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Trade and Environment in the WTO: after Cancùn

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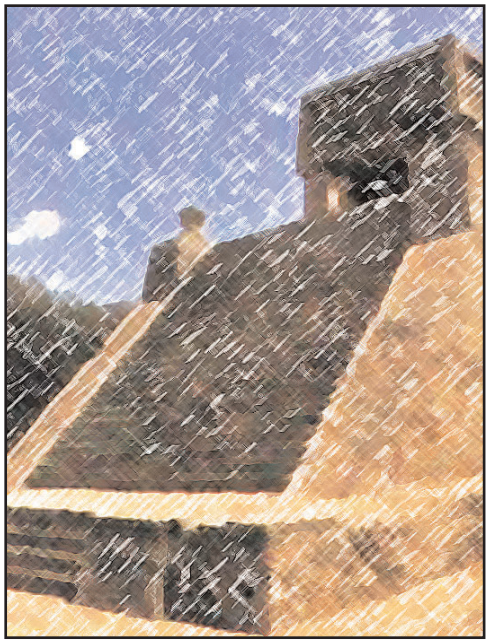

Introduction

The story of the trade and environment debate in the World Trade Organization (WTO) is one continued failure to make any substantial progress in rewriting WTO rules – but significant changes in the way in which existing rules have been interpreted to deal with environmental concerns. This briefing paper examines the ways in which the expansion of trade may sometimes conflict with and sometimes support environmental regulation; highlights the main areas of trade–environment tensions, over product standards, processes and production methods, and trade measures in multilateral environment agreements, and considers the politics behind the debate.

Since trade and environmental policies both affect the use of natural resources, it is hardly surprising that the two should interact. In theory, the objectives of trade liberalization and environmental protection should be entirely compatible. Both have as their aim the optimization of efficiency in the use of resources, whether from the perspective of maximizing the gains from the comparative advantages of nations, through trade, or of ensuring that economic development becomes environmentally sustainable. As international trade regulation impinges on increasingly broad areas of public policy – including agriculture, investment, services, intellectual property, and health standards – and as environmental agreements increasingly cover wider and wider areas of economic activity – such as the Kyoto Protocol on climate change or the Cartagena Protocol on trade in GM products – it is to be expected that the two areas of international policy should increasingly interact.

Both sets of international regulations pay at least lip service to the other. The Agreement establishing the WTO recognizes that trade should be conducted '… while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so …'.[1] Agenda 21, the programme for action aimed at achieving sustainable development in the 21st century signed at the 1992 UN Conference on Environment and Development (UNCED), the 'Earth Summit' in Rio, states that: 'An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development'.[2] Several of the more recent multilateral environmental agreements (MEAs), out of the 250 plus that now exist, borrow language from the General Agreement on Tariffs and Trade (GATT) in describing their approach to trade restrictions.

More recently, the Doha Declaration, agreed at the fourth WTO ministerial meeting in November 2001, reaffirmed the organization's commitment to the objective of sustainable development: 'We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.'[3] More importantly, the agenda for the next round of trade negotiations which was agreed at Doha contained, for the first time in a trade round, a series of commitments to discussions and possible negotiations on major trade and environment issues (See Box 1.)

So the trade and environment debate has steadily moved inwards from the fringes of the WTO agenda. Because of its nature it also overlaps with many of the other topics of discussion, such as agriculture, subsidies or investment. But that does not mean to say that much progress has actually been made in terms of reaching a resolution of the tensions inherent in the trade–environment relationship. The rest of this paper examines the key issues within that relationship; and before that, a look at why tensions may exist in the first place.

The environmental impact of trade and investment

Trade impacts both positively and negatively on the environment. The *net* impact in any given case of an increase in trade volumes will depend on the aggregate outcome of a number of effects:

Scale effects. In general, trade and investment liberalization accelerates economic growth. Positive scale effects then result from a reduction in poverty-driven environmental degradation, and from the increased attention countries tend to pay to environmental quality and regulation as income rises (though it is possible that by the time this 'turning point' is reached, the environmental resource base may have suffered irreversible degradation). Emissions of many global pollutants such as greenhouse gases, however, tend to grow as income rises, displaying negative scale effects i.e. without any turning point. This is at base a result of market failures, such as ill-defined property rights (no one 'owns' the atmosphere), and a failure to incorporate environmental externalities (such as the costs of climate change).

The *structural effects* of shifts in the structures of economies, which are accelerated by openness to trade, tend to be positive for the environment. Typically economies develop from primary resource extraction through processing to manufacturing and then to services, and each step tends to lead to a reduction in pollution output and resource depletion, though the correct pricing of environmental externalities is again an important factor.

Technology effects arise from greater access to new technologies (again promoted by trade and investment liberalization), which in general tend to produce less pollution and use fewer resources than their predecessors.

Product effects – changes in the mixes of goods produced and consumed, shifts in production methods (such as outsourcing component manufacture among different countries), and associated energy, transport and other environmental implications – can be positive or negative for the environment, once again largely depending on the extent to which prices and decisions reflect environmental costs.

The *distribution effects* of shifts in production and consumption between countries (and sometimes within countries), which are promoted and accelerated by trade and investment liberalization, may be an important determinant of environmental impact. It is often argued that business may respond to higher environmental standards, which are assumed to lead to higher business costs and lower profits, through migration, of investment flows if not of industrial plant itself, to countries with less stringent regulatory regimes, where the cost of production is lower. In fact this is a complex area with a dearth of empirical evidence.[4] Most research indicates that environmental standards play no significant part in investment location decisions, largely because the costs associated with them are relatively low; many other factors, including political stability, the potential of domestic markets, quality of infrastructure, labour costs and ease of repatriation of profits are more important.

BOX 1: WTO DOHA DECLARATION

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO´s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

Trade and Environment

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

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

procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, 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.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

While true in general, however, some specific industry sectors may be more significantly affected by environmental policy. In particular, policies designed to mitigate climate change are bound to require increases in the cost of carbon-intensive energy sources, with a major impact on energy-intensive industries such as iron and steel, or aluminium, where energy consumption may account for up to 15–20% of total costs. Furthermore, as with any measure where the benefits are diffuse and widespread but the costs are concentrated, political lobbies *against* action may often prove stronger than lobbies *for*. Industry lobbyists, and political decision-makers, often end up behaving as though they believe that environmental regulation does invariably raise costs. Thus competitiveness concerns are likely to remain an important part of the debate.

It is impossible to be precise about the net environmental outcome of these impacts of trade and investment growth, though key sectors can be identified where the liberalization process is more likely to have net positive environmental outcomes. In general these are industries in which subsidies for environmentally damaging production processes, which would be reduced or removed under liberalized trade and investment regimes, are widespread: agriculture, fossil fuels and fisheries (the inclusion of agriculture and fisheries in the Doha Round is therefore of potential environmental significance). Other benefits can flow from liberalization, particularly in the freight transport and environmental goods and services sectors.

Overall, however, given the widespread failure so far (with a few notable exceptions) of policies to halt or reverse environmental impacts, it is difficult to be optimistic about the future. It seems likely that any positive technology and structural effects of trade and investment liberalization will be swamped by the large negative scale effects from the expansion of economic activity, and smaller aggregate negative distribution effects. It should be noted, however, that the situation is not necessarily improved if the liberalization process is slowed down or halted: negative scale effects are reduced in magnitude, but so are the positive technology and structural effects. The key question in each case is the effectiveness of *environmental policy frameworks,* which have the potential, if they are adequately constructed and enforced, to offset, or even in some cases reverse, the negative environmental impacts. In general, it seems likely that environmental policies will be more strongly implemented and enforced under conditions of strong economic growth, though even then it is difficult to believe that they can reverse the overall process of environmental degradation world-wide.

The final impact of trade and investment liberalization on the environment is expressed through the *regulatory effects* of the legal and policy impacts of trade and investment policies: do these make environmental regulation easier or harder to implement? This is the key question underlying most of the trade–environment debate within the WTO, and is the subject of the remainder of this paper.

The multilateral trading system and environmental policy

The central aim of the multilateral trading system – the complex of agreements overseen by the WTO – is to liberalize trade between WTO members. Its core principles are to be found in the following articles of the GATT:

- GATT Articles I ('most favoured nation' treatment) and III ('national treatment') outlaw discrimination in trade: WTO members are not permitted to discriminate between traded 'like products' produced by other WTO members, or between domestic and international like products.

- GATT Article XI ('elimination of quantitative restrictions') forbids any restrictions other than duties, taxes or other charges on imports from and exports to other WTO members.

- GATT Article III requires imported and domestic like products to be treated identically with respect to internal taxes and regulations.

WTO members, in other words, are not permitted to discriminate between other WTO members' traded products, or between domestic and international production. Successive GATT trade rounds have both reduced tariff and non-tariff barriers to trade and extended these principles to ever wider ranges of traded goods and services – and so essentially the same principles are built into all the other WTO agreements that have developed alongside the GATT.

The GATT does, however, under particular circumstances permit unilateral trade restrictions for various reasons, including the pursuit of environmental protection. Article XX ('General Exceptions') states that:

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to

prevent the adoption or enforcement by any contracting party of measures:

…

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

…

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

So WTO members wanting to apply trade restrictions for environmental purposes can argue that their actions are justified under Article XX. Disputes between WTO members over particular trade measures are decided by the WTO's two-stage disputes procedure: a dispute panel produces a finding, after taking evidence and arguments from all sides; this may be appealed against, in which case the same procedure is followed by the Appellate Body. Decisions of the Appellate Body are binding unless WTO members decide – unanimously – not to adopt them. Given the fact that several key terms in the text of the GATT and other agreements, such as 'like product', are not defined, the findings of panels and the Appellate Body in a series of dispute cases have in practice determined how the multilateral trading system treats trade-related environmental measures, and will continue to do so in the absence of any agreement to modify or further extend the WTO system.

As noted above, the WTO itself contains a reference to sustainable development in the preamble of the Agreement establishing the body. Initially regarded as little more than a symbolic acknowledgement of the issue, it has been accorded considerably greater significance since the WTO Appellate Body cited it as an acceptable justification for particular trade measures in the 1998 shrimp-turtle dispute, which involved a US embargo on imports of shrimp from south-east Asian nations which did not require the fitting of turtle-excluder devices to their trawlers (designed to avoid incidental catches of endangered sea turtles).[5]

The heart of the multilateral trading system is the principle of non-discrimination between 'like products'. Although in most instances this would appear to cause no problem for environmental regulation, there are in fact three main areas where conflicts may arise: over internationally determined product standards; where processes, rather than products, cause the environmental damage; and in the enforcement of MEAs.

Product standards

Although the GATT in general frowns on trade restrictions, the existence of Article XX suggests that countries should be able to ban or restrict the import of products which will harm their own environments, as long as the standards applied are non-discriminatory between countries and between domestic and foreign production. As the GATT Secretariat expressed it in 1992, '… GATT rules place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products …'.[6]

The Uruguay Round, however, saw a significant extension of the two main WTO agreements governing the application of potentially trade-restrictive measures in the fields of standards. Technical standards, including packaging and labelling requirements, are covered by the Agreement on Technical Barriers to Trade (TBT Agreement), and human, animal and plant health standards by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Both aim to encourage the international harmonization of product standards and to avoid their use as disguised protectionism. Where possible, internationally agreed standards, such as those agreed by the International Organization for Standardization (ISO) or the Codex Alimentarius Commission, are to be used.

Under paragraph 2.2 of the TBT Agreement, technical regulations 'shall not be more trade-restrictive than necessary to fulfil a legitimate objective'. This is defined as including environmental protection, and environmental grounds have indeed become more widely cited as an objective and rationale for applying trade-restrictive regulations including, most notably, measures aimed at controlling air pollution and hazardous chemicals.[7] However, there is almost no experience with the way in which the WTO dispute settlement system might interpret the phrases 'not be more trade-restrictive than necessary' and 'unnecessary obstacle to international trade' in the TBT Agreement, particularly where non-international standards (e.g. standards more rigorous than those agreed by ISO) are involved.[8]

The SPS Agreement allows WTO members to take protective measures in the face of a threat from one of a number of specific causes (such as disease-causing organisms) as long as certain conditions are met, including the requirement that the measure is based on a risk assessment. This was a key point in the 1998 beef hormones dispute, in which the US argued that an EU ban on imports of beef from cattle treated with growth hormones was WTO-incompatible. The Appellate Body found that the ban could be justified

as long as the EU provided convincing scientific evidence of the danger to human health; when the European Commission failed to supply this within the set period, the WTO authorized the US to levy tariffs on specific categories of European Union (EU) exports.

This was not, however, an argument about discrimination, as the EU also bans its own producers from using the hormones in question. Effectively the Uruguay Round agreements have taken the WTO beyond the simple issue of trade discrimination into a new realm of global standard-setting. In turn this focuses attention on the standard-setting bodies themselves – both their composition (they are typically dominated by industry experts) and their modes of operating. It also raises the question of how appropriate standards can be set in the absence of complete scientific knowledge, and how the WTO would treat trade measures justified by the precautionary principle, familiar to environmental policy-makers, which argues for preventive action without full scientific certainty, particularly in instances where the costs of actions are low and the risks of inaction high.

The SPS Agreement itself contains only a rather weak version of the precautionary principle, and the Appellate Body in the beef hormones dispute was not convinced that it had yet been accepted as a principle of general international law. However, the Cartagena Protocol on biosafety, which entered into force in September 2003, contains a distinctly stronger version of a precautionary approach to the movement of genetically modified products; this may reinforce the status of the principle in WTO disputes. This issue has been raised once again by the US decision, in May 2003, to challenge the EU's de facto moratorium on approval of genetically modified organisms (GMOs) pending the adoption of rules ensuring labelling and traceability of GMOs and GMO-derived products; the US claimed this was inconsistent with obligations under the SPS, TBT and Agriculture Agreements, as well as the GATT itself. The highly charged and politically controversial issue of the acceptability of GM products, featuring very different views between the US and EU (governments and public alike) seems likely to bring the trade–environment debate sharply to the fore once the dispute panel and Appellate Body produce their rulings (expected in late 2004 and 2005).[9]

Process and production methods

The problem with trade restrictions based on environmental regulations derived from process and production *methods* (PPMs), as opposed to *product* standards, stems from the meaning of the GATT term 'like product'. This has become one of the most difficult issues in the trade–environment arena. Originally incorporated into the GATT in order to prevent discrimination on the grounds of national origin, GATT and WTO dispute panels have in general interpreted the term more broadly to prevent discrimination in cases where *process* methods, rather than *product* characteristics, have been the distinguishing characteristic of the product and the justification for trade measures. In the well-known US–Mexico tuna-dolphin dispute in 1991, for example, the dispute panel ruled that the trade restriction in question (the US import ban on Mexican tuna caught with dolphin-unfriendly nets) was in breach of the GATT because it discriminated against a product on the basis of the way in which it was produced, not on the basis of its own characteristics – i.e. it discriminated against a 'like product'.

In 1994, another GATT panel, ruling on an EU–US dispute over car imports, slightly relaxed the definition, considering that vehicles of different fuel efficiency standards could be considered *not* to be like products. However, it placed strict boundaries on this conclusion, arguing that Article III of the GATT referred only to a 'product as a product, from its introduction into the market to its final consumption'.[10] Factors relating to the manufacture of the product before its introduction into the market were, therefore, still irrelevant. In 1996 another panel found that chemically identical imported and domestic gasoline were like products regardless of the environmental standards of the producers.

This series of disputes has led to a widely held view that the GATT automatically rules out any discrimination in trade based on the way in which products are manufactured, caught or harvested. In turn this has aroused much concern among the environmental policy community, where policies designed to regulate PPMs (such as controlling emissions from manufacturing processes, or promoting sustainable production) are seen as increasingly important. This has resulted in a long-lasting – but somewhat sterile, debate. It should be noted, however, that contrary to this widespread belief, nowhere does the GATT explicitly rule out process-based trade discrimination; indeed, in some areas it is clearly permitted.[11] Both the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) regulate some aspects of *how* goods are produced, allowing importing countries to discriminate against products if they are produced using excessive subsidy or misappropriated intellectual property. GATT's Article XX(e) allows countries to discriminate against products produced using prison labour.

In any case, more recent disputes have led to very different conclusions about how the dispute

settlement system may deal with trade restrictions deriving from PPMs. In the shrimp-turtle case, for example, the US embargo on imports of shrimp from nations which did not require the fitting of turtle-excluder devices to their trawlers, a measure which US fishing fleets were required to undertake, clearly embodied discrimination on the basis of the way in which the shrimp were caught (a PPM). The Appellate Body, however, considered that this discrimination between like products could be justified under Article XX(g) of the GATT. In the end, the measure failed, among other reasons because the US had applied the embargo against all shrimp exports from a country unless it could demonstrate that it took sea turtle protection measures comparable to those of the US. If the exporting country in question could not do so, *all* its shrimp exports to the US were banned even if individual consignments were caught in turtle-friendly ways, for example by trawlers which *were* fitted with turtle-excluder devices. The US process of country-by-country 'certification' thus failed to satisfy the conditions set out in the headnote to Article XX, and was one of a number of elements that did constitute, the Appellate Body decided, 'arbitrary or unjustifiable discrimination'.

In the light of this finding, the US amended its regulations in various ways, including permitting the import of shrimp harvested by particular commercial vessels using devices comparable in effectiveness to those required by the US. In the second WTO dispute on the case, in 2001, the dispute panel and Appellate Body ruled that the new measures *were* compatible with the GATT, having satisfied the requirements of the headnote, and the measure remains in force today.[12]

This dispute case helps to illustrate the fact that there are different ways in which PPM-based trade measures may be applied.[13] Almost all of the relevant dispute cases to date have involved fairly crude trade measures involving discrimination against all exports from particular countries, or particular producers, on the basis of the processes permitted, or not permitted, in that country or by that producer. The shrimp-turtle case demonstrates that a carefully targeted measure, designed to exclude particular products on the basis of the way in which the *individual products* are produced (not on which country or which company they come from) could well be found to be GATT-compatible.

This is, however, a complex debate. Where the environmental damage caused by the PPM is confined to the locality of the process, PPM-based environmental trade measures are not easy to justify. Different parts of the world vary widely in their ability to assimilate pollution, depending on factors such as climate, population density, existing levels of pollution and risk preferences. Environmental regulations suited to industrialized nations, with high population densities and environments which have been subject to pollution for the past 200 years, may be wholly inappropriate for newly industrializing countries with much lower population densities and inherited pollution levels – and yet trade measures based on PPMs could in effect seek to impose the higher standards regardless. Carried to its logical extreme, enforcing similarity of PPMs could deny the very basis of comparative advantage, which rests on the proposition that countries possess different cost structures for the production of various goods. It is hardly surprising that many developing countries view the motives of those wishing to introduce the PPM issue to the debate as protectionist.

Where the environmental damage is transboundary or global, however, the argument is different, since the impact of the PPM is not confined to the country of origin. PPM-based measures are, furthermore, becoming increasingly important in strategies for environmental sustainability. Particularly where the use of energy is involved (as it is in virtually every manufacturing and processing activity), the pollution caused stems from the process and not the product. Attempts to reduce energy use in order to mitigate climate change – through, for example, energy or carbon taxes – may well be applied to processes. Life-cycle approaches, and ecolabelling schemes based on them, have similarly focused attention on the way in which products are manufactured, grown or harvested, as well on product characteristics themselves; indeed, the whole point of ecolabelling schemes is to provide information on differences in characteristics between like products.

The Appellate Body in the shrimp-turtle case did not, unsurprisingly, produce any general guidance on the circumstances in which PPM-based trade measures might be acceptable in the future. But its arguments were reinforced by its conclusions in the 2001 asbestos case, where a Canadian challenge to a French prohibition on the use of building materials containing asbestos was upheld. Canada had argued that building materials containing asbestos and those not containing it should be treated as like products, but the Appellate Body concluded that even where two products are deemed to be 'like' under the terms of GATT Article III, they could still be treated differently in regulation, as long as this did not lead to systematic discrimination against imports. As long as the relevant regulation was even-handed between imports and domestic products, and focused on appropriate goals (in the asbestos case, on the health impacts), then it should be WTO-compliant.

These two cases together could well signal the settlement of the PPM issue in the trade and environment debate – as the well-known academic commentator John Jackson has argued, in the light of

the shrimp-turtle case, 'the product-process distinction will probably not survive and perhaps *should* not survive'.[14] This is a good example of where the argument has moved forward entirely through dispute settlement rather than political negotiations; indeed, the issue does not feature at all on the Doha Round's agenda. Whether this is a firm and lasting conclusion, and what the implications are for the design of PPM-based trade measures, remain to be worked out, probably through further disputes.

Multilateral environmental agreements

As Principle 12 of the Rio Declaration states, international agreement is clearly preferable to unilateral action in tackling transboundary or global environmental problems. Well over 250 MEAs now exist, with memberships varying from a relatively small group to over 180 countries – which means effectively the whole world. Almost thirty of these MEAs incorporate trade measures, restraints on the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties. A wide variety of measures have been used, including reporting requirements on trade flows, labelling or other identification requirements, requirements for movement documents (such as permits or licenses, or systems of prior notification and consent), and export and/or import bans, with varying degrees of specificity.[15]

There are three broad sets of reasons why trade restrictions have been incorporated in MEAs:[16]

1. To provide a means of monitoring and controlling trade in products where the uncontrolled trade would lead to or contribute to environmental damage. This may extend to a complete exclusion of particular products from international trade.

2. To provide a means of complying with the MEA's requirements.

3. To provide a means of enforcing the MEA, by forbidding trade with non-parties or non-complying parties.

The Montreal Protocol, for example, contains examples of all three types. Considering the first category, a system of import and export licenses was introduced in 1997, through the Montreal Amendment, primarily in order to control illegal trade. In the second category, countries have used a variety of policies (such as taxes and quotas) to limit imports and exports, in order to fulfil their obligations to control the consumption of chlorofluorocarbons (CFCs) and other controlled substances; since consumption is defined as 'production + imports – exports', control of trade is essential. And in the third category, the Protocol requires parties to ban imports of ozone-depleting substances from non-parties, and potentially from non-complying parties, as an enforcement measure. On the face of it, this last type of trade measure in particular would appear to conflict with the GATT, since it discriminates between the same product imported from different countries on the basis of their membership of the Protocol. It is widely accepted, however, that the inclusion of this measure in the Montreal Protocol has contributed significantly to its success in attracting signatories.[17]

This topic has become one of the main items of debate within the trade-environment agenda in recent years, and was a particularly important topic in discussions in the WTO's Committee on Trade and Environment in its first two years of existence, during the run-up to the Singapore WTO conference in 1996. Members put forward proposals designed variously to define under what conditions trade measures taken pursuant to an MEA could be considered to be 'necessary' according to the terms of GATT's Article XX, or to establish a degree of WTO oversight on the negotiation and operation of trade provisions in future MEAs. The EU pressed for an amendment to the GATT itself to create a presumption of compatibility with MEAs, but no consensus was reached about the need for modifications to trade rules. Other options include waivers for MEA trade measures from the provisions of the multilateral trading system, or a WTO 'understanding' or full-blown agreement on MEAs. Like every other item on the Committee on Trade and Environment's agenda, however, the discussions never resulted in a firm conclusion, and the debates are now being largely repeated, with a few variations, under paragraph 31(i) of the Doha Round agenda.

It is worth noting, however, that no complaint has yet arisen within the GATT or WTO with respect to trade measures taken in pursuit of an MEA, and this may continue to be the case; in instances such as the Montreal Protocol, where the trade provisions were mainly designed to encourage countries to accede, this has been so successful that there are virtually no non-parties left against whom trade measures could be taken in any case. On the other hand, the threat of a conflict with WTO rules has been raised in almost all recent MEA negotiations, generally by those opposed to the principle of the MEA and/or its effective enforcement, and there have been various attempts to write 'savings clauses' into them, ensuring that they remain subordinate to WTO disciplines.[18] The lack of clarity on the issue, and the uncertainty about the outcome of any WTO dispute, has thus led many to call for some kind of resolution. The entry into force of the

Cartagena Protocol in September 2003 has added another dimension to the US–EU dispute over trade in GM products, and may provide the first testing ground for an MEA–WTO clash.

The latest stage of the shrimp-turtle dispute contains a potentially important development of WTO jurisprudence in this area. In the second shrimp-turtle case, in June 2001, the dispute panel found that the US was entitled to maintain its embargo (having adjusted its original regulations in various ways; see above), even though it was a unilaterally applied measure, as long as it was engaged in 'serious good-faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries'.[19] It did not accept Malaysia's contention that the agreement had to be concluded *before* a trade restriction could be enforced. In addition, the panel believed that the US trade measures would 'be accepted under Article XX if they were allowed under an international agreement', but in the absence of such agreement, such measures are '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 Appellate Body came to a somewhat different conclusion, arguing that there was no absolute requirement that countries had to offer to engage in multilateral negotiations before they were allowed to apply trade measures.[20] In the first shrimp-turtle case, it was the fact that the US had negotiated an agreement with Caribbean nations but had not tried to do so (at least initially) with south-east Asian shrimp-exporting countries that had led to the conclusion of 'arbitrary and unjustifiable treatment' – underlining the WTO dislike of discrimination between WTO members. So while unilateral trade measures may well be permissible, depending on how they are designed, trade measures taken in the context of a multilateral agreement ought to be even more justifiable under the WTO.

Although it is always dangerous to extrapolate too widely from particular disputes, it may well be that, as with the PPMs argument, this conclusion has taken the heat out of the WTO–MEA debate. However, there are still open questions over various aspects of the issue, particularly over the design of so-called 'non-specific' trade measures, those which may be applied in order to implement an MEA but which are not specifically described or required in the treaty itself (the second category identified above). These may be of particular importance in the implementation of the Kyoto Protocol on climate change (for example, in the use of carbon or energy taxes, and how these are applied to imported products), which, because of its impact on a huge range of economic behaviour, could lead to more controversies and, potentially, WTO disputes.[21]

From Seattle to Doha and Cancun: the politics of the trade and environment debate

The initial injection of trade and environment issues on to the GATT/WTO agenda was largely due to developments in the environment world. The UN Conference on the Human Environment in Stockholm in 1972 helped drive the establishment of the GATT's group on environmental measures and international trade. This EMIT group remained inactive, however, until the run-up to the Earth Summit in Rio twenty years later, when it finally started to meet on a regular basis, and in due course was transformed into the Committee on Trade and Environment (CTE), set up when the WTO was established in 1995. At the same time the tuna-dolphin dispute helped turned the topic into a high-profile political issue, taken up by many NGOs around the world (and not only, it should be noted, by those hostile to globalisation in general, and the WTO in particular).

Although the CTE was established with a mandate to 'identify the relationship between trade measures and environmental measures, in order to promote sustainable development [and] to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required …'[22] it has never managed to reach any conclusions on any such modifications. In one sense this is not particularly surprising. WTO trade rounds tend to make progress through agreement on a broad package of measures, inevitably involving national trade-offs – and there has never been enough scope within the CTE's agenda for such trade-offs to be reached in isolation. Discussions within the Committee have undoubtedly contributed towards a greater understanding of the issues, but there is not much else one can say for its deliberations.

The inclusion of the trade and environment paragraphs in the Doha Round agenda was almost entirely due to the insistence of the EU, supported only by a few other developed-country allies.[23] The US, prone to see any development of multilateral rules as a potential inhibition on its predilection for unilateral trade measures, largely stayed clear of the debate. Under the Bush administration, both environmental policy and support for international institutions in general have been heavily downplayed, so it seems highly unlikely that the US will express much interest in seeing these debates advance. Indeed, it may adopt an increasingly hostile position, as evidenced by its challenge to the EU's regulations on GM products (see above).[24] Matters are also complicated by the greater degree of scepticism European populations – and, usually, their governments – often display over matters

such as food safety (for example, over GM products, or hormone-treated beef) compared to the US public and government, who seem more likely to accept business-promoted new technological developments.

Developing countries as a whole also tend to be hostile to the trade–environment proposals of Northern countries, fearing that new environmentally directed trade restrictions will discriminate disproportionately against their exports, and potentially lead on to other new bases for trade barriers, such as labour or animal welfare standards. Discussions within the CTE on the Doha agenda have not proceeded with any great degree of rapidity or likelihood of consensus. The topic was due to be discussed at the WTO ministerial conference in Cancun in September 2003, but was entirely sidelined as the negotiators concentrated – in the end, fruitlessly – on more high-profile issues such as agriculture and investment. Given the failure to reach agreement at Cancun, it is not impossible that the whole area of trade and environment will be dropped from the Doha Round as negotiators seek to reach agreement on a smaller range of more 'traditional' trade topics. It should also be remembered, of course, that the Doha agenda focuses only on a few trade and environment issues, and avoids the more controversial ones, such as the PPMs debate.

It is now commonplace to observe that much of the problem stems from a failure of 'policy coherence', of national governments to integrate their environmental and trade objectives. A stark example of this is provided by the tendency of developing country trade negotiators firmly to oppose any new trade-related environmental measures, while at the same time their counterparts in environment ministries argue for stricter trade restrictions in certain MEAs than the developed world wants.[25] (This is not to say that developed countries handle the relationship any better – most of them do not.) To a certain extent this is a problem with environmental policy as a whole (for example in respect of its integration, or lack of it, into agriculture, or economic, policy), and is likely to remain so as long as most governments afford higher priority to economic and trade issues than they do to environmental ones.

In practice, such movement as there has been on the trade and environment agenda has derived almost entirely from two sources. First, the evolving way in which the WTO's dispute settlement system has interpreted the WTO agreements in trade–environment cases, which, as can be seen from the discussion above, has led to quite different conclusions in more recent cases than would have been predicted by most observers in the early 1990s. Second, from the way in which more recent MEAs have incorporated steadily more sophisticated trade measures, and tried themselves to address their relationships with the WTO.

In the absence of any political agreement on modification of WTO rules, this seems likely to be the pattern of future developments. A political crisis can never, however, be ruled out – a serious clash between the US and EU over GM products or a challenge to an MEA under the WTO, are the most likely candidates. Crises have the benefit of focusing attention and political will on the issue – and it may well be that without such a development, the relationship between trade liberalization and environmental protection will remain as a set of unresolved tensions on the international agenda.

Endnotes

1 Marrakesh Agreement Establishing the World Trade Organization, preamble, para 2.

2 United Nations Conference on Environment and Development, Agenda 21, Chapter Two, Section B.

3 WTO Ministerial Declaration, 14 November 2001, para 6.

4 For a good summary, see Lyuba Zarsky, *Havens, Halos and Spaghetti: Untangling the Evidence about FDI and the Environment* (paper for OECD conference on FDI and the Environment, January 1999).

5 This line of argument may widen the future potential for process-based trade restrictions (see further below) beyond what it was generally thought the WTO would allow, which is probably why it generated almost as much criticism from the complainants in the case as from the defendant.

6 *International Trade 1990–91* (Geneva: GATT Secretariat, 1992), p. 23.

7 Ibid., p. 32.

8 The 2001 sardines dispute between the EU and Peru over labelling of fish products resulted in a finding that the EU Regulation diverged unjustifiably from the relevant international (Codex Alimentarius) standard, but it did not rule on any wider issue.

9 For a full exploration of these issues, see Duncan Brack, Robert Falkner and Judith Goll, *The Next Trade War? GM Products, the Cartagena Protocol and the WTO* (London: RIIA briefing paper, 2003).

10 *US: Taxes on Automobiles (1994): Report of the Panel*, para. 5.52.

11 This point is powerfully argued in Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality', *Yale Journal of International Law* 27:1, Winter 2002, pp. 59–102.

12 For a thorough exploration of the two shrimp-turtle cases, see Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate' *Columbia Journal of Environmental Law* 27:2 (2002), pp. 489–519.

[13] For a further exploration of this issue, see Charnovitz, 'The Law of Environmental "PPMs" in the WTO', and Marie Wynter, *International Trade and Environmental Protection: Domestic PPM Regulations and WTO Jurisprudence,* unpublished PhD thesis, Australian National University, October 2001. Charnovitz divides PPMs into three types: ones based on a government policy standard, on a producer characteristic or on a 'how produced' standard.
[14] John H. Jackson, 'The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights' *Proceedings of the 94th Meeting of the American Society of International Law* (2000), p. 222.
[15] See Duncan Brack and Kevin Gray, *Multilateral Environmental Agreements and the WTO* (London: Royal Institute of International Affairs and International Institute for Sustainable Development, July 2003, available from www.riia.org/sustainabledevelopment) and OECD, *Trade Measures in Multilateral Environmental Agreements* (Paris: OECD, 1999).
[16] For a fuller consideration, see Steve Charnovitz, 'The Role of Trade Measures in Treaties', in Agata Fijalkowski and James Cameron (eds), *Trade and the Environment: Bridging the Gap* (London: Cameron May, 1998), pp. 97–117.
[17] For a full discussion, see Duncan Brack, *International Trade and the Montreal Protocol* (London: RIIA/Earthscan, 1996).
[18] The Cartagena Protocol contains both such a phrase and another sentence explaining that the Protocol is not subordinate to any other agreement, thus entirely avoiding resolving the issue.
[19] 'United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia', Report of the Panel, 15 June 2001 (WT/DS58/RW), para 5.73.
[20] See Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case', pp. 502–09.
[21] For a fuller exploration of these issues, see Duncan Brack, Michael Grubb and Craig Windram, *International Trade and Climate Change Policies* (London: RIIA/Earthscan, 2000).
[22] WTO: Trade and Environment Decision of 14 April 1994.
[23] The EU's commitment to environmental priorities is always somewhat undermined, however, by its attachment to existing and environmentally damaging subsidies for agriculture and fisheries.
[24] The US's increasing tendency to adopt a bilateral approach in trade policy was illustrated in June 2003 by the threat made by Senator Chuck Grassley (chairman of the Senate Finance Committee) to Egypt, which had decided against joining the US challenge to the EU. Grassley said that while he was supportive of a possible US–Egypt Free Trade Agreement, 'one of the criteria that ought to be used to determine with whom the United States negotiates future FTAs is whether a country shares the same vision of the global trading system as does the United States. I certainly would like to be able to include Egypt in that camp.' 'US announces panel on EU GMO moratorium, as Grassley warns Egypt', *Inside US Trade,* 20 June 2003, p. 1.
[25] The Basel Convention on hazardous waste, and the Cartagena Protocol on GM products, are both good examples – instances of where countries lacking strong domestic regulatory capacity effectively co-opt trade policy (allowing them to control imports) to serve the same purpose.

Further reading

RIIA trade and environment series:

Christoph Bail, Robert Falkner and Helen Marquard (eds), *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* (London: RIIA/Earthscan, 2002)

Duncan Brack, *International Trade and the Montreal Protocol* (London: RIIA/Earthscan, 1996)

Duncan Brack (ed.), *Trade and Environment: Conflict or Compatibility?* (London: RIIA/Earthscan, 1998) (proceedings of RIIA conference, April 1997)

Duncan Brack, Robert Falkner and Judith Goll, *The Next Trade War? GM Products, the Cartagena Protocol and the WTO* (London: RIIA, 2003)

Duncan Brack, Michael Grubb and Craig Windram, *International Trade and Climate Change Policies* (London: RIIA/Earthscan, 1999)

Jonathan Krueger, *International Trade and the Basel Convention* (London: RIIA/Earthscan, 1999)

Halina Ward and Duncan Brack (eds.), *Trade, Investment and the Environment* (London: RIIA/Earthscan, 1999)

James Cameron, Paul Demaret and Damien Geradin (eds), *Trade and Environment: The Search for Balance* (London: Cameron May, 1994)

Dan Esty, *Greening the GATT: Trade, Environment and the Future* (Washington, DC: Institute for International Economics, 1994)

International Centre for Trade and Sustainable Development: *Bridges* journal (print) and *Bridges* weekly trade news digest (electronic): www.ictsd.org.

International Institute For Sustainable Development / Centre for International Environmental Law, *The State of Trade Law and the Environment: Key Issues for the Next Decade* (forthcoming, 2003)

International Institute for Trade and Sustainable Development/UN Environment Programme, *Environment and Trade: A Handbook* (Winnipeg: IISD, 2000)

Peider Konz (ed), *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America – A Reader* (United Nations University / International Centre for Trade and Sustainable Development, 2000)

Gary P. Sampson: *Trade, Environment and the WTO: The Post-Seattle Agenda* (Washington DC: Overseas Development Council, 2000)

Gary P. Sampson and W. Bradnee Chambers (eds), *Trade, Environment and the Millennium* (Tokyo/New York/Paris: UN University Press, second edition, 2002)

United Nations Environment Programme (UNEP) Economics and Trade Programme: www.unep.ch/etu/etp/index.htm

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