

# WTO AND ENVIRONMENTAL ISSUES

Bhargav Mansatta and Anupam Pareek\*

## **Introduction**

A growing number of developing countries look to trade and investment as a central part of their strategies for development, and trade considerations are increasingly important in shaping economic policy in all countries, developed as well as developing. At the same time, however, most of the world's environmental indicators have been steadily deteriorating, and the global achievement of such important objectives as the Millennium Development Goals remains very much in doubt. These trends are not isolated; they are fundamentally related. Much environmental damage is due to the increased scale of global economic activity. International trade constitutes a growing portion of that growing scale, making it increasingly important as a driver of environmental change. As economic globalization proceeds and the global nature of many environmental problems becomes more evident, there is bound to be friction between the multilateral systems of law governing both. As the integration of trade and environment is inevitable in practice, a proper framework within the WTO mechanism itself is essential to strike a balance between the two.

The contention of critics of the WTO<sup>1</sup> is that the Organization is inadequate for the purposes of protecting the environment. This is not so. The WTO gives great latitude to members to restrict trade to protect the environment. This is rarely conceded. There are several provisions in the WTO agreements dealing with environment. There is a reference to sustainable development as one of the general objectives to be served by the WTO in the Marrakech 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

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\* Students, III Year, Gujarat National Law University, Pursuing B.A. LL.B. (Hons.)

<sup>1</sup>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.

are concerned are Article XX of the GATT and the Agreements on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.

However existence of uncertainties, ambiguities and conflict situation between WTO and environment is not denied. There are certain grey areas which require attention and they had been subject matter of debate between countries at international negotiations and before the WTO dispute settlement body. Conflict of relationship exist between Multilateral Environmental Agreements (MEAs) and WTO. Relationship between the two is still to be clarified. Such a conflict creates legal insecurity and is injurious to the world trading system. WTO though specifically meant for trade and not for managing environment has no option but to realize its international public policy objective.

Provisions within the covered Agreements pertaining to environment normally provided in the form of exceptions are itself suffering from interpretation problems, which is clearly evident from various disputes before the WTO dispute settlement mechanism. Review of cases in which panel and appellate body ruled on environmental matters suggests that current legal instruments are not sufficient for environmental concerns. Article XX of GATT affirms the legal right of WTO Members to adopt measures that address environmental issues; WTO is yet to come out clearly on such environmental obligations.<sup>2</sup> The WTO's Committee on Trade and the Environment (CTE), for its part, has provided a valuable forum for discussions on reconciling environmental and WTO treaty obligations and other crossover issues. However, it has not produced concrete proposals for trade policy reform to enforce or promote environmental goals.

Optimal policy is to have an appropriate environmental policy in place, to look after the environment, and then to pursue free trade to reap the gains from trade. There are pragmatic steps that the international community is required to take to more intelligently ameliorate trade-induced environmental degradation and to better balance free trade with ecological protection. The links between trade and the environment are multiple, complex

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<sup>2</sup> To an extent *Asbestos case*, *Gasoline case*, and *shrimp case*, the rulings have confirmed that countries can enact environmental measures, even if they affect trade and even if they concern others' Processes and Production Methods.

and important.. Trade liberalization is of itself neither necessarily good nor bad for the environment. Its effects on the environment in fact depend on the extent to which environment and trade goals can be made complementary and mutually supportive. A positive outcome requires appropriate supporting economic and environmental policies.

### **WTO and Environment Protection**

There are several provisions in the WTO agreements dealing with environment. There is a reference to sustainable development as one of the general objectives to be served by the WTO in the Marrakech 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 Agreements 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 waives members of the obligation 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 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.<sup>3</sup>

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. 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 Round<sup>4</sup> to contain such abuse. It states

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<sup>3</sup> 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.*

<sup>4</sup> Preventing abuse – the role of the Agreement on Sanitary and Phytosanitary Measures (SPS). *The Uruguay Round of Trade Negotiations, 1986-1994.*

that if countries base restrictions on trade on recognized international standards,<sup>5</sup> 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.<sup>6</sup> 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.

The Agreement on Technical Barriers to Trade (TBT) was negotiated in the Uruguay Round, replacing the Standards Code.<sup>7</sup> 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 regulations.<sup>8</sup>

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. In assessing that risk, the agreement stipulates that

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<sup>5</sup> *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)*

<sup>6</sup> See Articles 2.2, 3.3 and 5

<sup>7</sup> The Standards Code of 1979 was developed in the Tokyo Round of trade negotiations.

<sup>8</sup> Article 2.1

relevant elements of consideration are, inter alia, available scientific and technical information, related processing technology or intended end uses of products.<sup>9</sup>

Members are also required to base their standards on those developed by international bodies which are presumed to be in compliance with the Agreement<sup>10</sup> 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 or 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.<sup>11</sup> 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

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<sup>9</sup> Articles 2.2

<sup>10</sup> Article 2.4

<sup>11</sup> 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”.

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.<sup>12</sup> 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.

### ***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. 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.

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).<sup>13</sup>

WTO provisions generally do not allow 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.

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<sup>12</sup> 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)

<sup>13</sup> *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21<sup>st</sup> Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org* accessed August 2001.

However this is a limited application and the extent of its meaning has not been tested. The general case for not making provision in the WTO for the right to restrict an import according to the environmental effect of the way in which it was processed or produced is that to do so assumes the WTO should include provisions to secure public policy objectives other than trade. There is a difference between allowing exceptions to protect national policies and creating provisions which enable governments to force other to adopt non-trade objectives.

IT is argued that the purpose of the WTO is to enable countries to gain the benefits of an open trading system. If it is to be used as an instrument to achieve environmental purposes, the case in principle is made for it to be used to secure objectives in other areas of international public policy such as health, labor standards, postal services, human rights and air transport standards. If this were to happen, the WTO would cease to be effective in meeting its primary purpose, not just because it would be overloaded with policy objectives which have not intrinsic functional relationship to trade, but because giving members of the WTO the right to pick and choose specific areas in which they could insist on certain standards being met before trade was permitted would undermine the capacity of the WTO to allow members to exploit comparative advantage.

The case to alter the WTO to permit trade restrictions on environment grounds is loaded anyway. Those who make that claim are obliged first to explain why more normal means of achieving international agreement to meet international public policy objectives are not used. The United Nations Conference on Environment and Development (UNCED) in 1994 laid down some principles on trade and environment.<sup>14</sup> They stated that the preferred international approach to protecting the environment was to create multilateral agreements expressly for that purpose in which members would agree to adopt commonly agreed measures in their national law or practice. They also stated that use of trade measures to protect the environment should be avoided. To apply this approach in the case of the tuna/dolphin issue, rather than have one country threaten a trade sanction

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<sup>14</sup> See Annex The UNCED Trade and Environment Principles

unless another complied with its preferred environmental (fishing) policy (as was the US position) to achieve international environmental protection, all countries fishing in the region would enter an international agreement to required their fishing fleets to use the same fishing techniques, as they now do in a regional fishing agreement.<sup>15</sup>

The proponents of the sanction approach would argue that were it not for the coercion, the regional agreement would not have been adopted. This may be so, but this is to justify the morally-odious and internationally-censured option of applying coercion because it disregards the national sovereignty of nations simply on the grounds that the more normal approach of seeking an international agreement is too slow. In the case of the effect of dolphin in the Eastern Tropical Pacific region, there was no case for urgency. The species concerned were not endangered.

### ***Other Environmental Provisions***

In the Agreement on Agriculture, there is scope to permit subsidies which are for environmental protection. 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 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.

### ***Subsidies***

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

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<sup>15</sup> The Agreement on International Dolphin Conservation Program 1999, Inter-American Tuna Commission.

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 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.

### **MEAs AND WTO REGIME**

Multilateral environmental agreements (MEAs) are voluntary commitments among sovereign nations that seek to address the effects and consequences of global and regional environmental degradation. MEAs address environmental problems with transboundary effects, traditionally domestic environmental issues that raise extra jurisdictional concerns, and environmental risks to the global commons. International agreements to protect human health and the environment have used trade measures in varying forms since the 1870s.<sup>16</sup> Despite the early examples of employing trade provisions to advance the objectives of environmental agreements, the vast majority of MEAs currently in force and to which the United States is a signatory were negotiated in the last twenty-five years.<sup>17</sup>

The dramatic growth of MEAs as an integral component of international relations is attributable to unprecedented environmental threats to our planet. There is a need to

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<sup>16</sup> See generally Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX", 25 J. World Trade 37, 39 (1991). For example, a 1906 treaty banned the production and importation of phosphorous matches because their production process was deemed harmful to workers.

<sup>17</sup> United States International Trade Commission, International Agreements to Protect the Environment and Wildlife, USITC Pub. No. 2351, (January 1991), 1-1 (two-thirds of international agreements currently in force were signed after 1970).

address cooperative multilateral solutions among sovereign nations to address global environmental threats.<sup>18</sup>

### ***GATT/WTO Regime***

The General Agreement on Tariffs and Trade (GATT 1947)<sup>10</sup> and its recent successor, the World Trade Organization (WTO)<sup>19</sup> perform several functions in their combined roles as binding treaty obligation and multilateral institution. At its center, the GATT/WTO regime is a multilateral institution that exists to promote the liberalization of global trade. The GATT/WTO regime seeks to promote a common set of international trade rules, a reduction in tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations.<sup>20</sup> The GATT/WTO also attempts to provide an effective dispute resolution system to facilitate the settlement of trade disputes among its member nations.

Article XX(b) and (g) are the exceptions most frequently cited in trade disputes that involve the environment and natural resources. Articles XX(b) and XX(g) do not apply to all measures taken to protect the environment.

Rather, Article XX exceptions are only applicable when a violation of a general obligation of the GATT/WTO regime is alleged to have occurred. Article XX(b) allows members to take measures “necessary to protect human, animal or plant life or health.” Article XX(g) allows measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

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<sup>18</sup> Principle 7 of the Rio Declaration at the 1992 United Nations Conference on Environment and Development (UNCED) emphasizes the duty of countries to cooperate in the quest for solutions to global or transboundary environmental problems.

<sup>19</sup> General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, Multilateral Trade Negotiations (The Uruguay Round) Doc. MTN/ FA, 33 I.L.M. 1 (1994)

<sup>20</sup> Agreement Establishing the World Trade Organization (WTO), GATT/WTO, Preamble, (1994), 9.

When a trade dispute does arise between members, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) encourages members to enter into informal negotiations in an effort to reach a solution.<sup>21</sup> If a resolution of the matter is not forthcoming, a challenging member invoking the dispute settlement procedures is entitled to a *prima facie* assumption that the measure being challenged is inconsistent with the GATT/WTO regime.<sup>22</sup> The burden of proof to rebut the charge is on the defendant member.<sup>23</sup>

A complaining party may request the appointment of a panel to settle the disagreement.<sup>24</sup> The panel hearings are between governments and are generally closed to the public and non-governmental organizations (NGOs). Panel reports are adopted within sixty days of their issuance unless a member initiates an appeal or it is the consensus of the other members not to adopt the report.<sup>25</sup> If a member chooses to ignore the recommendations of a panel, the complaining member may seek compensation in the area of trade directly related to the dispute or, if necessary, may cross-retaliate in another trade sector.

### ***MEAs and Trade Measures***

MEAs use trade measures to promote cooperation through the use of a variety of incentives related directly to the environmental problem at issue.<sup>26</sup> An MEA may use trade measures to regulate trade among parties and nonparties of the product that is considered a major contributor to the environmental degradation the agreement seeks to curtail. MEAs Prohibit or limit the trade in target product or substance, establish a regulatory framework through which to regulate trade in the target product or substance of the MEA, Limit markets in goods that contribute to the environmental problem. “It is important to emphasize that the area of greatest concern is the effect of trade provisions in MEAs on those countries that are members of the GATT/WTO regime but are not parties to the MEA.

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<sup>21</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3:7, GATT/WTO (1994)

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at Article 6:1.

<sup>25</sup> *Ibid.*, at Article 16:4

<sup>26</sup> See generally, General Agreement on Tariffs and Trade, Trade and the Environment (Feb. 12, 1992), 30

Non-parties to the MEAs acting as “free-riders” pose several different problems for the parties to the agreement. In general, free riders derive the environmental benefits of the MEAs without having to pay any of the costs. An elimination of free riders generally leads to greater membership in the MEA and a strengthening of global consensus on the international environmental issue. If free riders are able to reap rewards for non-compliance, the interest in membership of MEAs will erode substantially.

### ***The Potential Conflict between MEAs and the GATT/WTO Regime***

The actions of a GATT/WTO member acting in compliance with the trade measures of the MEAs have never been challenged by another member. As a result, a GATT/WTO dispute settlement panel has never ruled on the consistency of the trade provisions of the MEAs with the obligations of the GATT/WTO regime.<sup>27</sup> Nevertheless, the potential for conflict has been recognized by the members of the GATT/WTO and numerous independent observers. In the context of a general analysis of the interconnections between trade and the environment, the GATT/WTO-sponsored Committee on Trade and the Environment (CTE) and its predecessor, the Environmental Measures and International Trade (EMIT) Group, have devoted a great deal of their respective discussions and workplans to the relationship between the MEAs and the GATT/WTO regime.<sup>28</sup>

The following represent some of the potential inconsistencies between the trade measures of the MEAs and the GATT/WTO regime:

#### **A. Most Favored Nation and Non-Parties**

The import and export restrictions against non-parties of the MEAs are potentially vulnerable to challenge by a GATT/WTO member and non-party to the MEA as a violation of the Most Favored Nation principle of the GATT/WTO regime. In the context

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<sup>27</sup> Nevertheless, on a few occasions, GATT members have attempted to invoke international obligations to justify GATT-inconsistent trade measures with little success. See, e.g., Canada — Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. L/6268, GATT BISD (35th Supp.) 98 (1988)

<sup>28</sup> Report by Ambassador H. Ukawa (Japan), Chairman of the Group on Environmental Measures and International Trade, to the 49th Session of the Contracting Parties, Jan. 25, 1994.

of the Montreal Protocol, for example, a non-party may assert that its like products are being discriminated against because they are not a member of the MEA. The MFN principle entitles all GATT/WTO members to equal treatment of their like products and therefore, a member may argue that they are not receiving equal MFN treatment when their products are subject to the trade restrictions of the MEA.

## **B. National Treatment and MEAs**

The import restrictions of the MEAs similarly may be subject to challenge. Article III's national treatment provision requires that imported like products not be discriminated against in favor of domestic like products. The recent unadopted 1994 panel report, *United States - Taxes on Automobiles (Auto Taxes)* recognizes that two individual products can never be exactly the same in all aspects and that regulatory distinctions by different national governments may be required in certain circumstances.<sup>29</sup> Panel considered that Article III could not be interpreted as prohibiting government policy options, based on products, that were not taken so as to afford protection to domestic production.<sup>30</sup>

Nevertheless, to satisfy national treatment, domestic regulatory measures that distinguish like products are reviewed as to whether the measure was applied, either in its aim or effect, "so as to afford protection to domestic production."<sup>31</sup>

In addition, a regulatory measure that distinguishes a like imported product and a like domestic product arguably must be applied directly to the product as a product.<sup>44</sup> In other words, a regulatory measure should be closely related to the end product as an end product and not to the process and production methods (PPMs) by which the product was manufactured. Thus, import restrictions in MEAs that restrict the use of certain

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<sup>29</sup> *Auto Taxes Panel*, (Sept. 29, 1994) (unadopted). A positive approach to trade and environment in the WTO will require addressing three key issues: expertise, funding, and measurable results. The WTO is not an environmental organization—and should not become one—and therefore, further work and capacity building on the topic will require outside expertise (see *Report of the GATT Council*), para. 5.6, 5.8.

<sup>30</sup> *Ibid.*, at 5.8

<sup>31</sup> *Ibid.* at para. 5.5. To determine the "aim" of the measure, a panel will review legislative history and interpretative language.

substances in products may be challenged as violations of national treatment as a result of their PPM-based distinction of like products.

### **C. Article XI Quantitative Restrictions**

The import restrictions that do not satisfy national treatment and MFN, and the export restrictions of the MEAs that take the form of bans, embargoes, prohibitions, etc., of trade, are potentially vulnerable to challenge as quantitative restrictions under Article XI of GATT.

### **D. Article XX**

Article XX contains the general exceptions to GATT/WTO obligations. Traditionally, the determination of whether or not a particular trade measure qualifies for an Article XX exception has been determined on a case-by-case basis before a GATT/WTO dispute settlement panel. Occasionally, the GATT/WTO Secretariat proffers interpretations of the standards to employ when a member seeks to invoke an exception.<sup>32</sup>

Unfortunately, the relationship between the trade measures of the MEAs and GATT/WTO regime is further complicated by the range of interpretations concerning Article XX exceptions that have been issued by several recent GATT/WTO dispute settlement panels. As a result, immediate clarification of such issues as the interpretation of Article XX's preamble of "arbitrary and unjustified discrimination" and the term "disguised restriction on international trade"; Article XX(b)'s "necessary" requirement and Article XX(g)'s "relating to the conservation of natural resources" standard; and, the extra jurisdictional applicability of Article XX, are all essential to a consistent, functioning relationship between the trade measures of the MEAs and the GATT/WTO regime.

### ***The Implications of Continued Confusion in the Relationship Between Trade Measures of MEAs and the GATT/WTO Regime***

Clarification of the relationship between the MEAs and the GATT/WTO regime will:

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<sup>32</sup> GATT Trade and Environment Report, at 8.

### **A. Reduce International Trade Friction**

Immediate clarification promotes many of the major goals of U.S. corporations, investors, consumers, environmentalists, and the objectives of the GATT/ WTO regime. Further elucidation as to the status of the trade measures contained in MEAs will enhance the principles of nondiscrimination, national treatment and fair market access. It improves transparency in rule making, assists dispute resolution and, promotes rule-based disciplines to enforce non-participation in the obligations of the MEAs and/or the GATT/WTO regime.

### **B. Improve Global Environmental Protection and Cooperation**

Trade measures in the MEAs are integral components of the agreements and are critical to the overall success of the MEAs. The use of trade measures provides for the most effective and efficient means of achieving the environmental objective on a global scale while supporting the aims of the multilateral trading system. The current experience with such MEAs as CITES, the Basel Convention, and the Montreal Protocol substantiate these claims.<sup>48</sup> For example, the measures embodied in the Montreal Protocol have been effective in achieving the goals of broad participation in the agreement. In general, multilateral solutions discourage the development of alternative unilateral measures.

### **C. Provide Much Needed Clarity of Policy and Certainty of Implementation in the Business and Environmental Communities**

In order to achieve their respective goals, the business and environmental communities require a consistent and well-established set of rules. The potential for disruption of previously formed expectations may produce competitive disadvantages if legitimate rules agreed to and implemented are subsequently thrown out. The current uncertainty surrounding the trade measures in the MEAs creates confusion and frustrates essential future planning.

### **D. Minimize Distortions and Discrimination of Goods in Open Markets**

MEAs promote the same environmental standards for imports and exports throughout the global economy.

#### **E. Stabilize the New WTO Regime**

Clarification on these issues will signal an important early victory for the WTO and avoid hobbling the organization with unnecessary trade tension in its formative years. Resolution of the MEA-GATT/WTO regime relationship may also further defuse North-South friction in the trade policy area in general.

#### **F. Provide Certainty and Predictability in Further**

Negotiations of MEAs A consistent understanding of the relationship between the GATT/WTO regime and the MEAs will provide important guidance to negotiators of current and future MEAs.

### ***Alternative Approaches to Resolving the Conflict***

#### **A. Criteria Approach and Article XX**

This approach to clarifying the relationship between the MEAs and the GATT/ WTO regime involves the development of specific criteria or list of attributes to determine whether the trade measures of the MEAs satisfy the objectives of the Article XX exceptions. The trade measures of MEAs that meet the flexible list of criteria (no single criterion would be determinative) would qualify per se for an Article XX exception to the other GATT/WTO obligations as long as the national measure chosen by the party state to the MEA also did not conflict with the Article XX Preamble. For example, in the context of Article XX(b) and XX(g), relevant trade measures in MEAs that satisfy the criteria and the Article XX Preamble would be deemed consistent with the GATT exceptions because they are “necessary” and “primarily aimed at conservation.”

#### **B. The Waiver Approach**

Many trade and environment fora, including meetings of the GATT/WTO regime members, have discussed the potential adoption of a waiver as a means to clarify the relationship of the MEA trade provisions with the obligations of the GATT/WTO

regime.<sup>33</sup> As generally envisioned, a waiver would be granted by the GATT/WTO members to allow derogations from members' obligations for actions taken pursuant to the MEAs. A waiver may be specifically directed at a select group of named agreements or it could encompass all MEAs that use trade measures to accomplish their environmental objective. In order to secure a waiver regarding the MEAs, a member will have to demonstrate "exceptional circumstances" and generally obtain three-fourths of the members support for such action.<sup>34</sup> Requests for a waiver are to be submitted to the Ministerial Conference and the request is to be decided upon by consensus within ninety days. If the request is not considered within ninety days, three-fourths of the members' support will be required.<sup>35</sup> Waivers must state the terms and conditions governing their application and the specific date of termination. All waivers, regardless of length of time, are to be reviewed annually by the Ministerial Conference.<sup>36</sup>

In addition to cumbersome procedural hurdles, the adoption of a waiver presents several other potential impediments to its ultimate effectiveness. A waiver will be viewed by those non-parties that have been resisting membership in the MEA as a *de facto* acceptance of the MEA. If the waiver applies only to specifically named MEAs, there are no assurances that future MEAs will be eligible for the waiver's protection. Criteria involved in weighing the appropriateness of a waiver may vary from case to case. This uncertainty creates an atmosphere of unpredictability that may produce more problems than it resolves. On the other hand, a successful waiver does establish a positive precedent in the GATT/WTO regime of cooperation between the trade and environment disciplines. It also has the potential to ease current North/South tension exacerbated by mutual distrust in the trade and environment policy relationship. Finally, it does provide immediate effective clarification of the MEA-WTO relationship and places it in a context of limited duration. (i.e., through the annual review of the waiver). However, the annual review process may also create uncertainty about the durability of the agreement and the

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<sup>33</sup> GATT EMIT 1994 Report, at 6.

<sup>34</sup> GATT/WTO, at Art. IX:3.

<sup>35</sup> *Ibid*, at Art. IX:3(a).

<sup>36</sup> *Ibid*. at IX:4.

legitimacy of the trade measures used that may work against the desirability for certainty which both business and environmental interests seek.

### **C. The Status Quo Option**

In addition to the criteria and waiver approaches to clarifying the relationship between the MEAs and the GATT/WTO regime, the possibility of taking no action should also be explored. In essence, the status quo option can be reduced to a continued reliance on GATT/WTO dispute settlement panel decisions.

In the dispute settlement procedures of the WTO, a complaint by one member challenging the actions taken by another member in compliance with a MEA is considered *prima facie* to constitute a case of nullification or impairment.<sup>37</sup> The burden is on the member being challenged to rebut the complaint that its actions infringe on the complainant state's obligations to the GATT/WTO regime and have an adverse impact on other members. Within sixty days of a panel report being issued, the report will be adopted by the Dispute Settlement Body (DSB) unless there is an appeal or the DSB refuses to adopt the report by consensus.<sup>38</sup>

In the rare instance that a panel report is not adopted under the new WTO regime, the report is not likely to have any binding legal status on the members and probably serves only as an advisory opinion of important GATT/WTO regime experts.<sup>39</sup> In the more probable event of the panel report being adopted by the members, it is generally recognized that the panel's decision settles the dispute between the members and is binding exclusively on the parties involved in the dispute.<sup>40</sup> The panel decisions do not have *stare decisis* effect and thus, no future panel is bound to the precedent of the previous panel's ruling as to the subject of the dispute. In practice, however, GATT/WTO regime panels frequently rely on a previous panel's reasoning in the interpretation of the GATT/ WTO regime's obligations and often refer to earlier panels in their opinions.

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<sup>37</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT/ WTO, Annex 2, art. 3:8

<sup>38</sup> *Ibid*, at Art. 16:4.

<sup>39</sup> Jackson, Changing GATT Rules, at 108.

<sup>40</sup> GATT/WTO Dispute Settlement, Art.3

Nevertheless, a later panel is under no obligation to follow a previous panel's reasoning as to a particular dispute or even the same dispute involving the same parties.

In current practice, a panel could be called upon to assess whether a particular member's action in compliance with a MEA was a violation of its MFN, national treatment, quantitative restriction prohibition, or other GATT/WTO obligations. A panel may also offer its interpretation of the applicability of the Article XX exceptions to the trade measures in MEAs. In particular, a panel report could clarify the "arbitrary and unjustified discrimination" standard in the preamble to Article XX and the "necessary" and "primarily aimed at conservation" standards of Article XX(b) and (g). In addition, a panel could explain the extraterritorial applicability of Article XX.

Despite the potential for increased clarity on these issues a panel report offers, the current confusion on the relationship between MEAs and the GATT/WTO regime is strong evidence that this practice will not be satisfactory in the long term. Previous panel decisions have arguably contributed significantly to the inconsistent interpretations of GATT/WTO regime obligations *vis a vis* actions taken in the name of the environment. The result is a lack of a coherent and predictable policy from which to base actions taken with the trade measures in the MEAs. The recent facilitation of panel report adoption procedures will approve and implement decisions more quickly but it may also expedite the adoption of fundamentally flawed panel reports. An increased reliance on the dispute settlement system will ensure uncertain interpretations of GATT/WTO regime obligations and may exacerbate future trade disputes.

### **ENVIRONMENTAL ISSUES AT DISPUTE SETTLEMENT BODY(DSB)**

There are handful of dispute cases in which the Dispute Settlement Body of the WTO made rulings on environmental issues

In spite of the fewness, however, those cases are landmark cases in the brief history of the WTO. These include, *inter alia*, The Gasoline Case, The Shrimp/Turtle Case (The Tuna/Dolphin Case), The Asbestos Case, The Hormones Case and The Australian

Salmon Case. A review of these cases reveals that the Dispute Settlement Body (DSB) has struggled to deal with a difficult issue of how to harmonize free trade and environmental protection. It reveals also that there is some room for improvement. The Gasoline Case and the Shrimp/Turtle Case deal with environmental issues directly. The Asbestos Case is concerned with product safety issues. The Hormones case and the Australian Salmon Case are related to SPS measures. The Hormones case<sup>41</sup> dealt with food safety issues and the Australian Salmon Case<sup>42</sup> examined the validity of a measure which allegedly was designed to protect a healthy environment for fish. Although all of these cases are important for environmental protection, the Gasoline Case, the Shrimp/Turtle Case and the Asbestos Case are especially relevant. Therefore, we will focus our attention primarily on these cases.

In the Gasoline Case,<sup>43</sup> the issue was whether the U.S. Clean Air Act, a law to control air pollution caused by hazardous substances contained in gasoline, was a violation of Article III 4 of the GATT 1994 for the reason that it imposed a more stringent control on imported gasoline than on domestic gasoline. The Appellate Body ruled that the environmental policy and regulation incorporated in the Clean Air Act fell under Article XX (g) of the GATT 1994 which provides that measures relating to the conservation of exhaustible natural resources are exempted from the disciplines of the GATT. However, the Appellate Body stated that the Clean Air Act was inconsistent with the Chapeau of Article XX which requires that the measure in question be not arbitrary, discriminatory or a disguised restriction of international trade.

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<sup>41</sup> European Communities — Measures Affecting Asbestos and Products Containing Asbestos, Panel Report and Appellate Body Report, WT/DS48/R, WT/DS48/AB/R, available at [http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS26%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS26%FCR%2A+and+not+RW%2A%29&language=1)

<sup>42</sup> Australia — Measures Affecting Importation of Salmon, Panel Report and Appellate Body Report, WT/DS18/R, WT/DS18/AB/R, available at [http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS18%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS18%FCR%2A+and+not+RW%2A%29&language=1)

<sup>43</sup>, United States - Standards for Reformulated and Conventional Gasoline, Panel and Appellate Body Report, WT/DS2//R and WT/DS/ABR, available at [http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS2%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS2%FCR%2A+and+not+RW%2A%29&language=1)

In the Shrimp/Turtle Case,<sup>44</sup> in which India, Pakistan, Malaysia and Thailand challenged a U.S. law which prohibited imports of shrimps from countries where the government did not obligate fishing boats to install “TED” (turtle exclusion devices) in order to prevent incidental catching and killing of sea turtles when harvesting shrimps, the Appellate Body held that the environmental policy incorporated in U.S. law fell under Article XX (g) and was exempted from the GATT disciplines. However, the Appellate Body condemned U.S. law for the reason that the United States did not do enough to negotiate with East Asian countries and reach an agreement whereby this issue could have been resolved through an international agreement.

It is noteworthy that in the Shrimp/Turtle Case the Appellate Body reversed the portion of the Panel report which held that there was no need to rule whether or not the U.S. law was covered by Article XX (g) since the U.S. law was contrary to the Chapeau of Article XX. The Appellate Body reversed this holding on the ground that the proper process of reasoning required the Panel and the Appellate Body to inquire whether or not the U.S. law in question was covered by Article XX (g) before examining the question of inconsistency with the Chapeau. It went on to inquire whether the U.S. law was covered by the exception provided in Article XX (g). After judging this affirmatively, as stated above, it held nevertheless that it was contrary to the Chapeau.

Logically both approaches taken by the Panel and the Appellate Body were possible. However, it is important to note that the Appellate Body chose to decide that the U.S. law was covered by Article XX (g). The Appellate Body recognized the importance of incorporating environmental policy into the framework of the GATT 1994.

As seen above, the two important cases at the WTO were dealt with as those of Article XX (g). What does Article XX (g) provide? It exempts from the disciplines of the GATT 1994 measures “relating to the conservation of exhaustible natural resources if

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<sup>44</sup> United States — Import Prohibition of Certain Shrimp and Shrimp Products, Panel and Appellate Body Report, WT/DS58/R and WT/DS58/AB/R, available at [http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCR%2A+and+not+RW%2A%29&language=1)

such measures are made effective in conjunction with restrictions on domestic production or consumption....” This provision has existed since the founding of the GATT in 1947. The framers of this provision envisaged that the conservation of exhaustible natural resources was important and included it in GATT 1947. The importance of protecting the environment was not as much recognized at the time when it was drafted as it is today and environmental issues were probably outside the perspective of the drafters. Time changed and environmental issues have become one of the most important issues for the existence of human beings and yet a provision designed to deal with them was not incorporated into the GATT regime. For this reason, there is no provision in the present GATT system which is specifically made to deal with environmental protection. Article XX (g) has been utilized simply because there is no effective alternative way to deal with it. This way of handling issues is like “putting new wine into old wineskins.” Is this a satisfactory solution?

It is true that some, and in fact many, environmental issues can be handled by Article XX (g). However, there may arise a dispute in which an environmental protection is the central issue and yet cannot be covered by the provision for the conservation of natural resources. Pollution of air and water could be covered by Article XX (g) for the reason that “clean air” and “clean water” are exhaustible natural resources. However, there may be a situation which affects the environment and yet cannot be dealt with as that of natural resources. For example, electromagnetic waves emanating from power transmission lines are said to cause disease to the human body if human beings are directly exposed to it. Noise generated by industrial plants, trains or trucks disturbs tranquility of life and is a nuisance. A measure to prevent “tyranny of noise” can be classified as environmental protection. However, can those issues be effectively taken care of by the conservation of natural resources?

It seems that the scope of environmental problems is much wider than the conservation of natural resources. In order to deal with them properly, a new provision in the GATT 1994 is necessary. One possibility may be to utilize Article XX (b) which provides that a measure “necessary to protect human, animal or plant life or health” is

exempted. This provision may more appropriately be applied to environmental issues. However, the term “necessary” has been interpreted narrowly and, because of this narrow interpretation, the applicability of this provision to environmental issues is limited. In fact, this was one of the reasons that the Appellate Body applied Article XX (g) instead of Article XX (b) to deal with air pollution problems. The issue involved in the Gasoline Case may have been more appropriately dealt with under Article XX (b) if the applicability of the term “necessary” was not so limited.

Indeed it is paradoxical that Article XX (b), designed to protect life and health of humans, should be interpreted more restrictively than Article XX (g) which covers the conservation of exhaustible natural resources. It is a fallacy to argue that the conservation of natural resources is more important and should enjoy a wider exemption than measures to protect human life and health. One suggestion may be to review the scope of Article XX (b) and, if necessary, widen its scope to make it possible to adopt a more flexible interpretation.

In this respect, the Asbestos Case<sup>45</sup> is encouraging. The issue there was the hazardous nature of asbestos. The Appellate Body upheld the French decree which prohibited the use and importation of asbestos primarily on the two grounds. First, asbestos and similar products which could be used as building materials were not “like products” for the reason that users of such substances (builders) were conscious of the hazards of asbestos compared with other similar substances. In judging whether asbestos and other substances were like products, this should be taken into consideration. Second, the prohibition of asbestos could be covered by Article XX (b) of the GATT 1994.

Article XX (b) covers product and food safety issues. With the ruling of the Appellate Body in the Asbestos case, this provision is now probably more useful than before. Here again, however, it should be noted that environmental issues are not limited

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<sup>45</sup> European Communities — Measures Affecting Asbestos and Products Containing Asbestos, Panel Report and Appellate Body Report, WT/DS135/R, WT/DS135/AB/R, available at [http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS135%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS135%FCR%2A+and+not+RW%2A%29&language=1)

to those related to human life and health. There may be other kinds of environmental issues which cannot be characterized as hazards to life and health. Therefore, both Article XX (b) and (g) cover parts of environmental protection issues but not all.

A review of previous cases in which panels and the Appellate Body ruled on environmental issues reveals that the current legal instruments incorporated in Article XX of the GATT 1994 and others are not sufficient to deal with them. In light of the above, therefore, it is submitted that the WTO consider the incorporation of a provision into Article XX of the GATT which would specifically address environmental issues. Such a provision would state that measures relating to environmental protection are exempted from disciplines of the GATT 1994 on the condition that these comply with the requirements of the Chapeau.

## **CONCLUSION**

There may be a conflict between the rights and obligations of a WTO agreement and those in MEAs. Such a conflict creates legal insecurity and is injurious to the world trading system. Such a conflict may arise between the SPA Agreement and the Cartagena Protocol and between Articles I and XI of the GATT 1994 and the Kyoto Protocol. The Cartagena Protocol allows a wider scope for the precautionary principle than that allowed by the SPS Agreement. There may be a situation where a Member of the Cartagena Convention takes a precautionary measure with regard to GMO and another country may challenge this measure in the WTO. It may be that one of the parties to the dispute is a Member of the WTO and the Cartagena Protocol. Or it may be that both of them are members of both WTO and the Cartagena Protocol. Likewise a dispute may arise in connection with the relationship between the Kyoto Protocol and a WTO agreement. For example, a country which is a Member of the WTO and the Kyoto Protocol imposes an economic sanction on another country which does not respect the requirements of the Kyoto Protocol. Assuming that the latter country is a Member of the WTO, the former country may be challenged by the latter through the WTO dispute settlement mechanism.

Paragraphs 31-33 of Doha Declaration are concerned with environmental issues. Paragraph 31 states that Members negotiate on: “(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).” It continues to provide: “The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Members that is not a party to the MEA in question...” Paragraph 32 provides, in part, that “...the negotiations carried out under Paragraph 31 (i) and (ii) shall not add to or diminish the rights and obligations of members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.”

Although the meaning of the above declarations is, to say the least, somewhat ambiguous, several issues stand out. First, the negotiation will take place only with regard to the applicability of existing WTO rules as among parties to the MEA. Second, the rights of WTO members that are not members of the MEA will be unaffected by the result of the negotiations. Third, generally the results of the negotiation will not affect the rights and obligations of members under existing WTO agreements in particular the SPS Agreement. Fourth, the needs of developing and least-developed countries will be taken into account.

The terms of reference of the negotiations are primarily focused on clarifying the relationship between WTO agreements and MEAs among members of the MEAs. It does not cover the relationship between WTO agreements and the MEAs in the context of the relationship between WTO members that are members of MEAs and those that are non-members of the MEAs. Therefore, the effect of the result of negotiations will be rather limited. If a dispute arises between Country A that is a member of the WTO and a member of a MEA and Country B that is a member of the WTO but not a member of the MEA, it will not be covered by the result of the negotiation.

Under the circumstances as they exist today, some ways should be explored to deal with possible conflicts between WTO agreements and the MEAs. Although tentative at this stage, three approaches are suggested below. One is to use a waiver by Article IX:3 of the Marrakesh Agreement. In this approach, a WTO member implementing a provision of a MEA agreement through measures which may come into conflict with provisions of a WTO agreement seek a waiver from the WTO in accordance with the above article. If a waiver is granted, the member's obligations under the GATT 1994 or any other WTO agreement are waived to the extent of conditions incorporated in the waiver.

However, a waiver is only an *ad hoc* and temporary measure and can be granted only by 3/4 majority votes at the General Council of the WTO. Article IX:3 states that a waiver is granted to deal with "exceptional circumstances." To characterize MEAs as "exceptional circumstances" seems to be at odds with the importance of environmental policies today as incorporated in MEAs. Although the use of a waiver may be necessary as a temporary relief, this is hardly a permanent resolution of conflict between WTO provisions and MEAs.

Another way is to seek an addition to Article XX. This is an approach suggested in Part 1 of this memorandum. This would be Article XX (k) of the GATT 1994 providing that measures which implement environmental protection or MEAs would be exempted from the application of GATT provisions. This option requires an adoption of a resolution to amend Article XX and requires consensus of WTO members. Such a consensus may be difficult to achieve. There may be claims by some WTO members that such a drastic proposal is outside the scope of Doha Declaration. In practice, chances of this option being adopted is rather slim.

Third option is an adoption of an "Understanding for Interpretation" with respect to the applicability of Articles XX (b) and XX (g) to measures designed to implement provisions of a MEA agreement. In this option, the WTO members consider the adoption

of an understanding of interpretation for WTO agreements in which they would agree that a measure taken by a WTO member for implementing a MEA agreement is given presumption that it falls under Article XX (b) or Article XX (g) as the case may be. Such a presumption is given only under certain conditions. Conditions for such a presumption should include, *inter alia*, the following:

- (a) Any country should be allowed to join the MEA as long as it shares the common objectives of the MEA.
- (b) There should be a sufficient number of participants in the MEA which reflect the interests of major supplier and consumer countries of products affected by measures implementing the MEA.
- (c) The content and scope of trade measures which will be used to implement the MEA should be clearly defined. Also the procedure for executing such measures should be clear and transparent.
- (d) Trade measures implementing the MEA should not be arbitrary and discriminatory with regard to countries under the same or similar conditions. None of these should be employed in a way that constitutes a disguised restriction of international trade.
- (e) The purpose of the MEA should be protection of environment including the protection of life and health of humans, animals or plants as well as the conservation of exhaustible natural resources.
- (f) Trade measures employed to implement the MEA should be related to the objectives of environmental protection and this relationship should be reasonably close and real.
- (g) The scope of trade measures based on the MEA should not be too wide in proportion to the purpose of protecting the environment.

An understanding of interpretation incorporating the above principles can be promulgated as a “decision” of the WTO in accordance with Article IX:1 of the Marrakesh Agreement or Article XXV of the GATT 1994. It also can be announced as a “declaration” of the WTO. In either case, however, the understanding would be non-binding and exhortative. However, it is expected that WTO members abide by these

principles. Also panels and the Appellate Body dealing with disputes in which the relationship between WTO agreements and MEAs is at issue are encouraged to follow them. In this understanding of interpretation, national measures complying with the principles incorporated therein should be given a presumption of satisfying the requirements of Articles XX: (b) and (g) of the GATT 1994 and the presumption can be rebutted.

Recognizing that this non-binding understanding of interpretation is not a complete answer to the question of how to resolve conflicts between the disciplines of WTO agreements and measures implementing MEAs, this is probably as much as one can accomplish given sharp tensions among WTO members on this issue today.

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