

The WTO and Multilateral Environmental Agreements: A Case of Disciplinary Neoliberalism?

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Introduction

If sustainable development is about the integration of economic and environmental goals, then there seems to be a significant lack of integration between the preeminent global governance structures set up to manage economic and ecological interdependence.

The international trade regime has evolved into one of the most powerful and influential multilateral regimes in the world today in terms of its ability to attract members (with the lure of expanding markets) and discipline them. The legal norms in the World Trade Organization's (WTO) trade agreements are backed up by powerful sanctions (which include trade retaliation) and a sophisticated dispute resolution mechanism accompanied by a rapidly developing jurisprudence that is unequalled in other international regimes.

In contrast, multilateral environmental agreements (MEAs), and international environmental law generally, provide a more fragmented form of governance that lacks the coherence, reach, financial backing and organizational structure of the WTO (Guruswamy 1998, 2). Most MEAs typically work in accordance with the voluntarist tradition of international law and proceed on an *ad hoc*, issue-by-issue basis by inducing cooperation and generally avoiding punitive sanctions and courts (Bodansky 1999, 598; Von Moltke 1997).¹ Judged in terms of size and teeth, we might regard the WTO as a large tiger and MEAs as a ragged collection of small cats.

One of the central points of dispute in the trade and environment debate is how conflicts between the international trade regime and international environmental regimes should be managed. Conflict between overlapping international regimes is not a novel problem. However, what makes the overlap between the trade and environment regimes politically contentious from an environmental point of view is that trade rules appear to rule. The onus is on those defending environmental norms to show that they are compatible with WTO agreements not only in disputes brought before the WTO but increasingly in MEA negotiations.² Yet there is no reciprocal requirement that WTO members demonstrate in trade negotiations or trade/environmental conflicts that trade rules are consistent with the objectives, principles and legal norms of particular MEAs, such as the climate change convention.

¹ One exception to this claim is the United Nations Convention on the Law of the Sea (UNCLOS) which creates a binding system of adjudication and dispute resolution that confers upon the International Court of Justice (ICJ) jurisdiction and authority to hear trade and environment disputes in certain circumstances (for a discussion, see Guruswamy 1998).

² Of course, the trade framework includes environmental exceptions, but they are strictly

This lop-sided state of affairs lends support to the claim by critical international theorists that the WTO is exercising a particularly potent form of ‘disciplinary neoliberalism’ on state and non-state actors, in this case by undermining international and national efforts towards more concerted environmental protection. According to Stephen Gill, ‘disciplinary neoliberalism’ (which he traces to a particular Anglo-American model of capitalist development) is increasing the power of investors relative to other members of civil society, both nationally and transnationally (Gill 1995, 4). The conclusion of the Uruguay Round of multilateral trade negotiations in 1994 saw a considerable expansion in the range and scope of trade agreements. The general worry is that the expanding scope of trade agreements will work to restrict the potential scope of MEAs and make them less effective than they would otherwise be. The particular worry is that trade restrictions in MEAs will become increasingly vulnerable to challenge in the WTO. As a consequence, environmental non-government organizations (ENGOS) have stepped up their critique of the global trading rules, arguing that they are primarily concerned with the effect of environmental policies on trade, but not the effect of trade policies on the environment. Against these arguments, skeptics argue that environmental concerns are exaggerated.³ There have been no formal legal challenges in the WTO against an MEA,⁴ and recent WTO jurisprudence (i.e., the *Shrimp Turtle* case) has moved towards a more generous interpretation of the environmental exemptions in the WTO rules.

This paper evaluates these claims and counterclaims and concludes that the expanding reach of the WTO’s trade agreements does serve to cramp the scope and operation of MEAs, albeit in subtle rather than direct ways. I begin by outlining the advantages of trade restrictive measures in MEAs and explaining the primary basis of the environmentalists’ objection to the existing trade rules in terms of their relationship to MEAs. I then take stock of the efforts within the WTO to address the MEA issue, principally through the work of the WTO’s Committee for Trade and Environment (CTE) and show how the political stalemate within this committee gives cause for serious environmental concern, notwithstanding the *Shrimp Turtle* case. Finally, I review some of the major reforms that have been proposed and assess

³ This view is also promulgated on the WTO’s website at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (accessed 19 September 2003)

⁴ The swordfish dispute between Chile and the EU threatened to escalate into a formal legal clash when the EU looked to the WTO dispute settlement procedure whereas Chile looked to the International Tribunal on the Law of the Sea, established under UNCLOS. However, the

the political prospects of new institutions of ‘disciplinary environmentalism’ designed to counterbalance the WTO and give MEAs freer rein.

The Advantages of Trade Restrictions in MEAs

There are around two hundred major multilateral environmental agreements (MEAs) in existence in the world today. Around twenty of the most recent and most significant treaties dealing with global environmental problems enlist trade restrictive measures to address transboundary and global ecological problems.⁵ The most successful MEA in the world today - the 1987 Montreal Protocol – has imposed stringent trade restrictive measures on both parties and non-parties to the agreement.⁶ The Protocol not only restricts trade in ozone depleting substances but also restricts trade in *products* (refrigerators, aerosol products and air conditioners) that *contain* such substances. Extending these trade restrictive measures to non-parties has provided a powerful incentive for states to join the Protocol. Restricting the market access of states outside the Protocol addresses the free rider problem and provides disincentives for industry to relocate their facilities to the territories of nonparties. There are now less than a dozen countries that have not joined the suite of ozone treaties.⁷ The trade restrictive measures contained in these treaties have played a major role in reducing the production and consumption of ozone depleting substances throughout the world, which have been shown to cause damage to the stratospheric ozone layer and to the health of living organisms, including humans.

Numerous other MEAs rely on specific trade restrictions to achieve their environmental goals, although few have been as successful as the Montreal Protocol in terms of gaining the support of most states, and in achieving concrete outcomes.⁸ Some MEAs include trade restrictions as

⁵ See the WTO site at

http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (accessed 19 September 2003)

⁶ The Montreal Protocol on Substances that Deplete the Ozone Layer 1987 was negotiated under the Vienna Convention for the Protection of the Ozone Layer 1985.

⁷ According to the Ozone Secretariat of the United Nations Environment Program, only 11 states have not ratified the Ozone treaties. <http://www.unep.org/ozone/countries-not-ratified.shtml> (accessed 23 May 2003).

⁸ These include the Convention on International Trade in Endangered Species 1973, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste 1989, the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Cartagena Protocol on Biosafety

options rather than compulsory measures. Most MEAs, however, specify objectives, goals and targets and confer considerable discretion on parties concerning implementation. Under these circumstances some parties may decide that trade restrictions are the best means to fulfill their obligations. For example, although there are no specific provisions for trade sanctions in the 1997 Kyoto Protocol, parties seeking to meet their emissions reduction commitments under the Protocol might wish to protect their local industry from overseas competitors by means of border tax adjustments on imports and exports to offset the costs of, say, a carbon tax.⁹ Additionally, parties trading under carbon trading schemes set up under the Kyoto Protocol might wish to exclude non-parties as a means of punishing outsiders and defectors, and/or inducing and rewarding cooperation.

Of these three categories – specific trade obligations, specific but optional trade obligations, and non-specific trade obligations – the last is the most contentious from the point of view of the WTO. However, from an environmental point of view, the more important issue is deciding which measures may ensure the most effective and efficient implementation of the objectives of the MEA. The types of measures that might be enlisted range from import and export bans to less restrictive measures such as prior informed consent procedures for the movement of certain goods, labeling requirements or border tax adjustments. The issue of whether all or only some parties to the MEA apply the measures is relevant only insofar as it may have a bearing on the effectiveness of the measure in ensuring compliance by offsetting the economic costs of treaty compliance, inducing more parties to join and/or to preventing defection.

Yet all of these measures are potentially vulnerable to challenge under the WTO rules by a WTO member that is not a party to the relevant MEA, although a legal challenge is most likely in relation to optional and non-specific trade obligations rather than specific trade obligations.¹⁰

show below, more recent MEAs – such as the Biosafety Protocol and the Stockholm Convention on Persistent Organic Pollutants (POPs) - have been negotiated ‘under the shadow’ of the WTO’.

⁹ This scenario is explored in USCIB 2002. The Kyoto Protocol has not yet entered into legal force, although Russia’s expected ratification will provide the final legal trigger.

¹⁰ For example, it is not clear whether border tax adjustments implemented as a means of offsetting the costs of a carbon tax would qualify under the environmental exemption provision of Article 20 of the General Agreement on Tariffs and Trade (GATT) or Article 14 of the General Agreement on Trade in Services (GATS) concerning non-discrimination. Similarly, assuming emission credits are defined as services, then restricting trade in emission

The Problem of Overriding Trade Rules

The basic trade principles of nondiscrimination under the General Agreement on Tariffs and Trade (GATT), encapsulated in the most favoured nation and national treatment rules, oblige parties to treat all imports from another GATT party no less favourably than they treat any imports from any other party while also treating all imported products no less favourably than 'like products' that are produced domestically. The upshot is that any environmental restriction (such as a ban, a quota, a licensing arrangement or even a labeling requirement) that discriminates against the imports of a GATT party vis-à-vis others prima facie offends these rules unless it can be brought within the environmental exemption provisions of the GATT in Article 20.

The exemptions allow members to take measures to protect human, animal or plant life or health (Article 20(b)), as well as measures designed to conserve exhaustible natural resources (Article 20(g)), provided 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (chapeau Article 20). This article had traditionally been interpreted quite narrowly and, in the aftermath of the infamous *Tuna Dolphin* case, has been a major bone of contention for ENGOs. Trade restrictive measures, whether applied by a state unilaterally or pursuant to a MEA, must pass a rigorous test in order to withstand any legal challenge. Essentially, states may impose trade restrictions on products that may be environmentally harmful but they are not permitted to impose trade restriction on 'like products' on the basis of the process and production methods (the PPM rule) in the country of origin. They must also show that the trade measure does not arbitrarily discriminate against any GATT member or form a disguised form of protection for local industry, that it is necessary to protect the environment, and that it is the least trade restrictive measure compared to any alternatives. So, for example, in the first *Tuna Dolphin* case, the US was not allowed, under the United States Marine Mammal Protection Act, to ban imported Mexican tuna caught by fishing technologies that caused a high incidental kill of dolphin because the Act addressed the process and production methods, not the characteristics of the product.¹¹ In the second *Tuna Dolphin* case, the US had pointed out that dolphins were listed in CITES and had argued that MEAs should be taken into account in interpreting

principle. For a more detailed exploration of the compatibility of the Kyoto Protocol and the WTO, see Brewer 2002.

¹¹ See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of

Article 20 of the GATT. However, the GATT Panel in that case ruled that CITES ‘did not apply to the interpretation of the General Agreement or the application of its provisions.’¹²

The *Tuna Dolphin* decisions, which have received extraordinary publicity, have been central to claims by ENGOs that the global trading rules systematically undermine efforts towards international and national environmental regulation. For example, the ruling makes it difficult for states to use trade measures to protect their greener industries from the unfair price advantage gained by firms operating in laxer regulatory environment or ‘pollution havens’. The so-called PPM rule makes it more difficult for states to pursue ‘disciplinary environmentalism’ by using trade measures (whether unilaterally or pursuant to the general provisions of a MEA) to punish foreign corporations for using environmentally unfriendly production processes and methods (PPM) or to induce more environmentally friendly methods.

The PPM rule even makes ecolabelling vulnerable where it is based on a ‘life-cycle analysis’, since this necessarily provides environmental assessments about not only the characteristics of products but also the manner of their production, including the raw materials and energy sources used in their production.¹³ Although the US’s ecolabelling requirements in relation to tuna were upheld in the *Tuna Dolphin* case, there has been growing body of opinion among many CTE members that ecolabelling should not be allowed to infringe the PPM rule (CTE 2003, 9). For example, proposals by Switzerland, Hungary and the Czech Republic for ecolabelling schemes based on life-cycle analysis have met with resistance from the US, Australia, Brazil, China, Hong Kong, Indonesia, Malaysia, the Philippines and Thailand.¹⁴ Merely providing the information to enable consumers to distinguish between environmentally friendly and unfriendly life-cycles in relation to ‘like products’ is seen by these nations as reaching too far into the domestic environmental policy of the exporting nation. The PPM rule lies at the heart of the environmentalist objection to the trade rules and, as I show below, it continues to impede progress in the CTE.

The Committee on Trade and Environment

At the conclusion of the Uruguay round of trade negotiations in 1994 the status of trade restrictive measures in MEAs vis-à-vis the GATT remained uncertain and the existing international public law on the resolution of conflict between overlapping treaties was not

¹² United States - Restrictions on Imports of Tuna, June 16, 1994, available in 1994 WL 907620, para. 5.19.

¹³ These issues are also being explored by the Technical Barriers to Trade (TBT) Committee.

particularly helpful.¹⁵ A Working Group on Environmental Measures and International Trade (EMIT) that had initially been set up in 1971 (which had been dormant for twenty years) had already been revived in November 1991 to explore the trade-environment interface under the GATT.¹⁶ The continuing tensions between trade and environment were acknowledged at the Marrakech meeting in April 1994 to sign off on the Uruguay Round, and a more formal Committee for Trade and Environment (CTE) was established.

Although the CTE emerged against a background of widespread environmental protests, legal uncertainty and the increasing prominence of global environmental problems in the wake of the Earth Summit in 1992, it would be misleading to suggest that environmental concerns were the only reasons for its establishment. As Gregory Shaffer points out, another objective was ‘to submit environmental regulatory developments to greater GATT scrutiny and control’ (Shaffer 2002, 85). These twin, and somewhat contradictory, objectives had already surfaced in the EMIT and they reflect persistent differences among the members – particularly between developed and developing countries (Shaffer 2002, 84-85).

The CTE’s initial brief was to identify the relationship between trade and environmental measures in order to promote sustainable development, and to make appropriate recommendations with regard to rules that might enhance the positive interaction between trade liberalisation and environmental protection. The Marrakech meeting also identified 10 specific items for the CTE to examine, including (most prominently) the relationship between the trading system and MEAs (item 1) and the relationship between the dispute settlement procedures of the trading system and those of MEAs. (item 5). The CTE, which is open to all members of the WTO, began its work in January 1995.

At the same time, the founding documents establishing the WTO went to greater lengths than the original GATT to acknowledge environmental concerns and the objective of sustainable development. In addition, a number of new trade agreements also contained environmental exemptions.¹⁷ In all, the new agreements reflected a greater awareness of the potential clash

¹⁵ The Vienna Convention on the Law of Treaties provides that where two treaties address the same subject matter, the later treaty shall prevail. However, this does not apply to a non-party to the later treaty. Moreover, both MEAs and the trade agreements are constantly changing, which considerably complicates the application of the Vienna Convention. The Vienna Convention on the Law of Treaties, 1969, Article 30(3); 1155 UNTS 331, 339.

¹⁶ See Trade and Environment Division 1999, 4.

¹⁷ For example, Article 14(b) of the General Agreement on Services (GATS) provided an exemption similar to Article 20 of the GATT, and environmental exceptions were recognized

between environmental regulations and trade liberalization. Yet the new raft of trade agreements also served to extend the scope of WTO supervision of environmental measures that might restrict free trade (Nissen 1997, 4).

The Doha Development Round

In the period between its first meeting in early 1995 and its report to the Singapore Ministerial Meeting in 1996, the CTE managed two rounds of analysis of the ten items on its agenda. However, the CTE's Singapore Report was a cautious document that merely reported on the general discussions that had taken place, and the differences of view among the members of the CTE (CTE 1996). No agreement was reached to recommend any modification of the trading rules to accommodate MEAs. Notwithstanding numerous proposals put forward by members, the CTE made no recommendations for any modifications to the WTO rules in relation to any item on its agenda. Despite the efforts of the so-called green *demandeurs* (led by the EU), the majority of members generally believed that the environmental exemptions in the current WTO rules were able to accommodate environmental concerns.¹⁸ The CTE also expressed concern that MEAs should extend the application of trade restrictive measures to non-parties. Although it suggested that better policy coordination between trade and environmental concerns at the national level could avoid disputes at the international level, it upheld the right of WTO members to challenge trade restrictive measures in MEAs in the WTO and it expressed confidence in the existing WTO dispute resolution procedures (noting that panels were free to call for environmental experts where necessary) (CTE 1996; Trade and Environment Division 1999, 15). The Report was endorsed by the Trade Ministers, and the CTE was directed to continue working under its Marrakech mandate.¹⁹

However, it was not until the fourth ministerial conference at Doha in Qatar that the CTE was given a specific negotiating mandate. The Doha Ministerial Declaration (adopted 14 November 2001) conferred a specific mandate to conduct negotiations on

Application of Sanitary and Phytosanitary Measures (SPS). Certain kinds of 'one-off' subsidies are also permitted for environmental protection in accordance with specific environmental programs. See the Agreement on Agriculture, Annex 2 (Domestic Support: the Basis for Exemption from the Reduction Commitments), Article 12 and the Agreement on Subsidies and Countervailing Measures, Article 8.

¹⁸ A useful summary of the 'Singapore Consensus' is provided in CTESS 2002.

¹⁹ In subsequent meetings, the CTE organized its work program into clusters (market access (items 2,3,4 and 6), and the multilateral environmental agenda (including MEAs) and the

the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question (paragraph 31(i)).

Paragraph 31(ii) also instructed members to negotiate on procedures for regular information exchange between the Secretariats of relevant MEAs and the relevant WTO Committees, and the criteria for granting observer status. The Doha Declaration went on to provide (in paragraph 32) that the negotiations carried out under, *inter alia*, para 31 shall be compatible with the open and non-discriminatory nature of the multilateral trading system and shall not add to or diminish the rights and obligations of Members under existing WTO agreements.

The Ministers also directed the CTE to identify rules that needed to be clarified in relation to a range of other matters²⁰ but the specific negotiating mandate was confined to MEAs (including information exchange with MEA Secretariats and developing criteria for observer status), trade barriers on environmental goods and services, and fisheries subsidies.²¹ While most of the issues listed in paragraph 32 of the CTE's brief are also covered by other WTO committees (e.g., ecolabelling is dealt with by the Committee on Technical Barriers to Trade, fisheries subsidies are handled by the Subsidies Committee), the issue of MEAs emerged as the one key area where the CTE had sole negotiating authority.

The various qualifications attached to the Doha negotiating mandate have effectively enabled the CTE to side-step the two areas where conflicts between the WTO and MEAs are most likely to arise: the case of conflicts between parties and non-parties to MEAs, and the case of nonspecific trade obligations. By explicitly preserving the rights of WTO members to bring legal actions under the WTO dispute resolution procedures, the opportunity for changing the trade rules to exempt MEAs from future WTO challenge was effectively ruled out. Moreover, the deliberations within the CTE under paragraphs 31(i) and (ii) have been such that, even if these three issues were left open, no progress would have been made.

For example, a strong division has emerged between those members (e.g, US, Australia and many developing countries) seeking a highly restrictive interpretation of 'specific trade obligation' (STOs) and the green *demandeurs* (EU, Norway, Switzerland, Poland) who have defended a more generous interpretation to give more flexibility to MEAs. This is also reflected in a division over whether to examine the STOs in a small handful of MEAs that are currently in force (e.g, the Montreal Protocol, the Basel Convention and CITES) on a case by

²⁰ These were market access (particularly for developing countries), trade related aspects of intellectual property, synergies between trade liberalization and environmental protection, and eco-labelling (paragraph 32).

case basis and those members who prefer a more ‘conceptual approach’ that develops criteria that can cover amendments to existing MEAs and the negotiation of new MEAs. Similarly, there is disagreement over whether the phrase ‘set out in multilateral environmental agreements (MEAs)’ in paragraph 31(i) should be restricted to the Articles of the MEA or extended to include decisions made by the Conference of the Parties that might modify or clarify how parties were to fulfill their obligations, or create new institutional mechanisms to this end. The weight of opinion currently favours the more restrictive interpretation on all of these issues.²² The CTE has spent considerable effort poring over existing MEAs and developing a matrix of STOs that might be upheld - but considerable disagreement remains as to which should qualify within the meaning of the Doha mandate. The most likely scenario is a basic consensus on the most obvious STOs in three to six of the major MEAs currently in force. However, members who are not parties to these MEAs retain their right to challenge the MEAs in the WTO.

The CTE negotiations have largely resulted in a stalemate between a minority of WTO members who have sought clear and explicit rules to exempt MEAs from WTO challenges and those who oppose any environmental compromise of the trade rules (the majority of other members).²³ Notwithstanding the pressure of the WTO Ministerial Meeting in Cancun, Mexico in September 2002, and the looming 1 January 2005 deadline for the conclusion of the Doha work program, there is no thawing of relations in sight. The regular session of the CTE produced a report to the Cancun Ministerial Conference on paragraphs 32 and 33 of the Doha Ministerial Declaration, but the summary report of the meeting of the special session of the CTE in May 2003 dealing with the negotiating mandate in paragraph 31(i) shows no signs of any breakthrough for Cancun.²⁴ The draft Ministerial text at Cancun makes no mention of the relationship between WTO rules and MEAs and merely takes note of progress made in the CTESS, without calling for any speedy resolution of the issues.²⁵ The only crumb often environmentalists relates to the procedural question of observer status.

²² These debates are canvassed in CTESS 2003.

²³ India, Pakistan and to a lesser extent Mexico have been particularly resistant to the EU proposals (Interview with WTO official #3, May 2002).

²⁴ Report to the Fifth Session of the WTO Ministerial Conference in Cancun TN/TE/R/6 and Summary Report on the Sixth Meeting of the Committee on Trade and Environment Special Session, 1-2 May 2003, TN/TE/R/6

²⁵ *Bridges Daily Update on the Fifth Ministerial Conference* – Issue 5, 14 September 2003, p.

Information exchange and observer status

Even the seemingly innocuous Doha mandate concerning the granting of observer status has been the subject of a major deadlock. The general rule has been that members may agree to admit observers in trade negotiations, but that any member may veto proposals. So far, only intergovernmental organizations have been admitted. As the WTO General Council has put it, ‘there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings’ (WTO 1996).²⁶

To date, the admission of observers has been dealt with in an *ad hoc* manner, and has mostly been thwarted in recent times by larger geopolitical differences between member states. This was set in train when the Arab League’s application for observer status was blocked by the US and Israel on the ground that the Arab League’s Charter calls for a trade boycott of Israel (ICTSD 2003, 23). The upshot has been that applications for observer status by other intergovernmental organizations have been blocked by states sympathetic to the Arab League (such as Egypt and Malaysia).

This has directly affected the work of all WTO Committees. The CTE sought to step around this impasse by holding *informal* information sessions between officials from WTO member trade and environment ministries and the secretariats of certain MEAs, including UNEP.²⁷ However, this agreement remained shaky against the background of the continuing broader impasse on the observer question in WTO, which can only be resolved at the level of the Trade Negotiations Committee and the General Council.

Prior to Cancun, the current *ad hoc*, informal arrangements had therefore not settled into a regular practice, it has only been applied to CTE special sessions in view of the importance of the environmental negotiating mandate to MEAs, and many members (particularly developing

²⁶ However, NGOs may seek permission to attend ministerial conferences, the WTO’s website has been upgraded for general public access and annual public symposia have been organized by the WTO Secretariat in Geneva.

²⁷ This began in November 2002 and continued in February 2003. See *Bridges Weekly Trade News Digest* 6(39), 14 November 2002, 1 and *Bridges Weekly Trade News Digest* 7(6), 19 February 2003, p. 1. The MEAs comprise the Basel Convention on the Transboundary Movement of Hazardous Waste, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, The Convention on Biological Diversity, the Montreal Protocol on Ozone Depleting Substances, the International Tropical Timber Organisation and

countries) remain resistant to the presence of MEA secretariats.²⁸ No agreement had been reached on the question of the observers for the CTE's post-Cancun meeting, scheduled for 30-31 October 2003. Nonetheless, the revised draft Ministerial text accepted the EU's demands that MEA Secretariats, UNEP and UNCTAD be allowed to attend as observers for the duration of the negotiations.²⁹

What is striking about the observer issue is the disparity in the observer rules between the WTO and MEAs. The WTO Secretariat is free to participate at MEA meetings and conferences of the parties merely by expressing an interest in attending, whereas attendance at WTO meetings by the Secretariats of MEAs has been regularly blocked.³⁰ According to *Friends of the Earth International*, the US has, in the past, blocked access by the CBD Secretariat to WTO negotiations that bear upon CBD concerns, such as the Agreement on Trade Related Intellectual Property Rights (FOE, no date, 4). So while WTO officials, and commercial interests, are increasingly represented at MEAs, there has been no systematic reciprocation at WTO meetings for MEAs, least of all ENGOs – a development that further confirms the hiatus in the respective reach and power of the trade and environmental regimes (Von Moltke 1997). The (unsigned) draft Ministerial Text at Cancun provides a modest tilt towards redressing this balance.

A New Green Era after Shrimp Turtle?

It is against this broad background of political stalemate within the CTE that the new green trajectory in WTO jurisprudence needs to be examined. After the establishment of the WTO in 1995, the rulings of the dispute panels more or less reinforced the *Tuna Dolphin* ruling throughout the remainder of the 1990s,³¹ and it was not until the decision of the appellate body in the *Shrimp Turtle* case in 2001 that a green window was opened.

²⁸ *Bridges Weekly Trade News Digest* 7(6), 19 February 2003, p. 1. A proposal by the EU at the most recent CTE meeting held on 7-8 July 2003 to invite UNEP and MEA Secretariats to observe CTE special (negotiating) sessions at the Cancun ministerial failed to win support. *Bridges Weekly Trade News Digest*, Vol 7, No. 25. July 2003 (Lead Stories).

²⁹ *Bridges Daily Update on the Fifth Ministerial Conference* – Issue 5, 14 September 2003, p. 6.

³⁰ *Bridges Weekly Trade News Digest* 6(39) 14 November 2002, p. 2; Greenpeace 2002, 19.

³¹ So, for example, the US was not free to apply pollution standards under its Clean Air Act to imported gasoline from Venezuela in ways that gave US gasoline manufacturers a preferential

In *Shrimp Turtle*, a US law that placed an embargo on the import of shrimp caught without turtle excluder devices (designed to prevent the incidental kill of sea turtles) was challenged in the WTO by India, Malaysia, Pakistan and Thailand. Although the appellate body upheld the WTO panel's ruling against the US, it acknowledged that the existence of an MEA protecting a certain endangered species could, *prima facie*, bring it within the Article 20 exemption in the GATT as a legitimate environmental purpose. However, the US had applied its law in a discriminatory manner by giving the Asian countries less time to comply than Caribbean countries and it had not taken sufficient steps to seek a multilateral solution to the problem. The US had also sought to specify how other nations should manage their shrimp fishers (stipulating that they should pass laws that required the use of turtle excluder devices), which left no leeway or discretion for other nations to decide how best to protect turtles. The US subsequently took steps to amend its law to avoid these offending provisions, and the amendments were upheld by a WTO arbitration panel in June 2001 following a further appeal by Malaysia. It was also found that the US had engaged in bona fide attempts to negotiate a multilateral solution to the problem.

Some commentators have considered that the *Shrimp Turtle* case has effectively solved the WTO/MEA conflict since the appellate body has now indicated that bona fide trade restrictions in a MEA will be upheld (DeSombre and Barkin 2002). The appellate body did not seem to be detained by the extra-territorial reach of the US law and it also indicated that WTO dispute settlement panels may accept *amicus* briefs from NGOs or other interested parties. Indeed, it could be argued that, in the aftermath of this decision, the negotiating mandate of the CTE on MEAs is now largely redundant. The Article 20 environmental exemptions in the GATT have been construed to include the reasonable regulation of species that have been classified as endangered under an MEA.

Although it cannot be denied that the *Shrimp Turtle* case has provided a much more generous interpretation of the environmental exemptions in the WTO rules, it is too hasty to suggest that the trade environment tensions have been resolved by this decision. Indeed, there are at least four reasons that point to the persistence of these tensions.

First, the rights of WTO members to challenge trade restrictive measures in MEAs remains intact. Indeed, these rights have been explicitly preserved in the formulation of the negotiating mandate of the CTE – a sign that sends a strong political signal that these rights remain more important to most states than ensuring the full and effective implementation of MEAs. This narrow negotiating mandate has also severely limited the options of the CTE. Moreover, as the number of WTO parties and the scope of the trading rules expand, along with the number of MEAs, the probability of inter-regime conflict and therefore legal challenge in the WTO will inevitably increase (Nissen 1997, 10).

Second, the dispute resolution process of the WTO still remains the dominant mechanism for the resolution of trade and environmental conflicts rather than the conflict resolution provisions of MEAs.³² This enables the WTO to judge the efficacy of trade restrictions in MEAs, rather than leaving it to the parties to MEAs to decide when trade rules should be waived in the interests of more effective global environmental protection. The burden of proof still rests on the party invoking the environmental exemption to show that the WTO rules have not been infringed. The standard of justification for a trade restrictive measure is one that obliges the party invoking Article 20 to show that it is necessary and that it is the least trade restrictive means – a matter that is difficult to judge in advance of any specific conflict (Trebilcock and Howse 1995, 338).

Third, the political impasse within the CTE demonstrates that WTO politics lags well behind WTO jurisprudence, a fact that may have a chastening effect on future appellate body rulings. Indeed, the CTE deliberations raise questions about the legitimacy of the judicial arm of the trading regime when it is patently out of step with the rule-making body. This is obviously not something environmentalists would wish to encourage, since the highest judicial arm of the WTO currently stands as the most promising site for the insertion of widely recognized international environmental legal norms into the trade regime. The members of the appellate bodies (unlike the panels) are not narrow trade specialists but rather respected international lawyers with a wide purview of public international law, including international environmental law. Nonetheless, if the members of the WTO plainly cannot agree to take the reasonably non-controversial step of exempting specific trade obligations in major MEAs from WTO disciplinary measures, then the WTO rule-interpreting body may decide in the future that it is overstepping its boundaries to interpret the law too creatively in this area.

Finally, a highly conspicuous feature of many of the most significant MEAs (such as the Basel Convention, the Convention on Biological Diversity and the Cartagena Biosafety Protocol, and the Kyoto Protocol) is the lack of US support. This lends credence to the persistent concern among ENGOs that the US may be moved to exercise its rights under the WTO to thwart any trade restrictive measures applied against it pursuant to those MEAs that it has chosen not to support. This is most likely in relation to non-obligatory trade measures (i.e., when individual parties take it upon themselves to implement their treaty obligations by means of trade restrictive measures) but might also conceivably apply to specific trade obligations that have been negotiated in MEAs. For example, in a recent submission before

³² In its report to the Singapore Ministerial Conference, the CTE argued that if there is a dispute *between* parties to an MEA, that those parties should be encouraged to – so very loose language – use a dispute settlement resolution in MEA's. However, this does not resolve the problem of non-parties to the MEA who wish to uphold their rights under the WTO. CTE

the CTE special session, the US argued that Article 16.1 of the Biosafety Protocol could not be considered a specific trade obligation within the Doha negotiating mandate under paragraph 31(i).³³ This Article obliges parties to ‘establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk-assessment provisions of this Protocol associated with the use, handling and transboundary movement of living modified organisms’.³⁴ In short, the US, supported by Australia, has argued that only those MEA provisions that impose a trade obligation on parties in clear and direct terms should form part of the CTE’s negotiating mandate. Provisions that leave it open to parties to opt for trade measures to fulfill their treaty obligations should remain open to WTO challenge (with the clear implication that any risk assessment procedures implemented under Article 16.1 that impeded trade would be vulnerable to US challenge).

It is no small irony here that while, in the past, the US had emerged as the major environmental defender in the most publicized GATT/WTO disputes (such as the *Tuna Dolphin* and *Shrimp Turtle* litigation) it looks set to emerge in the future as a primary anti-environmental plaintiff. Although these observations remain speculative, the current signs are that a US challenge is a real prospect. I suggest below that this is most likely in the area of biosafety but it might arise in relation to the Kyoto Protocol should a party decide to meet its Kyoto targets by enlisting trade restrictive measures against the US. The fact that the US has not played an active role as green *demandeur* in the CTE lends further support to these claims.

Biosafety and the Threat of a WTO Challenge

The growth of the modern biotechnology industry carries benefits as well as risks, and these risks have been a matter of increasing concern by ENGOs and broader publics (although much more in Europe than the US). In the absence of conclusive scientific evidence concerning these risks, much of the heated political debate about biosafety regulation has turned on evidentiary questions: who should bear the burden of proof, and by what standard, when there are potential risks to humans, animals and plants resulting from the transplantation of genes from one species to another and the transboundary movement of such genetically modified (GM) organisms and products? The Cartagena Biosafety Protocol 2000, negotiated under the UN Convention on Biological Diversity 1992, represents the international community’s major attempt to resolve these questions in relation to the transboundary movement of living modified organisms (LMOs) by adopting a risk averse approach in cases of scientific uncertainty. At the closing date for signatures (4 June 2001), the Protocol had 103

³³ CTESS 2003, 3.

³⁴ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Texts and

countries signed up, and it has the requisite number of ratifications to come into force on 11 September 2003.³⁵

The Biosafety Protocol places restrictions on the transboundary movement, transit, storage and handling of LMOs that are intended to be released into the environment in order to protect biodiversity or human health.³⁶ It provides for risk assessment, risk management, transparency and import regulations that include a prior informed consent procedure before transboundary movements can take place. In particular, it enables the party of import to conduct a risk assessment of LMOs prior to granting import approval.³⁷ The Protocol also requires the parties to apply the precautionary principle in making their assessments (Articles 1 and 24). This principle is included in the Rio Declaration on Environmental and Development and has increasingly appeared in international and national legal instruments and strategies. These provisions, which effectively serve to restrict the free flow of trade in LMOs, may be applied against both parties and non-parties to the Protocol. In effect, it enables all parties to the Protocol to scrutinize, and where necessary prevent, restrict or control, movements of LMOs into its territory.

However, trade in the products and methods of the biotechnology industry is also governed by a number of WTO Agreements, the most significant of which is the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). This Agreement enables parties to restrict or regulate trade in order to protect human, animal and plant safety, provided such measures can pass the usual tests concerning nonarbitrariness, nondiscrimination and least trade restrictiveness. The provisions of the SPS Agreement extend to LMOs. However, unlike the Biosafety Protocol, the SPS Agreement covers a smaller range of risks yet also includes a wider variety of products (e.g., it includes pharmaceuticals).³⁸

The Cartagena Biosafety Protocol 2000 is illustrative of the increasingly problematic relationship between the trade rules and MEAs in three significant respects. First, the five year negotiations on the Protocol were somewhat fraught and, in February 1999 in Cartagena, Columbia they collapsed as a result of disagreement over the relationship between the

³⁵ <http://www.biodiv.org/biosafety/default.aspx>

³⁶ The Protocol applies mainly to agricultural biotechnology products, not pharmaceuticals (see Article 5).

³⁷ The party of import generally carries the risk assessment, although it may require the exporter to carry it out at its cost (Article 15(3))

³⁸ For example, it only covers risks from LMOs in food and beverages (including feedstuffs).

proposed provisions of the Protocol and the WTO rules. As one UNEP officer put it, ‘...a number of countries were re-using the arguments that WTO rules prevented this moving forward.’³⁹

Arising from these tensions in the negotiations, the trade restrictive provisions of the Protocol that were eventually negotiated are less extensive than they might have been had it not been for the existence of the WTO rules. As Hutchison puts it, ‘[t]he Cartagena Protocol is a treaty that may be too self-conscious of its relationship with international trade law’, preventing the adoption of a more radical precautionary approach (Hutchison 2001, 32). The Cartagena Biosafety Protocol provides evidence that the ‘long shadow of the WTO’ is having a disciplinary effect on the negotiating phase of MEAs. Attempts to ensure that MEAs are ‘mutually supportive’ with the WTO remain lopsided, working to restrict the operation of MEAs, rather than vice-versa.

Second, despite this self-censoring process, the Biosafety Protocol still sits uneasily alongside the WTO’s SPS Agreement, which was negotiated at the conclusion of the Uruguay round in 1994. The Biosafety Protocol is a much broader agreement that overlaps with the SPS Agreement in significant ways. Moreover, the prior informed consent rules in the Protocol operate on the basis of somewhat different evidentiary rules than the WTO’s SPS Agreement. The Protocol enables the party of import to apply the precautionary principle when carrying out its own risk assessment prior to the import of LMOs. The SPS Agreement also allows countries to set their own standards but provides that measures to ensure food safety and to protect the health of animals and plants should be based as far as possible on the analysis and assessment of objective and accurate scientific data. Moreover, such measures should be applied only to the extent necessary to protect human, animal or plant life or health, and they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail. The SPS Agreement also encourages states to base their national measures on the international standards, guidelines and recommendations developed by WTO member governments in other international organizations.⁴⁰

The overlap between the Protocol and the SPS Agreement combined with different evidentiary rules and approaches to risk management, have sown the seeds for future controversy. As of August 2003, 56 countries have ratified the Protocol, including the

³⁹ Interview with UNEP officer, May 2002. The main group opposing any tight restrictions on trade in LMOs was the Miami group, made up of major exporters of biotechnology and agricultural products (US, Canada, Australia, Argentina, Chile and Uruguay). For a full account of the negotiations see Bail, Falkner and Marquard (2002).

European Union.⁴¹ However, this leaves a large number of potential WTO challengers who may seek to uphold the less restrictive provisions of the SPS Agreement against the relatively more cautious provisions of the Protocol.⁴² Neither the US nor Australia are parties to the Protocol.

The likelihood of a dispute is not idle conjecture given that the US is a major producer and exporter of GM products and anxious to remove restrictions on its exports. Moreover, strong differences have already emerged between the US and the EU over questions of food safety, with the US displaying increasing frustration with what it sees as a complicated and time-consuming structure of product authorization by seven members of the EU (which effectively stopped the development and testing of GM crops in Europe).⁴³ After more than a year of frustrated diplomacy, in May 2003 the US (with the support of Monsanto) officially initiated proceedings in the WTO against the European Union's de facto moratorium on the grounds that it violates a number of WTO trade agreements, including the SPS Agreement.⁴⁴ The European Commission has accepted that the de facto moratorium is probably illegal and it has taken steps to develop new general directives that it believes are compatible with WTO rules.

Although this US challenge does not involve the Biosafety Protocol, it is nonetheless likely to have an extremely chastening effect on parties to the Protocol, who must now conduct their risk assessments of US products containing LMOs under the watchful eye of vigilant US trade representatives. Moreover, US frustration in its failure to find markets for its GM products is likely to grow. Even impoverished African nations, such as Zambia, have refused to accept unsold US GM food that has been recycled by the US as food aid under the World Food Program.

Options for reform

The US is not the only obstacle to promoting environmental norms within the WTO. Many developing countries fear that bringing environmental norms into the WTO will weaken their

⁴¹ <http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt>

⁴² CTE, *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements* (WT/CTE/W/160/Rev.2 TN/TE/S/5), p. 26. The Protocol is set to enter into force 90 days after the 50th instrument of ratification is deposited (Article 37(1)).

⁴³ The offending countries are France, Italy, Austria, Denmark, Greece, Luxembourg and Belgium. Under the existing structure these states have joined together since 1998 to block all new product authorisations for a range of GM products imported from the US. Only US soya, which was approved prior to 1998, has been allowed into these EU countries.

⁴⁴ The other agreements claimed to be infringed are the Agreement on Technical Barrier to

comparative advantage and restrict their market access (see also Williams 2001; Shaffer 2002). These arguments have a particular potency in the light of the ongoing failure of the US and the EU to provide any significant reductions in their levels of agricultural protection.⁴⁵ Whether stronger environmental norms will emerge within the WTO is therefore likely to turn on the ability of greener states (such as those within the European Union) and ENGOs to persuade developing countries (which make up the majority of WTO members) that they will not be unfairly disadvantaged by the inclusion of more extensive environmental qualifications within the WTO rules. As a green *demandeur*, the EU is more likely to win the support of developing countries and the Cairns group on environmental reform by offering significant reductions in its own farm subsidies. Such package deals seem the most likely way in which the political impasse within the CTE and the broader WTO may be broken.

Against this political background, a number of options for reform on the MEA issue have been mooted. Proposals arising from CTE members have included maintaining the status quo, amending Article 20 of the GATT to exempt STOs in MEAs, granting waivers, issuing non-binding guidelines, providing less stringent tests for MEAs in WTO disputes, reversing the burden of proof, creating voluntary consultative mechanisms and promoting mutual supportiveness and deference between the WTO and MEAs.⁴⁶ While the EU and many commentators (e.g., Nissen 1997; Guruswamy 1998) consider that an amendment to article 20 of the GATT would provide the best long term solution to the tension, such an amendment would still leave open the question of non-specific trade obligations and the question of non-parties.

However, the general view of most ENGOs is that parties to MEAs should be free to enlist trade measures if these are the best means of fulfilling the environmental objectives of the treaty (and for some, this should apply even if trade restrictive measures are not expressly stipulated in the MEA). Moreover, parties should be free to do this in order to protect their own environment as well as the environment beyond their jurisdiction, including the global commons. A range of reforms have been proposed to give MEAs their due, including:

- amendment Articles I (MFN) and III (National Treatment) of the GATT to enable parties to *discriminate in favour of products manufactured or processed* in an environmentally sustainable manner;

⁴⁵ The recent US/EU proposed framework for a joint approach on the agricultural question included further cuts in agricultural subsidies, but these proposals were rejected at Cancun by the new G22. See *EC and US Propose a Framework for a Joint Approach on Agricultural Questions in WTO*, EU Institutions Press Release, 14 August 2003, DN:IP/03/1160.

- insertion into Article VI of a specific recognition that the failure of governments to impose certain prescribed minimum standards is *an impermissible subsidy*; this would force the internalisation of externalities and implement the polluter pays principle;
- extension of the application of Articles XX(b) and (g) - the exceptions - *beyond the territory* of the party imposing the conservation measures; this would enable parties to take action to protect the global commons, such as the atmosphere;
- reform the dispute resolution procedure to ensure that panels represent not only trade experts but also ecologists and environmental policy analysts to advise on the environmental implications of trade conflicts.⁴⁷

However, none of these more radical proposals are on the political radar screen of any WTO member and it is extremely unlikely that the CTE would contemplate such radical reforms (especially given that the GATT may only be amended by unanimous vote of the contracting parties).

The political obstacles in the way of greening the WTO from the inside have prompted many environmental sympathisers to argue for the creation of a World Environmental Organization (WEO) or Global Environmental Organization (GEO), to balance the disciplinary power of the WTO (Bierman 2001; Haas 2002, Esty 2002). In the absence of any significant overhaul of the environmental governance system in three decades, many consider it is high time for institutional reform (Haas 2002, 87).⁴⁸ UNEP has served as the primary international institution responsible for environmental protection since the 1972 Stockholm Conference but it lacks the organisational structure, powers, status and resources to match the WTO and it serves as the Secretariat for only a handful of MEAs. According to Haas, a new GEO could centralize the institutional support for MEAs under the one roof, while also consolidating environmental policy and technology research, retaining UNEP as the monitoring and research hub of the UN system and absorbing other existing environmental agencies such as the Commission for Sustainable Development. He also suggests that the GEO could hold high-profile, regular ministerial meetings, include the widespread involvement of environmental policy networks and 'galvanize rapid response to new alerts'. He even suggests the establishment of national environmental embassies to represent states and participate in future negotiations. The GEO could play the role of legal advocate for environmental protection and regulation to counterbalance the WTO 'by collecting a roster of international environmental lawyers to participate in WTO panels' (Haas 2002, 88). According to Esty (2002) the GEO should form part of a broader structure of checks and balances, with other organizations (such as the ILO) given the opportunity to cross check and challenge WTO proposals.

⁴⁷ See, for example, MacDonald 1993.

However, again, the major Catch-22 facing any proposal of this kind is that it will need the agreement of a critical mass of states. If the 148 members of the WTO cannot reach any agreement to green the rules of the WTO from within, it is going to be an uphill battle to find sufficient state support for a GEO to force the greening of the WTO from without. In short, there appears to be much more support by states for disciplinary neoliberalism or, in this case, disciplinary liberalization, than disciplinary environmentalism.

Conclusion

Despite the tensions that have emerged within the CTE, it has served as an important discussion forum and, as one WTO officer put it, 'increased the level of comfort of developing countries over environmental issues'.⁴⁹ The ad hoc, informal information exchanges with MEAs have also been effective in raising levels of awareness about the WTO/MEA interface, although most of these efforts began as the initiative of UNEP not WTO members.⁵⁰ Thanks to UNEP's efforts and financial assistance, many developing countries have been able to improve coordination between their trade and environmental departments at the domestic level, and include environmental negotiators in their delegations.

Yet hopes that the CTE might emerge as a creative new discursive space within which more environment-friendly trade rules might be developed within the WTO have so far been dashed. The deliberations within the CTE have revealed major conflicts over the conceptualization of, and future prescriptions for, trade-environment linkages in general, and on the MEA question in particular. Cancun offered no substantive breakthrough and it is likely that the CTE special negotiating session will to continue to split hairs over the meaning and scope of the Doha mandate in paragraph 31(i) when it reconvenes for its post-Cancun deliberations.

In the meantime, the EU is likely to remain the major green *demandeur* within the WTO.⁵¹ However, leaders of major ENGOs, such as FOE International's Vice President Tony Juniper (2003), have a more jaundiced view. Juniper has suggested that the EU's role may well fade in the future as it becomes increasingly preoccupied with expanding trade within its own region by orchestrating the dramatic enlargement of its membership from 12 to 25 members.

⁴⁹ Interview WTO Officee #2, May 2002.

⁵⁰ This initiative began around mid-1999 with a view to building synergies and mutual supportiveness between the WTO and MEA's. (Interview with UNEP officer, May 2002).

⁵¹ The European Commissioner for Trade Pascal Lamy has also stated in the lead up to Cancun that the EU will continue to ensure MEAs can coexist with the WTO agreements

This enlargement is likely to change the EU's own internal and external dynamics, along with its internal and external commitment to environmental reforms. This is expected to flow from the fact that none of the new accession states have strong environmental NGOs or strong green parties, and this will change the balance of power in the parliamentary and executive organs of the EU.⁵²

With Intergovernmental Organizations such as UNEP only able to enjoy observer status, and with ENGOs frozen out of WTO discussions, the future does not look bright for the general greening the WTO. In the absence of clear legal rules that exempt MEAs from WTO challenges, the Big Chill is set to continue.⁵³ Increasing international awareness of vulnerability to a WTO challenge will likely give rise to a conservative or 'cool' implementation of trade restrictive obligations under existing MEAs to avoid the threat of legal challenge and also produce a 'chilling effect' on ongoing multilateral environmental negotiations, which are likely to become increasingly self-censoring in terms of trade restrictions.⁵⁴

It is therefore most likely that the resolution of many of these problems will ultimately be left to the WTO's appellate bodies, which may or may not choose to follow the trajectory laid down in *Shrimp Turtle*. This is not a politically optimal way of addressing the incompatibility between the trade and environmental regimes from the point of view of democratic or environmental governance, but it is the only place where the legal norms of MEAs currently have a toehold.

⁵² Juniper also suggests that the commitment to the environment is also likely to be weakened in the EU's new constitution. For example, the current draft constitution defines sustainable development only in social and economic terms, not environmental ones (Juniper 2003).

⁵³ The idea of the Big Chill is drawn from WWF 1999, which refers to the 'chill factor'. Ken Conca also enlists similar language (see Conca 2000, 488).

⁵⁴ Conca 2000, 488. As I indicate below, debate over the WTO rules served to disrupt the negotiation of the Cartagena Biosafety Protocol as well as the negotiation of the Stockholm Convention to reduce the production and release of persistent organic pollutants (POPs), such as DDT and PCPs. More generally, it has been argued that the increasing incorporation of neoliberal economic principles into general environmental declarations, strategies, and MEAs (such as carbon trading schemes in the Kyoto Protocol) is undermining the environmental

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