The Environmental Threat to Development in the Doha Development Round

by Alan Oxley*

1. Introduction

The round of trade negotiations launched by WTO members at Doha in November 2001 has been dubbed 'the Development Round'. It offers vital opportunities to expand trade and growth in the developing world. Part of the Doha mandate and recent rulings by the WTO Appellate Body, however, portend the grim prospect that new rights to restrict trade on environmental grounds could seriously constrain these opportunities.

This prospect arises in two ways. First, new grounds to restrict trade could be created. Second, these changes could fundamentally diminish the capacity of the WTO system to deliver economic benefits to members.

The Importance of the WTO and the Doha Round to Developing Countries

The GATT (which was established as part of the Bretton Woods agreements) and its successor organization the WTO, has been a uniquely successful international institution. Alan Greenspan testified to the contribution which the GATT has made in a speech given in Dallas in April 1999:

> One of the most impressive and persistent trends of the last half century is the expansion of international trade. Adjusted for price change, trade across national borders has increased fourteenfold—far faster than the fivefold increase in world GDP. The evidence is overwhelmingly persuasive that the massive increase in world competition—a consequence of broadening trade flows—has fostered markedly higher standards of living for almost all countries who have participated in cross-border trade.

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Speaking at the World Economic Forum meeting in Davos, in February 2000, President Zedillo of Mexico said,

> in every case where a poor nation has significantly overcome its poverty, this has been achieved while engaging in production for export markets, and opening itself to the influx of foreign goods, investment and technology; that is by participating in globalisation.

Several studies have shown that the removal of all trade barriers would increase the global welfare of developing countries by US$155 billion annually, dwarfing current levels of development assistance which average US$43 billion per annum. To secure this result requires developing countries to remove all of their trade barriers and for industrialized countries to remove theirs, most of which apply to imports of agriculture and garments and textiles—key export products in the developing world.

Developing countries made real progress within the GATT structure as a result of the Uruguay Round, which culminated in the change from the GATT to the WTO. They obtained commitments from the developed countries (particularly the EU and the US) to open up their markets to clothing and textile imports, and to undertake serious reform of their agricultural policies (admittedly first with interim programs, but with promises of continuing long-term change). These obligations were reconfirmed at Doha where, again, the EU and the US, amongst the other developed countries, agreed to honour their Uruguay Round commitments and to move further than they did in the Uruguay Round to open their agricultural markets.

However, the success of the EU in getting the Environment onto the negotiating agenda for the Doha Development Round; and the final decision by the Appellate Body in October 2001 on the long-

running dispute over US unilateral trade restrictions on imports of shrimp (the shrimp–turtle case) hold the prospect of significant, new grounds emerging for restricting trade for environmental reasons. These developments are the result of pressure from environmental groups in industrialized economies—the EU and the US in particular. They greatly qualify, if not countermand, commitments by these Governments to use the Doha Round to undertake global trade liberalization to improve conditions in the developing world.

Developing countries, particularly, must now develop a strategy which will contain the damage that has been done in order to protect the capacity of the Doha Development Round to deliver comprehensive trade liberalization, and to restore to the WTO its capacity to carry out its primary responsibilities. Although the shrimp–turtle judgment preceded the outcome of the Doha meeting, it is convenient to consider the implications of the EU success at Doha first.

2. The Doha Outcome

Since 1995, the EU has sought to change the rules of the WTO in order to legitimize the use of trade sanctions to enforce compliance with the terms of Multilateral Environment Agreements (MEAs), regardless of whether a country had ratified a particular MEA or not.

The EU was rebuffed at the first WTO Ministerial meeting at Singapore in December 1996. It had the issue on the table when the Seattle Ministerial in December 1999 was adjourned without result.

In December 2001, at the WTO Ministerial meeting in Doha, the EU was again persistent in demanding the inclusion of environmental issues within the negotiating agenda, and at this meeting was successful in doing so. Environment was the last issue for the negotiations to be settled at Doha. Developing countries were overwhelmingly opposed to making Environment a mainstream subject for negotiation. But the EU was adamant. It wanted the impact of WTO rules on Multilateral Environment Agreements 'clarified'. Bob Zoellick, the US Special Trade Representative, proposed a compromise. The environment issues of interest to the EU would first be studied, and then WTO Ministers would decide at their meeting in 2003 on whether or not to negotiate changes to WTO rules. This was accepted as a compromise. One wonders if the negotiators understood the tactical leverage which this compromise gives the EU.

This deal gives the EU the chance to exert powerful leverage at the 2003 meeting. Since the issues on which the EU has been historically most reluctant to move—agriculture and garments and textiles—are issues of the greatest importance to developing countries, it is easy to see the EU holding progress in those areas at the 2003 meeting hostage to commitments to negotiate rule changes on environmental issues. This could be very detrimental to the interests of developing countries. The greater market access they expect from liberalization could be directly reduced by establishment of new rights to restrict trade, particularly in the two areas where barriers to access are greatest – agriculture and clothing and textiles. The dangers of this become clear when the interests which are shaping trade and environment policy in both the EU and the US are considered.

EU Policy on Trade and Environment

The environmental issue which the EU put on the table at Doha seems, at first sight, to be trivial. At this point it does not have a significant impact, at least in monetary terms, on international trade. The EU said it wanted the 'overlap' between WTO rules and rules in Multilateral Environment Agreements (MEAs) reviewed so that WTO rules can be 'clarified'.

What is the issue which is so important to the EU? In four important international environmental agreements, parties have, wittingly or unwittingly, accepted obligations which conflict with their obligations under the WTO. In three MEAs, members are obliged to use trade bans to enforce the environmental objectives of the treaties, and are required to ban trade with non-parties. These agreements are the convention banning trade in endangered species (CITES), within which a controversial ban on all trade in ivory was enacted; the Montreal Convention to ban production and trade

in fluorocarbons (CFCs) (to preserve the ozone layer); and the Basel Convention banning trade in hazardous wastes (to prevent illegal dumping of toxic waste in developing countries). In the fourth agreement, the Cartagena Protocol to restrict trade in products with certain types of Genetically Modified Organisms (GMOs), parties are given a general authority to restrict trade and can do so without any scientific justification. The WTO rules, contrariwise, only permit trade restrictions to protect health and safety on the grounds that restrictions on imports of products are based on sound and internationally accepted science.

The Westphalian tradition of respect for national sovereignty, which was entrenched in the 1945 UN Charter, and in the 1947 GATT agreement, is also found as the norm in international treaty-making, *viz*., that parties do not include obligations to coerce non-parties, whether through military action or through trade sanctions. The overwhelming majority of international treaties eschew any such provisions. They respect the principle that every nation has the sovereign right and duty to act in its own interests and to manage its own affairs.

This principle is regularly restated by the United Nations. The fact that some environmental treaties have been negotiated which contain obligations to coerce non-parties, does not change that situation. Nor does the argument put by some lawyers that the customary international law created by occasional negotiation of such conventions, and individual action by states to coerce others, has greater standing than the norms established in long-established international law and custom.

It is a serious departure from long-established practice to negotiate international treaties which impose penalties on non-parties. International treaty law deems it unacceptable. The United Nations Charter decrees it a breach of the principle of national sovereignty. The UN Environment and Development Summit (the Rio Summit) in 1992 decreed that trade sanctions should not be used to enforce environmental goals.

These UN decisions are based on very sound principles. A trade sanction is poor environment policy. Government measures to secure protection of the environment should aim to impact on the source of the environmental degradation. Usually it is at the point of production or consumption. Trade is almost never the cause of degradation. Trying to secure an environmental result with a trade ban is an extremely inefficient and correspondingly ineffective method for solving environmental problems.

This did not dissuade the World Wildlife Fund (WWF) from promoting trade bans to protect endangered species, despite a vigorously contested argument inside the organization, with its field officers in Africa arguing strongly against a ban on trade in ivory. Southern African countries which have effective elephant conservation programs are still opposed to the ban, which undermines their conservation programs.

The Basel Convention

Nor did it stop Greenpeace from promoting trade bans in the Basel Convention, effectively solving the problem of criminal dumping of toxic products in developing countries by requiring the countries of origin of these materials to impose and police export bans, and to apply extraterritorial jurisdiction within developing countries.

The Basel Convention requires exporting industrialized economies to permit exports of specified materials only if they consider and approve the environment policies of the importing countries, and it bans, completely, trade in other proscribed materials. Basel puts into international law a view of the developing world that derives from the European colonial period and still permeates the mindset of European NGOs, *viz*., that the interests of developing countries are better understood and managed by Europeans. Greenpeace, for example, is currently pressing the Dutch Government to exercise its rights under the Basel Convention to ban the export of ships to India for ship-breaking, because Greenpeace considers that the pollution caused by the Indian ship-breaking industry is unacceptable.

What is the overlap of these MEAs with the rules of the WTO? The contradiction is a simple one. In the case of trade bans, the WTO rules do not permit any member to use the threat, or the imposition, of trade bans in order to impose its policies extraterritorially. Contrariwise, the MEAs require parties not to trade with non-parties unless they accept the principles and policies established under the MEA. In the case of the Cartagena Protocol, countries which accede to it surrender the rights they have, under the WTO, of protection against the arbitrary use of trade restrictions by importers.

The apprehension of the Green groups is that one day a member of the WTO might secure a ruling from the WTO that another member has acted illegally under WTO rules by restricting trade in accordance with the terms of the MEA. There has been speculation from time to time that Israel might seek such a ruling. Greenpeace and the WWF have been pressing for a decade for an amendment to the WTO rules which would remove the right of any WTO member to take such a case. This is the result the EU is seeking.

No such complaint has so far been lodged. No country, as yet, has had sufficient commercial reason to do so. The measures have not yet imperiled economically significant amounts of trade, although some industries in developing countries, such as the lead acid battery recycling industry in the Philippines, have been badly affected. The ship-breaking industry in India is under threat, but is still operating. On the other hand, no environmental interests have been advanced by the trade bans. The MEAs in question were recently reviewed in case studies mounted by the UN Conference on Trade and Development (UNCTAD). The Director General of UNCTAD reported that in no case were the trade bans significant in securing the environmental purpose of the MEAs.

If this contradiction between the WTO rules and MEA provisions is not a matter of practical importance, then why not do as the EU proposes and remove the irritant by having the WTO legitimize such provisions in MEAs? First, a fundamental issue of principle is at stake. Second, EU environmental policy is driving in a direction which will significantly disadvantage the economic interests of developing countries.

If the EU succeeds in its ambition, discriminatory trade provisions will be legitimized and the foundation stones which have made the GATT–WTO so successful, will be fractured. The WTO is arguably the most successful international institution that has ever evolved. It has built a global trading system which encourages free markets. It has laid the foundation for the most sustained period of economic growth, enveloping more people, than ever before in the world's history.

Developing countries, however, have not secured the benefits which the WTO system should have delivered, because the major industrialized economies have not merely maintained high levels of protection of agriculture, but through heavy subsidies have generated huge surpluses which grossly distort world markets for agricultural commodities. They have also systematically discriminated against imports of clothing and textiles from developing countries.

The WTO works because it respects the national sovereignty of every member. Market access is guaranteed by its rules which are accepted and applied in common by every member, rich or poor, large or small. For many small and developing countries, WTO membership provides the only secure right they possess to economic development. If the principle is accepted that one member, or a sub-set of members, can use access to markets as an instrument of extraterritoriality, that fundamental right is subverted, as is the basic capacity of the WTO to deliver benefits to all countries, particularly smaller countries to whom that right is particularly valuable.

That is the long answer to the question: 'why not resolve this contradiction in the manner proposed by the EU?' The short answer is even simpler. The EU proposal is the wrong solution. We should be asking instead—why don't Environmental NGOs accept UN policy and stop proposing trade sanctions in MEAs? It is not the WTO rules which need changing, it is the Environmentalist NGOs' practice of continuing to negotiate trade bans and restrictions in MEAs which should be changed.

The EU seems determined to change the WTO rules so that it can restrict trade to satisfy what it calls 'consumer interests'. The WTO rules (Article XX) allow members to restrict imports to protect human health, and animal plant health and safety, but it obliges members to demonstrate, when challenged, that such restrictions are based on internationally accepted science. The EU does not like this obligation. It has been engaged in a long-running dispute with the US over its bans of imports of beef from cows grown on food enhanced with hormonal growth promotants. There is no scientific evidence that the meat is distinguishable from cows not fed with such hormones, or that that it is a threat to human health. The US invoked WTO procedures which ruled that the EU bans were illegal. The EU has paid compensation to the US and is persisting with efforts to demonstrate that there is a scientific basis for the bans. In the meantime, it has proposed that 'consumer interests' such as aversion to the idea of meat grown with hormone enhancement should

be grounds to restrict trade. It has proposed this in the agriculture negotiations in the WTO.

The Cartagena Protocol

In the Cartagena Protocol, the EU has secured a blanket right to restrict trade on such grounds. This Protocol is another Greenpeace initiative, spinning off from its wider campaign to ban GMOs. Otherwise known as the Biosafety Protocol, it is a Protocol to the Biodiversity Convention. It gives importers unchallengeable rights to ban imports of living products which are genetically modified, for example grains, seeds, fruit and vegetables. Importers are entitled to justify such bans by invoking the version of the Precautionary Principle which is laid down in the Cartagena Protocol. It is phrased in such wide and general terms that it gives officials in importing countries virtually full political discretion to block imports. Under the Cartagena Protocol, members have an explicit authority to ban imports without scientific justification.

The Protocol would give the EU the right to ban imports which it sought, unsuccessfully, in the beef hormone case. Consider a hypothetical case where the EU and Thailand were both parties both to the Cartagena Protocol and the WTO. The EU bans imports of GMO cassava from Thailand. Thailand challenges the EU under the terms of the WTO demanding demonstration of the scientific justification for the ban. The EU replies that under Cartagena it does not need to provide scientific justification and that under international treaty interpretation, Thai adherence to Cartagena post-dates membership of the WTO and therefore its Cartagena obligations take precedence. If the case went to WTO disputes panel, there is a strong chance the result would run against Thailand. The same situation can be envisaged in the case of exports of oilseeds from Argentina or Brazil.

It is no accident that this contradiction exists between Cartagena and the WTO rules. The backers of this Protocol were Greenpeace, the EU and a small group of developing countries advised by Greenpeace and the Third World Network (an NGO lobby based in Malaysia with historic links with Public Citizen, Ralph Nader's anti-free trade lobby). They were fully aware it would conflict with the WTO rules. Before Seattle, Public Citizen advocated completion of the Biosafety Protocol so that there was a basis to undermine the sound science approach in WTO agreements.[1] During the Cartagena negotiations some countries wanted a clause in the Protocol which stated that WTO rights would be unaffected by accession to the Protocol. The EU refused point blank to accept such a clause. Today, EU officials point to the Cartagena Protocol and its articulation of the Precautionary Principle as a standard, which should be followed and applied elsewhere.

The Cartagena Protocol was sold to environment ministries in developing countries on the grounds that it gave them powers to prevent businesses in industrialized economies from exporting products with GMOs with side-effects that were unknown to the importing administration. The Protocol obliges members to publicly notify all releases of GMOs. This is valuable, as it provides all countries with advice about what is being released. The Protocol, however, also creates new and draconian powers to restrict imports. Members of the WTO already had rights to restrict products which were a threat to human health and to flora and fauna. The new rights were pushed by Greenpeace and the EU to secure the additional right to restrict trade which the EU had been previously denied in the WTO.

Within a generation, every food commodity which is traded will have GMO variants. Developing countries will benefit from this technology in the same way they have benefited dramatically from new technology in the past. The Cartagena Protocol will give industrialized economies a new right to restrict imports of such foodstuffs. Given the reluctance of the EU to open its markets for food, it is inevitable that this will be employed as a protectionist tool. The Protocol also establishes a right for the EU to impose its environmental standards on developing countries in return for access to their markets, in the same way in which this right has been secured in the Basel Convention. This is no coincidence. The Cartagena Protocol is modeled on the Basel Convention.

The Cartagena Protocol is an important precedent for the EU to build its case to restrict trade in response to consumer or protectionist pressure and to ban imports without scientific justification. The EU intent is clear. Its officials regularly contend that it is legitimate for several countries to act collectively to impose trade

1 See Lori Wallach, 'Whose Trade Organization?', *Public Citizen,* 1999.

sanctions on others to protect the environment. Link this with its stated goal of wanting the WTO to legitimize discriminatory trade measures in MEAs, for example by granting an exemption for the environment in WTO rules. The resulting goal is clear: to secure international legal cover to use trade sanctions to impose, extraterritorially, EU environmental standards.

Ecolabelling and the Precautionary Principle

The EU has stated that it wants to see a wider application of the Precautionary Principle (by which it means *its* version, recalling that there is no agreed version of 'the' principle). It also wants WTO rules altered so that trade can be restricted on the basis of the environmental impact of the way in which products can be produced and processed. Its officials refer to the latter concept in shorthand as 'ecolabelling'. It is more than a certification system. It is regulation of the environmental impact of a product for the whole of its life cycle.

Acceptance of the Precautionary Principle generally would create discretionary rights to restrict trade and undermine the science-based and rule-driven system of the WTO. The EU could use it to deny market access to products to which there may be 'consumer aversion', such as vegetables grown in countries which do not have political rights, or where DDT is used for malaria eradication campaigns, or where there is inadequate commitment to participate in programs to reduce emissions of greenhouse gases.

Where the Precautionary Principle replaced scientific justification as the basis for restricting trade, imports would always be subject to case-by-case approvals for imports, and even after initial approval, imports would always be vulnerable to hostile campaigns based on the latest fads or fashions promoted by NGOs, or vested interests, or alliances of both. Through the Precautionary Principle the EU would be able to mainstream anti-science values in regulation and trade.

In March 2000, the EU issued its 'Integrated Policy Paper'. This reported the intention of the European Commission to apply regulations for 'whole of life cycle' product management across the EU. It referred to a draft directive which was being developed as a model. This is the Directive on Disposal of Electronic and Electrical Equipment. Under the directive, every producer and major importer of every electrical and electronic product would be responsible for disposal and recycling of the product at the end of its product life.[2]

This proposal has many political attractions, but it will have a seriously negative impact on the European economy. Its political appeal relies upon consumers believing that manufactures and distributors will accept and absorb the economic burdens of the policy. But it can only work if imports are subject to the same cost burdens as domestically produced products and one effect of this policy will be clear. The EU will diminish the global competitiveness of every industry which is regulated in this way. This is why the EU wants changes to the WTO rules to permit 'ecolabels'. The Ecolabel will be the certification that whole-of-life-cycle regulations are being followed. As well as verifying that manufacturers have committed to dispose of the product, there will be related or companion obligations to meet in various ways the cost of all the polluting impacts of the production and use of the product. To ensure that imported products, which do not have to bear the extra cost of 'whole of life cycle' management, do not have a cost advantage in the market over domestic products, the imported product will not be allowed to be sold unless it qualifies for the Ecolabel.

The EU wants ecolabelling permitted under WTO rules so that it can use trade sanctions (denial of access to its markets) to coerce other countries to adopt its standards and to protect the industries made less competitive by 'whole of life-cycle' regulation. So the proposed directive on disposal of electrical and electronic products would require manufacturers of such equipment in Tunisia or the Philippines to adopt the same environmental standards which the EU requires of European manufacturers if the product is to be exported to Europe.

The problem for the EU is that WTO rules have never before been seen as permitting restrictions of this kind. The understood position is that the WTO

2 The Directive has not yet been applied. National and possible sub-national authorities in EU member states would be responsible for implementing the Directive. There is likely to be significant variation in the way it is applied by EU authorities in EU member states

cannot get into the business of ruling on the legitimacy of how a product is made. If it did, it would become the focus of every political, religious, or ideological interest group within the metropolitan powers. Labour rights, animal rights, religious freedom, women's rights, will become issues used to justify denial of entry of a product into a market. International trade will become, as it was in the inter-war period, highly politicized.

In such a situation, commercial interests will be quick to use the cover of the environment, or labour rights, or religious freedom, in order to secure protection against imports, and those commercial interests will be prepared to provide financial support for these causes. Just such an alliance was manifest in the campaigns within the US, against the WTO, which preceded the Seattle Ministerial meeting in December 1999, and which culminated in massive street demonstrations.

Comparative Advantage

International trade has generated so much prosperity since the War because it brings into play, on a global scale, the principle of comparative advantage. Every country trades on the basis of what it can best make or provide. It works when the rules for trade regulate trade, and nothing else. If countries want to improve the environment (or any other sphere of activity – respect for human rights, compliance with labour standards, religious freedom) through international action, they should do so by negotiating policies and measures to that end in a purpose-built international agreement through which each member commits to apply those measures in national law. If multilateral trade laws are used to enforce non-trade purposes, their capacity to serve their trade end, and to benefit the common good, is lost.

If the EU secured the principle that the trade provisions of MEAs were legitimate instruments which the WTO should sanctify, it could then set about creating new MEAs to lay down its preferred environmental standards. It could propose an MEA on application of the Precautionary Principle. It could propose an MEA on Ecolabelling and whole-of-life-cycle product management. It could argue that actions taken by countries to protect the environment warranted trade restrictions to enforce them and that, as a matter of principle, the WTO should respect them.

There is already a major new multilateral environment agreement, not yet ratified, which one can expect the EU to seek to legitimize in this way. It is the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC). The Kyoto Protocol obliges parties listed in Annexe B of the Protocol—most of the industrialized economies—to reduce emissions of greenhouses gases, particularly carbon dioxide. To achieve the prescribed targets, industrialized economies will have to increase energy costs through taxes on carbon-containing fuels. This will significantly reduce their competitiveness against countries which do not increase their energy costs. The cost impact of 'whole-of-life-cycle' management is likely to be very low in comparison to the impact of the Kyoto Protocol.

Developing countries are not obliged to reduce emissions of greenhouse gases. They have, however, accepted the Climate Change Convention and the Kyoto Protocol and thereby have adopted the goal of global reduction of greenhouse gases. The United States has said it will not accept the Protocol while developing countries do not have comparable obligations.

There will be very strong pressure from European business on the EU to invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of business in the United States and other countries which are free of the cost burden of higher energy charges, but which are imposed in Europe to reduce emissions of carbon dioxide. If the EU will contemplate using trade leverage through ecolabelling, which mandates adherence to its preferred process of production and processing, why would it not tie access to its markets to requirements that developing countries adopt CO_2 emission-reduction programs which it applies at home?

The acceptance, therefore, by the trade ministers at Doha of the EU's demand to include the Environment in the negotiating round is a significant breakthrough, by the EU, in its long-term campaign to secure new rights to use trade sanctions to secure environmental objectives. The EU might argue that its motive is to protect the environment, but whatever its motives, the consequence will be an instrument which will facilitate the protection of European industry and agriculture from international competition.

3. The Shrimp–Turtle Case

The EU did not get all that it wanted at Doha, but the conclusion in October of long-running litigation by India, Pakistan, Malaysia and Thailand against unilateral trade sanctions imposed by the US on environmental grounds, in favour of the US, creates some of the grounds to use trade sanctions to enforce environmental standards which the EU has been seeking.

The shrimp–turtle case began in 1996, when India, Pakistan, Malaysia and Thailand appealed against a trade ban imposed by the US on shrimp imported from Thailand on the grounds that its shrimp boats did not use the Turtle Excluder Devices (TEDs) mandated by US legislation on American shrimp trawlers. The Disputes Panel which heard this case found against the US on the grounds that members of the WTO were not entitled to set unilateral conditions on access to their markets, in this case adoption of specified environment policies, because the sovereignty of the WTO membership should not be put at risk in this way.

The US appealed to the Appellate Body (AB) which adopted a radically different interpretation to that of the Panel. The AB contended that in principle the US measure was consistent with a provision in the GATT allowing exceptions to protect sustainable natural resources, and that the new reference to sustainable development in the Preamble of the WTO (adopted in 1994) and international concern about turtle preservation justified this. Nevertheless, the AB ruled that the US breached WTO rules because it discriminated against some shrimp-exporting nations when implementing its measures. The US then adjusted its regulations to provide for comparability of treatment among shrimp exporters and maintained the ban. Malaysia challenged the ban, contending that the unilateral trade sanction had to be withdrawn. The Panel ruled that under the new implementing regulations, the US satisfied the terms of the AB's first judgment and that the unilateral trade sanction could remain in place. Malaysia appealed that decision to the AB who supported the Panel.

The Shrimp–Turtle rulings endorse the use of trade sanctions to coerce other states to change domestic policy to accord with the policy preferences of the sanctioning state. It is true that, to date, this is restricted to the particular case in point. Nevertheless, this represents a dramatic change in WTO jurisprudence. The politically powerful now have grounds to impose their political will with trade sanctions upon countries which are economically dependant on uninterrupted access to their markets.

The initial Disputes Panel which considered Thailand's complaint against the US import ban ruled that the US measures were so much at odds with this fundamental point—it described them as a threat to the multilateral trading system—that they should be disallowed. The Appellate Body overruled the Panel, arguing that the measures were legitimate and important environmental objectives which were justified because they related to national measures to conserve exhaustible natural resources as described in Article XX, clause (g).

The AB made no case that the circumstances the US faced were extreme and ignored the widely recognized and fundamental principle that countries have a sovereign right to determine their domestic policies and not be coerced through the threat of trade sanctions.

The AB deliberately elected not to address whether or not the US was entitled to assert extra-territorial reach when invoking the terms of Article XX. The US was clear about this. It was banning shrimp imports in order to force other countries which did not use Turtle Extruder Devices when they fished for shrimp to do so, in accordance with the requirements that the US imposed on American shrimp boats.

By remaining silent on this point, the AB has opened the possibility that WTO members may impose production and processing methods in the jurisdiction of other countries. This has far-reaching implications. Until this point, the vast majority of WTO members would have refused to accept there was any right to assert jurisdiction under Article XX in the territory of another member.

The WTO Dispute Panel and the Appellate Body assumed the competence to assess the environmental importance and effectiveness of the US measures. In so doing, they demonstrated an

incapacity in understanding, and a lack of expertise in handling, technical material. The terms of Article XX (g) with which they justified the US measure addressed conservation. They declared that the international community had agreed (in CITES) that migratory turtles were in danger of extinction, but they did not demonstrate that the US measures would be effective conservation measures. They judged the US measures for their preservation value (would it save turtle lives?) not their conservation value (would it conserve the species?).

The scientific evidence before the panel supported the preservation value of the US measures, but did not agree on the conservation value. There was significant evidence that the measures might have little conservation effect, since restricting trade in shrimp from the complainant countries (Thailand, Malaysia and the Philippines) would have little effect. The US was not a significant shrimp export market for them. There was no conclusive evidence that forcing the Asian countries to reduce the incidental kill of turtles in their waters had a related impact on conservation of turtles in US waters.

There was no agreement among experts that turtles in US waters migrated regularly to the waters of the complainants.

Neither the Panel nor the AB sought to define 'sustainable development', the term in the Preamble to the WTO Agreement to which they pointed as a relevant objective for US measures invoked under Article XX. The meaning of the term 'sustainable development' is strongly contested. Some argue that it is synonymous with preserving the environment, regardless of other considerations. Others maintain that it means balancing conservation with economic development. The AB findings suggest the former meaning was the one employed by the Panel—a significant matter. In preferring sustainable development to the WTO's trade objective, a different outcome was achieved than if sustainable development was understood to mean a balanced pursuit of environmental and economic goals.

The Rio Principles

The AB quoted extensively from the 1992 UN Conference on Environment and Development and the WTO Committee on Trade and Environment to demonstrate that sustainable development was endorsed by the international community as a legitimate goal, but ignored the leading conclusions of both bodies that trade measures should not (except as a last resort) be used for environmental management. Article XII of the Rio Declarations explicitly states that

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.

This was ignored.

The Rio principles on trade and environment allowed the possibility of unilateral action, but effectively categorized this as a last resort. The AB did not consider if the US measure could be so characterized. In fact, on the basis of the evidence before the panel, it plainly was not a last resort. US law mandated a wide series of alternative activities to preserve turtles. Having elected to decide if the US measures were necessary to conserve the environment by examining the environmental impacts of the US policies, the AB (and the Panel to some extent as well) demonstrated that they did not have the technical competence to address this question.

This result is extremely serious. The AB has placed the WTO in the business of determining environment policy for the members of the WTO, despite the repeated refusal of the membership, confirmed by Ministers in 1996, to entertain any such outcome. Aside from the fact they have demonstrated plainly that the WTO system is not capable of working competently on that subject, it has set a worrying precedent for any future forays by the WTO disputes system when it is next asked, as it assuredly will be, to assess the propriety, the necessity and the effectiveness of any policy measure, not according to its legitimacy in relation to the international trade responsibilities of the WTO, but within its own particular policy parameters.

The AB ruled it was now more appropriate for members to exercise their rights under Article XX for environmental purposes than hitherto, since the Preamble for GATT 1994 included the objective of sustainable development whereas the Preamble to GATT 1947 did not. It reconfirmed that the primary business of the WTO was to protect and promote the international trading system but qualified this by noting that it was also a legitimate WTO objective to protect the environment, thus

diminishing the primacy of the WTO's international trade role.

The degree of weight given to this point by the AB is a matter of great concern, since the substantive provisions of the WTO Agreement which define and determine the role and functions of the WTO do not include any environmental ambitions which would elevate the environmental objective as a responsibility of the WTO in any non-trivial way.

Full Employment

There are other implications for the elevation of the relative importance of the environment as a responsibility of the WTO for the other non-trade elements in the Preamble. Full employment is also cited as an objective of the WTO in that same Preamble, as it was in the Preamble to GATT 1947. Yet it has never been adduced as a goal with such weight that it should temper judgments about whether or not maintenance and promotion of the international trading system is the primary and unqualified responsibility of the WTO.

Those who believe respect for labour rights should qualify trade objectives, and should justify unilateral trade restrictions, will take heart from the precedent established by the AB in shrimp–turtle. Until now the negotiating history has been clear that full employment was clearly a subsidiary goal of the GATT. When the Havana Charter was negotiated in 1947, Australia tried very hard to have full employment set out as a primary goal in an operational provision of the GATT, and did so in the erroneous belief that protection was a useful instrument for securing full employment. Australia failed in its ambition. The formula in the current Preamble to the WTO was the best that Australia could secure.

The AB has opened the way for members of the WTO to use provisions of Article XX to defend unilateral trade restrictions to enforce compliance with core labour standards, on the grounds that this is necessary to secure the goal in the Preamble of the GATT to secure full employment.

PPMs

The AB ruling opens the way for the legitimization of import restrictions based on attitudes within the importing country to the environmental impact of production and process methods (PPMs) on products for export. The fact of the case is that the US has banned shrimp which were harvested (processed) in ways which have alleged detrimental environmental effects but allows imports of shrimp which do not. The absolute silence by the panel on this matter is significant. In previous trade and environment cases, the principle was established that products could only be differentiated by their physical characteristics, not how they are made (or processed or produced). This was plainly set out in the first tuna–dolphin case.

As noted earlier in this paper, a very fundamental principle is at stake. If countries can restrict trade on the basis of how a product is made, it sets at risk the basis of all international trade—the capacity of WTO members to exploit their comparative advantages in the global economy.

The most striking thing about the disputes process rulings in the shrimp–turtle case is that the AB interpreted the WTO rules in such a way that positions and principles that member states of the WTO, in WTO fora, had consciously considered and rejected, are now part of WTO jurisprudence. These fora include the Committee on Trade and Environment; the WTO Council which adopted the Committee's report; and the Ministers of the WTO Ministerial meeting in Singapore in 1996. Other fora include the Ministerial and Heads of Government meeting at the UN Conference on Environment and Development at Rio in 1992.

WTO members have renounced unilateral trade sanctions, and commended multilateral conventions without discriminatory trade provisions, as the preferred instrument for multilateral measures to advance international objectives concerning trade and environment. They have rejected suggestions that trade should be restricted on the basis of the methods of production and processing. Their governments at Head of Government level at the UN Conference on Environment and Development have firmly stated that unilateral trade restrictions with extra-territorial reach should be avoided and that respect for national sovereignty should be the fundamental guiding principle in international endeavours to improve the environment.

The AB has taken upon itself to determine that, through WTO provisions which have not been so interpreted for half a century, members of the WTO meant otherwise.

4. The Threat to the Trade Interest of Developing Countries

These developments threaten the trade interest of developing countries. They create grounds for the EU (in particular) and the US (to a lesser extent) to establish new justifications to restrict imports, and they undermine the capacity of the multilateral trading system to expand trade and growth.

The EU has declared several environmental interests in the WTO in the periods leading up to the Seattle and Doha Ministerial meetings. It wants the trade provisions in the MEAs protected. It wants to be able to restrict imports according to whether the way in which they were produced matches the EU's environmental standards. The EU has indicated that it is moving to adopt an 'Integrated Product Policy' which is a whole-of-life cycle environmental management philosophy. This is poor environment policy which imposes significant costs on producers. The EU is committed to applying the Precautionary Principle widely, and wants it reflected in international agreements, although EU Commissioner Lamy wrote to USTR Zoellick after Doha advising that the EU would not seek its wide application in the WTO. The EU wants to restrict agricultural imports to protect the 'multifunctionality' of agriculture. By this it means imports can be restricted to satisfy consumer concerns, animal welfare issues, food safety and security, and preservation of the environment.

It is clear from the foregoing that if the EU secured the principle that the trade provisions of MEAs were legitimate instruments which the WTO should sanctify, it could then set about creating new MEAs to lay down its preferred environmental standards. It could propose an MEA on application of the Precautionary Principle. It could propose an MEA on Ecolabelling and whole-of-life-cycle product management.

The AB's decisions on shrimp–turtle also opens up the prospect that the EU could apply the grounds which the AB said justified imposition by the US of unilateral trade sanctions and apply its own environmental sanctions to enforce adoption of its preferred environmental policies.

Given the obvious application of restrictions such as these to trade in food, it is clear that instead of concentrating on how to create effective commitments to reduce protection of European farmers, it will create a new series of barriers to restrict food imports. The philosophy of its Integrated Product Policy, the first regulation under which will apply to electrical and electronic products, foreshadows restrictions on a wide range of manufactured products. Its strong commitment to the Kyoto Protocol suggests an interest in restricting trade in products which have significant inputs of energy from sources which generate carbon dioxide.

The United States' position is different. It does not support the EU on use of the Precautionary Principle, ecolabelling and whole-of-life-cycle environmental regulation, or the use of 'multifunctionality' to protect agricultural producers. It is not a party to three of the MEAs about which the EU is so concerned. The US does, however, have laws which mandate unilateral imposition of trade sanctions. And during the 1990s the Clinton Administration evinced increasing sympathy for arguments that trade agreements should make space for environmental issues and core labour standards. The Bush Administration does not agree with many of the positions of its predecessors. The US Congress, however, which is broadly sympathetic to the exercise of unilateral trade sanctions, continues to wield significant influence over US policy.

This is a bitter-sweet development for developing countries. At the very point when it is foreseeable that the historic failure of the GATT, then WTO, system to provide the benefits of free trade in the two sectors where the comparative advantage of many developing countries is preponderant—production of food and garments and textiles—will be corrected, changes are being proposed which could significantly restrict application of free trade policies, particularly in agriculture.

It also needs to be noted that the justification for this is environmental policy. Yet it must be noted in both the case of the EU and the US, that the preferred path to secure global improvement in the environment is by negotiation of specialist multilateral agreements which depend for their effectiveness on the consensual agreement of the signatories, and the subsequent adoption of the relevant measures in domestic law. Nobody disagrees that this is the preferred path for international cooperation to improve the environment.

Those who seek to use trade coercion to secure environmental improvements pay little regard for the loss of capacity of the multilateral trading system to

deliver long-overdue benefits to the developing countries. They prefer to use trade coercion measures because they believe they are quicker. They ignore the significant evidence indicating that, in most cases, trade sanctions are ineffective or ineffectual in achieving environmental goals.

5. Strategies for Developing Countries

What Should Developing Countries Do?

The issue is on the table in the WTO and will have to be addressed in the Doha Development Round. It will assuredly arise as well in the UN during preparations for the Johannesburg Development Summit.

First, developing countries should develop clear positions on all the issues which are at stake here:

- Sovereignty
- Use of coercion
- Discrimination
- Leverage
- The precautionary principle
- Production and process methods/ecolabelling
- Sound principles in trade policy
- Sound principles for environment policy

Secure Domestic Policy Coherence

Governments should seek greater coherence in internal decision-making processes on environment policy and trade policy and trade and environment issues. It is not uncommon both in developed and developing countries to see environment and trade officials adopting opposing positions on the same issue in different fora. The Cartagena Protocol is a very good case in point. Many environment officials in governments have agreed to sign that Protocol, unaware that they had pre-existing rights under the WTO to protect their environment using trade restrictions, and unaware that accession to the Protocol could undermine vital protections which the WTO provides them against abuse by others of the right to restrict trade.

The key is that governments should understand what is good trade policy and what is good environment policy. Most of the trade measures which are employed for environmental purposes are, in fact, poor environment policy.

Secure Clear Principles in the United Nations

In one respect, the question of clarification of overlap between the rules of the WTO and the MEAs is not properly a matter for trade officials or the WTO, it is a matter for environment officials and the UN Commission on Sustainable Development, the standing body of the UN responsible for overseeing implementation of the results of the Rio Earth Summit, and of preparing for the Rio plus 10 Summit in Johannesburg in September 2002. It is the constant insertion of trade provisions by environment officials in MEAs, which undermines the principles of respect for national sovereignty and application of sound science to decision-making, upon which WTO agreements are based. Logic dictates that there should be an item on the agenda for Johannesburg—clarifying the rules of the MEAs which conflict with provisions of the WTO.

Developing countries should secure international endorsement for their preferred principles at Johannesburg. They should strengthen and update the principles on trade and environment which were adopted at UNCED. They should be prepared for an effort by environmental groups such as Greenpeace and WWF to have those principles watered down or abandoned. They should be aware that, since Rio, EU governments and Green groups have disregarded those principles.

Protect Their Interests in the WTO

Having established clear positions on respect for national sovereignty, non-extraterritorial assertion of jurisdiction, and the proscription of the use of trade sanctions for any purpose, but particularly for securing compliance with domestic policies or provisions not provided for in the WTO, developing countries need to ensure the adoption of these as guiding principles for the interpretation of WTO provisions.

They also need to establish these principles as statements of intent of how they, as member states, understand WTO provisions are to operate, and make it clear that future interpretations by Disputes Panels and the Appellate Body are expected to respect these doctrines.