Sustainable Development: Promoting Progress or Perpetuating Poverty?
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Chapter 8

Environmental Protection and the WTO

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In November 2001, the 142 members of the World Trade Organization (WTO) agreed to launch a new trade round. The Doha Development Round should be good news for trade liberalization and world economic growth. The WTO membership is now committed to policies which will speed recovery from recession and which will support growth in the developing world. The anti-globalization movement has, at least for the moment, had the wind taken out of its sails. In the aftermath of September 11, the agreement at Doha, Qatar, to continue to build global economic interdependence is a reaffirmation by the nations of the civilized world of their intention to continue to cooperate for the common good of all.

There are, however, few successes in life that come without strings attached, and the string in this case was the mainstreaming of the environment as an agenda item in the new trade round. Most members of the WTO – especially developing countries – did not want environment to be negotiated in the Round. So why did they agree? After the debacle of Seattle and in the wake of the then pending economic downturn following September 11th, Robert Zoellick, the US trade negotiator, was under enormous pressure to make Doha a success. Meanwhile, Pascal Lamy, his counterpart from the European Commission, made it clear that he "had to have something" on the environment to deliver to the European Union (EU). Lamy had been telling everyone that the EU would not accept anything less and Zoellick knew this. So Zoellick brokered a deal.

The deal is that the environment issue of immediate interest to the EU – "clarifying conflict between the provisions of the WTO and MEAs" – would in the first instance be studied and then, at their meeting in 2003, WTO Ministers would decide whether or not to negotiate changes to WTO rules.

One wonders if negotiators understood the opportunity this gives the EU to exert dramatic leverage at the 2003 meeting. Since the issues on which the EU has historically been most reluctant to move – agriculture and garments and textiles – are issues of the greatest importance to developing countries, it is easy to see the EU holding progress in those areas hostage at the 2003 meeting to commitments to negotiate rule changes on environmental issues.

Adding to these woes, a recent decision by the Appellate Body of the WTO 'court'[1] upheld the use of trade sanctions by the United States, enabling the US to require importers to comply with domestic US environmental standards. This potentially creates an important precedent for the wider use of trade sanctions to coerce other nations to comply with the environmental standards

[1] The WTO dispute settlement body is the closest equivalent that the WTO has to a court system for settling disputes between members.

of rich countries, such as the US, Japan or EU, and legitimises new grounds to protect uncompetitive industries.

What is at stake?

The international trading system operates according to rules spelt out in the General Agreement on Tariffs and Trade (GATT) and applied by the World Trade Organisation (WTO). In general the GATT/WTO system has enabled a flourishing of international trade, with enormous benefits in terms of improved efficiency of resource use and increased wealth in all trading nations.

So far, rich countries have benefited more from the WTO than have poor countries. This is not because the system is rigged against poor countries, as some have claimed. Rich countries do not 'exploit' poor countries through trade. Trade is voluntary: if someone in a poor country sells something to someone in a rich country it is because both believe they will gain in the process.[2] However, poor countries continue to impose and to face higher tariffs than do rich countries, especially on agricultural and textile products. As a result, people in these countries are unable to gain as much from engaging in international trade as they would if they faced fewer restrictions. The question is: will these barriers be lowered, or will the system flounder under the weight of protectionist interests and environmentalist pressure?

GATT rules enable trade restrictions to be imposed for the protection of human health and/or the environment but limit the circumstances under which these may be applied. Specifically, Article XX of the GATT allows some such restrictions, subject to stringent tests.[3] Historically, trade restrictions were generally not permitted under Article XX if they related only to the methods by which a good was produced but not to the qualities of the product itself.[4]

However, a recent decision by the Appellate Body of the WTO's dispute settlement system indicates that WTO members may be able to impose restrictions on imports based upon the way those imports are produced under certain circumstances.[5] Those circumstances are: (a) that doing so is necessary for environmental protection or the conservation of natural resources; (b) that the importing country has attempted to negotiate a bilateral or multilateral agreement involving the country of export to achieve the environmental/conservation measure without the imposition of sanctions, but that this has failed; (c) that the sanctions imposed conform with the basic precepts of the WTO, namely fairness and non-discrimination. This case is discussed in greater detail below.

The EU seeks to legitimize the imposition of trade sanctions that are based on the way goods are produced. To achieve this end, it is employing a multi-component strategy. One key component is its support for the elaboration of numerous multilateral environmental agreements (MEAs) containing trade provisions.[6] A second, reinforcing component, is its attempt to obtain an

[2] Griswold (2001).
[3] Similar restrictions are permitted under the Sanitary and Phytosanitary Agreement, which covers trade in foodstuffs.
[4] Technically speaking, restrictions could not be placed on "non-product-related process and production methods (or PPMs)".
[5] WTO (1998), WTO (2001).
[6] The Bush Administration does not follow the same environment policy objectives, but it is bound to implement laws enacted by the US Congress, such as the unilateral trade sanctions against foreign exporters of shrimps who do

agreement that would assert the primacy of MEAs over trade rules enforced by the WTO. A third component is the attempt to introduce the precautionary principle into international law in general and trade law in particular. If successful, the trade provisions of MEAs would for many goods replace the WTO rules, whilst for other goods, nations would be able to impose essentially arbitrary restrictions on trade. The consequences for the WTO and for liberalization of international trade more generally could be devastating.

Clarifying the WTO Rules as they affect MEAs

In at least three significant MEAs, parties are obliged to use trade sanctions to enforce the specified environmental objectives and are required to ban trade in certain goods with countries that are not parties to the MEAs. These MEAs are: the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on Ozone Depleting Substances, and the Basel Convention on Transboundary Movements in Hazardous Waste.

It is, to say the least, morally and legally dubious to negotiate international treaties that impose penalties on non-parties. The United Nations Charter decrees it a breach of the doctrine of national sovereignty. At the UN Conference on Environment and Development (the Rio "Earth" Summit) in 1992, Ministers declared that trade sanctions should not be used to enforce environmental goals.[78] UN meetings are not known for the wisdom of their declarations but in this case, the Ministers got it right: trade sanctions are a poor environment policy. Government measures to secure protection of the environment should aim to impact on the source of the environmental degradation. Usually this is the point of production or consumption. Trade is almost never the cause of degradation. Trying to secure an environmental result with a trade ban is an extremely inefficient and consequently ineffective method.[9, 10]

However, this did not dissuade the World Wildlife Fund from promoting trade bans ostensibly to protect endangered species. Under CITES, trade in species listed on its appendixes is restricted. Trade in species and products derived therefrom listed on appendix 1 or 2 and requires the prior approval of the CITES Secretariat. Trade in species which are listed on Appendix 1 is effectively banned (except, for example, antiques, such as 19th-century carved ivory). The fact that these bans have in most cases had little impact on the species they supposedly protect, except in cases where they have been harmful,[11] does not deter WWF and other more radical organizations for pushing to keep them in place.[12]

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not protect turtles according to US law. The recent ruling of the Appellate Body decreeing that those sanctions are legitimate under the WTO rules ironically creates fresh opportunities for the EU to pursue its preference for sanctions to secure compliance with its environmental standards in important new areas, such as climate change and against major trading partners such as the United States.

[7] United Nations (1992).

[8] Ibid.

[9] See Sugg (1994) for an analysis of the effect of an ivory trade ban on the protection of the African elephant.

[10] For a technical description of CITES and its trade measures, see OECD (1999).

[11] 't Sas-Rolfes (1995) shows that in the time since 1973 when a CITES ban was instituted, trade in rhino horn has not ceased nor has the decline in rhino numbers, except where those rhinos are well protected.

[12] In pursuit of donations from animal lovers, WWF has managed to convince people that buying ivory endangers elephants. Now a whole gaggle of more radical organizations, such the Born Free Foundation and the Humane Society, continue that call, in spite of strong evidence that such bans are often counterproductive – a fact that even WWF field officers now acknowledge.

Nor did these facts stop Greenpeace from promoting a ban on trade in 'hazardous waste' under the Basel Convention. The Basel Convention requires industrialized nations to permit exports of specified materials only if they consider and approve the waste management policies of the importing countries.[13] Under a Ban Amendment being sought by Greenpeace and its affiliates in the Basel Action Network, Basel would ban completely trade in other proscribed materials.[14] As such, Basel injects into international law a view of the developing world reminiscent of the European colonial period and which still permeates the mindset of European NGOs, viz. that the interests of developing countries are better understood and managed by the developed world. Greenpeace, for example, is currently pressuring the Dutch Government to exercise its rights under the Basel Convention to ban the export of ships to India for breaking, because Greenpeace considers that the pollution caused by the Indian ship-breaking industry to be unacceptable.[15]

Like CITES, the Basel Convention has had all manner of bad consequences, which, even from the perspective of the colonial interventionist with an eye for eco-imperialism, should make one wary of promoting it as a model for future trade relations.[16] For example, restrictions on the export of used lead to India has undermined the formal lead recycling industry in that country with perverse environmental consequences. The formal recycling industry, which operates under strict environmental and health and safety regulations, requires high throughput of lead. Because of the relatively low levels of lead use locally, the industry requires imported lead in order to operate at a profit. The restriction on exports of used lead to India has led to the closure of a number of formal-sector lead recycling facilities, which became unprofitable. As a result, more of the locally-produced waste lead is now recycled by the informal sector. These are unregulated backyard operations, which typically cause contamination of water and air, with adverse health consequences.[17]

What is the Conflict?

The potential conflict between these MEAs and the WTO arises from the fact that the WTO rules bar members from imposing their own policies extraterritorially under the threat of trade bans and it bars WTO members from discriminating amongst each other in their trade policies. In contrast, the MEAs say "we will not trade with you unless you apply our policies and standards."

In principle, a member of the WTO that is not a party to an MEA might secure a ruling from the WTO that another member has acted illegally under WTO rules by restricting trade in accordance with the terms of the MEA. During the past decade various environmental groups have pressed for an amendment to the WTO rules that would remove the right of any WTO member to take such a case. The EU has now joined them in this cause.

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[13] Despite the concern that toxic waste from developed countries was being dumped illegally in developing countries, Montgomery (1995) that a careful assessment of the evidence compiled by Greenpeace indicates that there are only five recorded episodes of illegal export of hazardous waste from developed to developing countries, and four of these were cases of fraud.

[14] The ban amendment has in fact been agreed, but very few countries have signed it and it is not expected to be ratified.. (See http://www.basel.int/ratif/ratif.html for the status of ratification.) Accessed 10 June 2002.

[15] For an insightful treatment of this issue, see Langewiesche (2000).

[16] See Evans (1995).

[17] See Raychaudhari et al (2000).

No such case has so far been lodged within the WTO. No member has yet had sufficient reason to do so. The application of trade measures in MEAs has not imperiled a commercially significant amount of trade. Nor is any environmental interest significantly advanced by the trade bans. They are relatively ineffectual. Indeed, the MEAs in question were recently reviewed in a series of case studies by the UN Conference on Trade and Development (UNCTAD), which reported that in no case had trade bans secured the environmental purpose of the MEAs.[18]

Why does the conflict matter?

So, if this is not a matter of practical importance, why not do as the EU proposes and remove the irritant by having the WTO legitimize the trade provisions in a formal agreement? Two good reasons: First, a fundamental issue of principle is at stake. Second, the EU is driving environmental and regulatory policy in a direction that will significantly disadvantage businesses both inside and outside the EU.

The issue of principle is that such a result would legitimize discriminatory trade provisions and undermine the core values that have made the GATT/WTO an outstanding success. The GATT/WTO is arguably the most successful international institution that has ever developed. It has led to a global trading based on clear, non-discriminatory rules, and reciprocal reductions in tariffs and other trade barriers. This has encouraged trade to flourish and laid the foundation for a sustained period of economic growth enveloping more people than ever before in the world 's history.

The WTO system has just embraced China, giving the world's most populous country a stronger stake in the global economy. As a result, China is now more actively engaged in the international community – and on more friendly and positive terms – than it has ever been. As Bob Zoellick himself has said on many occasions, the global system of economic interdependence, based on free markets, is fundamental to global peace and security.

The WTO rules have worked because they respect the sovereignty of every WTO member. Non-discrimination is guaranteed by these rules, which are accepted and applied in common by every member, rich or poor, large or small. If the principle is established that one member, or a sub-set of members, can impose their own conditions for trading with other members of the WTO, the fundamental principle that sustains the whole WTO legal structure will fail.

Unwitting Support from Washington

That is the long answer to the question, "why not clean up this problem the way the EU proposes?" The short answer is even simpler. It is the wrong solution. Why don't environmental groups accept the principles set down by the UN and stop proposing trade sanctions in MEAs? It is not the WTO rules which need changing; it is the habit of environmentalists of pushing for trade bans in multilateral environmental agreements – and the habit of environment ministers negotiating the agreements accepting the bans – that should be changed.

One reason is that, as fundamental as this issue is, the conflict between the trade measures in MEAs and the WTO rules has never attracted as much attention in Washington as it has in Brussels. The argument that there is something wrong with trade sanctions gets little traction in

[18] See Jha (2000).

DC. A trade sanction is a traditional weapon for US interest groups and has been attractive to Congress. US Administrations have been forced to defend several trade sanctions demanded by environmental NGOs, mandated in law by Congress, and triggered by environmental NGOs through litigation in US courts.

Some of these sanctions are well known – the bans on imports of tuna from countries that did not mandate fishing methods which reduced the incidental kill of dolphins and, more recently, bans on imports of shrimp where the incidental kill of turtles was not minimized. Most of the US restrictions were struck down after complaints in the WTO by countries whose trade was affected (see box for details on the Shrimp-Turtle case). The EU itself lodged one of the complaints against the tuna bans. The EU has always maintained that unilateral trade sanctions are unacceptable, but that trade sanctions maintained by a group of countries, such as through an MEA (and presumably groups about the size of membership of the EU) are legitimate.

In addition, the US is not a party to the Basel Convention, which, until recently, was the most egregious offender against WTO principles. It is understandable that policy-makers in Washington would pay little attention to a Convention to which the US was not a party. But it leaves a large blind spot.

However, there is a policy interest in Washington which results in a sympathetic hearing for the EU approach. The collaboration between protectionist interests and environmental lobbyists over the last decade, first against the GATT over the tuna/dolphin rulings, and second and more significantly, in the campaign against NAFTA, have made respectable the idea that no trade agreement is any good unless it provides for extraterritorial reach with regard to environmental policy. This idea is now part of the basic position of the protectionists in Congress, giving perhaps unintended support to the EU position. Green groups such as WWF and Greenpeace understand that this position reinforces their global interest in protecting the MEAs that they have sponsored – CITES and Basel respectively. However, other US-based environmental groups see themselves as acting in accord with the older American tradition of supporting trade sanctions, in this case to see them used to force their preferred environmental policies on other countries.

What ultimately matters in Washington is, however, how many votes in Congress are locked into the position that environment has to be linked to trade. That the WTO might well be poisoned in the process does not rate in that situation. The focus in Washington is, always, how many votes do they have.

This political calculus can only be challenged when it can be shown that other US interests are threatened as a consequence, and the negotiation in January, 2001, of the Biosafety Protocol, which restricts trade in certain GMOs, has done just that.

EU trade bans on GMOs

Strongly supported by Greenpeace – as part of that groups wider campaign to ban GMOs – the Biosafety Protocol was driven politically by the EU. In contrast to the MEAs so far discussed, the Biosafety Protocol does not mandate trade sanctions. But it creates other significant conflicts with WTO rules. It gives importing countries absolute discretion to ban imports of living products which are genetically modified (including potentially all manner of grains, seeds, fruit

and vegetables). By invoking versions of the Precautionary Principle, which are laid down in the Protocol, importers may impose a ban simply because they have not yet carried out tests which satisfy them of the safety of the products to be imported. The fact that nothing is perfectly safe, or that the items to be imported may be significantly safer than other conventionally-produced food items that are regularly imported, is irrelevant. The Protocol is predicated exclusively on the way the products are produced.

By contrast, WTO rules allow members to restrict imports to protect human health, and animal plant health and safety, but it obliges members, when challenged, to demonstrate that such restrictions are based on scientific evidence, or at least a risk assessment. The US has already had experience with EU efforts to evade this obligation.

In 1985, the European Commission decided to ban hormones used for animal growth promotion, on the basis that "their safety has not been conclusively proven." This ban was instituted in spite of the fact that the EC's own official inquiry into the effects of growth promotion hormones had given the all-clear to the three natural hormones (progesterone, testosterone and estradiol) and had not yet reported on the two synthetics under investigation. The decision seems to have been motivated primarily by a highly vocal campaign by consumer organisations, which sought to ban all hormones.[19]

There is no scientific evidence that such meat can be distinguished from that of other cows, or that it is a threat to human health. The US brought a case against the EU at the WTO, which it won. The EU appealed the decision and the Appellate Body upheld the earlier decision, ruling that in the absence of any scientific evidence to the contrary, the EU bans were illegal. Incidentally, in the same case, the Appellate Body also narrowly construed the 'precautionary principle' as at most justifying emergency restrictions pending a risk assessment or new scientific evidence. In a subsequent case, the WTO narrowed this further by specifying that such a risk assessment should be carried out in a timely manner. This did the WTO attempt to bring even the unwieldy precautionary principle within the rule of law.

To see how the Biosafety Protocol might impact on trade, consider a case where the EU and Canada are parties both to the Biosafety Protocol and the WTO. The EU bans imports of GMO oilseed from Canada. Canada challenges the EU under the terms of the WTO rules requiring demonstration of the science or risk assessment supposedly justifying the ban. The EU replies that under the Biosafety Protocol it does not need to provide scientific justification and that under international treaty interpretation; the Biosafety Protocol post-dates the WTO Agreement and, therefore, trumps EU obligations under the WTO. If the case went to WTO Dispute Panel, there is a strong chance the result would run against Canada.

It is no accident that this conflict exists between Biosafety and the WTO. The promoters of this Protocol[20] were fully aware it would conflict with the WTO rules. Before the WTO Seattle Ministerial meeting, Public Citizen advocated completion of the Biosafety Protocol so that there

[19] Morris (2000b).
[20] Greenpeace, the EU and a small group of developing countries advised by Greenpeace and the Third World Network (an NGO lobby based in Malaysia with historic links to Public Citizen, Ralph Nader's US consumer lobby).

would be a basis to undermine the science-based approach in WTO agreements.[21] During the Biosafety negotiations some countries wanted a clause in the Protocol stating that WTO rights would be unaffected by accession to the Protocol. The EU refused point blank to accept the proposal. Today, EU officials point to the Boisafety Protocol and its articulation of the Precautionary Principle as a standard which should be followed and applied elsewhere.

The Clinton Administration was actively involved in the negotiation of the Biosafety Protocol. Aware of the dangers it posed to global arrangements for trade in GMOs, they worked actively to soften it. However, the Administration did not have the final card to play in the negotiations over the treaty – change it or we will not go along – because as a non-ratifier of the Convention on Biological Diversity it could not sign the agreement.[22]

In this case, officials were aware that the US's interests were not fully protected by non-signature. The EU might not be able to invoke biosafety provisions against the US, which currently cannot and probably will not ratify it, but they could in the case of other countries, both developing and developed. The result would be fragmentation of global markets for many key GMO products. For every WTO member that adhered to the Biosafety Protocol, the science-based regime of the WTO, and its international authority to regulate global trade in the category of GMOs covered by the Protocol, would be correspondingly diminished.

The Protocol is an important precedent for the EU to build its case to restrict trade in response to consumer or protectionist pressure, and to ban imports without scientific justification.

Wider EU policy Interests

The EU has signaled the direction in which it wants trade policy to move – towards wider use of trade sanctions to enforce its own regulations extraterritorially. Meanwhile, its own regulatory policy has been gradually moving towards that of a Hegelian bureaucracy, in which administrative officials have wide powers of discretion to construct and enforce new regulations. Through this combination of measures, the EU will perpetuate old interests and create powerful new interests dependent upon the use of trade sanctions for protection. A key element in this strategy is the implementation of the 'precautionary principle'.

The Precautionary Principle

The EU has stated that it wants to see a wider application of the Precautionary Principle (by this it means its version, recalling that there is no agreed version of "the" principle).[23] As noted above in the context of the Biosafety Protocol, the precautionary principle (PP) enables the imposition

[21] Wallach (1999).

[22] Administration officials forecast privately that pressure from US green groups on the Executive Office would result in US officials being instructed to withdraw from negotiations as they drew to a close. The negotiations were completed in Montreal in February 2000.

[23] Although it should be noted that after Doha, Pascal Lamy wrote to Bob Zoellick stating that the EU did not intend to seek adoption of the Precautionary Principle within the WTO Agreement. It should also be noted he is Commissioner for Trade. The evidence suggests that environment officials in EU member states are unconcerned about legislating into the Biosafety Protocol provisions which create the right to block trade by invoking the Precautionary Principle and which undermine the provisions of the WTO.

of essentially arbitrary restrictions on economic activity. In the context of trade, the precautionary principle is antithetical to the science-based, rule-driven system of the WTO.

The impact of wide application of the PP by the EU can be seen by considering what might happen to GMOs. The EU could use the PP to deny access of GMO products to the open, global international trading system. Trade in GMOs would then always be subject to case-by-case approvals for imports. Within a couple of decades, most food product are likely to have GMO variants or contain GMO elements. If the EU gets its way, international markets in foodstuffs will be highly regulated and access to the EU will be heavily restricted. The benefits of GMOs will be denied to EU consumers and producers. Worse, food producers outside the EU will be less likely to adopt GMOs because of he costs of obtaining access to the EU. This will reduce returns on investment in GMOs, slowing down their development. The knock-on effects for those in developing countries – where the potential benefits from GMOs in terms of increased yields and ability to withstand extreme conditions are likely to be highest – would be severe.

More general application of the precautionary principle would slow-up the development of a whole slew of technologies, from life-saving drugs to more fuel-efficient automobiles, with adverse consequences for pretty much everyone (even the environmentalists pushing for the use of the PP).

Basing regulation on the Precautionary Principle requires officials to be invested with executive powers. This is because the version of the Principle favoured by the EU is not based on technical or scientific standards – it is essentially an excuse for arbitrary intervention. So it can only be administered by officials through the political exercise of executive discretion. Indeed, EU officials have praised the fact that they are able to use the precautionary principle as a means of over-ruling the advice of their scientific committees in order to ban substances that are of clear benefit to commerce and consumers, and have not been shown to cause any harm.

Integrated Product Policy

In the lead up to Doha, EU officials also indicated that they wanted WTO rules altered so that trade can be restricted on the basis of the environmental impact of the way in which products are produced and processed. In March 2000, the EU issued a paper on "Integrated Product Policy" (IPP). This reported the intention of the European Commission to apply regulations for whole-of-life cycle product management across the EU. It referred to a draft directive that was being developed as a model. This is the Directive on the Disposal of Waste Electronic and Electrical Equipment (WEEE), which in turn is based on the 1994 Directive on Packaging and Packaging Waste. Under the WEEE Directive, every producer and major importer of every electrical and electronic product would be responsible for disposal and recycling of the product at the end of its product life.[24]

The proposal is of course economic lunacy. (The Packaging and Packing Waste Directive, which set in place a similar scheme for the collection and recycling of waste packaging, is costing EU consumers billions of dollars per year.) It is also essentially unworkable because – even more

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

than for packaged goods – a large proportion of electrical goods are imported from outside the EU. That means the only way it would have any chance of working would be if imports are subject to the same cost burdens as domestically produced products. One effect of this policy is clear: the EU will diminish the global competitiveness of every industry regulated in this way. This is – in part – why the EU wants changes to the WTO rules to permit mandatory 'ecolabels'.

The ecolabel will be the certification that whole-of-lifecycle regulations are being followed.[25] As well as verifying that manufacturers have committed to dispose of the product, there will be related or companion obligations to meet in various ways the cost of all the perceived polluting impacts of the production and use of the product. To ensure that imported products, which do not have to bear the extra cost of 'whole of life cycle' management, do not have a cost advantage in the market over domestic products, the imported product will not be allowed to be sold unless it qualifies for the ecolabel.

Whilst voluntary ecolabels are permissible under WTO rules, mandatory ecolabels of this sort almost certainly would not be. So the EU wants a change to WTO roles to enable it to mandate that products be ecolabelled. This would undermine the generally accepted WTO principle that trade restrictions based on production and process methods are not permissible. If the WTO gets into the business of ruling on how a product is made, this would be a slippery slope indeed. Labor rights, animal rights, religious freedom, women's rights, any number of the elements of what is perceived to constitute comparative advantage in any economy, can be picked out to justify denial of entry of a product into a market. However the recent decision in the trade dispute over US sanctions against imports of shrimp raises the possibility that in some circumstances trade might be controlled on such grounds (see below).

And this goes to the heart of how the WTO succeeds. Trade between people in different countries occurs for a number of reasons, including the perceived quality of goods produced in specific places. But a fundamental driver of much international trade is the principle of comparative advantage – that relative costs of production vary from country to country. Trade agreements work best when the rules are primarily focused on liberalising access to markets. If countries want to improve the environment (or any other sphere of activity, such as respect for human rights, or compliance with labor standards) through international action, they should do so by negotiating policies and measures to that end, in a purpose-built international agreement through which each member commits to apply those measures in national law. If multilateral trade laws are used to enforce non-trade purposes, their capacity to serve their trade end and to benefit the common good is lost. (This may not apply to issues that are primarily trade-related, such as international trade in knowledge-based products, where there are potentially large externalities from the trade itself.)

The well-established position is that the WTO cannot get into the business of ruling on the legitimacy of how a product is made. In the first place, it does not have the technical competence to deal with non-trade issues, as shown by its handling of the shrimp/turtle trade dispute (see below). Second, if it did get into this business, it would become the focus of every political, religious, or ideological interest group within the metropolitan powers. Labour rights, animal

[25] But as Morris (1997) has pointed out, it is impossible to know whether such a label in fact reflects an objective assessment of the environmental impact of the product throughout its lifecycle.

rights, religious freedom, women's rights, will become issues used to justify denial of entry of a product into a market. International trade will become, as it was in the inter-war period, highly politicized. In such a situation, commercial interests will be quick to use the cover of the environment, or labour rights, or religious freedom, in order to secure protection against imports, and those commercial interests will be prepared to provide financial support for these causes. Just such an alliance was manifest in the campaigns within the US, against the WTO, which preceded the Seattle Ministerial meeting in December 1999, and which culminated in massive street demonstrations.[26]

The strategic implications of EU policy

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

It could, more generally, argue that actions taken by countries to protect the environment warrant trade restrictions to enforce them and that, as a matter of principle, the WTO should respect such restrictions.

There is already a major new multilateral environment agreement that the EU might seek to legitimize in this way. It is the Kyoto Protocol to the UN Framework Convention on Climate Change. Parties listed in Annex B of the Protocol – most are industrialized economies – are required to reduce emissions of greenhouses gases, particularly carbon dioxide, by an average of 5 per cent below 1990 levels by 2008-2012. To achieve the targets, industrialized economies will have to impose taxes on energy consumption, particularly of carbon-based fuels. This will significantly reduce their competitiveness compared with countries that do not increase their energy costs in this way. The cost impact of 'whole of lifecycle' management is likely to be very low in comparison.

According to the Kyoto Protocol, developing countries are not obliged to reduce emissions. The United States has said it will not accept the Protocol while developing countries do not have comparable obligations. It is hard to believe that the EU, disadvantaged by self-imposed carbon taxes, would not invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of industries in the United States and other countries not so burdened by high energy costs.

A recent study indicated that the costs of complying with Kyoto to European economies could be huge. The UK and Germany in particular might face reductions in GDP of up to 5 percent by 2010.[27] There will be strong pressure from European business on the EU to invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of business in the United States and other countries which are free of the cost burden of higher energy charges. If the EU will contemplate using trade leverage through ecolabelling, which

[26] See Morris (2000a).

[27] DRI/WEFA (2002).

mandates adherence to its preferred methods of production and processing, why would it not tie access to its markets to requirements that developing countries adopt CO2 emission reduction programs which it applies at home?

The acceptance, therefore, by the trade ministers at Doha of the EU's demand to include the environment in the negotiating round is a significant breakthrough, by the EU, in a long term campaign to secure new rights to use trade sanctions to achieve environmental and other non-trade objectives, including the protection of European industry and agriculture from international competition.

Shrimp-Turtle

The EU did not get all that it wanted at Doha, but conclusion in October of the Shrimp-Turtle dispute creates some of the grounds to use trade sanctions to enforce environmental standards which the EU has been seeking.

Shrimp—Turtle began in 1996, when India, Pakistan, Malaysia and Thailand launched a case against a trade ban imposed by the US on shrimp imported from Thailand on the grounds that its shrimp boats did not use the Turtle Excluder Devices (TEDs) mandated by US legislation on American shrimp trawlers.

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

The AB made no case that the circumstances the US faced were extreme and ignored the widely recognized and fundamental principle that countries have a sovereign right to determine their domestic policies and not be coerced through the threat of trade sanctions. The AB deliberately elected not to address whether or not the US was entitled to assert extra-territorial reach when invoking the terms of Article XX. The US was clear about this. It was banning shrimp imports in order to force other countries which did not use Turtle Excluder Devices when they fished for shrimp to do so, in accordance with the requirements that the US imposed on American shrimp boats.

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

Although the WTO does not officially follow precedent, the Dispute Panel and Appellate Body regularly refer to earlier cases in justifying their decisions. It is possible that the aberrant *Shrimp-Turtle* decision will therefore influence future decisions. The implications of this for world trade could be dramatic. Economically powerful countries now have grounds to impose their political will with trade sanctions upon countries which are economically dependant on uninterrupted access to their markets.

Ruling on environment policy, poorly

In *Shrimp-Turtle* the WTO Dispute Panel and the Appellate Body (AB) assumed the competence to assess the environmental importance and effectiveness of the US measures.[28] In so doing they demonstrated incapacity in understanding and inexpertise in handling technical material. The terms of Article XX (g), with which they justified the US measure, addressed conservation. They declared that the international community had agreed (in CITES) that migratory turtles were in danger of extinction, but they did not demonstrate that the US measures would be effective conservation measures. They judged the US measures for their preservation value (would it save turtle lives?), not their conservation value (would it conserve the species?).

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

There was no agreement among experts that turtles in US waters migrated regularly to the waters of the complainants. Neither the Panel nor the AB sought to define "sustainable development", the term in the preamble to the WTO Agreement to which they pointed as a relevant objective for US measures invoked under Article XX. The meaning of the term "sustainable development" is strongly contested. Some argue that it is synonymous with preserving the environment, regardless of other considerations. Others maintain that it means balancing conservation with economic development. The AB's findings suggest the former meaning was the one employed by the Panel, a significant matter. In determining, as it did, that the sustainable development objective is the preferred trade objective, a different outcome was achieved than if sustainable development was understood to mean a balanced pursuit of environment and economic goals, rather than synonymous with securing incommensurable environmental objectives.

The AB quoted extensively from the 1992 UN Conference on Environment and Development and the WTO Committee on Trade and Environment to demonstrate that sustainable development was endorsed by the international community as a legitimate goal, but ignored the leading conclusions of both bodies that trade measures should not (except as a last resort) be used for environmental management. Article XII of the Rio Declaration explicitly states "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[29] This was ignored.

The Rio principles on trade and environment allowed the possibility of unilateral action, but effectively categorize this as a last resort. The AB did not consider whether the US measure could be so characterized. In fact, on the basis of the evidence before the panel it plainly was not a last resort. US law mandated a wide series of alternative activities to preserve turtles.

[28] WTO (1998), WTO (2001).
[29] United Nations (1992).

Having elected to decide if the US measures were necessary to conserve the environment by examining the environmental impacts of the US policies, the AB (and the Panel to some extent as well) demonstrated they did not have the technical competence to address this question.

This result is extremely serious. The AB has placed the WTO in the business of determining environment policy for the members of the WTO, despite the repeated refusal of the membership, confirmed by Ministers in 1996, to entertain any such outcome.

Aside from the fact they have demonstrated plainly that the WTO system is not capable of working competently on that subject, it has set a worrying precedent for any future forays by the WTO disputes system when it is next asked, as it assuredly will be, to assess the propriety, the necessity and the effectiveness of any policy measure, not according to its legitimacy in relation to the international trade responsibilities of the WTO, but within its own particular policy parameters.

Ignoring policy preferences of WTO members

The most striking thing about the disputes process rulings in the shrimp/turtle case is that the AB interpreted the WTO rules in such a way that ignored positions and principles that member states of the WTO had consciously considered and rejected in WTO fora. Shrimp Turtle is a revolution in WTO jurisprudence. WTO members have renounced unilateral trade sanctions, and commended multilateral conventions without discriminatory trade provisions, as the preferred instrument for multilateral measures to advance international objectives concerning trade and environmental. They have rejected suggestions that trade should be restricted on the basis of the methods of production and processing. Their governments at Head of Government level at the UN Conference on Environment and Development firmly stated that unilateral trade restrictions with extraterritorial reach should be avoided, and that respect for national sovereignty should be the fundamental guiding principle in international endeavours to improve the environment.[30] The AB has taken upon itself to determine that, through WTO provisions which have not be so interpreted for half a century, members of the WTO meant otherwise.
The AB ruling also lays grounds for the EU to restrict imports from the United States and other countries for not restricting CO_2 emissions according to the Kyoto Protocol.

Conclusions

If all multilateral environmental agreements were unambiguously beneficial for mankind – or merely unambiguously beneficial to the environment – it would be difficult to object to the clarification of the rules of the WTO that the EU is seeking. But the reality is that not all MEAs are unambiguously beneficial either to mankind or the environment. Indeed there is a considerable body of work indicating that most MEAs are at best inefficient means of achieving environmental objectives and at worst actually harmful both to man and the environment. MEAs that contain trade sanctions seem to be particularly ineffective, inefficient, and even counterproductive.

The result, therefore, of such a 'clarification' of the WTO rules would be a weakening of the pro-trade, rule-based system of international trade governed by the WTO, all in the pursuit of poor

[30] Ibid.

environment policy. This is bad news for business and the global economy. It is bad news for developing countries and it is bad news for the environment.

The EU's agenda reflects the disposition in the EU's institutions (the Commission, the Council and the Parliament) towards centralized command and control, rather than free market policies and the subsidiarity principle, as the means of improving the environment. The EU also uses environmental policy as a means of imposing costs on foreign producers, who have no formal representation in the EU. Such policies inevitably impact on trade and WTO rules threaten to impede their use. This is why both the EU and leading environmental NGOs want the WTO rules to be changed.

The greater efficiency of the subsidiarity principle and of encouraging free market forces to serve public policy interests applies to environment policy as much as in any other area. It is why the free market systems of the West increased prosperity, and raised social and environmental standards, while the command and control of the communist systems destroyed both physical and social capital and degraded the environment.

Environment officials have a choice. It has been repeatedly demonstrated that trade sanctions make for poor environment policy. The approach preferred by the international community to international action to improve the environment, endorsed by Ministers at the 1992 UN Rio Summit on Environment and Development, is to seek international agreement among governments to take common action, negotiate international agreements, and implement the commitments in national law. This approach respects the national sovereignty of each government, so that the merits of individual agreements are subject to the democratic processes in each member state. The Rio Summit in 1992 specifically abjured the use of trade sanctions as enforcement mechanisms in MEAs.[31]

The trade and environment issue must now be put back on track. Respect for national sovereignty must be restored as a key principle underpinning the WTO rules. Use of trade sanctions to secure extraterritorial compliance with national environment standards must be rejected as fundamentally contrary to the *modus operandi* of the WTO.

If this does not occur, global markets will be divided with new instruments applied for protectionist purposes and environment policies will be developed which are intended as much to punish business as to improve the environment. Increasingly poor and ineffective environment policy will be the result. The opportunity presented by the Doha Development Round of multilateral trade negotiations to deliver the benefits of greater prosperity to the developing world will be severely undermined.

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[31] Ibid.

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