

IS THE GATT COMPATIBLE WITH ENVIRONMENTAL PROTECTION?

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INTRODUCTION

The General Agreement on Tariffs and Trade¹ ('GATT') is in one sense incompatible with environmental protection laws. The objective of international trade law, as embodied in the GATT, is the free flow of goods and services, with minimal governmental interference. In contrast, advocates of environmental conservation seek more governmental regulation to protect the environment. This conflict is growing along with environmental consciousness. Many environmental organizations see GATT and its free trade principles as threats to national environmental laws and international accords while free trade advocates complain of "eco-imperialism." Free trade advocates argue that, to safeguard world trade against disguised protectionism, governmental environmental measures must be justified under the general exceptions of GATT.

To the environmentalist, GATT is not compatible with environmental protection. GATT deters the imposition of environmental standards through trade sanctions. GATT does not allow an import ban to be imposed on a party whose production processes do not meet the environmental standards of the importing country. The GATT prohibits unilateral environmental trade sanctions.

It is arguable that values pertaining to global environmental global environmental welfare should prevail over GATT. The GATT exception, which allows trade sanctions in the name of environmental protection, as we shall discuss later, is a very narrow window. Conservationists conflict with GATT² when they advocate the use of trade sanctions to protect the environment or to conserve endangered living species.

On the other hand, a trade lawyer or economist could argue that GATT is compatible with environmental protection. Although GATT is a multilateral treaty aimed at free trade and the removal of all technical barriers and quantitative restrictions to trade (Art. XI, par. 1), it does permit exceptions under Article XX.

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¹ General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S.G.I. (15 April 1997).

These exceptions include trade sanctions to protect the environment. Article XX states that, providing that trade restricting measures "are unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade," GATT allows contracting parties to adopt or enforce measures 'necessary to protect human, animal or plant life or health' (Art. XX(b)) or which relates to the 'conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption' (Art. XX(g)).

I. EXCEPTIONS UNDER ARTICLE XX OF THE GATT

A. ARTICLE XX(b) and (g) of the GATT

The GATT Panel of Judges has had occasion to elaborate on Article XX(b) and (g) of the GATT. The landmark case is *U.S. v. Mexico (U.S. Embargo Mexico Tuna, I and II)*.¹ Briefly, under these cases, the U.S. imposed a law which mandates that exporters of tuna to the U.S. must comply with U.S. environmental standards embodied in the Marine Mammal Environmental Act (MMPA) of 1972 in the catching of tuna. The aim was to protect dolphins which were being caught with tuna. If the catching of tuna by a foreign state, e.g., Mexico, does not comply with MMPA standards, the U.S. may ban importation of the tuna. For non-compliance, the U.S. imposed a primary trade embargo against Mexico and a secondary embargo against the European Community and other countries. Mexico contested that this unilateral trade sanction on the grounds that it was incompatible with GATT.

B. ARTICLE XX(g) Exception

With regard to Article XX(g), the Panel in the second Tuna Case (Tuna II) conducted its analysis in three steps. First, it had to decide whether the MMPA qualified as a policy to conserve exhaustible natural resources. Second, it had to decide whether the GATT-inconsistent trade measure was 'related to' the conservation of exhaustible natural resources, and whether it was made effective 'in conjunction' with restrictions on domestic production or consumption. Third, it had to determine whether the MMPA conformed with Article XX's requirement that a measure not to be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

On the first issue, the Panel found that dolphins are an exhaustible resource. It also observed that the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resources. On the second issue, the Panel defined 'relating to' as 'primarily aimed' at. It concluded that measures that were effective only if other countries changed their policies could not be aimed primarily at either the conservation of an exhaustible natural resource or rendering effective restrictions on domestic production or consumption within the meaning of Article XX(g). Embargoes

¹ GATT: Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) and 33 I.L.M. 839 (1994)

to coerce other countries to change their policies with respect to persons and things within their own jurisdiction in order to conserve dolphins were not permitted under Article XX because it would seriously impair the balance of rights and obligations of contracting parties, in particular the right of access to markets. Unfortunately, the Panel did not elaborate on this. With this conclusion, it decided not to continue to the third step.

ARTICLE XX(b) Exception

The Panel also applied the tree-step approach in elaborating Article XX(b) and reached similar conclusions. Adopting the Panel's decision in the *Thai Cigarette*² case, a trade sanction is 'necessary' under Art. XX (b) if there is no alternative measure consistent with the GATT which Thailand could reasonably be expected to employ to achieve its health policy objectives. It also concluded that measures taken to coerce other countries to change their policies, and which were effective only if such changes occurred, could not be considered 'necessary' for the protection of animal life or health. Thus, the Panel concluded, the embargoes were inconsistent with Article XI(1) of the GATT and were not justified under Article XX(b).

II. INTERNATIONAL ENVIRONMENTAL CONVENTIONS ALLOWED UNDER GATT

Trade restricting environmental measures have generally been tolerated by World Trade Organization members. These measures are embodied in some International Environmental Laws or Conventions such as the *Convention on International Trade in Endangered Species*³ (CITES), the *Montreal Protocol on Substances that Deplete the Ozone Layer*⁴ (Montreal Protocol) and the *Basel Convention on the Transboundary Movement of Hazardous Waste*⁵ (Basel Conventions). The three operate as acceptable exceptions to GATT.

A. CITES

CITES prohibits commercial trade in species of wild fauna and flora threatened with extinction and strictly regulates trade in species that could be threatened by extinction if trade were not controlled. It is an environmental protective measure which permits trade sanctions under Article XX(b) of GATT, i.e., for the protection of animals or plant life or health.

To implement CITES, Parties have to enact export and import restrictions, depending on the geographical location of the species involved. CITES explicitly authorizes contracting parties to take stricter measures including a complete ban on

² U.S. v. Thailand, *Pescatore Case No. 82*.

³ 12 I.L.M. 1085.

⁴ 26 I.L.M. 1550 (1987).

⁵ UN Doc. UNEP/IG.80/3.

trade of the affected species. Trade with non-parties is in principle subject to the same restrictions that apply to trade between parties. The latter is explicit in Article X of CITES which ensures that import bans imposed in accordance with the convention are non-discriminatory in the sense that they do not apply to a non-Party which substantially conforms to the requirements of the convention for permits and certificates, and which supplies comparable documentation. The effect of Article X therefore is that a non-Party, in order to claim the benefit of the GATT prohibition on quantitative restrictions, must act as if it were a party, in respect of specimens regulated by CITES.

B. The Montreal Protocol

The Montreal Protocol provides for the gradual phasing out of the production and consumption of Chlorofluorocarbons (CFCs). Within these limits, trade in CFCs is permitted between parties, whereas trade with non-parties is subject to stricter restrictions. These restrictions apply not only to the importation of CFCs from non-parties, but also to the importation of products containing CFCs or whose production require the use of CFCs. Exports of CFCs to non-parties are banned.

Under Article IV of the Montreal Protocol, each party shall ban the import of controlled substances from any State not a party to the Protocol, subject to exceptions. The purpose of the Protocol is to protect the health of humans, animals and plants, and is thus compatible with Article XX(b) of the GATT. It could also be argued that the Protocol is compatible with the GATT exceptions in that it protects an exhaustible natural resource, the ozone layer. Article IV(8) of the Protocol ensures that import bans adopted in accordance with the Protocol are non-discriminatory within the meaning of Article XX, in the sense that they do not apply to a non-party which is acting as if it were a party and which has submitted data to prove this to the Parties. The effect of Article IV(8) therefore is that a non-Party, in order to claim the benefits of the GATT prohibition on quantitative restrictions on imports in respect of controlled substances, should prove that it has acted as if it were a party. If it does not do so, it cannot claim its rights in this respect under GATT.

C. The BASEL Convention

The Basel Convention prohibits certain categories of movement of waste. Shipment of waste which are not per se forbidden are permissible provided that certain conditions are met, including the need to obtain the prior written consent of the State of Destination. Under the Basel Convention, contracting parties are authorized to adopt more stringent measures and are explicitly accorded the right to ban all imports of foreign waste in their territory. Movements of waste, whether through export or import between parties and non-parties are prohibited, except under bilateral or multilateral agreements which provide for the same level of environmental protection as the Basel Convention. The Basel Convention is allowed under Article XX(b) and (g) of the GATT.

CONCLUSION

As environmental awareness grows, the conflict between environmental law and the international trade regime under GATT/WTO Rules is likely to intensify. In one