the negotiation of the Montreal Protocol, the Trade Representative issued an opinion on the agreement's anticipated trade measures that endorsed the use of trade measures to protect the ozone layer, described the natural resources exception as "broad," ignored the "extra-territorial" question on which the GATT panel's conclusion rested, failed to address the desirability or necessity of a GATT waiver, and ultimately gave a clean bill of health to trade measures of the sort contemplated for that agreement.⁴⁹ Representatives of the GATT secretariat attended at least some of the negotiating sessions leading up to the Montreal Protocol. As a practical matter it would have been inconceivable for the agreement to be adopted in its current form if the GATT secretariat had objected.

Continuing the analogy to the United States and the EC, Professor Stewart argues that a free trade regime ought to have primacy in the international system and that the current GATT text is sufficiently flexible to provide a basis for a needed transition to a system that more effectively

46. Tuna/Dolphin Panel Report, *supra* note 39, paras. 5.24-.26 & 5.31-32, at 1619-21. This conclusion is not necessarily immune from criticism as a matter of treaty interpretation. The panel placed considerable reliance on an earlier version of article XX(b), dealing with human, animal, or plant life or health, that limited the exemption to cases in which "corresponding domestic safeguards under similar conditions exist in the importing country." *Id.* at 1620. The meaning of "similar conditions," while not entirely clear, certainly does not imply the necessity for identical conditions. Moreover, if there are no "similar conditions," there would be no need for "corresponding domestic safeguards," and the proviso would arguably be without effect. In any event, as Professor Jackson notes in his article for this conference, resort to preparatory work is less well accepted in the context treaty interpretation than in the construction of domestic statutes. Jackson, *supra* note 12, at 1241. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 32, 8 I.L.M. 679 (preparatory work as supplementary means of interpretation if plain language "leaves the meaning ambiguous or obscure . . . or leads to a result which is manifestly absurd or unreasonable"). An equally, if not more, plausible interpretation of article XX would apply to cases in which there might be effects on human, animal, or plant life or health or natural resources within a state's jurisdiction even if the activities that give rise to the trade restrictions take place outside that jurisdiction. Such effects are accepted in international law as a basis of jurisdiction to prescribe, which goes well beyond the sovereign authority to establish at-the-border trade measures. See 1 RESTATEMENT, *supra* note 4, § 402(c) & cmt. d.

47. Stewart, *supra* note 14, at 1366-67.

48. See *supra* note 17.

49. Memorandum from Amelia Porges, Associate General Counsel, Office of the United States Trade Representative, to CFC Trade Work Group (January 14, 1986) (on file with author).

accommodates environmental values.⁵⁰ While one might agree with Professor Stewart that the trade regime can be rendered environment-friendly, it is unrealistic to expect this to occur without a thorough reevaluation of the current system.

In contrast to federal systems like the United States⁵¹ and the EC,⁵² GATT dispute panels do not have the power to compel performance of relevant standards, environmental or otherwise. The GATT dispute settlement process results only in a conclusion that a particular action is or is not consistent with the regime. From a trade point of view this makes perfect sense. Impediments to trade result from affirmative governmental measures, like tariffs, and the principal goal of a free trade regime is to eliminate those governmental measures, which almost by definition promotes liberalized trade. By contrast, international obligations with respect to the environment—and many other areas as well—anticipate and require the implementation of affirmative governmental actions intended to address particular problems. From an environmental point of view, then, the international trade regime as currently structured is a no-win proposition: There are no mechanisms for assuring the implementation of minimum governmental measures, and once those policies that do exist are subjected to trade-based scrutiny, nothing more than maintenance of the status quo can be expected to result even in the best possible case. In short, to attain the quasi-constitutional status Professor Stewart would assign to it, the GATT needs to metamorphose into considerably more than the international version of the dormant Commerce Clause.

Professor Stewart and Professor Jackson both appear receptive to a trade regime that would accommodate trade measures that further the purposes of multilateral regimes for protecting resources of the global commons like Antarctica and the high seas.⁵³ This is the easiest possible case. Otherwise, the argument presumably goes, by comparison with resources within the jurisdiction of sovereign states, there is little chance that resources beyond national jurisdiction will be protected from environmental externalities. The tuna case provides an interesting gloss on this perspective. The United States has reached understandings under which Mexico and Venezuela will abandon the practice of setting on dolphin, provided that

50. Stewart, *supra* note 14, at 1349-50.

51. *E.g.*, Administrative Procedure Act § 10(e)(1), 5 U.S.C. § 706(1) (1988) (authorizing reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"); Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1988) (codifying "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff").

52. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 169-71, 298 U.N.T.S. 11, 75 (creating actions by member states or EC Commission in European Court of Justice alleging "that a Member state has failed to fulfil any of its obligations under this Treaty" and authorizing Court of Justice to require member states to take the necessary measures to comply with judgment).

53. Stewart, *supra* note 14, at 1364-65; Jackson, *supra* note 12, at 1249-50.

the U.S. ban on tuna imports is lifted.⁵⁴ Although for an international lawyer it is troubling, one way to read the history of this issue is that these negotiated promises from Mexico and Venezuela—which the GATT tuna dolphin panel implied would have been highly preferable to the import ban⁵⁵—were made possible only because of the leverage generated by the unilateral trade measures concluded by the panel to be contrary to the GATT. As the tuna panel pointed out, unilateral measures invite a crazy quilt of inconsistent and not necessary effective national approaches that may impede trade. On the other hand, national trade measures can provide some minimal protection for resources beyond the jurisdiction of any state that might otherwise be victims of the tragedy of the commons. Moreover, as in the tuna case and countless others, unilateral regulation can galvanize multilateral processes by increasing the incentives for effective multilateral responses.⁵⁶

Both Professor Stewart and Professor Jackson acknowledge that disparities in domestic environmental policies can affect international competitiveness.⁵⁷ Interestingly, where Professor Stewart categorically rejects the proposition that these disparities have any significance in a free trade regime,⁵⁸ Professor Jackson appears cautiously receptive to

rules in the trading system that impose certain kinds of harmonizing minimum level standards for environmental protection. In the alternative, rules that impose certain kinds of trade detriments, such as compensatory duties, on countries that do not adopt or enforce the harmonized or minimal environmental rules, might also be worthwhile.⁵⁹

If multilateral agreements to protect resources of the global commons are the easiest case, the trade consequences of different domestic standards that do not necessarily involve impacts outside a state's own jurisdiction are the hardest. Other, intermediate situations, as both articles suggest, might include transboundary pollution that originates in one state and causes harm in another.

A twenty-year old OECD recommendation, adopted in 1972, that articulates the so-called "Polluter-Pays Principle"⁶⁰ provides an informative

54. See *Pro-Dolphin Accord Made*, N.Y. TIMES, June 16, 1992, at D9.

55. Tuna/Dolphin Panel Report, *supra* note 39, para. 5.28, at 1620.

56. See, e.g., Steven J. Shimberg, *Stratospheric Ozone and Climate Protection: Domestic Legislation and the International Process*, 21 ENVTL. L. 2175 (1991).

57. Stewart, *supra* note 14, at 1354-55; Jackson, *supra* note 12, at 1248-49.

58. Stewart, *supra* note 14, at 1356.

59. Jackson, *supra* note 12, at 1250.

60. *Guiding Principles Concerning International Economic Aspects of Environmental Policies*, O.E.C.D. Doc. C(72)128 (May 26, 1972), reprinted in 11 I.L.M. 1172 (1972) [hereinafter 1972 Polluter-Pays Recommendation]. See generally Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEX. INT'L L.J. 463 (1991).

framework for analyzing the international significance of disparities in domestic environmental policies. As the title of the Polluter-Pays Principle suggests, the recommendation states that those that create environmental externalities ought to bear the costs. Less apparent is that the Principle includes a substantive standard of cost internalization as a test of the adequacy of domestic environmental policies. Reflecting the views of environmental economists, the recommendation states that

[w]hen the cost of [environmental] deterioration is not adequately taken into account in the price system, the market fails to reflect the scarcity of such resources both at the national and international levels. Public measures are thus necessary to reduce pollution and to reach a better allocation of resources by ensuring that prices of goods depending on the quality and/or quantity of environmental resources reflect more closely their relative scarcity and that economic agents concerned react accordingly.⁶¹

Further, "the cost of [pollution control measures] should be reflected in the cost of goods and services which cause pollution in production and/or consumption."⁶² For present purposes, the most interesting portion of the recommendation is a passage that states that one of the purposes of the Polluter-Pays Principle is "to avoid distortions in international trade,"⁶³ a goal apparently motivated as much by concerns about competitiveness as by the desire to conserve environmental amenities.

Although the GATT permits application of the Polluter-Pays Principle as a domestic environmental measure, the General Agreement does not authorize the enforcement of that standard with respect to imported goods through at-the-border measures like fees or duties to offset the costs to domestic industries of pollution control measures.⁶⁴ The OECD recommendation does not suggest a change in the resulting GATT distinction, mentioned by Professor Stewart⁶⁵ and Professor Jackson⁶⁶ and reiterated in the tuna dolphin panel report,⁶⁷ between products and processes. Instead, the instrument states that "[e]ffective implementation of the guiding principles set forth herewith will make it unnecessary and undesirable to resort to" at-the-border adjustments like countervailing duties to equalize disparities in national environmental policies.⁶⁸

61. 1972 Polluter-Pays Recommendation, *supra* note 60, Annex para. 2.

62. *Id.* at para. 4.

63. *Id.*

64. *Report of the GATT Panel, United States—Taxes on Petroleum and Certain Imported Substances*, para. 5.2.3-7, GATT Doc. L/6175 (June 17, 1987), BISD 34th Supp. 136, 27 I.L.M. 1596 (discussing Polluter-Pays Principle).

65. Stewart, *supra* note 14, at 1365-66.

66. Jackson, *supra* note 12, at 1243-44.

67. Tuna/Dolphin Panel Report, *supra* note 39, para. 5.11-15, at 1617-18.

68. 1972 Polluter-Pays Recommendation, *supra* note 60, at Annex para. 13. Cf. S. 984,

The Polluter-Pays Principle has been accepted in the EC at least since the 1972 OECD recommendation,⁶⁹ and an allusion to it is now included in the Treaty of Rome.⁷⁰ Principle 16 of the Rio Declaration on Environment and Development,⁷¹ adopted at the Earth Summit in June 1992, affirms the Polluter-Pays Principle at an unprecedented level of generality and universality. Rio Principle 16 does not mention trade implications except to note that the Polluter-Pays Principle ought to be applied "without distorting international trade and investment." Given that the Polluter-Pays Principle is intended to *prevent* trade distortions, this caveat is quite curious, if not downright incoherent.

Presumably the reasoning in the recommendation proceeds from the assumption that cost internalization is a minimum good practice standard that should be adopted by all countries. Those that do not do so obtain an unfair trade advantage, which, through application of the Polluter-Pays Principle, can be distinguished from the "inherent" comparative advantage that drives international trade. The 1972 OECD Recommendation consequently elevates environmental policies that otherwise would be purely domestic matters to the international level, which explains the justification of the Principle as a mechanism to "to avoid distortions in international trade." Similarly, the failure to adopt a minimum standard of internalization is analogous to an export subsidy—a "pollution subsidy"—that creates unfair trade advantages for industries in those states with environmental policies below the international minimum standard.

Some have suggested that the calculation of external costs, particularly in a foreign context and most especially in developing countries, would not be easy. But the principle of cost internalization is a central and familiar one in environmental economics. If this is a mortal defect in a trade context, it should be no less fatal in a variety of others.⁷² Some have questioned the wisdom of so-called "environmental countervailing duties."⁷³ Whatever the merits of those arguments, there is no reason in principle to draw the line at measures to protect the global commons adopted through multilateral processes.

We can set our sights somewhat higher than mere peaceful coexistence between trade and the environment. The alternative is continued clashes

102d Cong., 1st Sess. (1991) (proposed International Pollution Deterrence Act that would authorize imposition of countervailing duties on manufactured goods from countries with substandard environmental policies).

69. See Gaines, *supra* note 60, at 477-81 (describing uneven application at national level).

70. Single European Act, *supra* note 1, at 5 (adding new article 130R, paragraph 2, specifying "that the polluter should pay," to Treaty of Rome).

71. 31 I.L.M. 876, 879 (1992).

72. *Cf.* Ohio v. United States Dep't of Interior, 880 F.2d 42, 474-81 (D.C. Cir. 1989) (upholding use of "contingent valuation" methodologies involving interviews to determine individuals' willingness to pay for determining natural resources damages in cases where no market exists in identical or similar resources).

73. See *supra* note 68 and accompanying text.

between trade and environmental regimes that can only tend to erode the integrity of both. When more than one hundred heads of state gather in Brazil for the largest summit meeting ever, the notion that there are no internationally accepted environmental minimum standards is no longer consonant with current realities. Indeed, cost internalization and the Polluter-Pays Principle—at least if one relies on the black marks on the numerous pieces of paper coming from Rio—are precisely such a standard. For some time trade agreements like the GATT have targeted certain export subsidies,⁷⁴ and, based on news reports, it sounds as if further trade disciplines for agricultural subsidies are an essential precondition to the conclusion of the Uruguay Round.⁷⁵ Although the task is not necessarily easy and it will require leadership and political will, there is no reason in principle why an international trade regime could not move in the direction of imposing a similar discipline on *de facto* pollution subsidies provided by those countries with substandard environmental policies.

74. See, e.g., Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, 31 U.S.T. 513, BISD 26th Supp. 56 (1980) (GATT Subsidies Code).

75. See *supra* note 6.

