

A Study of the Trade and Environment Issue

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1. Executive Summary

The debate

At the initiative of the European Union, the WTO Ministers decided at Doha to include environment in the mandate for multilateral trade negotiations for the first time in over 50 years. Most WTO members were opposed but concurred to secure agreement to launch the new trade negotiations. The EU now has the opportunity to lever its environmental objectives against demands of others for it to open markets. Developing countries want the EU to liberalize trade in agriculture and garments and textiles.

The EU intends to introduce tougher, domestic environment policies and wants to restrict imports which do not meet those standards. The WTO does not permit this. The EU also supports use of trade sanctions against non-parties in multilateral environment agreements (MEAs). WTO rules generally do not permit use of trade sanctions. The EU wants to change WTO rules to allow such trade restrictions. The EU also wants agreement in the Doha negotiations to use environmental standards to protect its farmers. The United States occasionally imposes unilateral trade sanctions to support environment goals, but does not agree with the EU that WTO rules should be changed. Australia is opposed to any changes to WTO rules. Canada and Japan are unsympathetic to changes. Developing countries oppose the changes to WTO rules.

Areas of trade most likely to be affected by any change are chemicals, Information Technology (IT) and consumer electronic goods, products with genetically modified organisms (GMOs), food and, prospectively, energy. Fundamental interests are at stake. If trade rules are used to enforce environmental policies as proposed by the EU, is national sovereignty protected? Are benefits conferred by WTO membership diminished? Will old forms of protection be replaced with new ones?

This debate comes at a time when new doubts have arisen about what WTO rules do permit. The WTO disputes settlement body recently approved certain trade sanctions imposed by the US on environmental grounds which challenged the accepted wisdom that the WTO did not permit trade sanctions, did not condone exercise of extraterritorial jurisdiction or permit restrictions on imports based on how products are made. This must be clarified.

The international framework

The WTO makes international rules to open world markets. It recognizes the right of each member to use its comparative advantage in the global economy to trade and develop. It binds that right in enforceable international law which also prevents discrimination in trade. Developing countries don't yet get the full benefits from this system. Rules to open markets do not yet apply fully to trade in agriculture and garments and textiles. In the Uruguay Round of multilateral negotiations they started to apply and there is a commitment at Doha to continue this process. Freeing these markets can only be achieved by the WTO and the potential benefit to developing countries is billions of dollars in additional trade.

The WTO recognizes the need of countries to apply national policies to protect the environment and allows trade restrictions, such as quarantine controls, to protect the environment, on condition that these restrictions are not disguised protection and that restrictions are scientifically-based. WTO rules respect national sovereignty.

The UN system fosters international environmental agreements. It established a global umbrella for global environmental action at the UNCED session in 1992 and established the UN Commission on Sustainable Development to supervise the program. It will be reviewed in Johannesburg in September 2002. A UN Environment Program (UNEP) was also established in ECOSOC, a general assembly organ. Its primary business is to administer several Multilateral Environment Agreements (MEAs). There are six key MEAs. They protect endangered species, restrict international trade in hazardous waste, protect the ozone layer, restrict trade in certain GMOs, and restrict use and trade of hazardous chemicals.¹ Most of these agreements have measures which permit trade coercion and discrimination. One (on GMOs) mandates restrictions without scientific justification. The provisions in the MEAs do not respect national sovereignty. This creates conflict with WTO provisions and confusion. Most of the MEAs arise from initiatives from Northern Europe.

Dealing with the clash between the WTO and the MEAs

If the WTO is amended to permit trade coercion and to restrict imports which do not meet domestic environmental standards, fundamental rights of WTO members will be weakened. The environmental benefit must outweigh the costs. The environmental value of the trade provisions in the MEAs is low. They do not respect the principles adopted at the UN Rio Earth Summit in 1992 that trade coercion should not be used to protect the environment and that each country should set its own environmental standards. Studies by the OECD and UNCTAD as well as numerous private studies show these trade measures have low environmental impact. Instead of proposing that the WTO should be amended, it would be more logical to cease developing these measures in the negotiating processes in the UN system. While Governments oppose these measures in the WTO, their representatives in the UN negotiate them.

If countries apply effective environment and trade policies, there will be no problem. Environment policies should achieve outcomes by the most direct means with the least cost. Trade sanctions or adoption of universal environmental standards are not effective environment policies. Trade policies should ensure the economic welfare of countries is maximized. Using the WTO to achieve non-trade goals is not effective, nor is weakening the capacity of the WTO to allow countries to exploit their comparative advantage. Effective policy does not disregard national sovereignty.

All countries need to improve understanding of environment and trade policies in relevant national agencies. Coordination of policy between trade and environment agencies needs to be enhanced. Work in the UN and in the WTO needs to ensure fundamental principles such as non-discrimination and respect for national sovereignty are followed.

¹ The Kyoto Protocol on Greenhouse gases is more important than any of the five MEAs and does not have trade provisions although compliance mechanisms are being negotiated.

2. Setting the Scene

Trade and the environment has become the leading political issue in the WTO. It figured prominently at the Doha Ministerial meeting where the European Union secured agreement that trade and environment would be a mainstream item in the negotiations. This gives the EU the opportunity to leverage demands that others move towards its position on environment against their demands that it move towards their positions to open markets for agricultural products and clothing and textiles.

New questions have also arisen contemporaneously in the WTO about how far the provisions for exemption from GATT rules permit extension of trade controls into the territorial jurisdiction of other parties or permit trade to be restricted on the basis of how a product is processed or produced where the justification is to protect the environment. A ruling by the WTO Appellate body that the US is permitted to maintain unilateral trade sanctions against several countries on those grounds has altered the conventional wisdom until this time that GATT rules did not permit such actions on those grounds.

Origins of the debate

The Stockholm Conference on the environment in 1972 is regarded as the first major international conference on environment issues in the UN system. There was cursory reference to it in the GATT, but it was not until late in the processes of the Uruguay Round² that Western non-governmental organizations (NGOs) made an issue of the need to include the impact on trade of the WTO.

The issue which triggered interest was the Tuna/Dolphin dispute³. A GATT panel, acting on a complaint from Mexico, ruled that certain US bans on imports of tuna were illegal. The US banned imports of tuna from countries which did not impose controls on tuna fishing boats to minimize the incidental kill of dolphin like the controls the US required on US tuna boats.⁴

US environmental groups demonized the GATT in the United States⁵ and promoted the adverse impact of free trade on the environment as a populist platform to generate opposition to the North American Free Trade Agreement which was being negotiated in 1990/91. The World Wildlife Fund, possibly understanding the implications of GATT rules for the restrictive trade provisions in the Convention Banning International Trade in Endangered Species (CITES) and the ban on trade in ivory adopted in 1989, produced initial analyses arguing the need for the GATT to permit discriminatory restrictions on trade to protect the environment.⁶ Greenpeace, which had been sponsoring the Basel Convention to restrict

² The Uruguay Round began in 1986 and ended in 1994.

³ Some analysts attribute the linkage of trade and environment to an American, Mark Ritchie, President of the Institute for Agriculture and Trade Policy who represented protectionist US farm interests at an anti-trade liberalization conference organized in Geneva by the European Community in 1987.

⁴ The ruling was never adopted. Mexico dropped the case. The EU mounted the same challenge. The second panel ruled against the US, but that case was not adopted and lapsed when the WTO replaced the GATT. The same principle was asserted and challenged when the US banned imports of shrimp which did not minimize the incidental kill of turtle.

⁵ They popularized the slogan "GATTzilla kills Flipper."

⁶ Early papers published by the WWF were by Konrad von Moltke, a long-standing activist of the WWF and the International Institute for Sustainable Development in Canada.

Transboundary Movements of Hazardous Goods, would have also realized its trade bans were contestable under WTO rules. Public Citizen, Ralph Nader's consumer advocacy, and Friends of the Earth, who led the anti-free trade campaign in the United States, raised calls to introduce environment issues in the WTO as the Uruguay Round moved to conclusion in the early nineties. Public Citizen tried to raise fears about the adverse impact on food safety of the new rules governing quarantine restrictions which had been negotiated. There was little support from Governments.

It is worth noting that some of the key positions of the NGOs, particularly legitimization of the discriminatory measures of Multilateral Environment Agreements and greater rights of participation of NGOs in the WTO system dated from this period.

The debate

The debate appears complex. There are conflicts between the obligations of countries as members of the WTO with their obligations as members of Multilateral Environment Agreements. This generates debate and analysis by lawyers. The WTO is represented as a barrier to international efforts to protect the environment. It is contended that the "precautionary principle" needs to be applied, that ecolabelling must be permitted, that countries should have the right to restrict imports according to how they are processed and that new notions of sovereignty now apply. There is a large body of writing by NGOs about why the WTO is deficient. The key arguments are summarized in Annex 1.

In reality, the debate reduces to whether or not two simple propositions should be accepted. First, trade sanctions should be permitted to enforce environmental policies and secondly, imports should be restricted if they are not processed in a way that meets the domestic environmental standards of the importing country. The WTO is a target because it generally does not permit such trade controls.

The European Union wants to use these measures⁷. It is supported by only a few countries in the WTO but its position reflects the stance of leading environmental NGOs.

Principles adopted in the UN at the Rio Earth Summit in 1992 on trade and environment pose a basic question about the position of the EU. The principles discourage use of trade sanctions to secure international action to improve the environment and urge instead negotiation of international conventions which mandate collective adoption of measures to apply in national law and thereby respect national sovereignty. Why does the EU want the right to use trade coercion to improve the environment instead of collaborating with others to secure mutual consent to new global rules?

⁷ Although it appears to limit this right to cases where such sanctions are provided for in MEAs – it opposes use of unilateral sanctions by the United States.

3. The importance of sound policy

Effective policy derives from following sound principles. When economic instruments are employed to improve the environment, there are most effective when they are directed to the root cause of the degradation and when they have the least distortionary impact on other activities. There is a significant amount of research and literature which points out that the use of trade measures to achieve environmental objectives is poor policy – they are indirect measures and therefore relatively ineffective at securing improvements in the environment. They also they have a significant negative impact since their economic impact is wide. This issue is rarely considered in the trade and environment debate.

A closely related issue also does not receive adequate consideration – what is the appropriate level of environmental management in any economy, particularly developing economies? Economists point out that, like other standards, environmental standards must match the economic capacity in any country. It is rarely environmentally relevant or economically logical to seek to impose industrialized environmental standards in developing economies. Western NGOs, like Greenpeace, however do think it is appropriate for exporting countries to impose environmental standards on developing countries when it comes to management of waste. This is the operating principle of the Basel Convention which Greenpeace promoted.⁸ This is the point of eco labels - to verify that imports meet the environmental standards applied in the domestic economy of the importer.

Trade policy should ensure the economic welfare of countries is maximized. The principles of multilateral trade liberalization which are enshrined in the WTO work to ensure that benefits to countries derive from exploitation of comparative advantage. Using the WTO to achieve non-trade goals is not effective. It weakens the capacity of the WTO to allow countries to optimally realize its core purpose.

Effective policy does not disregard national sovereignty.

⁸ It should be noted as well that a developing country, the “Third World Network” in Malaysia was also a promoter of the Basle Convention.

4. The World Trade Organization

The purpose of the WTO is to enable countries to gain the benefits of an open trading system. There are several provisions in the WTO agreements which deal with environment and facilitate action by governments to protect the environment. There is a reference to sustainable development as one of the general objectives to be served by the WTO in the Marrakesh Agreement which established the WTO. There are provisions in the Agreement on Agriculture and the General Agreement on Trade in Services (GATS). However by far and away the most important provisions as far as environmental issues are concerned are Article XX of the GATT and the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.

Article XX of the GATT

The core agreement of the WTO system is the General Agreement on Tariffs and Trade (GATT). The principal purpose of the GATT was to oblige members to use the same rules to regulate trade and to ensure in particular that there was no discrimination in trade. All international agreements need exemptions clauses. These are the mechanisms that ensure that governments retain the capacity to perform essential functions that might be eroded if the basic rules of the treaty are applied. The most common exemption in most agreements is to preserve freedom of action to protect national security. Article XX specifies what activities are exempt from GATT rules. These exemptions give members very wide latitude to control trade to protect the environment.

Article XX allows members to waive obligations to apply fundamental commitments, particularly non-discrimination, in certain cases. They include protection of national security, protection of morals, preservation of national cultural heritage. Of particular importance is the right to waive the rules in order to protect human, animal, plant health and safety.

Article XX (b) permits restrictions on trade to protect human, animal and plant life health and safety. Article XX (d) permits restrictions on matters not inconsistent with the objectives of the GATT. Article XX (g) also permits restrictions if they complement national programs for the conservation of resources.

This is the basis upon which health and quarantine restrictions are applied to trade in pharmaceuticals, hazardous products, toxic products and products carrying risk of disease, for example. The capacity of governments to prevent the entry of such products into their national territory in this way enables governments to maintain the integrity of national environmental programs in the vast majority of cases.

Of necessity, exemptions clauses must be limited. If they are too wide, they undermine the effect of the principal provisions of the Treaty. Article XX is limited to a few areas. Members are also bound to utilize the exemptions only to the extent that it is necessary and are obliged to ensure they are not disguised restrictions on trade.

The provision relating to conservation of natural resources (Article XX.(g)) appears not to have been drafted with living natural resources in mind, however GATT/WTO panels have stated that it is reasonable that it should be so interpreted.⁹

Experience with use of Article XX of the GATT over many years revealed weaknesses in some provisions, particularly where the latitude to act was so wide that governments used the provisions to secure economic protection. Actions were taken to reduce the amount of discretion governments had to restrict trade.

Preventing abuse – the role of the Agreement on Sanitary and Phytosanitary Measures (SPS).

Many countries used the quarantine provisions to secure economic protection rather than to protect health and safety. The SPS Agreement was negotiated in the Uruguay Round¹⁰ to contain such abuse. It states that if countries base restrictions on trade on recognized international standards,¹¹ the restrictions are deemed as complying with the agreement. Countries could apply other standards, but they were subject to challenge by other WTO members to demonstrate that they were based on science and supported by a risk assessment process.¹² The development of the SPS Agreement coincided with a global trend to shift away from dealing with risk on a “no-risk” basis to “risk management”. The latter approach leads to better use of resources and better enjoyment of benefits.

The requirement that decisions be based on science and a process of risk assessment introduced transparency into decision-making by creating a visible check on abuse of executive discretion. This not only protected the rights of members of the WTO, it also gave assurance to consumers that governments were not abusing their powers.

Preventing abuse II – the role of the Agreement on Technical Barriers to Trade (TBT)

The Agreement on Technical Barriers to Trade (TBT) was negotiated in the Uruguay Round, replacing the Standards Code.¹³ It was designed to reduce the scope for countries to use technical standards as disguised barriers to trade. It obliges members to ensure that national treatment and non-discrimination apply when technical standards are adopted as mandatory regulations¹⁴.

Technical standards with restrictive trade effects are permitted for four “legitimate purposes”, (including standards developed for the protection of the environment, for national security requirements, for the prevention of deceptive practices and for the protection of human health and safety and animal and plant health and life), provided the effect is not more restrictive than necessary to meet one of those objectives, taking into account the risk of non-fulfillment.

⁹ This was stated in the second Tuna/Dolphin panel report, although that report was never adopted and it was restated in the Shrimp/Turtle panel report. *United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R. 12 October 1998.*

¹⁰ The Uruguay Round of Trade Negotiations, 1986-1994.

¹¹ Specifically those set by the International Office of Epizooty (which sets veterinary and animal health standards), the International Plant Protection Convention (which sets standards for plant health and science and Codex Alimentarius (a joint organization of the FAO and WHO which sets standards for human health)

¹² See Articles 2.2, 3.3 and 5

¹³ The Standards Code of 1979 was developed in the Tokyo Round of trade negotiations.

¹⁴ Article 2.1

In assessing that risk, the agreement stipulates that relevant elements of consideration are, inter alia, available scientific and technical information, related processing technology or intended end uses of products.¹⁵

Members are also required to base their standards on those developed by international bodies which are presumed to be in compliance with the Agreement.¹⁶ In other cases, and where measures have a significant impact on trade, parties are obliged to notify the measure and provide opportunities to other WTO members to comment.

Sound regulation, standards and eco-labeling

Making decisions transparent and setting objective criteria by which they could be challenged as provided in the SPS and TBT Agreements is consistent with the doctrine that regulations should be imposed by governments only to protect health and safety. When Governments regulate for other reasons, they interfere in the market and exercise influence which favours some parties in the economy and damages others. There is large body of standards which aim to improve the quality of goods and services and provide information to consumers. Most of these are national standards and are set by national standard setting organizations. A set of international standards is produced by the International Standards Organization. Well-known quality standards developed by that organization include the ISO 9000 series (to improve quality in organizations) and ISO 14000 (to set quality standards to improve environmental management.). These are voluntary standards and in most countries are developed by private organizations.

When Governments adopt these standards and make compliance compulsory, they become official regulations.¹⁷ If a company requires suppliers to comply with specified standards struck by national standards organizations or ISO, this does not constitute a trade barrier. It is a commercial requirement. However when a government stipulates that unless such standards are complied with imports or exports are not permitted, these are trade restrictions that must comply with WTO rules, including the provisions of the SPS and TBT Agreements.

Where eco-labelling systems are not mandated by governments, but are applied by commercial entities for the information of consumers, these are voluntary standards and WTO provisions do not apply.¹⁸ When an eco-label is mandated under government regulation, then the regulation needs to comply with the provisions of the WTO. As shown in the foregoing, the terms of Article XX and of the SPS and TBT agreements make ample provision for use of eco-labels.

¹⁵Articles 2.2

¹⁶ Article 2.4

¹⁷ The WTO Agreement on Technical Barriers to trade differentiates between standards with which compliance is mandatory, termed “technical regulations” and standards with which compliance is not mandatory, termed “standards”.

¹⁸ The Code of Good Practice under the TBT Agreement applies to voluntary standardising bodies and voluntary standards. There is no legal obligation on these bodies to comply with the Code, however there is an obligation on the central government standardising body take all “reasonable measures” to ensure they accept and comply with the Code. (Article 4 and Annex 3)

Production and Process Methods

A complaint about the WTO provisions is that trade restrictions on how a product is produced or processed are not permitted. Challenges under GATT and WTO provisions that US restrictions on imports of tuna in cases where fishing methods did not minimize the incidental kill of dolphin were lost. The general point was that the WTO did not permit one member to restrict trade with another on the basis that they did not apply policies which the first party preferred. Environmentally-based trade bans have been regularly challenged in the WTO. Cases are summarized in Annex 2 The recent dispute over US trade restrictions on imports of shrimp from countries that did not adopt measures to protect migratory turtles has modified this general point. It is not clear how much.

The environmental case is that if one method of processing (such as a method of fishing for tuna) causes environmental damage (high levels of incidental kill of dolphin) then an importer should be able to express preference for the product (tuna) processed in a way that does not cause environmental damage (caught using fishing methods that reduced the incidental kill of dolphin).¹⁹

WTO provisions have generally been interpreted as not allowing trade to be restricted on those grounds. The TBT Agreement recognizes “related processing technology” as a relevant consideration for applying a mandatory technical standard to protect the environment. However this is a limited application and the extent of its meaning has not been tested.

Other environmental provisions

In the Agreement on Agriculture, there is scope for subsidies to protect the environment. This was part of the Agreement on Agriculture which was negotiated in the Uruguay Round. Re-negotiation of that agreement has begun. The European Union has indicated that it wants general provisions to permit trade restrictions on agricultural products on environment grounds. Others, such as members of the Cairns Group coalition of agricultural exporters want to minimize the extent to which such measures can create new grounds for protection of economic interests.

There is a general recognition in the General Agreement on Trade in Services of sustainable development as an objective of the Agreement.

There is clear evidence around the world that payment of subsidies by Governments diminishes the regard in which users of resources hold them. Subsidies to farmers encourage overexploitation of land, subsidies of fertilizers encourage over use, for example causing excessive levels of nitrates in the water table in European Community farmlands, subsidies to forestry and fishery resources result in poor management, and in all these cases, there is environmental degradation.

The WTO Agreement on Subsidies and Countervailing Measures restricts the extent to which governments can pay subsidies. It therefore creates a positive framework to foster sustainable management of resources. It does not apply to subsidies to agriculture which are covered by

¹⁹ Centre for International Environmental Law and Greenpeace International, *Safe Trade in the 21st Century – A Greenpeace Briefing Kit*, September 1999, www.greenpeace.org accessed August 2001. See also footnote 6.

the Agreement on Agriculture. Much higher levels of subsidies are permitted in agriculture. There is a commitment by member of the WTO to negotiate further reductions.

Conclusion

There are no cases where it can be said WTO procedures prevent effective protection or management of any environmental asset, except where the tools to protect the environment are either a trade sanction or a restriction on trade because the exporter does not employ the domestic environmental standards of the importer.

5. The United Nations System

The UN system fosters international environmental agreements. It established a global umbrella for world environmental action at the UNCED session in 1992 and established the UN Commission on Sustainable Development to supervise the program. It will be reviewed in Johannesburg in September 2002. A UN Environment Program (UNEP) was also established in ECOSOC, a general assembly organ. Its primary business is to administer several Multilateral Environment Agreements (MEAs).

The Multilateral Environment Agreements

There are six key MEAs. They protect endangered species (CITES²⁰), restrict international trade in hazardous waste (Basel²¹), protect the ozone layer (Montreal²²), restrict trade in certain GMOs (Cartegena²³), and restrict use and trade of hazardous chemicals (PIC and POPs²⁴). (The Kyoto Protocol on Greenhouse gases is more important than any of the six MEAs but it does not have trade provisions although compliance mechanisms are being negotiated.)

Most of these agreements have measures which permit trade coercion and discrimination. The Agreement on Prior Informed Consent (PIC) is the only one which doesn't. Cartegena mandates restrictions without scientific justification. Most contain provisions which create conflicts with the provisions of the WTO. Most of the MEAs arise from initiatives from Northern Europe. Summaries of the key provisions of the agreements follow.

Protecting Wildlife

CITES is the original MEA with discriminatory trade provisions. Its primary provisions are to list species which are endangered or threatened and commit countries not to permit trade in those species. The Convention obliges parties not to trade with non-parties. The Convention was negotiated in the midst of an active debate within the conservation community and WWF in particular about the effectiveness of trade bans for conservation purposes.²⁵ The debate continues, with Zimbabwe in recent years seeking a waiver from the trade ban on elephant ivory in order to sell down ivory stocks because domestic conservation programs were so successful that herds of elephant had to be culled.

²⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora

²¹ Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal

²² Montreal Protocol on Substances that Deplete the Ozone Layer and the Vienna Convention for the Protection of the Ozone Layer

²³ Cartegena Protocol on Biosafety to the Convention on Biological Diversity

²⁴ Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals in International Trade, Stockholm Convention on Persistent Organic Pollutants

²⁵ According to one historian of the environmental movement, WWF offices in Europe opposed trade bans in ivory on the grounds they were ineffective but were overruled by WWF US who considered their capacity to raise funds in the US would be compromised by acceptance of hunting of elephants. (See F.Pearce, Green Warriors, Bodley Head, 1990)

Restoring the Ozone layer

The Montreal Convention and Vienna Protocol apply to the production and consumption of fluorocarbons to protect and restore the Ozone layer. They also oblige parties not to trade in the products covered by the convention with non-parties. There has not been much controversy over these bans, but there is debate about the necessity or effectiveness of the trade bans for the purpose of the convention.

Preventing dumping of hazardous waste

The Basel Convention specifies what products are hazardous then obliges parties to restrain exports until they are satisfied the environmental standards in the export markets are satisfactory. It also requires parties to create national inventories of hazardous products. The Convention obliges parties not trade on products covered by the Agreement with non-parties. There is a Protocol to the Convention (not yet in effect) which bans trade between industrialized economy parties and developing economy parties. All three provisions create circumstances where parties can discriminate among trading partners. There are doubts about the environmental effectiveness of the trade controls but to date, no country has chosen to challenge them under WTO provisions. Prevention of dumping of toxic waste became a cause celebre after European companies were found dumping toxic waste in West African countries. Greenpeace used the case to advance its philosophy that every country should be responsible for managing its own waste. The response was the Basel Convention which shifted responsibility for controlling imports of hazardous substances from the importer to the exporter.

Controlling trade in Chemicals

The Rotterdam Convention on Persistent Organic Pollutants (POPs) lists several chemicals the production and use of which is banned. (DDT is one, but developing countries have the right to continue to use it because of its importance in eradication of Malaria). Parties are obliged to ban trade in those products with non-parties. The Stockholm Convention on Prior Informed Consent (PIC) requires countries to seek prior consent from governments in export markets before exporting certain chemicals. The PIC convention is consistent with WTO rules, and because of the rights members of the WTO have to control imports on health and safety grounds, its provisions seem superfluous.

Controlling GMOs

The Cartagena Protocol to the Biodiversity Convention obliges parties to report releases of Living Modified Organisms (LMOs) to a central clearing house. It also sets up prior informed consent procedures before exports of non-food LMOs can be undertaken. It gives importers unhindered rights to restrict imports of products containing LMOs.

Protecting Biodiversity

It has become common recently to make “protection of biodiversity” a new, leading environmental goal. The Biodiversity Convention which was finalized at UNCED sets out national policies countries should adopt to protect biodiversity. The proposition has lately been invoked to support the case to alter intellectual property law, but it introduces no new

elements. Similarly it has entered the rhetoric of the trade and environment debate, but there is no cogent case that trade is intrinsically related to the issue of protecting biodiversity.

Assessing the effectiveness of trade provisions in MEAs

While the impact and effectiveness of WTO agreements receive extensive scrutiny, the analysis of the effectiveness of the MEAs is limited and what there is, is given little attention. There is a considerable body of literature on the inefficiency of the use of trade measures to protect the environment and several studies on the ineffectiveness of the trade measures of the MEAs in question. A comprehensive list of them is set out in the Bibliography to this report. The most comprehensive official work has been conducted by the OECD and UNCTAD.

In 1999, the OECD Secretariat reviewed the trade measures in MEAs.²⁶ It questioned the effectiveness of the trade measures and in its conclusions it recommended that they be reviewed and revised. In 2000, UNCTAD published the results of a comprehensive analysis of the effectiveness and impact of Basel, CITES and Montreal on Indonesia, the Philippines and Thailand following joint research projects with local experts in each country.²⁷ The studies showed that while the trade provisions might have been effective in coercing some countries to adhere to the agreements, their impact on improving the environment was low and that the most important measures in the Conventions were those encouraging members to develop national measures to raise domestic environmental standards.

A summary of the provisions of the MEAs, the trade provisions in them and their general impact on protection of the environments is set out in Annex 3.

UNCED Trade and Environment Principles

Members of the UN are aware of the conflict of obligations between the MEAs and the WTO and efforts have been made to address the problem. The most comprehensive is the set of principles on trade and environment which were adopted at the UN Conference on Environment and Development (the Rio Earth Summit) in 1992.

The principles which were adopted as part of the Agenda 21, the program adopted by the Conference, state that measures to open up international trade and to protect the environment should be “mutually supportive”. They enjoin members of the UN to respect national sovereignty when addressing trade and environment issues, avoid using trade sanctions to protect the environment and urge that international collaboration to protect the environment should be in the form of international agreements which are negotiated on a consensual basis. A compilation of the principles is set out in Annex 4.

It is notable that since the Principles were adopted, new provisions have been negotiated in MEAs which disregard them, in particular the Protocol to the Basel Convention which restricts trade between industrialized and developing parties to the Convention, the Cartagena Protocol which creates new rights to restrict trade which clearly undermine WTO provisions

²⁶ OECD, *Trade Measures in Multilateral Environmental Agreements*, OECD, 1999.

²⁷ Jha, Veena and Hoffman, Ulrich (eds), *Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies*, United Nations Conference on Trade and Development, 2000

and the Stockholm Convention on Persistent Organic Pollutants which requires members to restrict exports with non-parties.

Some members of the UN are clearly aware the UNCED principles are being breached. Proposals²⁸ made during the negotiation of the conventions to insert “savings clauses” in the Cartagena Protocol and the Stockholm Convention which would have preserved the rights of members of the WTO who adhered to the instruments were rejected by the EU. This is also appreciated by NGOs. In March 2002, the WWF issued a statement²⁹ urging members of the UN at the World Conference on Sustainable Development (WSSD) to be held in Johannesburg in September 2002 to ensure they took no action that would result in trade measures in the MEAs being undermined by WTO provisions. In other words, the WWF is urging that the Rio principles on trade and environment be ignored.

The role of UNEP

UNEP is the most active program in the UN on environment issues. The Commission on Sustainable Development is responsible for overseeing the implementation of the Agenda 21 program. However most of the initiatives for new environmental agreements come through UNEP.

The work of UNEP seems to be strongly influenced by the environmental policies of Northern European members of the UN. UNEP initiatives frequently reflect the policy interest of these countries. Funding for the secretariats of the various environmental agreements which UNEP administers is often provided by Trust Funds which are principally financed by these countries. The World Bank Global Environment Facility also funds activities of the Secretariats of MEAs.

Collaboration between UNEP and NGO environmental organizations is close. For example UNEP has published a Handbook on Trade and Environment (see Bibliography) jointly with the International Institute of Sustainable Development (IISD) a Canadian-based NGO. It argues the EU/NGO case on trade and environment. The principal author, Konrad von Moltke, is a senior fellow of the IISD, has had long and close association with the WWF and has been a long standing critic and advocate of change to the WTO.

²⁸ by Australia among others.

²⁹ see www.panda.org/resources/programmes/trade/wssdmar2002.pdf

6. The conflict between MEAs and the WTO

One presumption has dominated approaches to the problem of conflicts between obligations in Multilateral Environment Agreements and those of the WTO Agreements. It is that there is a case to make adjustments to the WTO to remove the basis of the conflict. The presumption should be tested. Does it address the root cause of the problem? The WTO system does not impede effective management of the environment at large. The conflict arises as a result of provisions in only a few multilateral environmental agreements (MEAs).

The Problem - the trade provisions of MEAs

Only a handful of MEAs create these problems although it is often asserted that there are up to 200 international treaties to protect the environment. The treaties which are at the core of the problem are those which either include trade sanctions or oblige importers to apply environmental policies stipulated by the importer.

These represent a considerable challenge to the norms of international treaty-making of which not nearly enough has been made. It is a recent innovation in international treaty-making to include provisions to impose sanctions on countries that do not adhere to international treaties. This has not been the norm in international law and decidedly not since the establishment of the United Nations. A basic right of the UN Charter is that each sovereign government has the right not to be coerced by others, unless the right is accorded under the procedures of the United Nations. This was no doubt why all members of the UN at the Rio Summit re-affirmed respect for national sovereignty as a fundamental principle to guide all activity concerning trade and environment.

The trend to adopt provisions in conventions to impose sanctions on non-parties and the move to create rights to restrict trade unless the domestic policies of trading partners are satisfactory has the effect of widening the political right of governments to restrict trade when the trend in the WTO multilateral trading system is to narrow this right by enhancing the role of legal processes to support the system, in particular through emphasis on objective criteria, notably sound science, to justify restrictions which are exceptions to the basic rules of the WTO.

The disregard for national sovereignty is at the core of the conflict of obligations between the MEAs and the WTO. Like most other international treaties, the WTO respects the principle of national sovereignty. Members may only restrict trade with other members on terms that are commonly agreed. Members may not independently set conditions on trade with other members, whether it is the United States acting unilaterally, as it has tried to do on a number of occasions, or whether it is a group of members acting collectively as parties to MEAs with discriminatory trade provisions.

The point that the trade provisions of the MEAs erode respect for national sovereignty is often obfuscated. Representatives of the European Community have for a number of years chosen to differentiate between unilateral actions to restrict trade on environmental grounds and collective action, such as by a group of states as members of an MEA, arguing that the provision in the MEA is somehow less of a problem because a number of states impose a

discriminatory trade measure, rather just one.³⁰ There may be comfort in numbers, but the disregard of the principle of respect for national sovereignty is the same.

The environmentalist justification for a new norm

The arguments that are put to justify creation of these new trade rights to protect the environment are that special action is needed to deal with environmental degradation of the global commons because they are beyond the scope of any single national authority; and that traditional notions of the sovereignty of the nation state are eroding and that new forms of international governance which provide for extraterritorial assertion of jurisdiction are emerging.

The case that countries are justified in taking action to protect the global commons has more superficial attraction. Who is responsible for the ozone layer, the atmosphere, migratory species and the oceans? If some nations want to take action and others do not, "do they not have a moral right to act in the global good?", the argument goes. There is nothing new in this. We have faced other issues affecting the global good which is beyond the jurisdiction of any one country – political freedom, global epidemics – but until now have not accepted that these matters are of such moment that they create a right for states or groups of states to coerce others to adopt the same point of view. It is arguable that health problems in the global commons are more important than any environmental problem sought to be addressed in the MEAs under consideration. None offer the grim prospect of the death toll likely from the HIV/AIDS pandemic.

It is not true that the global commons are beyond management of nation states. It is the actions of citizens of nations which cause environmental degradation of the global commons. Governments can collectively legislate to impose the same restrictions on all nationals to act in the same way to protect the environment in the global common.³¹ This is not easy and never has been. The contention that coercive action is necessary is saying no more than that global consensus is unattainable, or more specifically that the State taking coercive action

³⁰ At the WTO High Level Seminar on Trade and Environment in Geneva in March 1999, the EU circulated a paper entitled "Message of the European Community to the World Trade Organization High Level Symposium on Trade and Environment". It argues there is room for use of trade measures in MEAs and seeks to distinguish between measures in MEAs and unilateral measures. "The fact that such measures (trade measures in MEAs) were negotiated and agreed in a multilateral context is in itself a guarantee against unilateral action and that they will not be used for protectionist purposes". It goes on to note "Many of the conceptual difficulties we are facing are due to the fact that the GATT Article XX was designed to deal principally with unilateral measures." This is an uncommon interpretation.

³¹ The states in the Eastern and Tropical Pacific have adopted a convention in which they agree to require national fishing fleets to adopt fishing practices which reduce the incidental kill of dolphin. This is an action in which nations act collectively to protect the global common of dolphin in that region. The national sovereignty of each state is respected. It contrasts with the unilateral trade bans of the US which banned imports of tuna from Mexico and other countries which did not apply the same fishing restrictions on their fishing fleets that the US imposed on its own to protect dolphin. The US action was coercion and the trade ban was ruled by two GATT panels as a breach of WTO rules. Defenders of the US ban point to the pressure the ban put on countries in the region to agree to negotiate a convention. The pressure was undeniable. The US has the right to exert pressure, but there is a high cost in using coercion (it disregards the right of national sovereignty) and a higher cost in using a trade ban given the international welfare benefit of not restricting trade for political purposes. If coercion is to be used, why use a trade ban? Why not ban movement of nationals or foreign investment? And why use coercion at all? Why not offer incentives – grants, development assistance, soft loans? There is no justification for resorting to trade bans other than that they are effective in generating a political response.

could not secure consensus to its preferred position. This is simply a statement of political preference, namely that we should take coercive action on the environment whereas we would not over other global commons issues (such as human rights or global epidemics) because we believe that the environment is more important.

The argument that national sovereignty can be disregarded because a new form of international governance is emerging can be easily dispatched. When members of the UN decide to amend the UN Charter to recognize this new form of sovereignty, it will be a usable reference point for governments in international law. Until then, it is a subject for the academia and the lawyers, no matter how often it is given currency in discussion.

The environmental value of the trade measures in the MEAS

The presumption that the WTO should be amended to legitimize the trade provisions in the MEAs implies that they have a high environmental value. This is not the case. In the previous section the point is made that the environmental value of the trade measures in the MEA has been rated as low. The amount of environmental degradation which these MEAs seek to constrain with the trade provisions is also small.

The environmental consequences of trade in hazardous materials which the Basel Convention sought to tackle was insignificant³². In the case of fluorocarbons, (production of which the Vienna and Montreal instruments aimed to constrain) and living modified organisms (trade in which the Cartagena Protocol sought restraint) the containment of trade is of minor importance to managing the environmental consequences of the production and consumption of these products. Global trade in Living Modified Organisms is small.³³ In the case of endangered species, there is plenty of evidence to suggest the trade bans have been ineffective and that preservation of endangered species depends far more on effective domestic policies. The environmental footprint of the trade measures in the MEAs concerned is very small.

The experience with the MEAs (see the analysis in Annex 3) clearly shows how unintended effects arise when mechanisms which have only an indirect effect on the activity of concern are used to try to curb that activity. In all cases measures which directly worked on production and consumption would be more effective. All these agreements would be improved instruments for environmental management if the discriminatory trade provisions in them were removed. All demonstrate cases where discriminatory trade provisions are counterproductive for managing the environment.

The root of the problem

The source of the conflict between provisions of the MEAs and the WTO agreements is the insertion of provisions in the MEAs which seek create rights to use trade sanctions and restrict imports if the importer's domestic environmental standards are not acceptable. These

³² The environmental problem that triggered the Basel Convention was dumping of toxic waste in a few countries in West Africa. It was unpleasant, but in no way can it be considered as a major environmental problem.

³³ Environmentalists will contend that unintended introduction of LMOs which are not ready for release could have devastating consequences. All WTO members already had the authority to block the import of anything they considered a threat to health and safety or flora and fauna. The Cartagena Protocol does create a new right to restrict trade, just on more oblique grounds. The key issue for environmental management of the LMOs/GMOs is under what conditions are LMOs or GMOs initially released in any country.

provisions conflict with the trade and environment principles adopted by UNCED and breach the principle of respect for national sovereignty.

7. The precautionary principle

It is policy of the European Union to apply the precautionary principle to regulations. It stated before Doha it wanted the principle more widely respected in the WTO, but it is reported that after Doha, Pascal Lamy, the EU Commissioner for Trade, informed Robert Zoellick, the US Special Trade Representative that the EU would not pursue this goal in the Doha negotiations.

There is no standard definition of the precautionary principle. The philosophy behind the concept is to apply a “no risk” standard when assessing risk rather than a standard for managing risk. Since the Uruguay Round, the WTO has adopted standards for managing risk. As noted in Section 4, in the Agreement on Sanitary and Phytosanitary Measures (SPS) as well as the Agreement on Technical Barriers to Trade (TBT), the WTO stipulates that scientific assessments and evidence of risk assessment should underpin decisions to restrict products on technical grounds.

The SPS agreement does mandate restrictions on precautionary grounds, but they are qualified as preliminary and temporary measures which are limited by length of the time they may be applied.

The most stringent expression of the precautionary principle can be found in the Cartagena Biosafety Protocol. The terms which justify trade restrictions based on it are so wide that political discretion has to be exercised to take a decision. The protocol as well expressly creates rights to restrict imports without scientific justification. These provisions conflict fundamentally with the science-based and managed risk principles in the WTO SPS agreement. This is understood by NGOS³⁴ as well as the EU (see Section 10) whose officials regularly cite the version of the precautionary principle in the Protocol as a desirable standard.

³⁴ See Lori Wallach, Whose Trade Organization, Public Citizen, Washington 1999. The author notes the importance of completing the Biosafety Protocol in order to weaken the provisions of the SPS Agreement.

8. Ecolabelling

The EU has argued for some time that WTO rules need to be adjusted to enable use of ecolabels. An ecolabel is a means of verifying that the import has been made according to processes which meet the environmental standards of the importing country. The WTO does not permit restrictions on the basis of how a product is made. This is fundamental to the capacity of the WTO to enable countries to develop and trade in the world economy on the basis of their comparative advantage.

The conventional path for the EU to follow if it wanted other countries to adopt higher environmental standards would be to propose that an international convention be negotiated which struck such standards which each country would then apply in its national law. The EU has never proposed this. Even if it did, most countries would be unlikely to agree.

The EU has announced it intends to adopt “whole of lifecycle” environmental regulations across EU industry. This was announced in its “Integrated Product Policy” which was released in March 2001. This requires all producers and major importers to meet the cost of the environmental impact of their products from the time it is made until it is finally disposed of. The environmental and economic merits of this type of regulation are widely criticized by free market economists. This is not the place to discuss them, save to note the EU clearly intends to impose these standards on imports. It does not take this approach in other comparable situations. The EU, like other industrialized economies, applies labor standards which are much higher and more costly than developing economies, yet it absorbs these costs and does not attempt to restrict imports unless importers meet those standards. Why is environment different?

The WTO does not permit this for any standards concerning how products are made – labor, environmental or otherwise – so it is clear to see why the EU wants WTO rules changed to permit use of ecolabels.

A fundamental economic principle is at stake here. It is widely accepted that economic standards should relate to the level of development of economies. The same applies to environment standards. The EU approach has the effect of using trade leverage to force other countries to adopt its preferred environmental standards. One must assume the effect is intended.

9. Trade and environment in bilateral and regional agreements and fora

Trade and the environment are treated differently in regional trade agreements and forums throughout the Asia Pacific region. ‘Environment’ tends to be treated separately from trade provisions in regional trade agreements and free trade areas, if included at all. NAFTA and ANZCERTA are examples of this. There are some exceptions, such as the free trade agreement between the US and Jordan. Environment tends not to be a mainstream issue in regional forums such as ASEAN and APEC which focus primarily on economic cooperation and trade liberalisation. Environmental concerns are generally considered under the auspices of sustainable development.

Free trade agreements, as instruments creating legally binding commitments, should be distinguished from regional forums, such as APEC, that promote political or policy goals through cooperation and usually non-binding targets.

A summary of the environment and trade provisions, and their intersection, in relevant free trade agreements and regional forums in the Asia Pacific Region is at Annex 5. The summary includes the following free trade agreements: NAFTA, CER, US/Jordan FTA as well as Canada/Chile FTA. ASEAN and APEC are also included as regional forums.

The relevant environment provisions in trade agreements and the treatment of trade and environment in regional forums is set out in more detail below.

Free Trade Agreements

NAFTA

The North American Free Trade Agreement between the US, Canada and Mexico does not deal exhaustively with the environment but does include some environmental provisions. It allows general exceptions to trade rules for some environmental reasons, as they appear in the GATT. For example, for the protection of human, animal or plant life or health and for the conservation of exhaustible resources that complement domestic conservation programs. The latter exception is expressly interpreted in NAFTA to include both living and non-living exhaustible natural resources³⁵.

NAFTA also affirms the rights of the parties under certain international and bilateral environmental agreements, including the right to use discriminatory trade measures³⁶. These rights prevail over obligations in NAFTA in the event of an inconsistency. Potentially, market access rights granted under NAFTA could be undermined by rights to restrict trade according to an MEA, where the NAFTA members are parties to the MEA. This contrasts with the GATT and other agreements, which are subsumed by NAFTA obligations³⁷.

³⁵ Article 2101: General Exceptions

³⁶ Article 104. This applies to the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on Substances that Deplete the Ozone layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal and bilateral agreements between Canada and the US on the Transboundary Movement of Hazardous Wastes and the agreement between the US and Mexico on the Cooperation for the Protection and Improvement of the Environment in the Border Area.

³⁷ Article 103. In the event of any inconsistency between NAFTA and the GATT or any other agreement to which members are a party, NAFTA will prevail.

The investment section of the FTA also contains some weak environmental provisions. Parties are not prevented from taking measures to ensure investment activities within their territory are undertaken in an environmentally sensitive way. “Measures” must be consistent with other investment obligations in the agreement³⁸. Parties are also “encouraged” not to relax environmental measures to encourage investment. Where this occurs, the remedy appears to be consultation between the parties³⁹.

A separate side Agreement on Environmental Cooperation deals with the environment in more detail. It does not include any trade provisions and does not affect any obligations in NAFTA, but is complementary to it.

The Agreement reaffirms, in its preamble, the sovereign right of states to exploit their own natural resources pursuant to their environment and development policies. It provides for each party to establish its own levels of domestic environmental protection, policies and priorities, maintaining a high level of protection. It imposes general obligations in relation to reporting and publications of environmental laws and regulations, emergency environmental measures and promotion of environmental education, science and technology. It also requires governments to adequately enforce environmental laws and regulations, to set up administrative and judicial procedures and provide non-trade remedies for non-compliance.

There is a weak environmental obligation affecting trade. It requires parties to “consider” prohibiting the export to other parties of pesticides and toxic substances that are banned in that party’s territory⁴⁰. Any measures prohibiting or severely restricting trade must be notified to the relevant party through an appropriate international organisation.

The Side Agreement also expressly recognises existing rights and obligations of parties under Multilateral Environment Agreements⁴¹. This means it provides deference to trade provisions in MEAs that allow for trade sanctions for environmental purposes⁴².

US/Jordan Bilateral FTA

The bilateral trade agreement between the US and Jordan however, includes environment in the main agreement⁴³. It permits environmental measures that may affect trade. It recognises the rights of each party to establish their own level of domestic environmental protection but imposes obligations to ensure domestic laws provide for a high level of environmental protection. It grants a “right”⁴⁴ to parties to enforce their environmental laws in a way that can affect trade. This “right” can be enforced through the dispute settlement mechanisms in

³⁸ Article 1114.1

³⁹ Article 1114.2

⁴⁰ Article 2.3

⁴¹ Article 40

⁴² Including the Convention on Trade in Endangered Species (CITES), the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, The Montreal Protocol on Substances that Deplete the Ozone Layer and The Convention on Persistent Organic Pollutants.

⁴³ Article 5

⁴⁴ Article 5.3. This is framed in the Agreement as an obligation to ensure that a member doesn’t “fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties.”

the agreement. Remedies for non-compliance include “any appropriate or commensurate measures” where consultations and recommendations fail. This presumably allows trade sanctions in the event of non-compliance with the environmental obligations that are not confined to those agreed in MEAs.

ANZCERTA

The Australia New Zealand Closer Economic Relations Trade Agreement does not deal specifically with environment at all, but allows some exceptions to trade commitments for environmental reasons akin to the WTO. As in NAFTA, these provisions mirror Article XX of the GATT.

Canada/Chile FTA

Environmental provisions in the Chile/Canada Free Trade Agreement mirror those in NAFTA. Trade remedies under certain multilateral environmental and conservation agreements are preserved under a provision in the main agreement⁴⁵. It also allows for GATT general environmental exceptions as in NAFTA⁴⁶. The investment section of the FTA also contains environmental provisions similar to NAFTA that allow for measures consistent with the FTA to ensure investment is environmentally sound⁴⁷ and which encourage parties to avoid relaxing environmental measures to encourage investment⁴⁸.

Also as in NAFTA, environment is separately dealt with in a side Agreement on Environmental Cooperation. This imposes similar general obligations⁴⁹, allows countries to maintain their own level of protection, provided it is a high level, and requires the establishment and enforcement of this, including remedies. Like NAFTA, it has a weak provision on preventing trade in banned toxic substances and pesticides between the parties.

Mexico/EU FTA

The Mexico EU Free Trade Agreement does not contain any specific environmental provisions or side agreements. It does, however, contain general exceptions to trade obligations akin to those in the GATT Article XX.

The Agreement also allows safeguard measures for precautionary reasons. A safeguard measure is a measure that a country may take in response to increased imports of a product from another country in such quantities that the imports damage the domestic industry or cause “serious injury” to it. Safeguard measures are usually permitted to be taken for a limited period of time, or whilst damage is being caused, established through price and

⁴⁵ Article A-04 states that certain environmental agreements will prevail where there is an inconsistency, between NAFTA and the former, to the extent of the inconsistency. It includes 3 MEAs: CITES, the Montreal Protocol and Basel.

⁴⁶ Article O-01

⁴⁷ Article G-14.2

⁴⁸ Article G-14.1. As in NAFTA, the remedy for measures that may relax environmental measures in order to encourage investment appears to be consultation between the parties.

⁴⁹ In relation to environmental reporting, publication, education, information provision and environmental impact assessments.

economic information and examination. The safeguard clause⁵⁰ in the Mexico/EU FTA permits a party, in “exceptional and critical circumstances requiring immediate action”, to take “precautionary measures necessary to deal with the situation”. This applies in cases where prior examination or information is not possible. It therefore allows parties to impose duties or import restrictions as safeguard measures on the basis of the precautionary principle, rather than established evidence of damage. Parties may also adopt “precautionary measures necessary”, such as export restrictions, in the case of a critical shortage of foodstuffs or other essential products, in “exceptional and critical circumstances”⁵¹. These measures are not limited in duration, but are to be reviewed periodically “with a view to establishing a timetable for their elimination as soon a circumstances permit.”

Regional Forums

APEC

APEC is a regional forum which encompasses a range of activities to foster economic integration which include sustainable development. A core focus is on liberalisation of trade and investment, trade facilitation and a range of other trade-related issues such as intellectual property rights, customs procedures, competition policy and government procurement for example. The Bogor Declaration of 1994 sets out APEC’s goals towards free trade and investment in the Asia Pacific region by 2020. It does not create legally binding commitments for members but promotes fulfilment of policy goals through non-binding targets and cooperative work programs. Programs and goals for trade liberalisation are discussed separately to issues of sustainable development. Environmental considerations are discussed in the context of sustainable development. They do not include trade measures and are mostly related to developing strategies for cleaner production tools and technologies, environmental managements systems and educational awareness. There is also a focus on capacity building and technical assistance for the least developed economies.

ASEAN

ASEAN has no specific mandate related to the environment. AFTA deals with trade and trade facilitation measures. It seeks to eliminate tariff and non-tariff barriers among member countries through progressive reductions of tariffs, elimination of import duties and trade facilitation measures. It provides for binding commitments towards trade liberalisation. Lengthened implementation periods for commitments have been granted to several of the more recent members of AFTA. The Hanoi Plan of Action sets out ASEAN’s policy goals for this.

⁵⁰ Article 15. See Article 15.8(b) and (c)

⁵¹ Article 16.

10. Positions of the leading industrialized economies

There are significant differences towards trade and environment issues among industrialized economies. The European Community has become the leading advocate of introduction of new provisions on the environment in the WTO. Its position is generally coherent, reflecting the broad direction of environmental regulation in the EU, for example adoption of the precautionary principle and “whole of life cycle” regulation, and reflects strong domestic consumer and economic interests. The EU has made it clear it wants new rights based on environmental grounds to protect farming. The EU opposes exercise by the US of unilateral trade sanctions, but supports the discriminatory provisions in MEAs and seeks their legitimization in the WTO. It is generally supported by Switzerland.

The United States does not have a coherent position. It acts to defend measures in US law, such as unilateral trade restrictions (like the bans on imports of tuna and shrimp) in the disputes procedures. As a matter of principle it does not support legitimization of discriminatory trade provisions in MEAs. However, the Clinton Administration gave weak support to the EU position to defend discriminatory provisions in the MEAs. The US has given primacy to provisions of MEAs over trade provisions in NAFTA and included environmental trade provisions in its free trade agreement with Jordan. This is the first free trade agreement anywhere that allows trade sanctions to be employed to implement environment objectives.⁵² The US is not a party to the Basel Convention and will not sign the Cartagena Protocol because it is not party to the parent Biodiversity Convention. It is generally opposed to attempts by the EU to accommodate consumer and economic interests under the environment cause and opposes the EU approach to environmental regulation.⁵³

New Zealand is closer to the EU position. Canada, Japan and Australia oppose use by the US of unilateral environmental trade sanctions but are generally closer to the US on the general issues. They espouse opposition to discriminatory trade measures in MEAs, but to date have acceded to the key MEAs.

An analysis of the positions of industrialized economies on trade and environment issues is set out in Annex 5.

⁵² The Bush Administration did not like the environment provision in the Jordan FTA, but in the wake of the September 11 terrorist attack, allowed the Agreement to be passed through Congress.

⁵³ It needs to be noted that continuity of policy is not a feature of public policy in the US. The Republican Administration elected in 2000 is not sympathetic to linkage of environment to trade issues.

11. Future Directions

The current situation has arisen because the EU seems determined to press for changes to WTO rules to legitimize use of trade sanctions (not necessarily in all cases, but certainly those included in MEAs) and to secure the right to restrict imports if exporting countries do not apply environmental standards acceptable to the EU, either by adoption of the right to apply the precautionary principle in regulation of trade or securing the right to use ecolabels to restrict imports.

While the overwhelming majority of members of the WTO are opposed to changing the WTO in the way the EU proposes, the EU and its members as well as a number of developing countries are continuing to promote trade sanctions and use of the precautionary principle in MEAs and in other fora. The EU has been insisting on adoption of the precautionary principle in Codex Alimentarius, the joint body of the FAO and WHO which sets international food standards to protect human health.

The trade effect of these issues to date has not been economically important. Of the provisions in existing MEAs, perhaps the Cartagena Protocol has the greatest implications for trade. It is highly likely that within ten years there will be GMO variants of many important agricultural commodities. Those countries who are most concerned about the implications of the open rights to restrict trade in Cartagena are large agricultural commodity exporters (the US – who are anyway not eligible to sign because they are not a party to the parent convention, the Convention on Biodiversity – Argentina, Australia and Brazil).

It would also be important if the EU succeeded in having Codex recognize the precautionary principle. Since Codex is one of the international standard-setting bodies recognized in the WTO Sanitary and Phytosanitary Agreement, evidently such a development would further erode the principle of basing decisions for regulation of food to protect human health on scientific principles.

The EU and European NGOs appear resolved to continue to create new trade rights in MEAs. A set of principles to manage “Alien Invasive Species” was adopted by the meeting of parties to the Biodiversity Convention in April 2002. There was opposition from several countries including Australia and Brazil to the articulation of the precautionary principle and general advocacy of using trade and quarantine barriers to control these products. This proposal is an initiative of IUCN (the sister organization to WWF) and was promoted by the African Group. Adoption of these principles is a typical precursor towards the adoption of a new MEA.

Other areas in which the EU and NGOs are keen to see further international environmental regulation are regulation of heavy metals, chemicals and forests. The WWF is also sponsoring private sector based environmental standards to be adopted as voluntary codes. It has established the Forest Stewardship Council and the Marine Stewardship Council and is working on proposals for a Mining Stewardship Council. While not declared policy of WWF, other environmental groups see these activities as setting new standards which governments could later adopt as regulations. This could not happen unless changes were made to the WTO to permit ecolabels. It is noted that the WWF is one of the strongest supporters of the EU position in the WTO.

The most important issue where trade and environment issues might clash is climate change. Entry into force of the Kyoto Protocol to restrict greenhouse gases is imminent. Some industrialized economies which are important energy producers and consumers (the US and Australia) have refused to ratify the Protocol. When it comes into effect, the industrialized signatories (EU, Japan and Canada, if it ratifies) will be obliged to increase energy costs to reduce greenhouse omissions. This will create tension in international trade because those who do not raise energy costs may well acquire a competitive advantage in world trade. If the EU is unwilling to carry the cost of whole of life environmental regulation, will it be willing to carry alone the cost of increasing energy costs to reduce greenhouse gases? (As a footnote, it should also be a matter for debate (although it is not) how long the EU will accept higher domestic energy costs to reduce greenhouse gas emissions while developing economies which are major producers of greenhouse gases will not – they are not obliged to do so under the Kyoto Protocol.)

Think tanks in Europe for some time have toyed with the idea of proposing trade sanctions to enforce Kyoto obligations. The Shrimp Turtle decision in the WTO has left some wondering if that sets a precedent that the EU could follow by employing unilateral trade sanctions against imports which were greenhouse unfriendly (products produced with energy which generated greenhouse gases) and justified on the grounds that the sanctions support a domestic program to conserve an exhaustible natural resource. (This was the justification for allowing the US to maintain trade sanctions against certain shrimp importers) Legal analysts caution about drawing conclusions about what set of precedent the Shrimp/turtle decision sets.

However the question of tougher compliance in MEAs is on the table in UNEP. A general set of proposals to strengthen across the board compliance of MEAs has been adopted in UNEP. NGOs are increasingly focusing on the question of compliance and governance in MEAs.⁵⁴

Finally, if the patterns of behaviour in the past are any guide, it should be reasonably anticipated that the EU or Northern European members will seek to extend the ambit of existing MEAs. For example, once the Cartagena Protocol comes into effect (this now seems likely), it would not be surprising if a Protocol to it was proposed which sought to extend its provisions to all GMOs, not just Living Modified Organisms.

⁵⁴ A paper on this issue has recently been jointly prepared by WWF and the Centre for International Environmental Law in Geneva.

12. Addressing the problem

There is no disagreement that the clash of obligations in the MEAs and the WTO is undesirable. It creates conflict between the jurisdictions. This weakens each. It also generates political problems. Each time an environmental trade measure is ruled to be inconsistent with WTO rules, it generates opposition to the multilateral trading system from environmentalists. It raises questions about whether or not the WTO disputes system should rule on whether MEAs with discriminatory trade provisions are allowable or acceptable. This is undesirable. The business of the WTO is trade, not environment. Neither the trade nor the environment community wants the WTO standing as judge over environmental agreements.

If MEAs with discriminatory trade provisions continue to proliferate, a new norm in international law will start to emerge which justifies discriminatory measures. This would undermine the authority and effectiveness of the non-discrimination principle in the WTO. Furthermore, there will be proliferation of poor international environmental measures. It is clear that trade measures are poor instruments for environmental management.

The challenge posed by the Cartagena Protocol has another dimension. WTO members who adhere that Agreement will diminish their right under WTO rules to demand that trading partners justify decisions to block imports of products containing Living Modified Organisms with science and processes of risk assessment. That is their prerogative. But it poses a question for a number of Governments. In the WTO most governments oppose use of the precautionary principle and assertion of trade controls over non-parties. Yet many of the same governments, this time represented by environment officials, in the Conference of Parties of members of the UN Biodiversity Convention, support such measures in the Cartagena Biosafety Protocol. Environment officials are taking positions which diminish trade rights. Trade officials might be opposing such measures in the WTO, but effectively environment officials are rewriting trade policy in environmental fora. Governments usually do not pursue contrary policies. The approach of EU governments to trade and environment issues in trade and environment is clearly consistent. They clearly favour the assertion of new trade rights in the MEAs and the consequent diminution of the authority of the WTO. However among other Governments there is evidently a serious lack of coordination between trade and environment ministries.

Options to address the problem

There are five options;

- One, improve environmental policy-making. Cease putting measures which authorize coercion and create wide grounds for subjective discretion in MEAs. This is not the responsibility of the WTO. It is the responsibility of environment and foreign policy ministries in sovereign Governments. The fora to do this is the UN General Assembly and its subsidiary bodies in including UNEP and the Commission on Sustainable Development in ECOSOC.
- Two, amend the environment agreements to remove the offending provisions. Again this is a matter for international environmental fora and national governments.

- Three, amend WTO provisions to remove conflict with the trade provisions in the MEAs. This is the proposal most commonly advocated (in various forms for several years) by the EU and most environmental NGOs.
- Four, allow the WTO disputes system to provide a solution.
- Five, do nothing.

If nothing is done, the disregard by environmental policy and foreign policy decision-makers of respect for national sovereignty and of the principles of the rule of law in multilateral trade policy will continue.

To a degree, the WTO disputes system has tried to devise a solution. In rulings on the Shrimp Turtle case, the Appellate Body has ruled that in cases where members are acting to protect exhaustible natural resources, it is permissible to apply trade sanctions to encourage other countries to adopt specified policies in their national jurisdiction. This is a controversial ruling which overturns previous rulings by GATT panels that no member of the WTO was entitled to restrict trade until the other member applied specific measures in domestic law. The ruling has been widely criticized by many members and does not reflect the probable view of the great majority of member states that the WTO should not be interpreted this way. Allowing the disputes system to resolve these issues is a surrender of executive responsibility of the member states of the WTO.

Now that environmental issues are on the table in the Doha Round negotiations and one of the mandates of the Round is to review the operation of the WTO Disputes Resolution processes, WTO members should use the Round to establish positions that protect the fundamental principles upon which the WTO Agreements rest and review the disputes procedure to minimize the prospect of further errant decisions from the WTO disputes processes like Shrimp/Turtle.

To address this issue, countries should do three things. Review positions on basic principles. Improve domestic coherence. Ensure the issue is addressed in the United Nations.

Assessing basic interests

Countries should review and reconfirm or strengthen basic interest on the following fundamental issues:

- Sovereignty
- Use of coercion
- Discrimination
- Leverage
- The precautionary principle

- Production and process methods/ecolabelling
- Sound principles in trade policy
- Sound principles for environment policy

Once positions are established they should be used to guide trade policy and environment policy.

Improve domestic policy coherence

The implications of amendment to the WTO should be made clear to wider circles in government than trade ministries. If the WTO is to be amended to permit trade sanctions and members are to be allowed to restrict trade because importers do not satisfy the higher environmental standards of the importer, the balance of the benefits of this need to be understood because the national interest of countries is affected. The WTO is an extremely important instrument for protecting the rights of economies to develop according to their comparative advantage. That right is most valuable to developing countries. Such an amendment to the WTO would result in industrialized economies conditioning the right of access of developing countries to industrialized economy markets on their adopting the environmental standards of the industrialized economies. This would severely restrict the competitiveness of developing economies.

What do the developing economies get in return? First, the prospect of being forced to adopt higher environmental standards they may not be able to afford. The EU may be pursuing this goal to improve the environment. The experience of history warrants skepticism in the case of agriculture where it must be assumed any new environmental rights to protect trade would be used to substitute for protection of farming that the EU may have to surrender in the agricultural negotiations in the Doha Round. The reality is that such measures can be used to provide defacto protection of EU producers in all areas of trade including in textile and garment industries where they will also be under pressure in the Doha Round to open markets to developing countries.

The second result is a proliferation of global measures to protect the environment that may not work. It has already been noted that the trade measures in MEAs are not particularly effective and that their environmental footprint is small. It is to legitimize such measures that the capacity of the WTO to support the development interests of members is to be weakened. It is vital that agencies in governments 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.

The requirement that coordination between trade and environment ministries be improved and the impact of the legitimization of trade sanctions be understood by whole of government in most countries is urgent.

Secure clear principles in the United Nations

The question of clarification of overlap between the rules of the WTO and the MEAs is an issue first 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 or preparing for the RIO plus 10 Summit in Johannesburg in September 2002.

The Rio summit adopted principles on trade and environment. Had they been respected the conflict of obligations between the WTO and the MEAs would have been largely obviated. It is necessary for members of the UN to reassert and even strengthen those principles. Since EU member states and NGOs have basically disregarded those principles, it would be unsurprising if they argued at the Johannesburg RIO plus 10 conference that the principles should be watered down.

Annex 1. NGO arguments about the environmental deficiencies of the WTO

The contention of critics of the WTO⁵⁵ is that the Organization is inadequate for the purposes of protecting the environment. All contend that the Organization must provide for environmental goals and make two general arguments in support. The first is that the GATT is out of date;⁵⁶ when it was drafted, environmentalism was not a public issue. The second is that the environment is of such importance that WTO rules should allow trade restrictions to support protection of the environment.⁵⁷

The contention that the environment is so important that WTO rules should be subordinated to environmental measures is generally argued with four cases. First, the WTO does not permit controls on trade according to how products are processed or the environmental effects of those processes.⁵⁸ Second, the observance of respect for national sovereignty upon which the WTO is based prevents extraterritorial application of trade measures to protect the environment.⁵⁹ Third, the WTO threatens to invalidate trade provisions in some multilateral environment agreements.⁶⁰ Fourth, the WTO does not give adequate expression to the precautionary principle.⁶¹

NGO criticism of the WTO rarely addresses two fundamental points. The WTO gives great latitude to members to restrict trade to protect the environment. The WTO is an agreement for managing trade, not managing the environment or any other area of public policy. If it is to be given the task of serving other international public policy objectives its capacity to meet its core function will be weakened.

⁵⁵ The main critics of the WTO are a vast array of environmental, conservation and public policy NGOs and organizations such as Public Citizen, Greenpeace, One World, World Wildlife Fund, Friends of the Earth, Sierra Club to name a few.

⁵⁶ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001.*

⁵⁷ *International Institute for Sustainable Development, Principles for Trade and Sustainable Development, Winnipeg, 1994, www.iisd.org accessed July 2001. See also Konrad Von Moltke, Trade and Environment, the Linkages and the Politics, Paper for the Roundtable on Canberra, 25 August 1999.*

⁵⁸ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001. See also Konrad Von Moltke, "Reassessing Like Products" Paper presented at Chatham House Conference, Trade Investment and the environment, 29 and 30 October 1998 www.iisd1.iisd.ca accessed August 2001.*

⁵⁹ *Steven Shrybman, Canadian Alliance on Trade and Environment, c/o Sierra Club of Canada, An Environment Guide to the WTO, May 1997, www.sierraclub.ca accessed August 2001.*

⁶⁰ *WWF International, Sustainable Trade for a Living Planet, Reforming the World Trade Organisation, September 1999. Public Citizen argues the implementation of MEAs by signatory countries is susceptible to challenge as violating WTO requirements. Lori Wallach and Michelle Sforza, Whose Trade Organisation, Public Citizen, Washington, 1999. See also International Institute for Sustainable Development, United Nations Environment Program, Environment and Trade A Handbook, International Institute for Sustainable Development, Canada, 2000.*

⁶¹ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001* WWF also urged application of the precautionary principle before the WTO dispute Settlement body in the Shrimp Turtle Dispute and argues for such in the publication above. The European Union has clarification of the application of the precautionary principle on its agenda for negotiations in a new trade round. *EC Approach to Trade and environment in the New WTO Round WT/GC/W/194.* "Their principle interest is to secure, beyond its present inclusion in the language of the SPS Agreement, a clearer legal base within the WTO rules for the invocation of the precautionary principle before WTO Dispute Settlement Panels". *Brown and Jackson (eds), Reconciling Trade and Environment, Transnational Publishers, New York, 2001.*

Annex 2. A summary of trade and environment disputes in the WTO

Disputes over trade and environment issues in GATT/WTO	
GATT Case 1	Thai Cigarettes
Name of case	<i>Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes.</i>
Parties to dispute	Thailand – respondent US - complainant Adopted 7 November 1990
GATT legal provisions involved⁶²	GATT Articles XI:1, XI:2(c), XX(b) and III:2. (See Annex attached)
Facts and environmental issue	Thailand prohibited the importation of cigarettes and other tobacco preparations, including those from the US, under the 1966 Tobacco Act as part of its public health policy of reducing the consumption of tobacco in Thailand on the grounds that it was harmful to health. At the same time it authorised the sale of domestic cigarettes. These were subject to an excise tax, a business tax and a municipal tax.
Arguments of parties	<p>The US argued the import restrictions were inconsistent with Article XI:1 because they were a quantitative restriction and were not justified by Article XI:2(c), as they were not an agricultural or fisheries product within its meaning, and were not justified under Article XX(b) because the restrictions were not “necessary to protect human health”. The US argued that Thailand could pursue its health objective of seeking to prevent an increase in the number of smokers without banning imports, for example through education efforts, rather than restraints on availability. The internal taxes were inconsistent with Article III:2 because they treated foreign cigarettes less favourably than domestic ones.</p> <p>Thailand argued the import restriction was justified under Article XX (b) because the government had adopted measures that could only be effective if cigarette imports were prohibited and because chemicals and additives in US cigarettes might be more harmful than Thai cigarettes. Production was not altogether prohibited in Thailand because this would lead to an increased consumption of narcotic drugs which were more harmful to health. The objective was to produce enough cigarettes to satisfy consumer demand without increasing it. The mass modern marketing techniques of foreign cigarettes if allowed to be imported would increase the consumption of cigarettes.</p>
Panel ruling and conclusion	The Panel ruled that the import restriction was inconsistent with GATT Article XI:1 - it was a quantitative restriction and was not justified under Article XI:2(c) - it was not considered to be an “agricultural product” within the meaning of this article, nor was the restriction justified under Article XX(b) as it was not considered “necessary”. The internal taxes on cigarettes were found to be consistent with Article III:2.
Panel interpretation • Article XX (b) and (g)	Article XX(b) The panel found that the measure fell within the scope of Article XX (b). It accepted that smoking constituted a serious risk to health and that measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b). They held that the measure must be “necessary” to be justified. They stated that it would only be necessary if there was no alternative measure available that was consistent or less inconsistent with the GATT and that could be reasonably expected to be employed by Thailand at the time to achieve the same policy objective. They considered that the measure was intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand. Examining the question of necessity they held that concerns regarding the quality of cigarettes could be met with GATT consistent measures such as labelling schemes and that concerns for the quantity produced could have been dealt with through GATT consistent measures by reducing demand and supply through advertising bans, or a sales monopoly. The measure was therefore not necessary and inconsistent with the GATT.
Implementation ruling	Thailand removed the import prohibition and placed its laws in compliance with the national treatment principle.

⁶² GATT legal provisions are noted in Attachment 2

GATT Case 2	Tuna Dolphin 1 and 2
Name of case	<i>US – Restrictions on Imports of Tuna</i>
Parties to dispute	<p>Tuna Dolphin 1 Complainant: Mexico Respondent: US Not adopted, circulated 3 September 1991</p> <p>Tuna Dolphin 2 Complainant: European Communities, Netherlands Respondent: US Not adopted, circulated 16 June 1994</p>
GATT legal provisions involved	<p>Tuna Dolphin 1 GATT Articles XI, XIII, III, XX(b), (g) and (d) (See Annex attached)</p> <p>Tuna Dolphin 2 GATT Articles XI, III, XX(b), (g), (d)</p>
Facts and environmental issue	<p>The US Marine Mammal Protection Act (MMPA) aimed to achieve dolphin conservation by setting protection standards for US boats and foreign boats catching yellow fin tuna in the Pacific, where dolphin who swam with tuna, were often caught in fish nets. If a country exporting tuna to the US could not prove to a US authority that it had met these standards as set out in US law the US government could embargo imports of fish from that country (the direct embargo) and also from “intermediary” countries that handled the tuna on the way to the US (the intermediary embargo). Generally, the Act involved a prohibition on the importation of marine mammals into the US without authorisation. It meant a ban on the import of fish and fish products caught with commercial fishing technology that resulted in the kill (incidental or otherwise) of marine mammals. Importation of tuna harvested with nets that might catch dolphin were prohibited unless: firstly, the government of the harvesting country had a program of regulating the taking of marine mammals comparable to that of the US, secondly, the average rate of incidental kill by foreign boats was comparable to the average taken by US vessels and third, the average rate of kill was not greater than 1.25 times the average rate of US vessels in the same period.</p>
Arguments of parties	<p>Tuna Dolphin 1 Mexico was an exporting country from which the US banned tuna imports. It claimed the import prohibition was inconsistent with GATT Articles XI, XIII, and III. It argued that Article XX was not applicable to measures imposed to protect the life or health of animals outside the jurisdiction of the member taking it. Mexico also argued the measures was not “necessary” because alternative measures consistent with the GATT were available, namely international cooperation between the countries.</p> <p>The US argued that the direct and the intermediary embargoes were consistent with Article III, and in the alternative, were allowed under Articles XX(b) and (g) and the intermediary embargo also under Article XX(d). The measures were “necessary” because in respect of dolphin protection outside US jurisdiction, there no alternative measure available to the US to achieve the protection of their life and health as a migratory species.</p>
Panel ruling and conclusion	<p>Tuna Dolphin 1 The Panel held that the import prohibitions under both the direct and intermediary embargoes did not constitute internal regulations under Article III, were inconsistent with Article XI:1 and not justified under Articles XX(b), (g) or (d). The Panel concluded that the US could not embargo imports of tuna from Mexico because the way the tuna was produced did not satisfy US regulations. They also concluded that GATT rules do not allow one country to take trade measures for the</p>

GATT Case 3	US Taxes on automobiles
Name of case	<i>United States – Taxes on Automobiles</i>
Parties to dispute	<p>Complainant: European Communities Respondent: US</p> <p>Not adopted, circulated 11 October 1994</p>
GATT legal provisions involved	Articles III:2, 4 and XX (g), (d) (See Annex attached)
Facts and environmental issue	<p>The US imposed several taxes on automobiles: a luxury tax, a ‘gas guzzler tax’ and the Corporate Average Fuel Economy regulation (CAFÉ) aimed at reducing environmentally damaging air pollution.</p> <p>The luxury tax was applied on cars sold for over US\$30,000. The ‘gas guzzler’ tax applied to the sale of automobiles attaining less than 22.5 miles per gallon (mpg) and the CAFÉ regulation required the average fuel economy for passenger cars manufactured in the US or sold by any importer not to fall below 27.5 mpg. Companies that were both importers and domestic manufacturers had to calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically.</p>
Arguments of parties	<p>The EC argued that the calculation methods were inconsistent with GATT Article III and could not be justified under Article XX (g) or (d).</p> <p>The US considered the measures were consistent with the GATT.</p>
Panel ruling and conclusion	The Panel found that the luxury tax and gas guzzler tax were consistent with Article III:2 of the GATT. The CAFÉ regulation was found to be inconsistent with Article III:4 and not justified under Article XX.
Panel interpretation	The CAFÉ regulation was inconsistent with Article III:4 because the separate foreign fleet accounting system discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. The Panel found that the separate foreign fleet accounting was also not justified under Article XX (g). The panel did not make a decision regarding the consistency of the fleet averaging method with Article XX (g). The regulation was not justified under Article XX (d).

WTO case 1	US Gasoline
Name of case	<i>United States – Standards for Reformulated and Conventional Gasoline</i> Report of the Panel, 29 January 1996 Report of the Appellate Body and Panel, 20 May 1996
Parties to dispute	Complainant: Venezuela, Brazil Respondent: US Third Parties: Australia, Canada, EC, Norway Adopted 20 May 1996
WTO legal provisions involved⁶³	Articles III:4, XX(b), (d), (g) of GATT 1994 (See Annex attached)
Facts and environmental issue	The US enacted the “Clean Air Act of 1990” (the Act) and a regulation pursuant to it by the EPA (The Gasoline rule) to control toxic and other pollution caused by the combustion of gasoline manufactured or imported into the US. The rule permitted only gas of a specified cleanliness to be sold to consumers in the most polluted areas of the country. Only gas no dirtier than that sold in the base year of 1990 could be sold. The rule applied to all US refiners, blenders and importers of gasoline. It required a domestic refiner to establish an “individual baseline” representing the quality of gas produced by a specific refiner. The EPA also established a statutory baseline to reflect the average US gas quality. Domestic refiners could choose whether they used the individual or the statutory baseline. Foreign refiners, importers and blenders of gas were assigned the statutory baseline. In some cases, the individual baseline was more advantageous to the refiner than the statutory baseline.
Arguments of parties	Venezuela and Brazil were exporters of gasoline to the US. They claimed that the baseline rules established in the Gasoline rule were inconsistent with the national treatment obligation of the GATT in applying stricter rules for imported gasoline than domestically refined gas by denying foreign refiners the possibility of establishing individual baselines. They further argued that the rule was not justified on health and environmental grounds under Article XX of the GATT. The US argued that the measure was justified under GATT Article XX as a policy to conserve a natural resource within the meaning of paragraph (g). Clean air equated to an “exhaustible natural resource” because it could be exhausted by emissions of pollutant. Further more, in acting to preserve this natural resource (prevent air degradation) the rule also protected other natural resources such as lakes, streams, parks crops and forests. It claimed that difficulties of verification and enforcement prevented the establishment of individual baselines for foreign refiners.
Panel ruling and conclusion	The Panel ruled that baseline establishment methods in the gasoline rule were inconsistent with GATT Article III:4 and were not justified under paragraphs (b), (d) or (g) of Article XX. It concluded that WTO members were free to set their own environmental objectives but were bound to implement these through measures consistent with GATT provisions.
Panel interpretation • Article XX (g) and (b)	Article XX (b) The gasoline rule was not justified by paragraph (b) as it was not a measure “necessary to protect human, animal or plant life or health”. Article XX (g) The panel found “clean air” was an exhaustible natural resource within the meaning of paragraph (g) as it could be depleted. The fact that it was renewable was not an objection. The US policy to reduce the depletion of clean air was therefore a policy to conserve a natural resource within the meaning of paragraph (g). The panel further

⁶³ WTO provisions are noted in Attachment 2.

<ul style="list-style-type: none"> • The chapeau • General statements 	<p>decide however, that the measure was not one “relating to” to the conservation of exhaustible natural resources as it was not primarily aimed at such. It was therefore not justified under Article XX (g).</p> <p>The chapeau Having found the measure did not fall within the scope of paragraph (g) or (b) the Panel did not consider it necessary to examine the chapeau.</p> <p>General statements The panel confirmed that it was not its task to examine generally the desirability or necessity of environmental objectives of the gas rule. It confined its examination to those aspects raised by the parties.</p>
<p>Grounds for appeal</p>	<p>The US appealed the decision of the panel that the gasoline rule was not justified under Article XX (g) and the panel interpretation of the article as a whole, specifically that rule was not a measures “relating” to the conservation of clean air.</p>
<p>AB ruling and conclusion</p>	<p>The Appellate body (AB) upheld the Panel’s conclusion that the measure was not justified under Article XX (g) but through different reasoning: the measure did provisionally meet the requirements of paragraph (g) but did not meet the requirements of the chapeau to Article XX of the GATT.</p>
<p>AB interpretation</p> <ul style="list-style-type: none"> • Paragraph (g) of Article XX • The chapeau 	<p>Article XX, paragraph (g) The panel had erred in its reasoning of whether the measure was “related to” the conservation of exhaustible natural resources. The panel had made an error in its legal reasoning by asking whether the “less favourable treatment” determined under Article III:4 was related to conservation, not simply whether the measure was. The AB stated that the relationship between a measure and whether it is “related to” conservation are not negated by a finding of inconsistency with Article III:4. It confirmed that there was a substantial relationship between the gasoline rule and the conservation of clean air and that the measure was “related to” such. It affirmed that “relating to” was equivalent to “primarily aimed at”, as determined by the Panel. The US measure was therefore provisionally justified under Article XX (g).</p> <p>The Chapeau The AB confirmed that the interpretation of Article XX is two tiered: first, provisional justification by characterisation of the measure and second, appraisal of the same measure under the chapeau. The AB stated that the chapeau addresses mainly the manner in which the measure is applied, rather than the contents and that its basic function is to prevent abuse of the exceptions in Article XX. It distinguished the application of the chapeau from determining a violation of a substantive rule, stating that interpretation requires a different standard in order to avoid rendering the exceptions under Article XX meaningless. The question is whether inconsistency is justified. The AB took a narrow interpretation in deciding whether there was unjustifiable or arbitrary discrimination. It said that “arbitrary discrimination”, “unjust discrimination” and a “disguised restriction” may be read side by side and impart meaning to each other and that the fundamental theme is found in the object and purpose of avoiding illegitimate use of the exceptions. To this end, the AB looked at whether there were alternative courses of action open to the US other than the Gasoline rule. It decided that the US had made two omissions: it had not explored means to deal with administration problems it cited as a reason for rejecting individual baselines for foreigners and it had failed to take account of the costs to foreign refiners resulting from the statutory baselines. It could have used different techniques for checking and verification and entered into appropriate procedures in cooperation with governments of Venezuela and Brazil so as to mitigate the administration problems. The AB concluded that the baseline rules constituted “unjustifiable discrimination” that was foreseen and not inadvertent or unavoidable.</p>

<ul style="list-style-type: none"> • The preamble • General statements 	<p>The preamble Whilst not a question in issue, the AB made some passing comments on this. It recognised that in the preamble is specific acknowledgement about the importance of coordinating policies on trade and the environment.</p> <p>General statements The AB stated that the exceptions to the GATT are just that: Article XX is not so broad as to subvert Article III and in the same way, Article III is not so broad as it emasculates Article XX (g). It also stated that its decision does not mean that the ability of WTO members to take measures to protect the environment is at issue, as Article XX contains provisions designed to permit important state interests to find expression. They added “<i>WTO members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and other covered agreements.</i>”</p>
<p>Implementation ruling</p>	<p>There was an agreed period of 15 months for implementing a solution. The US agreed with Venezuela that it would amend its regulation. A new regulation was signed by the US.</p>
<p>Implementation interpretation</p>	<p>The AB did not state that the gasoline rule should be amended in a particular way. The US felt that the AB required a public comment process open to relevant foreign governments and firms, although did alter the regulation to permit foreign refiners to use an individual baseline.</p>

WTO case 2	Shrimp Turtle
Name of case	<p><i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> Report of the Panel, 15 May 1998 Report of the Appellate Body, 12 October 1998 Recourse to Article 21.5 by Malaysia. Report of the Panel, 15 June 2001 Recourse to Article 21.5 by Malaysia. Report of the Appellate Body, 22 October 2001</p>
Parties to dispute	<p>Complainants: India, Malaysia, Pakistan, Thailand Respondent: US Third Parties: Australia, Ecuador, El Salvador, European communities, Guatemala, Hong Kong, Japan, Nigeria, Philippines, Singapore, Venezuela</p> <p>Appellate body ruling Adopted 6 November 1998</p>
WTO legal provisions involved	<p>GATT Articles I:1, XI:1, XIII:1, XX (g) or (b) (See Annex attached)</p>
Facts and environmental issue	<p>The US enacted a ban on the importation of certain shrimp and shrimp products, aimed at the protection of sea turtles, pursuant to the US Endangered Species Act of 1973. (The Act) The Act listed as endangered/threatened 5 species of sea turtles that occur in US waters and prohibited their “take” within the US, in its territorial sea and the high seas. The Act required US shrimp trawlers to use “turtle excluder devices” (TEDs) in nets when fishing in areas where there was a significance likelihood of encountering sea turtles. Section 609 of US Public Law (the measure) dealt with imports. It determined that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US unless the harvesting country was certified by the US to have a regulatory program and comparable rate of incidental kill like the US or a harvesting area that did not pose a threat to turtles.</p> <p>In 1996 guidelines for the implementation of s609 extended its application to Caribbean and Atlantic countries and then to shrimp harvested in all countries. The guidelines set out certain procedures for importing shrimp into the US, for example, requiring imports to have a declaration attesting their shrimp were harvested under conditions that did not harm turtles, and setting out the requirements for certification. The guidelines also defined shrimp and shrimp products that were considered to be harvested in conditions that did not affect sea turtles.</p> <p>The US imposed an import prohibition on shrimp and shrimp products from India, Thailand, Pakistan and Malaysia under s609.</p>
Arguments of parties	<p>India, Pakistan and Thailand argued that the embargo was inconsistent with GATT Article I:1(MFN) because physically identical shrimp and shrimp products from different nations were treated differently by the US based solely on the method of harvest and policies of government. Also, different nations had different phase in periods for TEDs and certification requirements. Together with Malaysia they also argued the embargo violated Article XI:1 as a quantitative restriction on the importation of shrimp and shrimp products and violated Article XIII:1 because it restricted the importation of shrimp from countries which had not been certified while “like products” from other countries which had been certified could import freely into the US. Regarding Article XX, the complainants argued that the US measure was not about conservation but was a unilateral measure designed to coerce other members to adopt the same environmental policy. They also argued the panel should find an implied jurisdictional limitation in Article XX.</p> <p>The US stated that it need not address Articles I, XI and XIII as the complainants had the burden of proving a violation under them. It argued the measures, if found in violation, was justified under Article XX (b) and (g) as a bona fide measures to protect and conserve an exhaustible resource. They argued that turtles were a shared global resource and that the panel should consider the preamble as an aid in interpreting the GATT. It urged the Panel not to find a jurisdictional limitation in Article XX as this would forbid</p>

	members from adopting trade measures needed to conserve the environment.
Panel ruling and conclusion	The Panel ruled that the US measure was inconsistent with GATT Article XI and not justified under GATT Article XX (g) as it constituted “unjustifiable and arbitrary discrimination” and did therefore not meet the requirements of the chapeau.
Panel interpretation	
<ul style="list-style-type: none"> • Article XX (g) and (b) and the chapeau 	<p>Article XX (g) and the chapeau In its interpretation of Article XX, the panel first looked at whether the measure met the requirements of the chapeau. It determined that that the chapeau “<i>only allows members to derogate from GATT provisions, so long as in doing so, they do not undermine the WTO multilateral trading system</i>”(MTS). They looked at the design and type of the US measure and found that it was a measure conditioning access to a market for a product by the adoption of certain policies, including conservation ones, which could undermine the MTS. The measure therefore constituted unjustifiable discrimination within the meaning of Article XX and was not justified under it. The panel did not consider it necessary to examine whether the measure was covered by paragraphs (b) or (g) having made this finding.</p>
<ul style="list-style-type: none"> • The preamble 	<p>The preamble The Panel made some statements in relation to the preamble whilst examining the chapeau as above. The panel stated that they did not disagree with the US argument that the right to protect natural resources under Article XX is affirmed by the preamble but confirmed this did not change their finding. They stated that the preamble endorses the fact that environmental policies must be designed taking into account the situation of each member – it does not allow measures of the type of the US measure (as determined above) but rather implies that attempts to generalise standards of protection must be undertaken through international cooperation.</p>
<ul style="list-style-type: none"> • Extra territoriality 	<p>Extra territoriality The Panel stated, in their examination of the chapeau, that certain unilateral measures, in so far as they could jeopardise the multilateral trading system, could not be covered by Article XX. However, they stated that general and international law favour the use of negotiated instruments which are clearly to be preferred when addressing transboundary or global environmental problems. They added that their findings regarding Article XX did not imply that unilateral measures were always excluded, particularly after serious attempts to negotiate had been made, nor that they would be permitted.</p>
Reasons for appeal	The US appealed the decision of the Panel on the basis that it had erred in finding that the measure was outside the scope of Article XX (g) and in terms of its interpretation of the chapeau and Article XX generally, including the preamble.
AB ruling and conclusion	The AB reversed some of the Panel’s findings with respect to its interpretation of Article XX (g) and the chapeau but came to the same overall conclusion: the measure was not consistent with Article XI, and although qualified for provisional justification under Article XX (g), did not meet the requirements of the chapeau of Article XX and was therefore not justified under Article XX of the GATT.
AB interpretation	
<ul style="list-style-type: none"> • Panel errors 	<p>Panel errors The AB found that the Panel had erred in its interpretation of the chapeau to Article XX. It had looked at the design of the measure rather than its application, and had interpreted the chapeau by considering the whole of GATT and WTO Agreements rather than the object and purpose of the chapeau. The AB rejected “<i>undermining of the multilateral trading system</i>” as an interpretive standard for meeting the requirements of the chapeau. The panel had also erred in its interpretative sequence of Article XX by considering consistency with the chapeau prior to justification under paragraph (g). They confirmed the interpretation in the <u>Gasoline case</u>, that Article XX involved a two tier analysis of</p>

<ul style="list-style-type: none"> • Article XX (g) • The chapeau • The preamble • Extra territorial application 	<p>firstly Article XX (g) and then further appraisal under the chapeau of Article XX.</p> <p>Article XX (g) The AB confirmed that exhaustible natural resources were not confined to nonliving or mineral resources and that the terms “<i>must be read...in light of contemporary concerns of the community of nations about the protection and conservation of the environment</i>”. They referred to the preamble (see below) and found migratory sea turtles to be exhaustible natural resources within the meaning of paragraph (g). They then looked at the relationship between the measure and the policy of conserving resources such as sea turtles to find that the measure was “<i>primarily aimed</i>” at this objective and was “related to the conservation of exhaustible natural resources”. The US measure was therefore provisionally justified under Article XX (g).</p> <p>The Chapeau The AB articulated a test for meeting the requirements of the chapeau of Article XX. They confirmed the standards required for the chapeau and affirmed from the Gasoline case that these standards differed from those for the requirements of Article XX (g) or violations of substantive rules of the GATT. They confirmed that the general purpose and object of the chapeau was to prevent abuse of the exceptions in Article XX and that the exceptions be applied reasonably. Generally in relation to the chapeau they confirmed it reflected the principle of good faith which involved striking a balance between the rights of members to invoke the exceptions and the duty of that member to respect the treaty rights of other members. They stated that the task of interpreting the chapeau was a matter of marking out a “<i>line of equilibrium</i>”, which is not fixed, but varies according to the measure involved.</p> <p>Applying this test they found that the US measure constituted “unjustifiable discrimination” under the chapeau for several reasons. Firstly, it was a uniform embargo imposed by the US that did not consider the differences between members or take into account other policies for sea turtle protection, and treat them accordingly. Secondly, the US had failed to engage in serious good faith negotiations for the protection of sea turtles with the appellees and other countries outside of the Caribbean/Atlantic basin, despite this being reasonably available to it, and its appropriateness being recognised by the WTO and other international agreements. Third, the US had prohibited shrimp from non certified countries, regardless of the catch method, and lastly, accorded differential treatment to countries seeking certification, for example though differing time periods for “phase in” of TEDs and differing efforts to transfer the TED technology. The measure was also found to constitute arbitrary discrimination. It therefore did not meet the requirements of the chapeau and was not justified under Article XX of the GATT.</p> <p>The preamble The AB referred to the preamble to the WTO Agreement in its interpretation of the provisional justification of the measure under Article XX (g) and also in considering whether the requirements for the chapeau had been met. When interpreting whether sea turtles constituted exhaustible natural resources under paragraph (g) the AB looked at the preamble and stated that it expressly acknowledged the objective of sustainable development and showed awareness on the part of WTO signatories of the legitimacy of environmental protection as a policy goal. In support of their determination that sea turtles were natural resources they confirmed that the term “<i>natural resources</i>” was not <i>static...but rather by definition evolutionary</i>”. The AB also referred to the preamble during its interpretation of the chapeau of Article XX. It confirmed that the chapeau was to be interpreted in light of its object and purpose and that the preamble could be taken into account when examining its context.</p> <p>Extra territorial application of the measure The AB chose not to deal with the question of the extra territorial application of the measure imposed by the US. They declined to comment as to whether there was a</p>
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<p>of the measure</p> <ul style="list-style-type: none"> • General statements 	<p>jurisdictional limitation in Article XX (g), stating that in the present case for the purpose of Article XX (g), there was a sufficient link between the migratory sea turtles and the measure involved. The extra territorial application of the measure was likewise not considered during the AB's analysis of the chapeau and interpretation of the discriminatory effects of the measure.</p> <p>General statements The AB stated that it had <u>not</u> decided that protecting and preserving the environment is of no significance to the WTO, that sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species and that sovereign states should act together in the WTO or other international fora, to protect endangered species or otherwise the environment. It affirmed that <i>“WTO members are free to adopt their own policies aimed at protecting the environment, so long as in doing so, they fulfil their obligations and respect the rights of other members under the WTO Agreement.”</i></p>
<p>Implementation measure</p>	<p>The US modified its guidelines relating to the implementation of the measure (s609) but did not modify s609 itself or lift the import ban. Amendments to the s609 guidelines included:</p> <ul style="list-style-type: none"> • revised guidelines that provided more flexibility in decision-making • enhanced due process protections for exporting countries • efforts to negotiate a sea turtle conservation agreement in the Indian Ocean region • and enhanced offers of technical assistance.
<p>Implementation dispute under Article 21.5 of the DSU</p>	<p>Malaysia requested a panel, pursuant to Article 21.5 of the DSU, to find that the US, in failing to lift the import prohibition, had failed to comply with the rulings of the Appellate Body. Malaysia argued that the US was not entitled to adopt a unilateral import ban outside the framework of an international agreement and should have negotiated an agreement to protect sea turtles before imposing the import ban. It argued that the steps taken by the US did not remove the elements of ‘unjust’ or ‘arbitrary’ discrimination and that the measure remained inconsistent with Article XI and XX of the GATT. Malaysia stated the burden was on the US to show that the measure was consistent with Article XI, which it had failed to do, and although it met the requirements of Article XX, paragraph (g), it failed to meet the requirements of the chapeau.</p> <p>The US did not contest the consistency of the implementing measure with Article XI of the GATT. In relation to Article XX, the US argued the implementing measure was provisionally justified under paragraph (g). It stated the AB's findings under the chapeau were not addressed to s609 itself but to the US application of the measure. The ruling did not require the US to lift the ban, but only to modify the application of it by revising the relevant guidelines to provide greater flexibility, enhance due process protection for exporting countries, offer technical assistance and make sufficient efforts to negotiate a sea turtles conservation agreement, thus fixing the deficiencies with the original measure. The US contended that it had made a prima facie case for consistency under Article XX by undertaking the above and that the burden fell on Malaysia to bring evidence to the contrary.</p>
<p>Panel ruling on implementation</p>	<p>The panel found that the US implementing measure still violated Article XI of the GATT but no longer constituted unjustifiable or arbitrary discrimination under the chapeau of Article XX. It was justified under Article XX (g) <i>“as long as the conditions stated in the findings.....in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied”</i>.</p>
<p>Implementation interpretation</p> <ul style="list-style-type: none"> • Paragraph (g) of Article XX 	<p>Provisional application under paragraph (g) of Article XX Regarding consistency with paragraph (g), the Panel determined that it should not reach a different conclusion from that of the AB as the implementing measure was identical to that examined by the AB, having not been modified by the US. The measure was</p>

<ul style="list-style-type: none"> • The chapeau • <i>Negotiation of an International agreement</i> • <i>Other claims</i> • The preamble • Sovereignty 	<p>therefore found to be provisionally justified under paragraph (g).</p> <p>The chapeau The panel concluded that in undertaking “serious good faith efforts” to conclude an international agreement for the protection of sea turtles and in modifying the guidelines to s609 to take into account conditions prevailing in different countries, the measure was not applied in a way that constituted arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The implementing measure was therefore also justified under the chapeau of article XX.</p> <p><i>Negotiation of an international agreement</i> The Panel referred to the reasoning of the AB, affirming the importance of international negotiations in determining the existence of unjustifiable discrimination. They stated that in order to determine what was actually required from the US in relation to this they would need to assess what was required to avoid the misuse and abuse of rights under Article XX. They confirmed that this relied on a “line of equilibrium” as articulated by the AB and that this demanded “concerted and cooperative efforts” on the part of different countries where sea turtles exist as recognised as appropriate by the WTO and other international instruments. They noted that “serious good faith efforts” on part of the US to negotiate, but not conclude prior, an international agreement for the protection of sea turtles, continuing over a period of time were required. They set out parameters as to what this entailed and then assessed whether the US had met the requirements. The panel concluded that the US had met the established standards. The Panel stated: ‘<i>in a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the US in this case may only be accepted under Article XX if they were allowed under an international agreement or if they were taken further to the completion of serious food faith efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under s609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a provisional measure allowed for emergency reasons than as a definitive “right” to take a permanent measure. The extent to which serious good faith efforts continue to be made may be reassessed at any time.</i>’</p> <p><i>Other claims</i> The panel looked at the other claims relating to unjustifiable and arbitrary discrimination, such as the insufficient flexibility of the guidelines that failed to take into account the conditions prevailing in different countries, the differing phase in periods and transfer of technology for different countries granted by the US, and application of the prohibition on non certified countries. They found that the modifications to the guidelines implemented by the US satisfied the requirement that s609 was no longer applied in a manner that constituted unjustifiable or arbitrary discrimination. It neither constituted a disguised restriction on international trade.</p> <p>The preamble The panel referred to the preamble when discussing the ambit of discrimination under the chapeau of Article XX. They stated that when assessing the object and purpose of the chapeau, reference can be made to the notion of sustainable development. They referred to the WTO preamble and noted “<i>this means that in interpreting the terms of the chapeau, we must keep in mind that sustainable development is one of the objectives of the WTO agreement</i>”.</p> <p>Sovereignty Malaysia argued that the US, by imposing a unilaterally defined standard of protection, had violated the sovereign right of Malaysia to determine its own sea turtle protection and conservation policy. The panel referred to Principle 12 of the Rio Declaration and confirmed that “<i>while a WTO member may not impose on exporting members to apply the same standards of environmental protection as those it applies to itself, this member may legitimately require, as a condition of access of certain products to its market, that</i></p>
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<ul style="list-style-type: none"> • Extra territoriality 	<p><i>exporting countries commit themselves to a regulatory programme deemed comparable to its own.</i>” They considered the “sovereignty argument” an additional factor in favour of international agreement to protect and conserve sea turtles.</p> <p>Extra territoriality The panel did not address the question of a jurisdictional limitation in Article XX per se, but through its finding, allowed the US to impose an import ban with extraterritorial reach on a provisional basis whilst attempting to reach a multilateral solution through an international agreement for the protection of sea turtles.</p>
<p>Appeal of Panel compliance ruling</p>	<p>Malaysia appealed the Panel’s compliance ruling. Regarding the chapeau, it contended the panel was mistaken in considering there was an obligation to negotiate but not conclude an international agreement before imposing the ban and that if this were allowed to stand, “<i>it would lead to an “incongruous” result that any WTO member would be able to offer to negotiate in good faith an agreement incorporating unilaterally defined standards before claiming the measure is justified, and in the event of failure to conclude an agreement, claim that the measure applying the unilateral standards could not constitute unjustifiable discrimination</i>”. It argued the Inter American Convention was not a benchmark of what was to be achieved.</p> <p>Malaysia also argued that the Panel had misconstrued the usage of the term “measures comparable in effectiveness to the US measure” by the AB to mean the AB accepted the legitimacy of such “comparable measures” as the US had put in place. Malaysia also contended that the revised guidelines put in place by the US did not provide sufficient flexibility for taking into account the conditions prevailing in Malaysia.</p>
<p>AB compliance ruling</p>	<p>The AB endorsed the ruling and analysis of the Panel, finding that the US measure was justified under Article XX of the GATT “<i>as long as the conditions stated in the findings of this report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied</i>”.</p>
<p>AB compliance ruling interpretation.</p> <ul style="list-style-type: none"> • The chapeau • <i>Negotiation of an international agreement</i> • <i>Other claims</i> 	<p>The AB confirmed that the original discrimination it had found in its report resulted from the deficiencies found in the application of the original measure. The deficiencies were not related to s609 itself, but to the original guidelines for the purpose of implementing s609 and also to the practice of the US in applying the original guidelines to WTO members. The US had amended these such that they were no longer considered discriminatory.</p> <p><i>Negotiation of an international agreement</i> The AB termed the above claims of Malaysia to be “<i>related to the nature and extent of the duty of the US to pursue international cooperation in protecting and conserving sea turtles</i>”. They upheld the finding of the panel that avoiding arbitrary or unjustifiable discrimination under the chapeau required “<i>serious good faith efforts “to negotiate an international agreement, and does not require the <u>conclusion</u> of such an agreement. They noted that requiring a multilateral agreement to be concluded by the US “would mean any country party to negotiations with the US, whether a WTO member or not, would have, in effect, a veto over whether the US could fulfil its WTO obligations</i>”. The AB then quoted multilateral efforts for the protection of sea turtles and their importance as preferred instruments. The AB confirmed the Inter American Convention was not a legal benchmark by which to measure the standard required for negotiations, but was merely interpreted by the Panel in terms of an example of what was negotiated with some countries but not others by the US. They affirmed that the US had undertaken sufficient “<i>serious good faith efforts</i>” to negotiate an international agreement.</p> <p><i>Other claims</i> In relation to the terms “comparable in effectiveness” the AB affirmed the reasoning of the panel that conditioning market access on the adoption of a program that was “comparable in effectiveness” as opposed to “essentially the same” as that of the US, would allow for sufficient flexibility in the application of the measure so as to avoid</p>

	<p>unjustifiable or arbitrary discrimination. Measures that allowed for such programmes would be sufficiently flexible to allow for specific conditions prevailing in the exporting members to be taken into account. “It allows the exporting member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory”. The revised guidelines of the US, in allowing for the use of regulatory programmes that were “comparable in effectiveness” could take into account the specific conditions prevailing in Malaysia and other countries. The implementing measure was therefore no longer considered to constitute arbitrary or unjustifiable discrimination.</p>
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Annex 3. The effectiveness of the provisions of MEAs

There are now a number of analyses which demonstrate the ineffectiveness of the trade provisions of these MEAs.

The trade ban in the CITES Treaty has not stopped the decimation of endangered species. Zimbabwe's success at managing its elephant population illustrates the point that the most effective economic instrument for wildlife management is to attribute an adequate economic value to the preservation of the species concerned. In fact, Zimbabwe argued successfully at the last conference of the parties to the CITES Treaty that the trade ban in fact impeded efforts at conservation and secured a waiver from the ban to export ivory collected from culling to use the proceeds of international sales to support the conservation program.

The trade bans in the Montreal Convention have not prevented production of CFCs in parties outside the Treaty. There is no reason why they should. They also had no impact on the capacity of parties to the Treaty to outlaw production of CFCs since parties were required in other provisions to ban production and consumption.⁶⁴

The Basel Convention was designed to stop illegal dumping of toxic waste in foreign, principally developing, countries. The Convention is an outstanding example of the wrong solution because of the wrong diagnosis of a problem. Toxic waste was being illegally dumped in African countries. The problem was lack of enforcement of national laws which anyway already prohibited this. The Basel Treaty does nothing about improving enforcement of laws in the importing country. Instead it erects a complex set of regulations which require exporters to take responsibility for ensuring that minimum standards of environmental protection apply in the export markets when products listed in the Basel Treaty, most of them being neither toxic nor hazardous and only distantly related to the dumped products, are exported. Since the problem had been created by illegal actions in the first place, it is hard to see how the treaty improves the prospect in the future of preventing further criminal action.

As far as is known, the practice of international dumping of toxic waste in West Africa has stopped. Since the incidence of illegal dumping was localized and uncommon, the attention created by the brouhaha about the issue may have been enough to stop it. There is nothing which tells us why more elaborate export controls will make any difference. The Treaty however had a number of adverse economic effects. It has stopped trade in a number of low hazard products and impeded recycling of a number of low hazard products. (None of these were the "toxic wastes" the treaty was supposed to control). It has redirected economic activity from developing to industrialized economies. Recycling of lead acid batteries and computer scrap in the Philippines has declined. Greenpeace, an historic sponsor of the Treaty, is pleased with the result because it reinforces its philosophy that every country should take responsibility for its own waste. It appears that this objective was more important than the fact that it is at the cost of the economic welfare of developing countries with no noticeable improvement in the environment.

⁶⁴ It should be conceded however that the trade ban in the Montreal Treaty did have a political economy effect: it helped secure support for the treaty from the major producers of CFCs in North America and Europe. The Treaty mandated a phase down period during which trade was permitted. The trade ban gave a degree of protection to the market of the producers in this phase down period. However from an economic standpoint, the ban was not necessary.

The tables below are an analytical overview of the effectiveness of MEAs drawing on the OECD and UNCTAD analyses as well as academic reviews of the Agreements.

Summary of the Effectiveness of the provisions of MEAS

Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
<p>The Convention aims to prevent the unauthorized dumping of toxic waste in developing countries</p>	<p>Parties are to create a national inventory of hazardous materials.</p> <p>Hazardous materials are listed in an Annex.</p> <p>Exporting Governments must prohibit exports unless the importing country indicates they are acceptable and the exporting government is satisfied environmental controls in the importing country are satisfactory.</p> <p>Parties are prohibited from trading with non-parties unless the latter apply the measures specified in the Agreement.</p> <p>A Protocol to the Convention bans trade in products covered by the convention between developed and developing members of the Convention.</p>	<p>Difficult to assess. The dumping of toxic waste was anyway an illegal activity. New rules do not thwart illegality; only improved compliance does that.</p> <p>Nothing in the Convention improves the capacity of importing countries to enforce import controls.</p> <p>The trade ban in the Protocol (which has not come into effect) principally has economic effects: it protects recycling industries in industrialized economies and denies low cost supplies to recycling industries in developing economies.</p>	<p>Inconsistent with Rio Principles. Undermines the sovereignty of importing countries; uses trade restrictions to secure environmental goals.</p>	<p>Parties may not export unless formally satisfied that environmental policies in the importing country are satisfactory.</p> <p>Parties may not trade with non parties unless the latter apply policies like those mandated in the Convention.</p> <p>In the Protocol, trade between developed and developing parties to the Convention is prohibited.</p>	<p>Unless identical conditions are imposed on all trading parties, exporters would be at risk of breaching the WTO rule to apply non-discrimination in trade.</p> <p>The ban on trade with non-parties breaches the WTO non – discrimination rules.</p>	<p>Very Low. Does nothing to improve the capacity of importers to ensure exporters comply with import regulations.</p> <p>UNCTAD studies show the main value of the treaty is to encourage higher standards of environmental management in domestic policy. The trade bans are not relevant to that.</p>

Cartagena Protocol on Biosafety to the Convention on Biological Diversity						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
<p>To protect developing countries from the risk of contamination from GMOs by preventing unannounced imports of products containing living modified organisms.</p>	<p>Establishment of an international system for notification of release of products containing living modified organisms (except pharmaceuticals).</p> <p>Obligations on exporters to advise importers of exports and to secure prior approval of exports of non-food living modified organisms.</p> <p>Importers have rights to restrict imports with extensive discretion based on wide interpretation of the precautionary principle and an explicit right to act without scientific justification.</p> <p>Risk assessments are provided for, but are not an essential prerequisite for, imposing import bans.</p>	<p>No empirical experience – the Protocol is not yet in effect.</p> <p>In principle, of dubious effect.</p> <p>Trade in GMOs is not the issue, the terms upon which they are released is what matters – the Protocol does not affect those procedures.</p> <p>Most countries already had rights to restrict imports which threatened health and safety.</p>	<p>The principle control in Cartagena is a trade control. There are no controls on national measures such as production and consumption, which the Rio trade and environment Principles prefer for effective conservation.</p>	<p>The Protocol gives importers unilateral rights to restrict trade.</p> <p>Importers are explicitly authorized to restrict trade without scientific justification.</p>	<p>The WTO obliges members to use international standards when restricting imports to protect health and safety or to justify those restrictions on scientific grounds and risk assessment.</p>	<p>Trade bans have low environmental value. The critical issue is on what terms national authorities release GMOs.</p> <p>The Cartagena Protocol has no effect on improving international standards to apply to the release of GMOs.</p>

CITES – Convention on International Trade in Endangered Species of Wild Fauna and Flora						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
To conserve endangered species by banning trade in animals and animal parts of endangered species.	<p>Endangered species are scheduled.</p> <p>Threatened species are scheduled.</p> <p>Trade in endangered species is banned.</p> <p>Trade in threatened species is banned or regulated.</p> <p>A specific ban on trade in ivory was adopted by parties to the Convention in 1989.</p>	Highly questionable. Since the Convention was enacted, endangered species have continued to decline in some countries but have recovered in others.	Inconsistent – Rio stipulated that multilateral conventions mandating common national laws is the preferred and more effective approach to conservation.	<p>Bans on trade in animals and animal parts which are scheduled as endangered.</p> <p>Trade with non-parties on threatened species is banned.</p>	Bans on trade with non-parties probably breaches the non-discrimination rules of the WTO.	Experience in Africa shows with bans, endangered species continued to decline in some countries, but not others where they have flourished. The key conservation measures were national policy. The bans were irrelevant. In the countries with thriving animal populations, the ivory bans impeded conservation – sales of ivory from culled herds were initially banned.

Montreal Protocol on Substances that Deplete the Ozone Layer and the Vienna Convention for the Protection of the Ozone Layer						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
To reduce global emission of fluorocarbons to protect the Ozone Layer	<p>Ultimate ban on the production and consumption of fluorocarbons.</p> <p>Phase-out of production and consumption.</p> <p>Ban on trade with non-parties.</p>	<p>Production and consumption phased out among parties.</p> <p>Trade ban supported phase out among complying parties.</p> <p>Production continues in non-parties.</p> <p>Global production of fluorocarbons has probably reduced.</p>	<p>Generally consistent – the principle measure is multilateral agreement to apply common national laws (prohibition of production and consumption).</p> <p>Trade bans not consistent – not necessary.</p>	Parties must ban imports and exports with non-parties.	<p>Bans on imports probably consistent with WTO – supported domestic measures.</p> <p>Export bans with non members probably breached WTO non-discrimination rules.</p>	<p>Partially effective – secured political support of producers to phase out – bought them off by protecting market while phasing out.</p> <p>Of limited value: the most effective measure was the ban on production and consumption.</p>

Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals in International Trade						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
To establish a system to provide prior informed consent before prescribed chemicals are imported.	<p>A list of prescribed chemicals is established.</p> <p>A procedure to require the consent of importing government for prescribed chemicals is adopted.</p> <p>Importers are required to apply the same controls to imports of the prescribed product from all sources and to ban domestic production of the same product.</p>	<p>The Convention is new.</p> <p>Economics suggest it should work.</p>	Consistent with Rio Principles.	<p>Imports not permitted unless prior consent obtained.</p> <p>Importer has to apply the measure consistent with the principles of non-discrimination and national treatment.</p>	Measures are consistent with WTO.	<p>Key value is that it promotes national measure to control production.</p> <p>The direct value of the trade measure is small.</p>

Stockholm Convention on Persistent Organic Pollutants						
Aim	Key measures	Environmental Effectiveness	Consistency with Rio principles	Trade Measures	Relationship to WTO	Environmental value of trade measures
To eliminate the use of nominated chemicals.	<p>Identification of chemicals, the use of which is to be prescribed.</p> <p>Restricting use and production of those chemicals.</p> <p>Banning exports to non-parties in those chemicals.</p>	<p>The Convention is not yet in effect so no empirical experience is available.</p> <p>The restrictions on use should be effective.</p> <p>However the environmental value depends on the scientific quality of the decisions to prescribe. The Convention sets no scientific standards.</p> <p>It should be noted developing countries opposed bans on use of DDT because of its effectiveness for programs to eradicate malaria.</p>	The ban on trade with non-parties does not respect the sovereign rights of countries, as required in the Rio Principles.	Exports of prescribed chemicals to non-parties is banned.	Conflicts with WTO principles of non-discrimination.	Value is low. The key provisions are the controls on the production and consumption of the prescribed chemicals.

Annex 4. The UNCED Trade and Environment principles

Summary

UNCED laid out principles to govern implementation of trade and environment principles. Like most UN communiqués, they were negotiated and do not follow a structured order. However, the philosophy behind them is remarkably consistent. UNCED adopted the concept of cohabitation between systems for management of the environment and management of an open trading system. The summary conclusion was that measures to open up international trade and measure to protect the environment should be "mutually supportive". Each system should operate independently, but with regard to economic principles which ensure that instruments used in one system did not impede interests in the other.

In the environment systems, instruments should address the root of the environmental problems. The trade system was to support growth to enable sustainable development. Discriminatory restraints on trade were formally discouraged. Collective action to improve the environment should be implemented through international treaties based on consensus. The fact that measures had been used which were inconsistent with the foregoing was recognized. UNCED treated these measures as exceptions or instruments of last resort. Where trade measures were used in environmental agreements, they had to satisfy rigorous criteria, in particular the principle of non-discrimination.

The Details

UNCED addressed trade and environment issues in a number of areas. The most important were in the Rio Declaration and in the Agenda 21 program.

A. The Rio Declaration.

UNCED set out the broad issue of trade and environment in Principle XII of the Rio Declaration. It states:

"States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."

B. The Agenda 21 Program

There is more detail in Chapter 2 of Agenda 21. This chapter is entitled "International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies." While apparently relating only to economic issues in developing countries, this chapter also lays out the principles for development by other international bodies of policies to achieve the UNCED goal of creating a supportive international climate

for achieving environment and trade goals. Paragraph 2.3 of the Introduction to the Chapter sets out the broad objectives to do this:

"The international economy should provide a supportive international climate for achieving environment and development goals by:

- (a) Promoting sustainable development through trade liberalisation;*
- (b) Making trade and environment mutually supportive;*
- (c) Providing adequate financial resources to developing countries and dealing with international debt;*
- (d) Encouraging macroeconomic policies conducive to environment and development."*

There is elaboration on how each of these objectives should be met. They are:

- Objective (a) - Promoting sustainable development through trade liberalisation - defines trade liberalisation as a critical means to stimulate growth in developing countries to enable them to contribute to sustainable development. It recommends that governments should promote international trade liberalisation.
- Objective (b) - Making trade and environment mutually supportive. This section declares that environment and trade policies should be mutually supportive; that a more efficient international allocation and use of resources lessens demand on the environment and provides additional resources for development and environmental protection; and that a sound environment provides resources for development and expansion of trade.

In the general introduction to this section (paragraph 2.20) it notes that trade provisions have been used in multilateral environmental agreements on the grounds that they are necessary to enhance the effectiveness of environmental regulations, and declares:

"Such regulations should address the root causes of environmental degradation so as not to result in unjustified restrictions on trade."

Twelve principles and propositions are set out with a recommendation that they should be considered in GATT, UNCTAD and other bodies to develop an environment/trade agenda. Where they deal with how the intersection of trade and environment issues should be considered they specify that where trade measures related to environment are used, they should:

- ensure transparency and compatibility with international obligations;
- deal with the root cause of environmental problems in a manner which avoids the adoption of environmental measures resulting in unjustified restrictions on trade;
- seek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences and regulations since their application could lead to trade distortions and increase protectionist tendencies; and
- avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder or global environmental problems should, as far as possible be based on an international consensus.

It is noted that domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective. Should trade policy measures be found

necessary for the enforcement of environmental policies, certain principles and rules should apply, including the principle of non-discrimination, the principle that trade measures chosen should be the least restrictive necessary to achieve the objectives. There was also an obligation to make the measures transparent.

Annex 5. Trade and environment in regional Forums and Free Trade Agreements

Free Trade Agreement	Main Trade Provisions and commitments	Environmental provisions and commitments	Environmental provisions affecting trade		
<p>NAFTA North American Free Trade Agreement</p>	<p>Main principles of non-discrimination and national treatment and prohibitions on quantitative restrictions. Sector and some country specific commitments apply (to different degrees) economy wide. Includes agriculture, services, intellectual property, clothing and textiles, automotive, energy, government procurement, SPS, subsidies and countervailing, standards, competition policy and investment. Exemptions in certain circumstances. Also includes dispute settlement and enforcement mechanisms.</p>	<p>Yes. Existing rights and obligations of parties under certain Multilateral Environment Agreements (MEAs) prevail over NAFTA. The section on investment allows measures consistent with the agreement to ensure investment activity is environmentally sensitive. Parties encouraged not to relax environmental measures to encourage investment.</p> <p>Main provisions on environment in a Side Agreement On Environmental Cooperation. No mandated environmental standards or laws. Includes general obligations for reporting and promotion of environmental education. Sets out dispute settlement mechanisms for their enforcement, and remedies.</p>	<p>Yes. Right to take trade measures pursuant to certain MEAs prevail over rights granted by NAFTA.</p> <p>In the side Agreement, weak obligation for parties to “consider” prohibiting exports of pesticides and toxic substances to other parties where their use is banned. Measures restricting or prohibiting trade must be notified. Also expressly gives deference to trade provisions under MEAS to which states are party.</p>		
<p><i>Parties:</i> US, Canada and Mexico</p>				<p>US/JORDAN BILATERAL FTA Bilateral Free Trade Agreement</p>	<p>Establishes a free trade area and affirms WTO rights. Applies national treatment principles to goods, to GATS listed services and certain intellectual property rights with some exceptions. Also includes provisions on environment, labour, electronic commerce, government procurement and safeguards. Establishes dispute settlement mechanisms and procedures for enforcement of obligations. Sets out general exceptions.</p>
<p>US/JORDAN BILATERAL FTA Bilateral Free Trade Agreement</p>	<p>Establishes a free trade area and affirms WTO rights. Applies national treatment principles to goods, to GATS listed services and certain intellectual property rights with some exceptions. Also includes provisions on environment, labour, electronic commerce, government procurement and safeguards. Establishes dispute settlement mechanisms and procedures for enforcement of obligations. Sets out general exceptions.</p>	<p>Yes. Environment is in the main body of the trade agreement.</p> <p>Obligations to ensure high levels of environmental protection. Rights to exercise discretion with respect to the allocation of resources and the environment. Establishes dispute settlement procedures for non compliance with environmental provisions.</p>	<p>Yes. Provisions to enforce environmental laws through actions that might affect trade. Allows members to take “any appropriate or commensurate measure” in event of non compliance with the agreement, including environmental provisions, presumably allowing trade sanctions. Some environmental GATT exceptions with qualifications.</p>		
<p><i>Parties:</i> US and Jordan</p>					

Free Trade Agreement	Main Trade Provisions and commitments	Environmental provisions and commitments	Environmental provisions affecting trade
ANZCERTA Australia/New Zealand Free Trade Agreement <i>Parties:</i> Australia, New Zealand	Main principle of national treatment. Includes tariff reductions, prohibitions on quantitative restrictions and harmonisation of standards. Covers agriculture, subsidies and countervailing measures, SPS measures akin to WTO and an understanding on competition policy. General exceptions as in WTO.	No. CER has no environmental provisions or mandate.	No.
CANADA/CHILE FTA Free Trade Agreement <i>Parties:</i> Canada Chile	Main principles of national treatment, non-discrimination and transparency apply, with exceptions. Applies to goods, services and investment and covers customs procedures, antidumping and countervailing, telecommunications, competition policy and dispute settlement. Provides for progressive tariff elimination and waiver of duties for goods and, prohibits export and import restrictions, all with certain listed exceptions; requires the removal of export subsidies for agricultural goods, allows special safeguard measures for clothing and textiles. Contains separate Side agreements on Environment and on Labour.	Yes. Like NAFTA, existing rights and obligations of parties under certain Multilateral Environment Agreements (MEAs) prevail over the FTA. Contains similar investment environmental measures to NAFTA. Environment is governed in a separate side agreement on Environmental Cooperation. It imposes general obligations for reporting, publication, education, and information provision. Parties can establish their own levels of environmental protection, but must maintain a high level and establish enforcement mechanisms, including remedies. Recognises rights of parties under international agreements.	Yes. Mirrors the side agreement in NAFTA. Includes a weak obligation to “consider” prohibiting exports of pesticides and toxic substances to other parties where their use is banned. Measures restricting or prohibiting trade must be notified. Also expressly gives deference to trade provisions under MEAS and conservation agreements where a party
MEXICO/EU FTA Free Trade Agreement <i>Parties:</i> Mexico European Union	Main principles of non-discrimination and national treatment, with exceptions. Applies to goods including government procurement, competition policy, SPS measures, standards, subsidies and antidumping. Also applies to services (financial services and maritime transport), investment and intellectual property. Provides for progressive elimination of customs duties with exceptions, prohibitions on quantitative restrictions and safeguard measures. Establishes a cooperative mechanism for competition and also dispute settlement procedures.	No. No specific environmental provisions. Includes general exceptions as they appear in the GATT Article XX. Also includes safeguard provisions that allow action to be taken in a precautionary manner in exceptional and critical circumstances and where there are critical shortages of foodstuffs and other essential products.	Allows parties to adopt precautionary export restrictions or duties as safeguard measures or where compliance with the agreement could lead to a critical or immediate shortage of foodstuffs or essential products. The measures are then subject to periodic consultations between the parties.

Regional Forum	Main Trade Provisions and commitments	Environmental provisions and commitments	Environmental provisions affecting trade
<p>ASEAN/AFTA Association of South East Asian Nation. ASEAN Free Trade Area</p> <p><i>Parties:</i> Thailand, Laos, Malaysia, Indonesia, Philippines, Singapore, Brunei Darussalam, Vietnam, Myanmar, Cambodia</p>	<p>ASEAN intends to create an economic region where there is free flow of goods, services, investments and capital. The ASEAN Free Trade Area provides for the elimination of tariff and non-tariff barriers among members through progressive reduction of tariffs, elimination of import duties and trade facilitation measures such as elimination of technical barrier to trade, harmonisation of standards, and the simplification of customs procedures. The Hanoi Plan of action sets out the first series of ASEAN's goals for this.</p>	<p>No</p>	<p>No</p>
<p>APEC Asia Pacific Economic Cooperation</p> <p><i>Parties:</i> US, Canada, Australia, Brunei Darussalam, Chile, Hong Kong, Japan, Mexico, PNG, Peru, Korea, Singapore, Chinese Taipei, New Zealand, China, Russia, Indonesia, Malaysia, Philippines, Vietnam, Thailand</p>	<p>APEC is committed to the liberalisation and facilitation of trade and investment and support for the multilateral trading system. The Bogor Declaration of 1994 commits members to continuing trade liberalisation and to the long term goal of free trade in the Asia Pacific region by 2020 by reducing trade barriers and promoting free flows of goods, services and capital and trade facilitation. There are no binding targets that can be enforced.</p> <p>The APEC Committee on Trade and Investment coordinates APEC work on trade and investment in areas of tariffs and non-tariff measures, services, investment, standards, customs procedures, intellectual property rights, competition policy, government procurement, deregulation, rules of origin, dispute mediation and implementation of WTO obligations.</p>	<p>No. APEC has a policy mandate for cooperative work on sustainable development that is non-binding. APEC Environment Ministers adopted in 1994 an "Environmental Vision Statement" for integrating economic and environment issues as part of APEC's activities. Activities under the mandate are conducted mainly by the environment task force and also across other working groups. They include work programs and strategies for sustainable development such as projects for activities for cleaner marine environments, environmental technologies and production tools also and management systems.</p>	<p>No</p>

Annex 6. Positions of industrialised economies on trade and environment issues

WTO Member	European Community	United States	Canada	Switzerland	Australia	New Zealand	Japan
General	The overall objective of sustainable development is a central benchmark and a consideration to be borne in mind throughout negotiations. The final package of negotiations should result in an outcome where “environmentally friendly consequences can be identified.”	Trade liberalisation should be pursued in a way that is supportive of high public health and environment standards. Trade liberalisation and environment are both important objectives and should be mutually supportive in favour of sustainable development.	Canada will ensure trade policies support sustainable development by not restricting legitimate action to protect the environment but by adopting measures in the least restrictive trade manner necessary to achieve the policy objective.		Australia rejects the perception there is a conflict between the objectives and values of the multilateral trading system and the objectives of environmental protection.		
Use of unilateral measures	Unilateral measures to deal with global and transboundary environmental issues should be avoided.					Trade measures taken unilaterally to address an environmental problem extra territorially, should generally be avoided.	
Environmental impact assessment of trade agreements		Review of the trade round’s potential environmental effects, both positive and negative, is supported.	The process of identifying and evaluating the likely and significant environmental impacts of the upcoming trade round are supported through the National Strategic Environmental Assessment.		National environmental and sustainability assessments of trade agreements important.		

WTO Member	European Community	United States	Canada	Switzerland	Australia	New Zealand	Japan
The relationship between the WTO and MEAS	MEAs are the most effective way for tackling international environmental problems. The fact they are agreed by consensus in a multilateral context is a guarantee against discrimination and their use for protectionist purposes. Trade measures in MEAs and WTO rules are mutually supportive. Environmental problems should be solved multilaterally. The legal relationship between WTO rules and trade measures taken pursuant to MEAS and above general principles should be clarified. Trade measures pursuant to MEAs should be accommodated within WTO rules; including through amending GATT Article XX or reversal of its burden of proof. ⁶⁵	There is broad scope provided by existing WTO provisions for countries to take measures needed to achieve environmental objectives, including those pursuant to MEAs, and therefore clarification and amendment to WTO rules is not necessary.	The relationship between WTO rules and trade measures pursuant to MEAS should be clarified and incorporated in “some form of interpretative or ministerial statement” with principles and criteria developed. The basic principle of good faith in international law ⁶⁶ should be borne in mind when considering accommodating MEA trade measures in the WTO.	Trade related measures in MEAS play an important role in promoting the objectives of MEAs. It is desirable to adopt measures that affect trade in an environmental framework. The relationship between the WTO and MEAs is one of “mutual supportiveness, no hierarchy and deference”. The following principles should be clarified and confirmed within a WTO framework: -trade related measures internationally agreed upon within MEAs are presumed to be WTO compatible -both regimes pay deference to the other regime. Clarification by means of an interpretative decision by members would suffice at this stage.	The WTO can accommodate environmental concerns. There is sufficient flexibility in the existing WTO system to accommodate a mutually supportive WTO-MEA interface and therefore there is no need to change WTO rules to clarify the relationship.	MEAS are essential for addressing environmental objectives. Trade measures are seldom the best policy tools to achieve environmental objectives but in certain circumstances they play an important role in MEAs in dealing with environmental problems directly. The relationship between the WTO and trade measures in MEAs should be clarified through existing WTO mechanisms and a voluntary consultative mechanism established to assess whether a trade measure is the most effective instrument available to assess environmental problems. There should also be an informal mechanism established for broader dialogue of issues with participation from international organisations, NGOs and industry.	Supports clarification of the relationship between WTO and MEAs.

⁶⁵ So that the country challenging the environmental measure would have to prove the measure imposed by the other party did not meet the conditions of Article XX of the GATT 1994

⁶⁶ The principle is that a state should not ordinarily enter into an international agreement that is clearly inconsistent with its existing obligations.

WTO Member	European Community	United States	Canada	Switzerland	Australia	New Zealand	Japan
The Precautionary principle	<p>The Precautionary Principle is a basic concept already in some WTO provisions and gradually asserting itself as a principle of international law in environment and health protection.</p> <p>The Precautionary Principle (PP) should be fully recognised in relevant international, health, environment and world trade fora and taken into account as fully as possible, particularly in the WTO.</p> <p>The relationship between precautionary principle and the principles of the multilateral trade systems should be clarified. Guidelines for use of the PP in order to clarify arrangements for its application should be established.</p>	<p>Members have the right to take science-based measures to achieve the appropriate health, safety and environmental protection.</p> <p>Use of the precautionary principle is context specific: there would be difficulty in arriving at an internationally agreed definition of the concept.</p>			<p>Supports science based risk assessment and decision making as reflected in the WTO SPS Agreement.</p> <p>Application of the precautionary principle varies depending on a case by case analysis.</p>		<p>There is lack of consensus on the precautionary approach with respect to food safety. There will be difficulties arriving at an internationally agreed definition. There is a need to clarify the issue of burden of proof with respect to the use of the concept of precaution.</p>

WTO Member	European Community	United States	Canada	Switzerland	Australia	New Zealand	Japan
Restricting trade on the basis on process and production methods	The relationship between WTO rules for non-product related process and process methods and their compatibility with eco labelling schemes based on a life cycle approach should be clarified. Rules for the creation and administration of schemes based on such should be created. Subject to procedural safeguards, there should be scope within WTO rules to use non-discriminatory; non-protectionist and markets based instruments for achieving environmental objectives.		There is a clear need to address the policy challenge of labels regarding how products are produced and not just their final characteristics.	The division between marks and labels based on product characteristics, based on process and production methods, and on non-product related process and production methods, should be clarified and reconsidered. The applicability of the TBT Agreement to non-product related process and production methods should also be clarified.			
Eco labelling	Voluntary eco labelling schemes based on a life cycle assessment are allowed per se by existing WTO rules, but coverage under the TBT Agreement should be clarified. It is desirable to promote solutions to preserve the integration of a life cycle approach and for the WTO regime to promote full transparency in developing and operating voluntary eco labelling schemes.	Members should ensure full transparency in the design and implementation of eco labelling programmes within their territories in terms of design, products covered, selection criteria and design of conformance assessment.	The strengthening of multilateral trade disciplines to take into account the increased use of voluntary international standards based on life cycle considerations should be considered.	The extent to which TBT provisions apply to marking and labelling schemes should be clarified, including the definitions of “technical regulation” and standard” in the TBT Agreement.			

WTO Member	European Community	United States	Canada	Switzerland	Australia	New Zealand	Japan
Agriculture and Subsidies	<p>The CTE should address the relationship between environmentally harmful and trade distorting measures and policies in energy markets, by examining the environmental benefits associated with eliminating trade barriers and distortions. Account should be taken of policies and measures and their consequences for the use of environmentally friendly technology. “Artificially cheap energy” that does not reflect the environmental cost associated with consumption can be a subsidy. Industry can benefit by offloading the real cost of energy to society as a whole which is counter to sustainable development.</p> <p>The FAO is the main forum for discussion on fisheries.</p>	<p>Opening of agricultural markets contributes to a more efficient allocation of resources and may improve environmental quality. Agro-environmental policies that internalise environmental externalities contribute to a more efficient allocation of resources and improve environmental quality. Free trade and environmental policies can work in tandem to achieve social benefit, economic growth and environmental quality.</p> <p>Subsidies in the fisheries sector that contribute to over capacity should be eliminated. Agricultural export subsidies should be eliminated as a key priority. The transition from domestic subsidy programmes that encourage degradation of natural resources and distort trade is supported. “Green box” subsidies that have no or negligible impact on trade should be retained.</p>	<p>The negative environmental consequences of export subsidies is recognised as well as the trade distorting effects of subsidies to the fisheries sector and high tariffs to value-added products in the forest sector.</p>		<p>Reforms to trade distorting measures can contribute to sustainable development. Australia supports the elimination and reduction of trade distorting subsidies and the elimination of agricultural export subsidies as a key priority. Better disciplines on domestic subsidies in agriculture and fisheries sectors should be ensured through transparency and monitoring. Substantial reductions in support levels and the elimination of tariff peaks and tariff escalation are supported as well as increases in tariff rate quota volumes.</p>	<p>Export subsidies should be eliminated as a key priority. There should be progressive elimination of fisheries subsidies that contribute to fisheries overcapacity. The WTO should address this by recognising the FAO Plan of Action⁶⁷, further analyse and study existing WTO disciplines on fisheries subsidies and their adequacy and determine if they are effective or whether they require supplementation.</p>	<p>The CTE should discuss in a broad manner the relationship between the sustainable use of fishery resources and trade in fish and fishery products. fishery subsidies are not adequately dealt with by the Agreement on Subsidies and Countervailing Measures.</p> <p>The multifunctionality of agriculture is recognised, particularly in relation to land utilisation. The impact of agricultural trade liberalisation on the environment cannot be discussed only from the viewpoint of the market mechanism. The long term impacts on multifunctionality should not be ignored.</p>

⁶⁷ Developed by the Food and Agriculture Organisation, this offers an agreed framework for measures at national, regional and multilateral levels to balance fishing capacity with resource sustainable objectives.

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Annex 7. Annotated Bibliography

The Economics of environmental protection and free trade

Bahiigwa, Godfrey, *The Impact of Trade and Investment Policies on the Environment: Uganda's Fisheries Industry*, in OECD, Assessing The Environmental Effects of Trade Liberalisation Agreements: Methodologies, OECD, 2000, pp 187-197.

Bahiigwa provides an economic assessment of the environmental impact of trade and investment policies as well as other institutional, government and ecological factors on Uganda's declining fisheries sector. He then presents a series of proposals for the use of market based instruments for sustainable fisheries management, including quality control, pollution management and instruments to reduce overfishing.

Eira, Ana I, and Schaeffer, Brett D, *Trade: the Best way to protect the Environment* in The Heritage Foundation Backgrounder, Number 1480, September 27, 2001.

Eiras and Schaeffer argue that free trade is critical to providing countries with the economic means to adopt measures to protect the environment, in the context of 'Trade Promotion Authority' in the US. They argue that any attempt to restrict trade for environmental reasons through trade sanctions or trade agreements may pose a threat to increased growth and wealth necessary to protect the environment and generally maintain higher levels of environmental sustainability.

Gillespie, Catherine, *Protecting the environment with Property Rights, the Market and the Rule of Law: The Case of Norilsk* in Property Rights and the Environment, Institute of Economic Affairs Studies on the Environment No 13, IEA Environment Unit, London, 1999, pp 36-45.

Gillespie examines the case study of Norilsk Nickel, a mining and metals complex in Russia, to present a case for the importance of the free market in protecting the environment. She argues that incentives provided by property rights and an emerging free market, motivated by private companies and individuals, not governments, can lead to an improvement in environmental conditions, as a natural by product of the pursuit of profit and efficiency.

Griswold, Daniel T, *Trade, Labor and the Environment: How Blue and Green Sanctions Threaten Higher Standards*, Cato Institute, Trade Policy Analysis No.15, August 2, 2001.

Griswold takes up the issue of enforcement of labor and environmental standards through trade sanctions. He refutes the argument that enforcement is required to maintain high standards, maintains that this is instead promoted through openness to trade and investment and asserts that attempts to enforce such standards through trade sanctions deprives developing countries of the opportunities they need to raise them.

Hoekman, Bernard and Kostecki, Michel, The Political Economy of the World Trading System: The WTO and Beyond Second Edition, Oxford University Press, 2001, Chapter 13, pp 441-448.

This short extract forms part of a chapter focussing on regulatory issues associated with trade, such as the environment, that have in recent years been pushed towards the WTO agenda. It provides an economic related discussion of trade measures in dealing with environmental problems in terms of national policies, competitiveness and regulation, with some comment on work in the WTO Committee on Trade and Environment (CTE).

Morris, Julian, *Business and the Environment*, private paper, 1998.

This short piece provides a concise explanation of the effectiveness of different types of regulation imposed on business for dealing with environmental effects. It looks at the role of private property and the rule of law in achieving beneficial environmental outcomes compared to utilising the power of the state.

Morris, Julian, *International Environmental Agreements: Developing Another Path* in Anderson, Terry L and Miller, Henry I The Greening of US Foreign Policy, Hoover Institution Press, California, 2000, pp267-302.

The book provides a theoretical basis for understanding how global environmentalism has come to the forefront of foreign policy and examines the costs and benefits of issues driving international treaties and agreements. The chapter suggest there are significant problems with the way in which international environmental agreements are developed their success in achieving environmental protection. Morris explains how international environmental agreements might be restricted according to a more market and science based approach and develops criteria for doing so.

Oxley, Alan, *Poor environmental Policy – the fundamental problem in the “trade and environment” debate*. Environment Australia Roundtable, 23 August 1999.

Oxley argues that trade and environment debate, presented as a relationship of conflict between the WTO and other international moves to protect the environment, such as MEAs, is leading to poor public policy results, poor environmental protection and unnecessary restriction of trade. The paper focuses on redressing the debate in a different light and employing more effective instruments for environmental management in order to solve the perceived conflict between MEAs and the WTO and achieve positive environmental outcomes.

Sugg, Ike and Krueter, Urs, Elephants and Ivory: Lessons from the Trade Ban, Institute of Economic Affairs Studies on the Environment No.2, IEA Environment Unit, London, 1994.

The authors critically examine the ban on ivory trade aimed at protecting the African elephant, its effectiveness and the political motivation behind it. They argue that positive measures that increase the benefits of conservation, economic and otherwise, rather than preservation, are much better placed to achieve positive environmental outcomes. They reassert the need for reliance on valid scientific information and economic proprietorship.

t’Sas Rolfes, Michael, Rhinos: Conservation, Economics and Trade-Offs, Institute of Economic Affairs Studies on the Environment No.4, IEA Environment Unit, London, 1995.

This account argues that the ban on trade in rhino horn has been largely unsuccessful, with illegal trade continuing. It examines the benefits and cost of reopening trade in rhino products and suggests a strategy for managing the opening of trade to increase the probability that rhinos will survive.

Tynan, Nicola, *How to have your Seahorse and Eat It: Conservation of a Common Pool Resource in Property Rights and the Environment*, Institute of Economic Affairs Studies on the Environment No 13, IEA Environment Unit, London, 1999, pp 24-35.

This short essay reveals how property rights solutions can be an effective means of preventing exploitation of a species, where trade bans or quotas commonly called for by wildlife conservation groups often fail. Using the case of threatened seahorse in the Philippines as an example it demonstrates that through common property rights and private enforcement wildlife like the seahorse can be protected form over exploitation.

International action to protect the environment

-General material

UNCED Agenda 21.

Agenda 21 is described by the United Nations as “a comprehensive plan of action to be taken globally, nationally and locally by organisations of the United Nations System, governments and Major groups in every area in which human impacts on the environment”. It comprises a lengthy document of 40 chapters, including a section on conservation and management of resources. The full text is available at www.un.org/esa/sustdev/agenda21.htm and a plain language version at iisd.ca/rio+5/agenda/agenda21.htm. For a short description of Agenda 21 see Oxley, Alan, Managing the Relationship between MEAs and the WTO: Addressing the Real Problem, Annex *The UNCED Trade and Environment Principles*, noted below.

Bhagwati, Jagdish and Hudec Robert (eds), Fair Trade and Harmonisation – Volume 1, MIT Press, Cambridge, 1996.

This book deals comprehensively with the growing conflict between free trade policies and domestic environmental, labour and antitrust policies of individual nations. It provides a critical economic and legal analysis of contending positions and proposals for reconciling and resolving them. Contributors extensively discuss and analyse policy harmonisation with a particular view to imposing some restraint on demands to push the WTO aside in the name of labour and environmental rights.

International Environmental Management in International Institute for Sustainable Development, United Nations Environment Program, Environment and Trade A Handbook, International Institute for Sustainable Development, Canada, 2000 pp7-19.

This extract provides a brief and general explanation of the origins of major environmental agreements from an environmentalist perspective, as well as attempting to define the main principles of environmental regimes including those that find expression in trade restrictions. It includes a general description of the principal MEAs with trade provisions with some comment on their environmental effectiveness and rationale.

-Environmental NGOs

Pearce, Fred, Green Warriors: The People and Politics behind the Environmental Revolution, Bodley Head, UK, 1991.

Pearce provides a very interesting account of the environmentalist movement of the late 1990s. He focuses on the origins, motives, campaigns and philosophies of the handful of organisations and people who set the green agenda and green issues around the world, including western environmental non-governmental organisations such as Greenpeace, Friends of the Earth and World Wildlife Fund, as well as organisations in developing countries.

Trade and Environmentalism in Sheehan, James M, Global Greens – Inside the International Environment Establishment, Studies in Organisation Trends #12, Capital research Centre, 1998, Chapter 3, pp 67-89.

Sheehan provides an account of the role of environmental pressure groups that promote the idea of protecting the environment by regulating trade in US and international trade policy making. He discusses their increasing presence and power in policy and political battles over international trade agreements, through a detailed and objective account of political connections, funding and campaigns waged over both NAFTA and the WTO.

-Protection of endangered species

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973
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A short description of the Convention can be found in OECD, Assessing The Environmental Effects of Trade Liberalisation Agreements: Methodologies, OECD, 2000, Chapter 1 pp12-20.

Experience with the Use of Trade Measures in the Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES) in OECD, Trade Measures in Multilateral Environmental Agreements, OECD, 1999, Chapter 1 pp11-62.

The OECD provides a comprehensive and technical description of the CITES Agreement, its objectives and trade measures. The majority of the report involves a detailed discussion on trade measures in CITES and a lengthy analysis of their effectiveness in terms of CITES participation, compliance and environmental outcomes, concluding the results are mixed. The chapter also considers other factors, such as international cooperation and a discussion of the relationship between CITES and the WTO.

Sugg, Ike and Krueter, Urs, Elephants and Ivory: Lessons from the Trade Ban, Institute of Economic Affairs Studies on the Environment No.2, IEA Environment Unit, London, 1994.

See description above. The work focuses on the effectiveness of the ban on ivory trade under CITES, aimed at protecting the African Elephant.

t'Sas Rolfes, Michael, Rhinos: Conservation, Economics and Trade-Offs, Institute of Economic Affairs Studies on the Environment No.4, IEA Environment Unit, London, 1995.

See description above. The work focuses on the effectiveness of the ban on trade in rhino horn under CITES, aimed at protecting the Black rhinoceros.

Thailand's Experience with CITES, Natural Resource Management Programme of the Thailand Environment Institute in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 95-108.

The chapter focuses on Thailand's experience with CITES, analysing the extent to which trade sanctions in CITES have induced Thailand to form legislation to comply with the Convention and the effectiveness of that legislation in curbing illegal trade. It concludes that trade measures alone have a limited role without positive measures to ensure compliance, such as financing, capacity building and relevant infrastructure.

The Experience of Indonesia with CITES, Inter University Centre, Gadjah Mada University, Yogyakarta, Indonesia in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results

of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 109-120.

Based on empirical data available, the chapter discusses the effectiveness of trade sanctions in CITES in inducing Indonesia's compliance with the Convention, concluding they may play a limited and indirect role. It further discusses the role of positive measures and factors limiting their effectiveness in terms of research, market structure and institutional problems.

-International action to manage toxic wastes and hazardous materials

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 available at www.unep.ch/basel/

A short description of the Convention can be found in Assessing The Environmental Effects of Trade Liberalisation Agreements: Methodologies, OECD, 2000, Chapter 3 pp103-111.

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Stockholm Convention on Persistent Organic Pollutants, 2001

Information on the Convention and the full text are available at www.chem.unep.ch/pops/

Bate, Roger and Tren, Richard, *When Politics Kills: Malaria and the DDT Story*, December 2000, available at www.cei.org/search/asp

Bates and Tren discuss the story of DDT as a public-health tool to fight malaria. They argue that with the modern environmental movement, governments in industrialised countries have been forced to restrict DDT for environmental fears, spelling both health and economic disaster for the world's developing countries, despite the effectiveness of DDT in controlling malaria and the lack of scientific evidence proving it as a threat to human health. They then offer a private and cost effective solution to the malaria problem other than an outright ban.

Greenpeace/Basel Action Network, UNCTAD's Role in Fostering Toxic Waste Trade: An illustrated Case Study on Hazardous Waste Exports to Asia, Prepared for UNCTAD Meeting held in Bangkok, 12-19 February, 2000, available at <http://www.greenpeace.org/~toxics/toxfreeasia/unctad.html>

Greenpeace strongly criticises UNCTAD's claim that the Basel Ban is an unjustified trade barrier that hurts the environment and the economy, asserting the organisation has succumbed to minority interests of certain developed countries at the expense of developing countries and the environment. The report includes several illustrative country case studies of trade in hazardous wastes in Asia.

Langewiesche, William, "The Shipbreakers", Atlantic Monthly, August 2000

This journalist-style article provides a fascinating insight into the practice of "shipbreaking" in India; the process of disposing of old ships. Langewiesche clearly narrates the views of the Indian workers who earn a living from the shipbreaking industry and sale of scrap metal against the attempts by environmentalists to ban the process for its polluting effects.

Montgomery, Mark, *Banning Waste Exports: Much Ado About Nothing in Buffalo Human Rights Law Review*, Vol 1, Fall 1994, Number 2.

The article examines the ban on hazardous waste exports, concluding that the ban was largely inconsequential in both legal terms and practical effect. It argues that attempts to tighten the ban on waste exports are unwarranted.

OECD, Trade Measures in Multilateral Environmental Agreements, OECD, 1999. See Chapter 3 *Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, pp 97-164.

The Chapter provides a detailed and comprehensive description of the environmental and policy context of the Basel Convention and provisions controlling trade in hazardous wastes. It includes a qualitative analysis of the effectiveness of the trade measures and discusses the environmental and economic effects of such measures, compliance issues and moves toward using trade measures in this area. It provides a short analysis of the relationship between the Basel Convention and the WTO, noting that there may be potential conflict in meeting obligations under both agreements simultaneously.

Srinivasen, Prasanna, *The Basel Convention of 1989 – A Critique – The Basel Convention – A developing country's perspective*. (private copy)

Srinivasen's critique examines the Convention in terms of its consistency with practices of multilateral fora, meeting of its objectives, consistency with principles of free trade as under the WTO and whether it has worked toward development of environment related practices, concluding the convention falls short on all four points. It includes a short case study on shipbreaking in Indonesia.

The Case of Used Lead-Acid Batteries In the Philippines: The Need for Supportive/enabling Measures to Encourage Environmentally Sound and Economically Viable Management of Lead, Ulrich Hoffmann, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 122-138.

Using the case of used lead acid batteries, Hoffmann discusses the effect of the Basel Ban on the natural resource management of lead and the use of environmentally sound processing technology in the Philippines, asserting they may be adverse both environmentally and economically and may lead to a fragmentation of the world market for lead scrap. He maintains there is a need for supportive measures to increase environmentally sound and economically viable management of lead and to adhere to the objectives of the Basel Convention.

The Effectiveness of the Provisions on Transfer of Technology to Developing Countries in the Basel Convention: The Case of Used Lead-Acid Batteries in India, Ajay Raychaudhari and Ulrich Hoffman, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp139-150.

This chapter examines access to environmentally sound technologies (ESTs) and the conditions of their dissemination under the Basel Convention, based on the case study of recycled used lead acid batteries in India. It notes that to facilitate technological transfer under the Convention, a flexible package of measures to provide for the dissemination and development of ESTs is needed.

-International action to protect the ozone layer

Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and its amendments available at www.unep.ch/ozone/index.shtml/

A description of the Convention can be found in Assessing The Environmental Effects of Trade Liberalisation Agreements: Methodologies, OECD, 2000, Chapter 2 pp 66-72.

India: Effects of Trade Measures and Positive Measures in the Montreal Protocol on Selected Indian Industries, Das, Shipra, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 51-62.

This short empirically based study examines broadly the role of trade and positive measures in contributing to participation and phase-out of the Montreal Protocol in India, a then producer of ozone depleting substances. It finds that trade measures have had a limited effect in terms of both participation and phase-out, with positive measures, such as the expectation of technology transfer playing a much larger role.

India: The issue of Technology Transfer in the Context of the Montreal Protocol, Jayashree Watal, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 63-76.

This chapter is complementary to the case study above. It examines and highlights the importance and difficulties of technology transfer in the implementation of the Montreal Protocol in India, focussing on sector specific experiences with ozone depleting substances such as aerosols, foams and refrigerators.

OECD, Trade Measures in Multilateral Environmental Agreements, OECD, 1999. See Chapter 2 *Experience with the Use of Trade Measures in the Montreal Protocol on Substances that Deplete the Ozone Layer*, pp 63-96.

This chapter focuses on the discriminatory trade measures of the Montreal Protocol. It provides a detailed analysis of their purpose and effectiveness, including their relationship with compliance to the Protocol and also with the Multilateral trading system. The chapter also includes a brief survey of the environmental and industrial context of the Protocol and a detailed description of its main features.

Thailand's Experience with the Montreal Protocol, Natural Resource Management Programme of the Thailand Environment Institute, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp36-50.

This chapter focuses on Thailand's experience with the Montreal Protocol as an importer and significant user of ozone depleting substances. It discusses the role of trade and positive measures in inducing participation to the Protocol and phase-out of prohibited products, concluding that whilst trade sanctions have played an initial role in inducing participation to the Protocol, positive measures are likely to prove more effective in contributing to phase-out obligations.

The Republic of Korea and the Montreal Protocol, Korean Trade Promotion Agency, in Jha, Veena and Hoffman, Ulrich (eds), Achieving Objectives of Multilateral Environmental Agreements: a package of trade measures and positive measures. Elucidated by Results of Developing Country Case Studies, United Nations Conference on Trade and Development, 2000, pp 77- 94.

This case study examines the effectiveness of trade and positive measures in participation and phase-out under the Montreal Protocol for Korea as a producer and exporter nation. It also highlights the importance of other factors present in Korea that differ from other developing countries, such as the level of indigenous technology development.

-International action to manage LMOs and GMOs

Cartagena Protocol on Biosafety, 2000.

A brief introduction and note on background to the Protocol is available at www.biodiv.org/biosafety/default.asp. For a more detailed history and review of the provisions of the protocol see *The Biosafety Protocol* in Adler, Jonathon H, *The Cartagena Protocol and Biological Diversity: Biosafe or Bio-Sorry?* in The Georgetown International Environmental Law Review, Vol XII, Issue 3, Spring 2000. The full text of the Protocol is available at www.biodiv.org/biosafety/protocol.asp

Adler, Jonathon H, *The Cartagena Protocol and Biological Diversity: Biosafe or Bio-Sorry?* in The Georgetown International Environmental Law Review, Vol XII, Issue 3, Spring 2000.

Through an examination of the objectives and negotiating history of the Cartagena Protocol, as well as a thorough discussion of its potential impact, Adler argues that the precautionary approach adopted in the Protocol goes far from achieving advantageous environmental outcomes in terms of both biotechnology and biodiversity.

Bernasconi-Osterwalder, Natalie, “ *The Cartagena Protocol on Biosafety: A multilateral approach to regulate GMOs*” in Jackson, John H and Brown Weiss, Edith (eds), Reconciling Environment and Trade, Transnational Publishers Inc, New York, 2001, Chapter 21, pp 689-721

Bernasconi-Osterwalder provides a descriptive, detailed and legalistic account of the Cartagena Protocol and its relationship to the WTO and its relevant agreements. Through an examination of the potential inconsistency between the provisions and obligations of Protocol and then that of the WTO, she is of the view that the relationship is generally not one of conflict although does acknowledge that legally interaction between the two treaties is currently not certain.

Oxley, Alan, *The Biosafety Protocol – a help or a hindrance*, PBEC Working Committee on Food Products, Biotechnology – Roadmap to the Future, Hawaii, 16-17 March 2000.

This critique questions the effectiveness of the Cartagena Protocol in achieving environmental objectives by placing controls on trade. It discusses succinctly and clearly the rationale for such an agreement, the potential negative impact of the protocol on trade, its uncertain legal effect and likelihood of advancing environmental objectives.

Waincymer, Jeffrey, *Cartagena Protocol on Biosafety*, Deakin University, Melbourne, Australia, 2001
Waincymer provides a legal analysis of the Cartagena Protocol on Biosafety, its relationship with WTO rights and obligations and its potential effects in terms of trade uncertainty and protectionist behaviour.

-International action for climate change

United Nations Framework Convention on Climate Change, 1992.

See www.ciesin.org/TG/PI/TREATY/framwork.html for a brief summary of the convention with links to signatories, negotiations, UNCED and the full text of the framework.

Kyoto Protocol, 1997.

See the United Nations Framework Convention homepage at unfccc.de/resource/convkp.html for the full text of the Protocol, status of signatories and ratification as well as for links to other sites.

Competitive Enterprise Institute (CEI), The Costs of Kyoto: Climate Change Policy and its Implications. See Part 2 Global Impacts (Montgomery, David, "Global Impacts of a Global Climate Change Treaty", Fisher, Brian, "International Impacts An Australian View" and Lal, Deepak, "Ecological Imperialism, The Prospective Costs of Kyoto for the Third World")

These papers are a result of a conference hosted by the Competitive Enterprise Institute on global climate change policy and its implications, in July 1997. The papers focus on the costs of the Kyoto Protocol and examine the economic and social implications of climate change policies, with emphasis on real world impacts. Montgomery and Fisher address the global impacts of emission reductions under the Protocol, concluding the cost and impact of limitations would be severe. Deepak Lal's paper examines how greenhouse policies could mortgage the economic future of people in the developing world.

Moving Beyond Kyoto~ A Responsible Approach to Climate Change, Speech to the James A. Baker Institute of Public Policy Rice University by U.S. Senator Chuck Hagel, September 7, 2000.

Senator Hagel's speech takes a scientific and practical approach to the debate on climate change and the Kyoto Protocol, asserting the need to rely on sound science and scientific evidence, which is at present conflicting and uncertain. He advocates focussing on a workable solution to climate change that rather than adherence to the protocol, presents an alternative, science based and common sense policy solution to the issue.

International action to create global free markets

Croome, John, *Reshaping the World Trading System A history of the Uruguay Round*, World Trade Organisation, Geneva, 1995.

Croome's detailed history of the Uruguay Round of negotiations is an informative and interesting non technical account of how and why the Uruguay Round came about, what the participant countries sought during the negotiations and the outcome of each stage and sector of the negotiations.

Hoekman, Bernard and Kostecki, Michel, The Political Economy of the World Trading System: The WTO and Beyond Second Edition, Oxford University Press, 2001. See *The Trading System in Perspective*, Chapter 1, pp 9-46.

This chapter provides a short and comprehensive introductory piece covering the history and description of the trading system, the functions of the multilateral trading system in the context of liberalisation as well as the history and main principles behind the GATT and development of the WTO. It includes a short commentary on challenges for future global cooperation.

Hoekman, Bernard and Kostecki, Michel, The Political Economy of the World Trading System: From GATT to WTO, Oxford University Press, 1995.

Hoekman and Kostecki's book is a comprehensive and objective reference source for an overview and detailed description of the history, setting and institutions of the trading system up to 1995, covering the GATT and focussing on the agreements, provisions and future challenges of the WTO system. It was updated by the second edition in 2000.

Jackson, John H, The World Trading System Law and Policy of International Economic Relations, Second Edition, MIT Press, London, 2000.

This is a comprehensive reference source providing a legal and policy oriented description and discussion of the world trading system of GATT/WTO. It includes detailed analyses of all trade topics covered by the WTO and their implications, as well as further discussion on potential new subjects.

The Precautionary Principle

Adler, Jonathon H, *More Sorry than safe: Assessing the Precautionary Principle and Proposals for an International Biosafety Protocol*, 35 Texas International Law Journal, 2000 173.

Adler provides a detailed account of regulation and approaches to dealing with the potential and uncertain risks and benefits of new technologies, in particular biotechnology. He focuses on the precautionary approach as embodied in Cartagena Protocol on Biosafety, arguing that risk avoidance of precautionary regulation rather than risk management may in fact do more harm than good to biodiversity, human safety and the environment.

Cameron, James, *The Precautionary Principle* in Sampson, Gary P and Chambers, W. Bradnee, (eds) Trade, Environment and the Millennium, United Nations University Press, Hong Kong, 1999, pp239-270.

This short paper seeks to define the precautionary principle by its core concepts and argues that the principle forms part of international environmental law. It discusses the precautionary principle as a means to safeguard rights in the public interest in the trade and environment debate in the WTO through an examination of WTO dispute settlement and the case of several NGOs.

Morris, Julian (ed), Rethinking Risk and the Precautionary Principle, Butterworth - Heinemann, Oxford, 2000. See Chapter 1 *Defining the Precautionary Principle*, pp1-21 and Chapter 5 *Genetically Modified Fear and the International Regulation of Biotechnology*, pp 84-104.

Chapter 1 by Morris critically considers the meaning and definition of the precautionary principle as understood by different NGOs, governments and international bodies and discusses the implications of such application for

regulation. Chapter 5 provides a critique of the Cartagena Protocol on Biosafety, predicated on the precautionary principle, and its effects on and implications for biodiversity.

Environmental provisions and the WTO

Eglin, Richard, “*Keeping the “T” in the WTO: Where to next on environment and labor standards?*” in North American Journal of Economics and Finance, Vol 12, 2001 p 173-191.

Eglin examines the claim that the WTO should contribute to better environmental protection and more social justice by allowing trade sanctions to enforce this. He provides a strong argument against using trade sanctions as policy tools, assessing the need to maintain a robust trading system to tackle poverty, the most important cause of environmental degradation and social injustice.

Oxley, Alan, *WTO and the environment*, Draft Paper for Policynetwork.net, September, 2001

In response to criticism of the inadequacy of the WTO to provide for environmental protection, Oxley’s paper describes and explains the extent to which the WTO provides great latitude for restricting trade in order to protect the environment. He provides a strong case for keeping public policy considerations, such as protecting the environment, outside the core functions of the WTO in order to avoid undermining its principal capacity to raise prosperity through trade.

Morris, Julian, *Critique of the rebuttable presumption/reversal of burden of proof proposal on the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs)*, International Council on Metals and the Environment Round Table Meeting of Experts, July 17-18 2001, Washington D.C.

Morris discusses the proposal in the WTO of the European Union in 2001 to reverse the burden of proof in relation to Article XX of the GATT 1994 pursuant to Multilateral Environment Agreements. He argues strongly against this and for keeping the status quo, maintaining that the proposal raises several questions and problems in relation to WTO rights and obligations and increases the chances of trade restrictions being imposed for arbitrary or protectionist purposes.

Rogelio Torres, Hector, *Review of Developing Country Interests in Trade and the Environment in OECD*, Assessing The Environmental Effects of Trade Liberalisation Agreements: Methodologies, OECD, 2000, pp175-185.

This paper examines the trade and environment interface in the context of the new round of multilateral trade negotiations from the perspectives of developing countries. It provides a short summary and explanation of issues and concerns as dealt with in the WTO and CTE, (such as extra-territoriality, interaction with MEAs and process and production methods) articulates developing country reticence to include these issues on the WTO agenda and argues for a meaningful consideration of trade and environment that addresses real causes of environmental concern (such as OECD subsidies and tariff escalation in developed countries).

Oxley, Alan, “*The WTO Doha Development Round: The Threat to international Business of the Spread of Environmental Trade Sanctions*”, The Australian APEC Study Centre, Monash University, 2002.

Oxley looks at the issue of environment in the context of the new round of trade negotiations in the World Trade Organisation. He examines the direction of EC policies on trade and environment and the outcome of a recent WTO disputes case, arguing that the mainstreaming of environment on the WTO's agenda could lead to new grounds for protection in trade and represent a serious threat to the multilateral trading system.

Oxley, Alan, "*Implications of the Decisions in the WTO Shrimp Turtle Dispute*", private paper, 2002.

This paper examines the recent decision in a major WTO disputes case and looks at the interpretation of WTO disputes body of WTO rules, from a policy perspective. Oxley argues that outcome of the case potentially legitimises restrictions on trade that many of the WTO members themselves would not ordinarily permit and advocates the need to quarantine or reverse the trend.

-Work in the WTO

Relevant WTO Agreements are available at www.wto.org

- The General Agreement on Tariffs and Trade, 1994
- The WTO Agreement on Sanitary and Phytosanitary Measures
- The WTO Agreement on Technical Barriers to Trade
- The WTO Agreement on Trade Related aspects of Intellectual Property Rights

WTO Secretariat, Appendix 1 "*Trade and Environment in the GATT/WTO*" in Sampson, Gary P and Chambers, W. Bradnee, (eds) Trade, Environment and the Millennium, United Nations University Press, Hong Kong, 1999, pp301-345

This short paper prepared by the WTO Secretariat is a good summary account of trade and environment issues and activities as they have featured in the GATT and WTO. It includes historical background of GATT and WTO instruments on trade and environment, the evolution, role and work of the WTO Committee on Trade and Environment, activities of the WTO Secretariat and also a short section detailing environmental provisions as they appear in WTO Agreements.

A complete list of working documents of the CTE is available at:
www.wto.org/english/tratop_e/envir_e/cte_docs_list_e.htm

-WTO Critiques

Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, available at www.greenpeace.org

Prepared for the WTO Ministerial Conference of 1999 in Seattle, Greenpeace outlines its agenda for "safe trade", including recommendations to address the need to change the WTO to better incorporate environmental protection and sustainable development as well as trade liberalisation. It uses a case by case examination of environment relate disputes in the WTO to argue the current treatment of the environment under WTO has threatened the ability of governments and citizens to respond to demands against threats to the environment and health.

Shrybman, Steven, *An Environment Guide to the WTO*, Canadian Alliance on Trade and Environment, c/o Sierra Club of Canada May 1997, www.sierraclub.ca

Sierra Club provides a detailed environmental and political critique of the WTO, claiming the institution will have far reaching and adverse effects for the environment in relation to global resources, natural resources, agriculture, energy and intellectual property rights.

Wallach, Lori and Sforza, Michelle, Chapter 1 “*The WTO’s Environmental Impact*” in Whose Trade Organisation?, Public Citizen, Washington, 1999, pp 13-50.

Public citizen provides a highly critical and political public policy critique of environmental issues and the WTO, dealing qualitatively with WTO environmental provisions, environment related disputes in the WTO and the WTO and multilateral environment agreements.

WWF International, Sustainable Trade for a Living Planet, Reforming the World Trade Organisation, September 1999.

WWF’s brochure argues that whilst growth in international trade has expanded, the WTO has failed to adequately protect the environment. It urges inclusion of environmental protection and sustainable development as a central feature of the new round of trade negotiations and for a reshaping of international trade to account for this.

Relevant websites

- www.wto.org
- www.greenpeace.org
- www.panda.org
- iisd1.iisd.ca

Discriminatory Trade Measures

-MEAs and the WTO

International Institute for Sustainable Development, United Nations Environment Program, Environment and Trade A Handbook, International Institute for Sustainable Development, Canada, 2000, pp60-63.

This extract provides a short qualitative discussion of the role and purpose of trade restrictive measures in multilateral environment agreements in the context of the United Nations Agenda 21. It also discusses the sources of potential conflict with WTO rules, and outlines the treatment of such in the WTO, concluding that a workable solution is needed to resolve such conflicts.

International Institute for Sustainable Development, Principles for Trade and Sustainable Development, Winnipeg, 1994, available at www.iisd.org

IISD sets out several principles for trade and environment intended to guide trade and trade- related environment policies in the interests of achieving sustainable development. The paper describes the IISD vision of sustainable

development and discusses the main principles, including the adoption of a precautionary approach to science and revision of WTO rules to protect the environment extraterritorially within internationally agreed criteria.

Jackson, John H and Brown Weiss, Edith (eds), *The Framework for Environment and Trade Disputes*” in Jackson, John H and Brown Weiss, Edith (eds), Reconciling Environment and Trade, Transnational Publishers Inc, New York, 2001, Chapter 1, pp 1-37.

This chapter provides an introduction to the historical background of, differing international legal regimes for and current issues in, trade and environment disputes. It details disputes between environment and trade, in and outside the WTO and offers some discussion as to the potential future conflict between multilateral environment agreements and the WTO.

Jha, Veena and Vossenaar, Rene, Appendix II “*Key Trade and Environment Issues: Problems and Possible Solutions*” in Sampson, Gary P and Chambers, W. Bradnee, (eds) Trade, Environment and the Millennium, United Nations University Press, Hong Kong, 1999, pp 347-360

This appendix provides an easy to read and helpful matrix description of trade and environment problems and a balance of possible solutions both in and outside the WTO. It covers a wide range of perceived problems including those arising from the trade and environment agenda, from mainstreaming of environment provisions in WTO agreements, market access issues, MEAs, environmental technologies and TRIPS. It also offers solutions for “win win” scenarios and methods for dealing with environmental impacts of trade policies and agreements.

OECD, Trade Measures in Multilateral Environmental Agreements, OECD, 1999. See Chapter 4 *Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies*, pp 165-209.

This chapter comprises a summary of the main issues raised from three OECD case study analyses of the Montreal Protocol, Basel convention and CITES. It examines the nature of trade measures in each treaty and their role and effectiveness in achieving MEA objectives as well as noting main themes and lessons learned in terms of policy approaches, responsibilities, implementation and relationship to the multilateral trading system.

Oxley, Alan, *Managing the relationship between MEAs and the WTO: Addressing the real problem*, International Trade Strategies, July 2001.

Oxley examines the environmental case for addressing the problem of conflict between the WTO and MEAs through modification of the WTO. He argues strongly against this, maintaining that the solution lies in more effective environmental policy rather than through amendment of the fundamental principles of the WTO.

Oxley, Alan, *Managing the Threat of Environmentalism to global trade reform*, Presentation to the Policynetwork Seminar, Geneva, 13 September, 2001.

Oxley discusses the origin and purpose of environmental demands of NGOs and other campaigns involving the WTO as well as the approach taken by the European Union. He examines the focus and merits of these demands, concluding they pose a fundamental threat to the WTO and that a more appropriate strategy is needed.

Quick, Reinhard Dr, *Trade Measures and Multilateral Environmental Agreements (MEAs)*, BIAC Meeting of Management Experts on Trade and Environment, Paris, 26 April 2001.

These notes from a powerpoint presentation provide a short dot-point outline of potential conflicts between MEAs and WTO Agreements and possible solutions and associated problems, including a summary of the European business position.

Von Moltke, Konrad, *Trade and Environment, the Linkages and the Politics*, Paper for the Roundtable on Canberra, 25 August 1999.

From an environmentalist perspective, Von Moltke discusses generally the evolving relationship between the environment and trade and the politics behind the debate. He argues that the substantive case for addressing environment in the next trade round is strong and proposes several mechanisms to pursue an environmental agenda in trade.

Von Moltke, Konrad, Whither MEAs? The Role of International Environmental Management in the Trade and Environment Agenda, International Institute for Sustainable Development, Canada, July 2001.

Von Moltke's paper supports and argues for a strengthening of multilateral environment agreements as part of international environmental management in the context of the trade and environment debate. It examines the current international environment structure and discusses possibilities and sets out proposals for strengthening environmental management through institutional and organisational reform.

WTO Committee on Trade and Environment, "*Linkages between the Multilateral Environment and Trade agendas Cluster, Canadian Intervention*", July 23-24, 1998.

The intervention in the WTO CTE canvasses Canadian principles and approaches to multilateral environmental agreements including the relationship between the WTO and MEAs generally and in terms of dispute settlement as well as the relevant provisions of the TRIPs Agreement.

WTO Secretariat, Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environment Agreements, 6 June 2001, WT/CTE/W/191

This paper prepared by the Secretariat provides a factual overview of relevant dispute settlement and compliance provisions in the WTO and MEAs as well as the processes involved. The paper builds on the Matrix on trade measures and discussions held in the CTE and elsewhere.

WTO Secretariat, Matrix on Trade Measures Pursuant to Selected MEAs, 14 June 2001, WT/CTE/W/160/Rev.1

The WTO Secretariat has prepared a detailed and comprehensive summary matrix on trade measures pursuant to 14 environmental Protocols and Conventions. It serves as an excellent reference source for information on the adoption and purpose of covered MEAs, a summary of trade related measures in the particular agreement, supportive measures and also compliance and dispute settlement provisions.

-Unilateral Measures

Relevant WTO environment cases:

- Shrimp Turtle: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October, 1998, WTO/DS/58/AB/R

- Tuna Dolphin I: *United States – Restrictions on Imports of Tuna (Mexico)*, September 3, 1991
- Tuna Dolphin II: *United States – Restrictions on Imports of Tuna (EEC and the Netherlands)*
June 16, 1994

Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area.

A bilateral agreement between the United States and Jordan, this treaty expressly recognises the objective of protecting the environment. It includes binding obligations for enforcement of laws for high levels of environmental protection in a manner affecting trade and has provisions against relaxing such laws to encourage trade.

O'Brien, Paul, "*Unilateral Environmental Measures after the WTO Appellate Body Shrimp-Turtle Decision*" in Jackson, John H and Brown Weiss, Edith (eds), Reconciling Environment and Trade, Transnational Publishers Inc, New York, 2001, pp 445-473.

O'Brien provides a legal analysis of the WTO Appellate Body Shrimp Turtle decision with reference to the appropriateness of unilateral actions under WTO. Through a detailed examination and discussion of the methodology and approach taken by the Appellate Body he concludes that the matter remains largely unresolved and inadequate, revealing the inability of the WTO to deal beyond trade measures and assess international environment concerns.

Shaffer, Gregory, *A Trade and Environment Conflict: The Shrimp Turtle Case*, International Council on Metals and the Environment Round Table Meeting of Experts, Washington D.C., July 17-18 2001.

In his concise, critical analysis of the WTO Shrimp Turtle case, Shaffer argues that the decision of the Appellate Body has far reaching effects, resulting in a modification of the former GATT approach to trade measures imposed in reaction to a foreign environmental practice. He asserts the decision takes into account unrepresented foreign interests and in doing so implies unilateral environment-related trade measures may be allowed under WTO rules.

Standards, eco labelling and process and production methods

The WTO Agreement on Technical Barriers to Trade, available at www.wto.org

Relevant WTO disputes cases:

- Tuna Dolphin I: *United States – Restrictions on Imports of Tuna (Mexico)*, September 3, 1991
- Tuna Dolphin II: *United States – Restrictions on Imports of Tuna (EEC and the Netherlands)*
June 16, 1994
- EC Asbestos: *European Communities – Measures affecting Asbestos and Asbestos Containing-Products*, WTO/DS135/AB/R

Appleton, Arthur E, “*Environment and Labelling Schemes: WTO laws and Developing Country Implications*” in Sampson, Gary P and Chambers, W. Bradnee, Trade, Environment and the Millennium, United Nations University Press, Hong Kong, 1999, Chapter 8, pp 195-221

Appleton examines the concerns and implications for developing country of eco-labeling schemes, alluding to controversial and current related issues in the WTO, such as process and production methods. He provides a legal analysis of eco-labeling schemes with key WTO provisions, with conclusions for their implications for developing countries from both a trade and strategic perspective.

Commission of the European Communities, Green Paper on Integrated Product Policy 07.02.2001 COM(2001) 68 final, Brussels, 2001.

The Green Paper sets out the elements and aims of the European Union’s product related environment policies, based on an “integrated product policy” approach and primarily focussed on the eco-design of products. The approach effectively imposes the environmental costs of a product throughout its entire life on the producer of that product, aimed creating a market for greener products through a mix of policy instruments.

International Institute for Sustainable Development, United Nations Environment Program, Environment and Trade A Handbook, International Institute for Sustainable Development, Canada, 2000, pp41-48

This chapter includes short discussions on environmental standards and environmental PPMs, the precautionary principle, eco labels and the effect of environmental standards on competitiveness from an environmental perspective.

Von Moltke, Konrad, Reassessing Like Products Paper presented at Chatham House Conference, Trade Investment and the Environment, 29 and 30 October 1998, available at www.iisd1.iisd.ca

Von Moltke discusses the issue of process and production methods (PPMs) in the international trade regime, arguing that a trading system that does not provide for distinctions between products produced sustainably and those that are not is unacceptable from an environmental perspective. He advocates the use of environmental PPMs in a rule based manner, developed by those primarily concerned with the environment and then inserted into the rules based system of the GATT to respect the needs of both the environment and trade liberalisation.

Wilson, John.S, Sewadeh, Mirvat and Otsuki, Tsunehiro, Dirty Exports and Environmental Regulation: Do Standards Matter?, Selected Paper for the AAEA Annual Meeting, Development Research Group, The World Bank, August, 2001

Using econometric analysis, this paper includes an economic assessment of the effects of the stringency of environmental regulations on international trade, finding that such regulations do affect export competitiveness and that the effect is primarily trade limiting. It also provides a good economic discussion of trade agreements as a policy tool to affect changes in environmental policy and a summary of theoretical and empirical works on trade and environment regulation.

Morris, Julian, “*Green Goods? Consumers, product labels and the environment*”, IEA Studies on the Environment No.8, IEA Environment Unit, 1997.

Morris describes in detail the evolution and characteristics of eco labels and discusses their associated environmental, technological, information and trade effects, with the aid of examples. He notes that often eco labelling schemes are unsuccessful in achieving desired environmental effects when compared with information sharing and certification schemes.

Other References

World Trade Organisation, [Annotated Bibliography of Selected Literature concerning the Use of Trade Measures in Multilateral Environment Agreements](#), WT/CTE/W/129, 2 February 2000, available at www.wto.org

The WTO has provided an exhaustive list of material relevant to trade and multilateral environment agreements.