

Forest Certification and the WTO

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1 INTRODUCTION

The present paper is written as a non-technical discussion paper on the connection between the international trading regime and the practice of forest certification. The purpose of the paper is, primarily, to stimulate debate concerning the desirability and feasibility of forest certification in light of the international trading environment determined by GATT and the World Trade Organization. This is important in view of the Seattle Ministerial Conference, where tariff reductions in timber are on the agenda and an increased awareness of the pertinent world trade disciplines may be of use.

I shall first present a brief outline of the complex relationship between trade and environment generally, followed by a brief outline of the world trading regime. Subsequently, various ways of reconciling trade and environment will be discussed, before the focus comes to rest upon forest certification.

However, for reasons to be explained below, it may prove to be impossible to say anything of finality on the topic of forest certification in light of international trade rules: too much depends on the precise implementation of any set of standards and on the precise circumstances in which certification plays a role. Instead, I will discuss a number of factors which may, depending on the circumstances, have a bearing on the question of legality. By way of conclusion, I will advocate the further harmonization of voluntary standards.

2 TRADE AND ENVIRONMENT: SOME PROBLEMS

The relationship between free trade and environmental protection is complex, for a variety of reasons. One is that we tend to think that both free trade and environmental protection are good things.¹ Ever since David Ricardo pointed out that free trade would increase total welfare, free trade has become an accepted fact of life. Indeed, some ascribe the outbreak of the second World War (in part, at any rate) to the protectionism that prevailed throughout most of the 1920s and 1930s, underlining the belief that even if free trade were not a good thing in itself, then it is at least of value in that it contributes to the interdependence of states and therewith makes the outbreak of war less likely. Most recently, this has found a powerful voice in the “liberal peace” thesis: liberal and democratic free market economies do not, generally, go to war with one another.²

On the other hand, the natural environment is also deemed worthy of protection. Ever since scientists discovered such phenomena as the hole in the ozone layer, the degradation and destruction of forests, or the gradual increase of temperature (possible leading to the large-scale melting of polar ice and rising sea levels), the protection of the environment has become increasingly prominent in domestic and international political agendas. Each high profile incident serves to maintain the public’s interest in the environment.

Thus, when it comes to trade and the environment, the public usually “wants to have its cake and eat it too”, as it were. Yet, on occasion we are confronted with the impossibility of doing so; occasionally, there is a conflict between the two and difficult choices may have to be made.

Another reason adding to the complexity of the relationship resides in the circumstances that different perspectives yield different results. In other words: from the point of view of liberal trade, environmental protection may serve as a noble goal, but may also constitute a barrier to trade. Indeed, inasmuch as free trade rules attempt to create a level playing field amongst traders, environmental protection in one form or another might be deemed detrimental, in various ways. Thus, an import prohibition of goods from state B due to their being produced in an environmentally unfriendly way may benefit producers in state A; but to the extent that producers in state A must produce according to high environmental standards themselves, those standards might work to their detriment. Thus, the same measure may be felt to be both detrimental and beneficial, even for one and the same actor.³

1 In a similar vein, John H. Jackson, “Greening the GATT: trade rules and environmental policy”, in James Cameron, Paul Demaret & Damien Geradin (eds.), *Trade & the environment: the search for balance, vol. 1* (London 1994), 39-51.

2 Arguably the most powerful exploration hereof in international law is Anne-Marie Slaughter, “International law in a world of liberal states”, 6 *European Journal of International Law* (1995), 503-538. The argument is usually said, with varying degrees of cogency, to derive from Immanuel Kant’s *Zum ewigen Frieden*.

3 This ignores, of course, the underlying assumptions that both free trade and environmental protection are generally beneficial.

As the example already highlights, what adds to the problem is that environmental protection may not so much relate to products as such, but rather to the processes by which they are produced. Indeed, this is the general state of affairs when it comes to the conflict between trade and environment: the problem resides not so much in trade in polluting goods (although trade in hazardous waste does occur and, according to some, ought to be treated as trade in any other product⁴), but rather concerns trade in goods that are produced in environmentally harmful, or at least possibly harmful, manners.

However, the protection of the environment has proved difficult to regulate internationally, perhaps in part because any attempt at regulation presupposes not just reliable knowledge concerning the environmental effects of proposed regulations, but assumes a vision of what political theorists usually refer to as “the good life”. By contrast, it has proved much easier to regulate trade, at least in broad outline, for to regulate free trade means in large measure simply to get rid of barriers to trade. It does not require much by way of philosophical justification once there is consensus that free trade is a good thing in itself: once that consensus is in place, all that is required is to abolish existing barriers and prevent the creation of new ones. The precise modalities of protecting the environment, on the other hand, are infinitely varied and likely to be subject to continuous debate, even where general consensus on the desirability of protection may exist.⁵

4 For example, the European Court of Justice, case C-2/90, *Commission v. Belgium (Walloon waste)*, [1992] ECR I-4431.

5 In a similar vein, Michael J. Trebilcock & Robert Howse, *The regulation of international trade* (London 1999, 2d. ed.), at 425.

3 THE WTO: A BRIEF OUTLINE

As an aftermath of the protectionism of the 1920s and 1930s free trade has come to be advocated as a means of preventing the causes for international conflict from occurring and as a means of contributing to the general welfare of nations. Thus, the wartime plans of Churchill and Roosevelt, embodied in the 1941 Atlantic Charter, envisaged free trade, and when the Bretton Woods system of a postwar economic order was devised, a prominent place was reserved for a planned International Trade Organization (ITO).⁶ Indeed, negotiations leading to its creation progressed speedily, until it became clear that the US Senate (which shortly after the war favoured isolationism) might be tempted to reject the ITO's founding document, the Havana Charter. In order not to frustrate the goal of free trade, part of the Havana Charter was singled out, and became a separately concluded treaty: the General Agreement on Tariffs and Trade (GATT). The GATT never formally entered into force; instead, it operated from 1947 onwards on a provisional basis.⁷

Given these unusual origins, it was no surprise that the practical functioning of GATT left a few things to be desired. No institutional machinery was included (this, after all, had found a place in the other parts of the Havana Charter), and dispute settlement procedures had to be built almost from scratch. More importantly, GATT dealt almost exclusively with trade in industrial goods. While GATT contained some agricultural provisions, little came of them, given the agricultural protectionism prevalent in both the US and Europe. Additionally, the newer phenomenon of trade in services was left completely unregulated.

None the less (or perhaps because of its inherent flexibility), GATT proved to be successful, at least during the first decades of its existence. Various negotiating rounds had resulted in the progressive abolition of tariffs and other, non-tariff barriers to trade. And GATT's improvised dispute settlement procedures, consisting of panels appointed by mutual consent and working with reports which would only become adopted if all parties involved could accept them, managed to iron out many trade disputes by using diplomacy and negotiation rather than relying only on law.⁸

Still, during the 1970s and 1980s it became increasingly clear that GATT was no longer well-suited to cope with ever-changing circumstances. As a well-known economist succinctly put it in the mid-1980s: "GATT is dead".⁹ Among the reasons for proclaiming GATT's death were the rise of new trade-inhibiting devices which focussed on production

6 This was to function in conjunction with two institutions that were created: the International Monetary Fund and the World Bank. Between the three of them, international economic relations would be exhaustively covered.

7 The seminal study on substantive GATT law is John H. Jackson, *World trade and the law of GATT* (Indianapolis 1969).

8 The standard study is Robert E. Hudec, *The GATT legal system and world trade diplomacy* (New York 1975). For an analysis of a dispute of exceptional tenacity, see Jan Klabbers & Annerie Vreugdenhil, "Dispute settlement in GATT: DISC and its successor", *Legal Issues of European Integration* (1986/I), 115-138.

9 The well-known economist was Lester C. Thurow, but I have been unable to retrieve the original citation.

processes and mechanisms rather than on products themselves. It is no coincidence that the *general exceptions clause* to GATT (article XX) was for the first time the subject of a panel report in the late 1980s. Article XX aims to provide the member states with the freedom to regulate production processes by allowing for the protection of intellectual property rights, by protecting exhaustible natural resources, and by protecting human, animal and plant life.¹⁰

The changes in the international trading environment were many: trade in services had increased dramatically; the EC was devoured by its own agricultural practices and intellectual property protection and investment protection were increasingly viewed as affecting trade. The agreement ostensibly liberalizing textiles turned out to be hopelessly protectionist in application and, perhaps most importantly in retrospect, GATT had become a veritable labyrinth of documents, instruments, understandings, agreements and decisions: thereby failing to live up to one of the requirements traditionally associated with any legal regime: providing clarity and certainty.

By the late 1980s, the time was ripe to re-invent GATT; to breath new life into it. This was to take place during the so-called Uruguay Round of trade negotiations, which built an entire new framework for world trade around the core of the existing GATT. A World Trade Organization was established, incorporating the old GATT law plus adding a number of new issues to the scope of the world trading regime (most visibly trade in services and the trade related aspects of investment measures and intellectual property rights) and creating an elaborate institutional machinery including a more comprehensive dispute settlement mechanism.¹¹

Under GATT the dispute settlement system consisted of loosely established panels whose reports would gain authority only upon acceptance by the parties involved. The new streamlined mechanism (referred to as the Dispute Settlement Body) provides for panels working within fixed time-limits following fixed procedures and allowing for the possibility of appeal with a so-called Appellate Body. Unless subjected to appeal, decisions are deemed to be final, and the system also allows for more effective sanctions to be authorized.¹²

Although the GATT/WTO increasingly bears the hallmarks of a legal system (clarity, transparency, above all perhaps predictability), the transition has not been fully completed just yet. Many of the uncertainties of GATT have been carried over into the new organization, and many of the substantive rules have been found to need further interpretation before they are able to function effectively.¹³ While the rules themselves may be relatively clear, their application in concrete situations may not always be self-evident. Hence the cases decided by GATT panels and the present-day Dispute Settlement Body are vitally important for setting precedents.¹⁴

10 For a general analysis of the first panel reports, see Jan Klabbbers, "Jurisprudence in international trade law: article XX of GATT", 26 *Journal of World Trade* (1992/2), 63-94.

11 For an excellent overview, see Bernard Hoekman & Michel Kosteci, *The political economy of the world trading system: from GATT to WTO* (Oxford 1995).

12 See generally Marko Wuorinen, "The cross-retaliation in the WTO dispute settlement system: can the European Communities benefit from it?", 8 *Finnish Yearbook of International Law* (1997), 340-365.

13 Compare, for a lucid analysis, Rambod Behboodi, "Legal reasoning and the international law of trade – the first steps of the Appellate Body of the WTO", 32 *Journal of World Trade* (1998/4), 55-99.

14 In addition, discussions take place in special Committees, such as the Committee on Trade and the Environment. So far, however, those have been more instrumental in raising mutual understanding of the issues than in finding a solution for them.

4 PROTECTING THE ENVIRONMENT

In recent years, various attempts have been made by states to resort unilaterally to environmentally protective measures; in some cases, such measures have come before GATT/WTO panels, giving rise to an instructive body of case-law.

The practice of banning imports runs the risk of being in violation of various GATT provisions. For one thing, any import prohibition amounts almost by definition to a quantitative restriction on trade, and thus runs counter to article XI GATT. If, after importation, distinctions are being made according to the country of origin of the banned substance (as in allowing products from Mexico but not like products from Guatemala), then the legislation is difficult to reconcile with the most-favoured-nation clause, one of the cornerstones of GATT and laid down, not coincidentally, in article I.

Usually though, distinctions do not so much relate to various countries of origin, but are in existence between foreign producers and domestic producers; such might for instance be the case if domestic fishermen use more advanced fishing techniques and have discarded driftnet fishing generally. Under such a scenario, banning the products of driftnet fishing, while this might be inspired by concerns for the safety of dolphins, has the side-effect of protecting the domestic fishing industry. It fails to treat like products alike regardless of their source, and thereby runs counter to article III GATT, the so-called national treatment clause.¹⁵

It is here that the recognized exceptions to GATT's basic rules may come in, and the most pertinent ones are laid down in article XX.¹⁶ Article XX provides (possible) relief when domestic measures deviating from GATT rules are considered to serve useful purposes. Thus, if such deviating measures serve to protect public morals, their use may be justified, despite their incompatibility with GATT's main rules. Similarly, when they serve to protect patents or trademarks, national treasures, or relate to the products of prison labour, such measures are permitted.

With respect to environmental protection, two clauses in particular are important. Under article XX(b) GATT, deviating measures be taken in order to protect human, animal or plant life or health, while article XX(g) allows protection for the conservation of exhaustible natural resources. Article XX reads, in relevant part:

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

¹⁵ Articles III and XI, incidentally, are held to be mutually exclusive. The latter deals with import *per se*, while the former relates to treatment of products already imported.

¹⁶ Others include the right to take deviating measures when suffering from balance of payments problems (article XII), import floods (article XIX), or when national security is under threat (article XXI).

trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...

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

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

However, under article XX, such deviating measures¹⁷ must meet certain (relatively strict) requirements. When it comes to measures for the protection of human, animal or plant life or health, such measures must be “necessary”, something which even at first sight means that they must not just be desirable or generally beneficial; the word “necessary” conveying a greater degree of need. Thus, what is often required is that either no effective alternative exists, or that alternatives may exist but the chosen is the least obstructive of trade.¹⁸

Moreover, measures relating to the conservation of exhaustible natural resources must be made in conjunction with restrictions on domestic production or consumption. Thus, banning the import of a scarce resource while stimulating domestic consumption or production will not meet the requirements of article XX(g).

In addition, the so-called *chapeau* to article XX (the lengthy opening sentence) contains a number of other requirements. The application of measures to protect life or conserve resources may not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. If either of these two is ascertained, then the measure will be struck down, regardless of whether it meets other requirements.

Article XX has given rise to many interpretational difficulties¹⁹, and not unsurprisingly so, for its wording is ambiguous. Thus, while any exception must meet with strict requirements, article XX also seems to suggest that those strict requirements may warrant a relaxed interpretation: the starting point appears to be that nothing in the GATT shall be construed in such a way as to prevent adoption or enforcement of desirable policy goals, thus tilting the balance towards domestic concerns rather than international commitment. However, this is off-set by the consideration that article XX constitutes a set of exceptions to basic rules and therefore, under traditional principles of treaty interpretation²⁰, would warrant a rather restrictive interpretation, tilting the balance back to international commitment.

In short, much of the debate concerning the relationship between trade and the environment revolves around the proper interpretation of article XX, and its place in the larger scheme of GATT. The need to resort to article XX indicates that environmental measures are usually in violation of GATT/WTO rules, and may find their only legal justification in falling within the scope of article XX.

Since the entry into force of the WTO, the legal picture has been made more

17 For our purposes, the term ‘measures’ shall relate not so much to specific instances of certification, but rather to underlying general schemes. In the past, the concept of measures within GATT/WTO law has given rise to some confusion; see generally Klabbers, *supra* note 10.

18 For a lucid discussion, see Arthur E. Appleton, *Environmental labelling programmes: international trade law implications* (The Hague 1997).

19 Compare generally Klabbers, *supra* note 10.

20 These can be found largely in article 31 of the 1969 Vienna Convention on the Law of Treaties, a provision eagerly resorted to by GATT/WTO panels.

complicated by the revitalization of two other sets of rules. Two agreements concluded initially in 1979, and only attracting a moderate number of ratifications by GATT members, have been lifted into the new framework, and have been upgraded so as to embody sets of rights and obligations for all member states of the WTO.²¹ The Agreement on Sanitary and Phytosanitary Measures is one of them, and while it bears an obvious importance on environmental protection in general, it tends to do so by allowing (temporary and limited) import bans rather than forcing states to think of creative other ways to protect. Thus, for present purposes, it can safely be ignored.²²

More important, however, is a second agreement originally concluded in 1979: the Agreement on Technical Barriers to Trade. For, after all, many environmental measures take the form of a technical barrier to trade, the most obvious example being the inclusion of mandatory environmental standards in product specifications. Any WTO-member who enacts a rule saying that, for instance, only sustainably grown timber may be imported, may be creating a technical barrier to trade, in much the same way as packaging rules, or rules on the mandatory sizes of cloth for resale, or the technical specifications of VCRs, may constitute technical barriers to trade.

²¹ And thus no longer only for those states which initially accepted them.

²² So also Appleton, *supra* note 18.

5 RECONCILIATION

Assuming that environmental management is difficult to reconcile with some of the basic rules underlying the world trading system, what can be done to ensure or promote environmental protection? Several possibilities have so far been explored.

The most simple method is to resort to unilateral action, and many environmental measures are indeed taken unilaterally, often as the result of pressure from interest groups. Yet, as noted earlier, to comply with the WTO such measures must, as a minimum, respect the most-favoured-nation and the national treatment provisions; they must make sure that they do not amount to a quantitative restriction, and when it does depart from these basic principles it must meet with a number of other requirements so as to become justified by a provision such as Article XX, or under the Technical Barriers to Trade Agreement.

Even if a unilateral measure manages to circumvent these pitfalls, then it may still not be very effective in terms of what it aspires to achieve. For instance a measure by Liechtenstein to protect or conserve tropical forests through its trade in hardwood will provide only marginal relief. In other words, in terms of effectiveness, it is more than likely that only the unilateral actions of the larger markets (the US, EU, Japan, and soon China) will contribute to the stated goal.

Another way then, and potentially a more fruitful one, is to conclude a treaty between interested states outside the WTO context. Such a multilateral solution is, indeed, frequently suggested by GATT/WTO decisions and panels as a possible way out²³, and the general law of treaties tends to favour the application of later treaties over earlier concluded treaties, at least among states that are parties to both. While the possibility has not, *in concreto*, been tested by GATT/WTO panels so far, it is difficult to imagine a rejection of the later treaty on grounds of incompatibility with GATT/WTO, unless the system wishes to declare itself supreme.²⁴

But there would appear to be little legal ground for declaring that GATT/WTO rules must prevail and in practice certain trade-limiting agreements have been concluded and have met with little resistance. The 1973 Convention on International Trade in Endangered Species (CITES) is often cited as an example, as is the Basel Convention on the control of transboundary movements of hazardous waste and their disposal.²⁵

On the other hand, two serious problems remain. One is, that an environmental agreement cannot be invoked against non-parties to that agreement; thus, relations

23 Thus, e.g., on the occasion of the signing of the WTO package in Marrakesh, the ministers recommended that the Council for Trade in Services request the Committee on Trade and the Environment to “examine the relevance of inter-governmental agreements on the environment” and their relationship to the WTO. See Joseph Denna (ed.), *The law and practice of the World Trade Organization* (looseleaf), Binder I, booklet 5, at 33.

24 Along the lines of the classic finding by the Court of Justice of the EC assumes supremacy over the legal systems of its member states and does so by virtue of EC law itself. See Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

25 Compare, e.g. (albeit inconclusively), James Cameron, “The GATT and the environment”, in Philippe Sands (ed.), *Greening international law* (London 1993), 100-122.

between two WTO members only one of whom is a party to the environmental agreement would continue to be governed by WTO disciplines; and that, in turn, would create serious problems concerning the viability of the environmental regime as such, for it would be difficult to reconcile with the most-favoured-nation treatment due under GATT/WTO law. Arguably, the only proper way out then is to organize the environmental regime as a trade regime; but that might not always be feasible.

Additionally, there is the circumstance that some treaty conflicts are structurally unsolvable; any preferred solution, would then be coloured by the initial approach to the problem. Thus, from a trade perspective, the trade view will almost by definition prevail, while from the environmental perspective, the environmental view most likely will prevail.²⁶ Perhaps it was with this phenomenon in mind that the WTO's Committee on Trade and the Environment in 1996 called upon states "that are WTO members and also parties to an MEA [multilateral environmental agreement – author's note] to consider bringing any dispute involving the trade provisions of the MEA to that agreement, as opposed to the WTO."²⁷ This makes clear that the conclusion of multilateral environmental agreements, however useful, may not necessarily result in WTO-conformity.

There is also the issue of the free rider problem: state X does not participate in an environmental scheme, does not pay its share of the burden, but does profit from the improvement in environmental quality – it free-rides on the efforts of others. Moreover, it might even enjoy a competitive advantage precisely due to its non-participation. While concluding the 1989 Montreal Protocol on substances that deplete the ozone layer, the drafters gave careful consideration to the free rider problem, and decided to gradually phase-out trade with non-parties (who may or may not be WTO members). While this might, at first glance, conflict with the WTO's non-discrimination provisions, the Montreal Protocol's drafters theorized that such would not be the case. They argued that non-discrimination only applies to countries where the same conditions prevail; after a few years, the difference between states banning substances depleting the ozone layer and states not doing so have become so wide as to be able to plausibly claim that different conditions prevail. Consequently, the WTO's non-discrimination provisions are not violated.²⁸

The conclusion of a treaty, on whatever topic, presupposes a large measure of political agreement on the desirability of the treaty. Where political differences exist and are unbridgeable (or are only bridgeable at the expense of clarity and determinacy) no meaningful treaty can be concluded. And where that is the case, other options may have to be explored.

One of those options is to be found in taxation measures. Thus, to impose an environmental tax on certain products appears feasible. While any tax would potentially fall under the prohibition of article III GATT, as long as it applies to all like products alike,

26 See in particular Guyora Binder, *Treaty conflict and political contradiction: the dialectic of duplicity* (New York 1988). Also, eventually, Jan Mus, *Verdragsconflicten voor de Nederlandse rechter* (Zwolle 1996).

27 Cited in the 1996 Annual Report of the President of the United States on the Trade Agreements Program, and reproduced in Joseph Denna (ed.), *supra* note 23, Commentary I, at 56.

28 For an account by someone close to the negotiations, see Robert A. Reinstein, "Trade and environment: the case for and against unilateral action", in Winfried Lang (ed.), *International law and sustainable development* (Dordrecht 1995), 223-231. Additionally, the Montreal Protocol is careful to allow trade with non-parties that have unilaterally committed themselves to comply with the major provisions of the Protocol. See Laura B. Campbell, "Comment on the paper by Robert Reinstein" in *ibid.*, 233-237.

regardless of their source, it would seem to be reasonable under article XX GATT. After all, a tax on product A and all like products does not necessarily impede free trade, as long as it is applied across the board. So-called border tax adjustments, moreover, have long been a recognized device for avoiding double taxation.

The problem, then, is rather on the political level: few politicians will plan a prosperous career on the idea of raising taxes, no matter how sound the motivation. Moreover, it is difficult to predict what will happen once a tax is in place, giving rise to a higher retail price: will consumers really change their consumption patterns as intended? And if so, will they substitute environmentally friendlier products for the not so friendly ones, or will they perhaps resort to even worse substitutes? Furthermore, there remains the problem of the distinction between products and production processes: while much of GATT relates to products and to products alone, it is difficult to find ways to attack the underlying production methods, particularly if these do not relate of the product as such.²⁹

Given the above-mentioned difficulties, it is perhaps no surprise that some recent scholarship no longer recommends searching for a comprehensive reconciliation of trade and environment, but advocates rather a process-based approach. As one author puts it, not without a certain sense of defeatism, “[p]erhaps the most that can be done is to establish a process for taking incremental decisions to resolve specific conflicts.”³⁰

²⁹ Indeed, one of the problems even with border tax adjustments is that they are best applied to products but difficult to apply to processes. For a useful review, see Paul Demaret & Raoul Stewardson, “Border tax adjustments under GATT and EC law and general implications for environmental taxes”, 28 *Journal of World Trade* (1994/4), 5-65.

³⁰ Thomas J. Schoenbaum, “International trade and protection of the environment: the continuing search for reconciliation”, 91 *American Journal of International Law* (1997), 268-313, at 271.

6 FOREST DESTRUCTION

Forest destruction is usually said to encompass two distinct phenomena: deforestation (usually defined as the change in land use from forest to non-forest purposes), and degradation, which in turn signifies changes in sites or tree stands but not in overall land use.

While the precise environmental consequences of forest destruction remain unclear, some may reasonably be expected to occur. Thus, forest destruction will result in a loss of species diversity (an irreversible process), which in turn may affect the possibilities of finding new or unknown medicinal potential. Additionally, forest destruction may result in watershed problems and erosion, affect weather patterns, and possibly contribute to enhanced greenhouse gas emission and global warming.³¹ In addition, there may be other consequences, ranging from the disappearance of human habitat to a loss of resources capable of generating export earnings.

The causes of forest destruction are also not quite beyond debate, and presumably a number of factors simultaneously play a role. Thus, forest products, at least in the poorer parts of the world, are used as fuel to provide energy; commercial logging affects forests³², as do greenhouse effect feedbacks and acid rain. In addition, there might be institutional causes of deforestation, residing in such things as corruption or, more generally, in weak governmental regulation.³³ But the single most important factor appears to be the conversion of forests to agricultural land, either formally as part of a government's formal policy or as the result of "slash-and-burn" agriculture.³⁴ Trade in forest products seems to play a relatively minor role, at least when it comes to tropical timber.³⁵

Perhaps partly due to underlying disagreement relating to the causes of forest destruction, its consequences and the question of who should bear the responsibility, the international community has, thus far, failed to agree on an international convention to prevent forest destruction. While the conclusion of such an agreement was considered on the eve of the United Nations Conference on Environment and Development (1992), in the end the various negotiating positions remained so divided that all that could be agreed on was a set of non-binding principles.³⁶

31 See generally, in a cautious tone of voice, Caroline Thomas, *The environment in international relations* (London 1992), esp. 254-260. More self-assured is Jutta Brunnée, "A conceptual framework for an international forests convention: customary law and emerging principles", in Canadian Council on International Law (ed.), *Global forests and international environmental law* (The Hague 1996), 41-77, esp. at 45-47.

32 Commercial logging also confers a commercial value on forests and can provide an incentive for conservation.

33 Compare Daniel W. Bromley, "Deforestation – institutional causes and solutions", in Matti Palo & Jussi Uusivuori (eds.), *World forests, society and environment* (Dordrecht 1999), 95-101.

34 Compare generally Thomas, *supra* note 31, 245-254.

35 See Edward B. Barbier, "The role of trade interventions in the sustainable management of key resources: the cases of African elephant ivory and tropical timber", in Cameron, Demaret & Geradin (eds.), *supra* note 1, 436-458.

36 On the legal qualification of such instruments, see generally Jan Klabbers, *The concept of treaty in international law* (The Hague 1996).

Indeed, the negotiating positions appear to be locked between the eagerness of the developed world to arrange and stimulate sustainable forestry, and the fear of many developing countries that this is a means of restricting their market access, forcing them to adopt more costly processing methods (and thus making them less competitive) or to avoid having to take tough measures to mitigate greenhouse gas emissions.³⁷

The same stalemate is reproduced in other fora, including the World Trade Organization. Thus, the US is of the opinion that ecolabelling, even when it concerns production methods rather than products, finds its justification under the Agreement on Technical Barriers to Trade, whereas developing countries are generally of a contrary opinion.³⁸

37 Compare David VanderZwaag & Douglas MacKinlay, "Towards a global forests convention: getting out of the woods and barking up the right tree", in Canadian Council on International Law, *supra* note 31, 1-39, at 1.

38 Compare US report, *supra* note 27, at 56-57.

7 FOREST CERTIFICATION AND WORLD TRADE LAW: ASPECTS TO CONSIDER

Under those circumstances, it is perhaps not surprising that the main initiatives at present have come from what can loosely be called the private (or semi-public) sector.³⁹ Forest certification takes place under several auspices, most visibly those of the International Organization for Standardization (ISO) and the Forest Stewardship Council (FSC). While both work on different premises (ISO standards relate to management, while FSC relates more to performance), both share one important characteristic: they work on a voluntary basis.

The legality of voluntary certification schemes under the WTO has not been tested so far.⁴⁰ At best, several commentators have specified that voluntary certification schemes deserve to be treated as being presumptively in accordance with WTO rules.⁴¹ Clear arguments have, however, rarely been forthcoming. It would seem that the main point in defense of voluntary certification is that it is voluntary, and thus, the argument continues, out of the reach of the WTO.⁴²

The one exception hitherto has been the argument (made in the context of ecolabelling rather than certification) that its voluntary character notwithstanding, ecolabelling may only be available to those who can afford it. After all, it may be costly to get the required machinery in place, and it may be the case that the application for the eco-label itself is costly. Moreover, the precise standards to be met are often posited after consulting domestic producers, which might result in choosing standards which are difficult for foreign competitors to meet. The net result, then, could be discrimination of foreign producers, in particular those in less developed countries.⁴³

As the scant discussion in the literature already implies, much depends on the precise circumstances of any given situation. To take an hypothetical example: if state X, when insisting on certified tropical timber, is itself a producer of timber, the situation may clearly be different when compared with that of state Y which does not have any domestic timber production. In the former case, insistence on certificates may serve to protect the domestic industry; in the latter case, such is by definition excluded.

39 In the same vein, Farhana Yamin & Ijaz Zahid, "Forests", in 8 *Yearbook of International Environmental Law* (1997), 296-306.

40 Mandatory schemes, by contrast, have been the subject of some debate, as when Malaysia challenged the legality of a mandatory Austrian labelling programme for tropical timber in 1992.

41 Thus, e.g., Appleton, *supra* note 18; see also Naomi Roht-Arriaza, "Compliance with private voluntary agreements: the example of the International Organization for Standardization's ISO 14000 environmental and related standards", in Edith Brown Weiss (ed.), *International compliance with nonbinding accords* (Washington D.C. 1997), 205-218. Elsewhere, though, Roht-Arriaza seems to ground the presumption of legality in the international nature of the standards concerned. *Infra* note 48.

42 Being based on an agreement between states, the WTO does not directly touch upon the private sector, let alone on voluntary commitments undertaken by the private sector. Still, if the argument of voluntariness is taken to the extreme, then the question of presumptive compatibility can never arise. Hence, one may regard the positing of the presumptiveness thesis as an implicit admission that there might be more than meets the eye.

43 See Christian Tietje, "Voluntary eco-labelling programmes and questions of state responsibility in the WTO/GATT legal system", 29 *Journal of World Trade* (1995/V), 123-158.

In those circumstances, it is futile to attempt to provide a single final conclusion on the legality of certification schemes. At best, a number of factors may be sketched which might have a bearing on the question of legality. What follows, then, is such a set of factors. Some of those relate to general characteristics; other are relevant to specific legal instruments, either the Technical Barriers to Trade Agreement or the GATT 1994 agreement.⁴⁴

7.1 VOLUNTARINESS

One factor which may clearly influence things is the method by which producers are persuaded to certify. Where a state enacts mandatory certification requirements⁴⁵ (for example insisting on certification as a prerequisite for either importation or for some other treatment), the chances are that the result may end up being in contravention of GATT/WTO rules. This is so for several reasons (some of which will be more extensively discussed below). Mandatory schemes, after all, differentiate in legal treatment between similar products (or “like” products, to adopt the WTO phraseology) stemming from different sources, and while they may serve recognized policy goals they may none the less be more trade-restrictive than alternative means of serving the same policy goals.

The same does not automatically apply to voluntary schemes.⁴⁶ Here, however, the danger might exist, as noted earlier, that certification is not equally within the reach of producers from all corners of the earth. Thus, not only is there the possibility that for some producers, the certification process itself is too expensive, there may also be the circumstance that domestic standards are set in conjunction with domestic producers and therewith will display a bias in favour of those domestic producers.

One thing to note, though, is that the question of the voluntary assumption of certification by producers will not automatically render certification outside the scope of GATT/WTO rules. Even the smallest amount of government involvement will result in bringing private sector certification within the scope of GATT/WTO disciplines; and once they are thus covered, they will have to be justifiable.⁴⁷

7.2 THE ORIGIN OF STANDARDS

The Technical Barriers to Trade Agreement places a premium on international standards, on the theory, we may presume, that when there is agreement among states *involving international* standards, then the possibilities for unilateral action are significantly diminished. While both ISO standards and FSC standards emanate from bodies occupying a grey zone between private and public, there can be little doubt that the resulting standards are, for all intents and purposes, international in aspiration.⁴⁸

44 The hypothetically applicable Agreement on Sanitary and Phytosanitary measures will be left out of consideration.

45 These would qualify as “regulations” under the Technical Barriers to Trade Agreement.

46 “Standards”, under the Technical Barriers to Trade Agreement.

47 In a similar vein, Tietje, *supra* note 43.

48 A useful analysis of the ISO’s work is Naomi Roht-Arriaza, “Shifting the point of regulation: the International Organization for Standardization and global lawmaking on trade and the environment”, 22 *Ecology Law Quarterly* (1995), 479-539.

One problem may then be the very proliferation of standards and certification approaches: if one group of states adopts ISO standards, another opts for standards set by FSC, and yet others may fall for standard adopted within the more limited confines of, e.g., the International Tropical Timber Organization, then harmonization is called for lest trade gets distorted, in spite of the existence of standards of international origin.

7.3 PROCESS OR PRODUCT

Traditionally, it has been thought that GATT/WTO rules apply solely to products, leaving untouched the way those products are made. Thus, steps taken against a polluting product would come within the scope of GATT/WTO disciplines; steps taken against clean products produced by strongly polluting means, though, would remain outside the scope of GATT/WTO rules, giving states at least the freedom (perhaps even an incentive) not to ensure environmentally sound production methods and processes.

There are certain circumstances where such a stand makes sense. Obviously, while products, upon importation, may contribute to degradation of the environment in the importing state, the same does not hold true with regards to processes or production methods. Those, after all, usually do not move along with the product⁴⁹, and it must be within the prerogatives of the producer state to decide whether or not it wishes to condone certain production processes.⁵⁰

Indeed, also following the letter of much of GATT/WTO law, this product-oriented interpretation is understandable, as much of those rules specifically refer to treatment of products.⁵¹ One of the few (arguable) exceptions is to be found in article XX(d), which allows for deviation from general rules for purposes of the protection of patents, trade marks and copyrights. Even here the issue of whether this exception covers patented production processes as well as patented products has been subject of heated debate.⁵²

Recent dispute settlement proceedings, however, appear to tilt increasingly towards treating process and production methods as coming within the ambit of GATT/WTO rules. An example was already constituted by the two (unadopted) *Tuna*⁵³ panel reports, where the panels refused to accept the argument that since driftnet fishing merely related to the process of harvesting tuna it ought to remain outside GATT's (as it still was) ambit.⁵⁴ This line of thinking has been confirmed in the more recent *Shrimp* report, where the fact that the Appellate Body did not specifically address the circumstance that it was dealing with a process rather than a product itself indicates a certain (increased) tolerance for finding process and production methods to come within the scope of GATT/WTO disciplines.⁵⁵

When it comes to forest certification, the mere fact that certification usually does not so much apply to end products but rather to process or production methods does not

49 Exceptions might reside in, e.g., the use of pesticides.

50 A brief but useful analysis is Candice Stevens, "Trade and the environment: the PPMs debate", in Winfried Lang (ed.), *supra* note 28, 239-247.

51 See, e.g., such pivotal provisions as Article I and Article III.

52 See in particular the *United States – Section 337 of the Tariff Act of 1930* panel. For a discussion, see Klabbbers, *supra* note 10.

53 *Tuna I* is reproduced in 30 *International Legal Materials* (1991), 1594, whereas *Tuna II* can be found in 33 *International Legal Materials* (1994), 839.

54 Instead, US legislation was rejected, amongst other things, for exercising extra-territorial effects.

55 *United States – Import prohibition of certain shrimp and shrimp products*, AB-1998-4.

necessarily have to imply that it is not subject to regulation. The *Tuna* and *Shrimp* panels create some inroads into traditional thinking, and it follows that where activities fall within the scope of GATT/WTO rules, they may also violate those rules.

7.4 ENVIRONMENTAL PROTECTION AS PURPOSE

Under the Technical Barriers to Trade Agreement certain trade-restricting regulations may be allowable, provided they serve a worthy cause, such as the protection of national security objectives or the protection of human health or safety, animal or plant life or health, or the environment.⁵⁶ This applies only to (mandatory) technical regulations; with regard to (voluntary) standards, no specific objectives are listed.⁵⁷

Thus, mandatory schemes must serve the protection of the environment or human, animal or plant health and life (and in addition fulfill some other requirements); surely, when it comes to forest certification, a plausible case to that effect can be made.

7.5 NO UNREASONABLE RESTRICTION

The more problematic aspect of justifying schemes under the Technical Barriers to Trade Agreement is that neither technical regulations nor voluntary standards shall be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade.⁵⁸ This is further specified, with respect to mandatory technical regulations, to mean that restrictive measures “shall not be more trade-restrictive than necessary” to reach their objective, taking due account of the risks involved if the objective (such as environmental protection) is not met.⁵⁹ In other words: where alternatives exist, and those alternatives are equally effective but less trade-restrictive, use of alternatives is to be preferred.

Needless to say, whether in any practical set of circumstances such alternatives can be deemed to exist depends on those very circumstances, but some commentators have already expressed pessimism with regard to mandatory ecolabelling schemes: these are difficult to justify under the Technical Barriers to Trade Agreement precisely because it is not at all self-evident that no useful alternatives could be found.⁶⁰

7.6 LIKE PRODUCT

Both the Technical Barriers to Trade Agreement and GATT 1994 specify that non-discriminatory treatment is warranted when it comes to “like products”.⁶¹ The question

⁵⁶ Article 2.2.

⁵⁷ When it comes to standards, the main provisions are to be found in annex 3 to the TBT Agreement, which contains a Code of Good Practice for the preparation, adoption and application of standards.

⁵⁸ Compare article 2.2. TBT and article E of the Code of Good Practice.

⁵⁹ No such provision applies to voluntary standards.

⁶⁰ Thus, Appleton, *supra* note 18, at 117.

⁶¹ Article 2.1 TBT; article D Code of Good Practice; articles I and III GATT.

arises when products are similar enough to warrant application of the non-discrimination provisions. On this issue, opinions are probably as manifold as there are possible factual circumstances, and often resort is sought with economic theory. As the Appellate Body imaginatively put it in the 1996 *Alcoholic Beverages Appeal*, the concept of likeness “evokes the image of an accordion... [it] stretches and squeezes in different places...”⁶²

When two products are identical, there is, obviously, not much of a problem: a car from state X competes directly with a car from state Y. Problems may arise, though, in roughly two sets of circumstances. First, if the two products, while (close to) identical, none the less serve different purposes, can they still be regarded as like products? Here, recent developments suggest that differences between seemingly similar products may nevertheless be taken into account. Thus, the 1992 *Malt Beverages Panel* distinguished between beer with low and high alcohol contents, on the theory that different regulations for strong beers were not intended to differentiate between imported and local beers. Indeed, the panel concluded by claiming that “it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.”⁶³ And that, in turn, suggests that at least within the confines of article III, something of a balance must be sought between the requirement of national treatment and domestic policy goals.

The other circumstance in which a “like product” problem may arise is where products are different, but may none the less be used for similar purposes. In other words: are they competitive or substitutable?⁶⁴ Where this is the case, non-discrimination is warranted. At any rate, the usual way of determining likeness is by looking at such things as physical properties, end-uses, tariff classifications, perhaps even manufacturing processes.⁶⁵

Where manufacturing processes are to be discussed for purposes of the likeness of products, then clearly forest certification may become an issue: if certified timber is thought not to compete with non-certified timber, then article III does not apply (and is thus not violated) whenever a state places a premium on certified timber. Similarly, if tropical and temperate timber are not treated as ‘like’, then article III is not violated.

There are, however, a few ifs and buts. Thus, there is an element of artificiality in distinguishing products by using characteristics relating to the geographical origins of components as the distinguishing criteria; by the same token, to distinguish between certified and non-certified timber seems plausible only if there is widespread agreement that, indeed, these are ‘unlike’. Still, it has been argued that the *Japanese Alcoholic Beverages Panel* may have gone further than strictly necessary in listing manufacturing processes amongst the factors determining likeness for, as some suggest, such a test is implausible in those circumstances where the production method has no direct bearing on the end product (does not change its appearance, or taste, or longevity, or any such factor).⁶⁶ If one thing is clear then it is that the determination of what constitute like products will always have to take place on a case-by-case basis: what may be like products in one set of circumstances may not be like products under different circumstances.

⁶² *Japan – Taxes on alcoholic beverages*, AB-1996-2, at 19.

⁶³ As quoted in Appleton, *supra* note 18, at 100.

⁶⁴ This may play a different role with different provisions; compare, e.g., article III(4) GATT with article III(2) plus note.

⁶⁵ See, e.g., Appleton, *supra* note 18, at 97.

⁶⁶ *Ibid.*

7.7 NO LESS FAVOURABLE

Another requirement present in article III GATT as well as article 2.1 TBT and article D Code of Good Practice is that treatment of foreign products shall be no less favourable than that of domestic products. Clearly, the idea was never to prohibit different treatment, and clearly, more favourable treatment of foreign products is not out of bounds.

While much may depend on the precise circumstances of each and every individual case, it would seem that the term “no less favourable” is meant to encompass both formal and material discrimination. What matters is, as the 1996 *Gasoline Panel* put it, “effective equality of opportunities for imported products”.⁶⁷

Here, then, even voluntary labelling or certification schemes may find a high obstacle, in that, as discussed earlier, there is the danger that the costs involved in voluntary schemes may make it difficult or impossible for some producers, particularly from the poorer regions, to obtain certification. If this is the case, then the result may be that in effect (if not in intention) those producers are banned from certain markets. In such circumstances, much may depend on a weighing of the policy goal of sustainable forestry with the possible detrimental effect on producers from developing states.

7.8 NECESSARY OR UNNECESSARY

Even where measures may violate article III, they may none the less be rescued under reference to the exceptions of Article XX. Article XX(b) provides for exceptions which are “necessary to protect human, animal or plant life or health”. Here, *mutatis mutandis* the same applies as was said above the “no unnecessary obstacle” test of the Technical Barriers to Trade Agreement: the requirement entails “that no alternative measures consistent with the General Agreement can be taken, and that any measures taken are as consistent as possible with the terms of the General Agreement.”⁶⁸

7.9 EXHAUSTIBLE

Article XX(g) allows for deviating measures relating to the conservation of exhaustible natural resources, provided domestic production or consumption are similarly restricted. This creates an opportunity for forest protection, in the sense that few would deny that forests constitute an exhaustible natural resource; therewith, forest protection measures which would otherwise arguably violate GATT/WTO rules may none the less find permission under XX(g).

The possible catch is, however, in the provision that similar domestic measures must be taken. This need not necessarily imply identical treatment, as the 1996 *Gasoline Appeal* makes clear, but a certain “even-handedness” is none the less required.⁶⁹

⁶⁷ *United States – Standards for reformulated and conventional gasoline* (29 January 1996), at 49, para. 6.10.

⁶⁸ Klabbbers, *supra* note 10, at 91. The words quoted were based on an analysis of Article XX(d) but may be transposed to XX(b).

⁶⁹ *United States- Standards for reformulated and conventional gasoline*, AB-1996-1, at 20.

There is one other requirement in article XX(g) that is of importance: measures must be “relating to” conservation. Where this has traditionally been interpreted as meaning that measures must be “primarily aimed at” conservation (a high hurdle to take), recently the line adopted appears to be more in the nature of demanding a “substantial relationship” between the measures and conservation of the exhaustible natural resource.⁷⁰ Here, clearly, the requirement has been relaxed.

Indeed, it has been observed that generally, article XX(g) appears relatively relaxed⁷¹, and may provide useful services when it comes to environmental protection. Thus, forest certification may (always dependent on precise circumstances) well fall within the protection of article XX(g), as it often concerns measures substantially related to conservation of a resource that is undeniably exhaustible. Still, meeting the specific requirements of subparagraph (g) does not yet say anything about whether the general requirements of article XX are met.

7.10 ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION

Finally, under the so-called *chapeau* (or preamble, or opening sentence) to article X, measures may not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor may it result in a disguised restriction on international trade.

There are, hidden in the words of article XX’s *chapeau*, three items to focus on: what is a disguised restriction? What is arbitrary or unjustifiable? And what is meant by countries where the same conditions prevail? Oddly, the first of those has in the past given rise to some strained interpretations, such as the finding that something could not constitute a disguised restriction if it was a publicized one.⁷² In later years, it has become clear that concealment is not what matters, but rather the effects of trade measures, and that, in turn, has given rise to the development of treating the phrases “disguised restriction” and “arbitrary or unjustifiable discrimination” in the same breath. The *Gasoline Appeal*, for one, specifies that considerations of the same kind apply.⁷³ What exactly those considerations are, though, is another matter; presumably, among them such things as market access rank high.

Some environmental breathing room is created (or at least utilized) by the provision that article XX’s requirements only apply to products from states “where the same conditions prevail”. It was this clause which, as noted, the negotiators of the Montreal Protocol on substances that deplete the ozone layer, seized upon in order to justify trade restrictions: states which have signed up to the Montreal Protocol are no longer to be regarded as states where the same conditions prevail as in non-parties.

That is a plausible line to take, but only on condition that parties to the Montreal Protocol actually live up to their obligations. In other words: whether or not the same

⁷⁰ *Ibid.*, at 18.

⁷¹ Appleton, *supra* note 18, at 171-172.

⁷² Elsewhere I have argued that such would lead to untenable results: it would be absurd to allow trade barriers “on the mere basis of their being publicly announced.” Klabbbers, *supra* note 10, at 91.

⁷³ *Gasoline Appeal*, *supra* note 69, at 24-25.

conditions prevail depends on implementation of the Protocol, not merely on having become a party. In yet other words: where a party to the Protocol is in non-compliance, it cannot justify any trade restrictions with the help of this particular argument.

And then there is another condition linked to the plausibility of this “same conditions” argument: it presupposes an international agreement to begin with, lest it will undermine the very trading disciplines. It presupposes that states are by and large (and in large numbers) in agreement on what to do and how to do it. Put differently: a state can hardly use the argument to justify unilateral action. For if it were possible for state A to argue that since it takes unilateral measures, it is no longer a country where the same conditions prevail, and therefore its unilateral measures are justified, then everything goes. Thus, while attractive and ingenious, the argument must be handled with care, and much will depend, once more, on the precise circumstances which may emerge.

8 BY WAY OF CONCLUSION

It seems to follow from much of the above, that any unilateral measures will have a hard time being justified in the eyes of the GATT/WTO. In line with the internationalist spirit prevailing amongst internationalists, whether traders or environmentalists, the only feasible options appear to be multilateral.

One option, often referred to in panels, is the conclusion of a multilateral agreement on forestry. Yet, politically this seems a long way off, and even then, multilateral agreements do not automatically imply GATT/WTO approval, as observed above.⁷⁴ Moreover, there is the consideration that the WTO does not appear to think of itself as the proper forum for negotiations on such an agreement⁷⁵, rendering it difficult to bridge the cognitive gap between one set of rules and another set of rules.

The remaining alternative then is to continue the further development of voluntary standards for certification. This is, given the measure of disagreement among states, at present difficult to conceive in the form of an intergovernmental agreement. Instead, certification standards developed by the private or semi-public sector seem easier to achieve. These standards remain, preferably, voluntary, for reasons outlined above – anything mandatory is very difficult to reconcile with GATT/WTO rules. Additionally, it would be useful, in line with the Code of Good Practice, to try and make uniform or harmonize standards. Where several sets of standards are in competition, the cure may eventually be worse than the disease.

In concrete terms: short of an amendment of WTO rules allowing for import restrictions on unsustainably harvested forests (which does not appear likely), or of a global agreement between states on forest protection, the most practicable alternative is to focus on the further development and harmonization of voluntary standards as the basis of forest certification. That, in turn, means that the forest industry (in the widest sense) will have to concentrate on what standards it is prepared to accept and to adopt.

74 Similarly, Ann Rutgeerts, "Trade and environment: reconciling the Montreal Protocol and the GATT", 33 *Journal of World Trade* (1999/4), 61-86.

75 By analogy: the 1996 Ministerial Conference resolved that the development of labour standards is best left to the International Labour Organization.