The World Trade Organization and Global Environmental Governance

Gary P Sampson

Preface

This paper is part of series of working papers that represents one of the first outputs from a two-year United Nations University Institute of Advanced Studies project on International Environmental Governance Reform, being conducted in collaboration with Kitakyushu University, Japan, and with support from The Japan Foundation Center for Global Partnership.

The project was initiated in response to increasing calls, from both within the UN and from external sources, for a more detailed analysis of the current weaknesses and gaps within the existing system of international environmental governance (IEG) and a more elaborate examination of the various proposals that have been put forward for reform. In responding to these calls, the project has drawn upon the expertise of several renowned academics and practitioners in the fields of international environmental law, science, economics, political science, the humanities, and environmental politics.

The first section of the project focuses on the identification of weaknesses and gaps within the current system of international environmental governance. The individual research papers commissioned within this section have concentrated on six key aspects of international environmental governance: the inter-linkages within the environmental governance system; the science/politics interface; industry/government partnerships for sustainable development; the participation of NGOs and other civil society representatives; the interaction between national, regional, and international negotiation processes; and the role of international institutions in shaping legal and policy regimes.

The second section of the project elaborates upon specific reform proposals that have been generated throughout recent debates and evaluates the potential of each proposal to strengthen the existing IEG system. The papers commissioned within this section of the study have focused on exploring the potential advantages and disadvantages of specific reform models and explained, in detail, how each model may be structured and how it would function. The models of reform that have been explored include: clustering of MEAs; strengthening UNEP; expanding the role of the Global Ministerial Environment Forum (GMEF); reforming existing UN bodies; strengthening financing sources and mechanisms; building up the environmental competence of the World Trade Organization (WTO);

The final section of the project combines insights gained through the first two sections in order to provide an in depth evaluation of current reform proposals, elaborate on how they may resolve current gaps and weaknesses, and offers alternative

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THE WORLD TRADE ORGANIZATION AND GLOBAL ENVIRONMENTAL GOVERNANCE

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Abstract

There are a number of options available to the WTO for enhancing its role in environmental governance: changes could be made to WTO rules and processes, new interpretations of WTO provisions could be made through the dispute settlement process, 'uderstandings' which spell out specific articles of agreements could be formulated (as was the case in the Uruguay Round), or a higher priority could be assigned to the environmental work of existing WTO 'business as usual' committees, such as the Committee on Trade and the Environment. When assessing these different possibilities, there are at least three important questions that must be addressed: what changes could be made in a technical sense, would it be desirable to make them, and is it realistic to expect them to be accepted and implemented by governments?

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Gary P. Sampson*

Introduction

The implementation of the outcome of UNCED is to be reviewed at the 'Rio plus Ten' conference – the World Summit on Sustainable Development (WSSD) – scheduled for September 2002 in Johannesburg. In this process, one of the priority items to be addressed is how to secure an improved and strengthened institutional structure for international environmental governance.[1] From a trade perspective, an important question, particularly in the aftermath of the WTO Ministerial meeting in Qatar is whether environmental matters were addressed, or whether there is an enhanced role for the WTO in this regard.[2] There is little doubt that the WTO could become a far more important player in the field of international environmental governance than is the case at present.[3] There could be understandings that spell out specific articles of agreements as was the case in the Uruguay Round, or there may be a higher priority assigned to work on the environment in existing WTO

The objective of this chapter is to analyze various options available to the WTO for enhancing its role in environmental governance. In pursuing this objective a number of ways. There could be changes in WTO rules and procedures, or there could be new interpretations of WTO provisions through the dispute settlement process. The important question is whether this is desirable and from whose point of view

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[1] See the *Malmö Ministerial Declaration*, Adopted by the Global Ministerial Environment Forum - Sixth Special Session of the Governing Council of the United Nations Environment Programme, Fifth plenary meeting, Malmö, Sweden, 31 May 2000.

[2] One response to this question came in a high profile manner when the then Director General of the WTO called for a "framework" or an "architecture" within which environment agreements could be dealt with coherently, effectively and efficiently. Renato Ruggiero considered it the responsibility for environmentalists to "put their house in order", and a World Environment Organization could be considered as a means to bring this order. See remarks by Renato Ruggerio to the *WTO High Level Symposium on Trade and Development*, Geneva, 17-18 March 1999.

[3] When global environmental governance was discussed by EU Environment Ministers in July 2000 the "main issue" was whether to copy the WTO model in the environmental

"business as usual" committees (such as the Committee on Trade and the Environment). In addition, different priorities will almost certainly be assigned to fulfilling the mandate that emerged from Qatar; including in terms of future work in the area of environment. However, in my view, in almost all instances, it is not in the interests of the trade or the environment communities for the WTO to take on greater formal responsibilities in the area of global environmental governance. On the other hand, I will argue that the effectiveness of the WTO in governance matters relating to the global environment can be enhanced through action outside the WTO, as well as through a change in emphasis within the WTO with respect to its existing functions.

It is not the intention of this chapter to be comprehensive in addressing all the options available to the WTO. Space would not permit.[4] The intention is rather to draw on some of the most important examples where change in WTO rules and processes could be undertaken to enhance its role in environmental governance. To avoid launching ideas in a vacuum, the objective is also to describe what changes could in fact be considered feasible within the boundaries of political realities. There are in fact at least three important questions: what changes could be made in a 'technical' sense, would it be desirable to make them, and is it realistic to expect them to be accepted and implemented by governments. I also address some examples of the issues that should be dealt with outside the WTO where it can be more effective in its work relating to the environment.

The outline of the chapter is as follows. The first discussion of some of the characteristics of the WTO system that are relevant for the following sections of the chapter. It also seeks to highlight some of the key differences between global trade and environmental governance. The second section discusses some areas where change could be implemented in the WTO that would give it a greater role in environmental governance. In both sections the choice of topics is selective, but sufficiently broad to give and idea of the nature and implications of the changes addressed. I then review the likelihood of acceptance of

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The World Trade Organization is the product of the Uruguay Round of Multilateral Trade Negotiations (1986-94). It came into being on 1 January 1995, and, at the time of writing, has 142 members, the most recent additions being China and Taiwan.[5] The WTO deals with all trade agreements attached to the Agreement Establishing the WTO (signed in Marrakech on 15 April 1994). Attached to the Agreement are four annexes containing all other multilateral trade agreements reached in Uruguay Round, as well as other understandings and decisions reached during the negotiations. All individual WTO members have accepted these agreements. They constitute a totality in terms of an undertaking and there can be no choosing between them.[6]

The Preamble to the Agreement Establishing the WTO sets out the objectives of the Uruguay Round multilateral trade agreements. Much of the language of the Preamble is taken over from the GATT, with some minor modifications. The most important for present purposes is that the Agreement adds the objective of sustainable development, and that of "seeking both to protect and preserve the environment". The declared means of achieving these objectives is reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade, and elimination of discriminatory treatment in international trade relations. The objective of sustainable development does not appear in any of the multilateral trade agreements establishing rights and obligations, although there are a number of references to the environment in various agreements.

The structure of the WTO is such that it is headed by Ministerial Conference, composed of all members of the WTO, which meets at least once every two years. The most recent meeting was in Qatar in November 2001 and prior to that in Seattle in December 1999. The conference has the power to carry out the functions of the WTO and any of the multilateral trade agreements. Between sessions of the Ministerial Conference, the General Council, also made up of the full membership of the WTO, exercises its functions. It is responsible for the continuing management of the WTO and supervises all aspects of its activities. The General Council also meets as the Dispute Settlement Body and as the Trade Policy Review Body.

An important characteristic of decisions in the WTO is that they are taken on the basis of consensus. An issue is first discussed to the point of all Members agreeing, or at least not opposing, the decision. To the extent that voting takes place, it is a mere formality, and usually is concerned with the pre-negotiated terms of accession of a country to the WTO, or a waiver to permit a member to deviate from a certain rule. Formally each WTO member has one vote and the normal rule is a decision according to the majority of the votes cast. Matters are far more complicated when it comes to amendments to WTO rules: for certain key articles such

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[5] In what follows the governments that constitute the membership of the WTO will be referred to as the WTO members. While the 15 countries of the European Union are individual members, they are represented at WTO meetings (with the exception of the Budget Committee) by the European Commission which speaks on behalf of the 15

Like the GATT before it, the WTO is an intergovernmental organization and does not provide for the participation of non-governmental interest groups. The closed nature of GATT negotiations can arguably be traced to the realities of the political economy of protection. The vast literature on this topic makes clear that distributional coalitions form to resist policy change that is not in the specific interest of their members. As interest groups can be adversely affected through a process of trade liberalization, they naturally use their influence to resist such change. WTO members—and GATT contracting parties before them—are familiar with taking decisions that are not in the interest of all groups in society but are nevertheless thought to be in the interests of the constituencies that the governments represent when elected democratically.[8]

A further relevant feature of the WTO is its dispute settlement process. The current practices are inscribed in the Dispute Settlement Understanding (DSU), which is viewed by many as one of the most significant outcomes of the Uruguay Round and an effective way to promote multilateralism in the resolution of trade conflicts. This lies at the heart of the WTO. In all of the diverse multilateral trade agreements, breaking the rules means being taken to (the same) court. If the offending measures applied by the country found to be in error are not brought into conformity with WTO rules, then compensation and retaliation - with the approval of the General Council - are provided for. And in this context, the inter-relationship between the trade agreements is critical. Compensation can be sought in the form of improved market access in any of the areas covered by the multilateral trade agreements and not necessarily with respect to the agreement where the breach of obligations was committed. Similarly, retaliation can take place in any of the areas covered by the agreements, not necessarily with respect to the one where there was a breach of obligations.

Non Discrimination

The principle of non-discrimination underpins the rules based multilateral trading system. It has two components: the most-favoured nation (MFN) clause contained in Article I of GATT, which stipulates that WTO members are bound to grant to the products of other members treatment no less favorable than that accorded to the like products of any other country. Thus, no member is to give special trading advantages to another or to discriminate against a particular product because of the manner in which it was produced or because of the country of origin of the product. Article III of GATT stipulates that once goods have entered a market, they must be treated no less favorably than domestically-produced like goods.[9]

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7 For an explanation of how decisions are taken in the WTO, see John Jackson, *The World Trade Organization: Constitution and Jurisprudence*, Chatham House Papers (London, Royal Institute of International Affairs, 1998), Section 3.4. See also John H. Jackson, "Global Economics and International Economic Law," *Journal of International Economic Law*, March 1998.

8 For example, if a country has an efficient domestic motor vehicle manufacturing industry requiring removing tariff protection for a highly protected and inefficient local steel industry, it is most unlikely that the government concerned would invite steel and car manufacturers to the negotiating table.

9 Under the GATS, Members are also required to offer MFN treatment to services and service suppliers of other Members. However, it permits listed exemptions to the MFN obligation covering specific measures for which WTO Members are unable to offer such treatment initially. National treatment is only an obligation in GATS where Members

The WTO does not inhibit governments from taking the measures they wish to protect the environment; for example, measures to avoid damage to the environment resulting from the manufacture and consumption of goods produced and used within national boundaries. Final products can be taxed and other charges levied for any purpose thought to be appropriate. Similarly, there are no problems from a WTO perspective with governments levying taxes according to the process used to produce something within their own territory. But the interpretation of non-discrimination in the WTO agreements is that WTO flexibility only extends to regulation of domestic products and processes and not the process used to produce imported products. It does not generally extend to the extraterritorial application of measures relating to production processes in exporting countries.

In short, from a trade policy perspective, goods produced in an environmentally unfriendly manner are like any other. From an international relations perspective, this serves to minimise any unwanted encroachment on national sovereignty with powerful countries imposing their will on less powerful ones by forcing them to produce goods meeting the preferred environmental standards of the importing country. Importantly, it leaves the space for other treaties to be negotiated to deal with the establishment and enforcement of environmental norms. The reality would seem to be that global environment agreements do not have the same legally enforceable discipline and compliance mechanisms as that found in the WTO Agreements.

Not surprisingly, there has been a call come from a number of environmental groups for the WTO to modify its interpretation of like products to permit discrimination on environmental grounds. In other words, have the WTO adopt the role of an enforcement agency for what are considered universally held environmental norms. If standards are universally held, there is, in principle, no real problem. If all WTO members have agreed to forgo their rights not to be discriminated against in trade when certain environmental standards are not met, then trade discrimination should be acceptable. WTO Members have already agreed to restrictions on trade in endangered species, living modified organisms, stolen goods, narcotics and many other products.

However, as noted above, decision taking in the WTO is on the basis of consensus, and it may well be that not all countries agree to the preferred environmental standards of the countries, and, therefore, the use of trade restrictions. A country may find the scientific evidence unpersuasive, it may not be able to afford to join the agreement concerned, or it may not have access to the necessary technology on favorable terms. It may not agree with a given environmental objective or with the means to achieve the objective, or it may consider there are more pressing national policy

The important question then becomes what is the role of the WTO in environmental governance if there is not a universal acceptance of environmental norms via a multilateral or regional agreement. Ideally, from a WTO perspective, such an agreement should establish the conditions under which trade restrictions can be invoked for environmental purposes and the nature of the trade measure. If this is not the case, there are at least two potential problems. The first is when a trade-related measure is taken by a party to an MEA against another party of the MEA. The problem arises when the measure is not specifically provided for in the MEA itself, but is "justified" by the party taking the measure as "necessary" to achieve the objectives of the environment agreement. The necessity of this measure may be challenged by the party against which the measure is taken. In this case, both parties could be members of the WTO and the measure could violate WTO rights and obligations. This could lead to a dispute as to the legitimacy of the measure in terms of either the MEA or the WTO.

Another problem relates to potentially WTO inconsistent measures, which are specifically provided for in an MEA and taken by a party to the MEA against a non-party. A problem may then present itself if the measure is against a WTO member which challenges the legitimacy of the measure in the WTO dispute settlement process. Dealing with this group of problems involves a number of decisions on the part of the WTO dispute settlement process. These include whether the measure can be justified as an exception to WTO rules and what importance to ascribe to the existence of the MEA in determining if the measure in question is really "necessary" (see below on dispute settlement). The likelihood of a positive decision on the necessity of the measure is presumably enhanced if the

It seems reasonable that such a dispute should be pursued under the dispute settlement procedures of the MEA. In this respect, it would be helpful if MEA parties stipulated from the outset that they intended trade disputes arising out of implementation of the obligations of the MEA to be settled under the MEAs provisions. It could be argued that this approach could help ensure the convergence of the objectives of MEAs and the WTO, while safeguarding their respective spheres of competence, thus overcoming problems arising from overlapping jurisdictions. This, however, requires an effective compliance mechanism to be available to MEA parties. Most of the MEAs with trade-related provisions do contain mechanisms for resolving disputes, but these lack the power of the WTO dispute settlement process. In the absence of an effective dispute settlement system in the MEA, the dispute could gravitate to the WTO. It has been suggested on numerous occasions in the CTE that there would be value in strengthening MEA dispute settlement mechanisms. This, of course, is outside the terms of reference of the CTE.

Exceptions

Exceptions are provided for in the GATT 1994 Exceptions Article (i.e. Article XX) where nonconforming measures can be taken for environmental purposes if they are necessary to protect human, animal, or plant life or health, or if they relate to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production or consumption. If at least one of these conditions is fulfilled, then the remaining requirement is specified in the head note to the Exceptions Article: that the measures not be applied in an arbitrary or unjustifiable manner in order to discriminate between countries where the same conditions prevail or constitute a disguised restriction on international trade.

With respect to substance, there is little doubt that the WTO Dispute Settlement Process could play a greater role in environment related matters, particularly in its rulings with respect to exceptions to WTO obligations taken for environmental purposes. In the Shrimp Turtle case, a decision had to be taken on whether the term "renewable resources" applied to renewable biological resources or was limited to depletable mineral resources. The Appellate Body ruled that in the light of contemporary international law, living species, which are in principle renewable, "are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities." In taking this decision, the existence of an MEA was critical. As "all of the seven recognised species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)," the Appellate Body concluded that the five species of sea turtles involved in the dispute constitute "exhaustible natural resources" within the meaning of Article XX of the GATT 1994.[10]

The Appellate Body also drew on the Preamble to the Agreement Establishing the WTO referred to above. Principles as expressed in Preambles are general legal commitments rather than specific legal obligations of states.[11] In its ruling, the Appellate Body clearly assigned importance to promoting sustainable development and preserving the environment. While this objective is certainly recognized and supported by WTO Members, the manner in which it balances rights and obligations can fundamentally change the character of the exceptions provisions of the WTO.

Openness

A principal criticism of the Dispute Settlement Body (DSB) as it relates to process is its lack of openness; a common criticism is that all hearings should be open to the public and that all briefs by the parties be made

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[10] See WTO (12 October 1998, adopted 6 November 1998), *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, paragraph 128.

[11] Philippe Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles," in Wilfred Lang (ed.), *Sustainable Development* (Netherlands: Kluwer

publicly available at the time of submission. In this respect, an important question is whether a panel or the Appellate Body is obliged to accept information submitted in the form of amicus briefs by NGOs. This became a particular issue in the shrimp-turtle case, in which three submissions were received from NGOs, all with expertise in turtle conservation.[12] The panel found that it could not accept non-requested submissions from NGOs, as this would be incompatible with the DSU provisions. It explained that the initiative to seek information and to select the source of information rested with the panel alone, and noted that only the parties to the dispute and third parties could submit information directly to panels. The Appellate Body ruled that "the Panel erred in its legal interpretations that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU."[13]

The complaining countries objected to the Appellate Body's ruling, arguing that this procedure was not in conformity with the working procedures. They argued that as WTO Members that are not parties or third parties cannot avail themselves of the right to present written submissions, it would be unreasonable to grant the right to submit an unsolicited written submission to a nonmember when many members do not enjoy a similar right. Such information might be strongly biased if nationals from members involved in a dispute could provide unsolicited information. The complaining parties reasoned that this would only increase the administrative tasks of the already overburdened secretariat. They also reasoned that the parties to a dispute might feel obliged to respond to all unsolicited submissions, just in case one of the unsolicited submissions catches the attention of a panel member. Due process requires that a party know what submissions a panel intends to consider, and that all parties be given an opportunity to respond to all submissions. It was argued that the Appellate Body had diminished the rights of members and intruded upon members' prerogative as negotiators to establish the bounds of participation in the WTO. Such issues should be decided by members. The Appellate Body, which was only a judiciary, was in this case writing the rules of participation. With regard to amicus briefs, the

[12] During the panel proceedings, the panel received briefs from the Defenders of the Conservation, the Center for International Environmental Law (CIEL), and the World Wild Fund for Nature with copies to the complainants. During the Appellate Body proceedings, the United States submitted comments on briefs from these groups of NGOs (paragraph 79 of the Appellate Body Report). In addition, CIEL sent a revised version of its brief directly to the Appellate Body (paragraph 1.10).

[13] See the views of Members as reported in WTO, *Minutes of Meeting of the Dispute Settlement Body*, WT/DSB/M/50, 14 December 1998, p. 11.

standards are appropriate to fulfill legitimate objectives while taking into account the risks that non-fulfillment would create. At the same time they recognize that for a variety of reasons, a particular standard may not be appropriate across countries. For example, physical conditions may differ between areas and, in the light of scientific evidence, the absorptive capacities for air pollution may differ between countries because of these physical characteristics. However, while such differences across countries can presumably be measured objectively, this is not necessarily the case with respect to how different societies wish to manage the risk.[16] As risk assessment is the scientific determination of the relationship between cause and effect in situations where adverse effects can occur, it is hard to imagine a role for the WTO in this. Risk management, on the other hand, is the process of identifying, evaluating, selecting, and implementing measures to reduce risk.[17] Determining what is "appropriate" in the light of scientific evidence and what constitutes legitimacy in terms of public preferences for the management of risk promises to be one of the most contentious areas for environmentalists and trade officials alike.

At the heart of the issue is the role of "precaution" in risk assessment.[18] The Precautionary Principle responds to the gap between banning a product or procedure until science has proved it is harmless and not banning it until science has proved that there is a real risk. The theoretical underpinnings of this principle are elusive and difficult to define, and there is no consensus with respect to its acceptance as a basis for establishing obligations in national and international rules.[19]

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[16] See Steve Charnovitz, "The World Trade Organization, Meat Hormones and Food Safety," *International Trade Reporter*, October 15, 1998.

[17] National Research Council, *Risk Assessment in the Federal Government* (Washington, DC: National Academy Press, 1983).

[18] The principle has already taken its place in a number of international agreements. See for example, the Report of United Nations Conference on Environment and Development, Annex 1, *Rio Declaration on Environment and Development*, Rio de Janeiro, 3–14 June 1992, Principle 15. The Biodiversity Convention, for instance, states that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid

[19] For insightful thoughts on the European Commission, Directorate General XXIV, *Guidelines on*

As far as WTO Agreements are concerned, the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement are both specifically designed to avoid standards constituting unnecessary barriers to trade.[20] In the SPS Agreement, the management of risk is important in ensuring food safety and animal and plant health. The most important objective of the agreement is to reduce the arbitrariness of governments' decisions by clarifying which factors to take into account when adopting health protection measures. The approach is that measures taken to fulfil the objectives of the agreement should be based on the analysis and assessment of objective and accurate scientific data. Thus, an important question in managing risks to human, animal, and plant life and health is deciding on the risk levels and the appropriate standards to adopt to manage the risk.

The SPS Agreement provides for long term national measures that exceed the protection levels established in international agreements if these are judged not to provide an acceptable level of protection at the national level. But if challenged, these measures must be supported by scientific evidence based on an objective assessment of the potential health risks involved. When introducing a standard that is more trade-restrictive than Codex, OIE, or IPPC, the SPS Agreement calls for measures based on the analysis and assessment of objective and accurate scientific data. In the absence of an international standard, each country must conduct its own risk assessment and determine its "acceptable level of risk." These commonly include substantial safety margins as a precautionary measure. Once a government has determined its appropriate level of sanitary and phytosanitary protection, however, in order to be consistent with the WTO, it should not choose a measure that is more stringent and trade-restrictive than necessary. Thus the evaluation of this

International standard-setting organizations offer ready-made yardsticks. The SPS Agreement explicitly refers to three such groups whose activities are considered relevant in meeting its objectives: the Codex Alimentarius Commission, a joint effort of the Food and Agriculture Organization (FAO) and the World Health Organization; the International Office of Epizootics (OIE); and the international and regional organizations operating within the framework of the FAO International Plant Protection Convention (IPPC). Many WTO members are involved in those fora, and their scientists and health experts participated in the development of these voluntary international standards.

[20] The Trade-Related Intellectual Property Rights Agreement also establishes minimum standards for the protection of intellectual property. These standards are not addressed here. The SPS Agreement allows countries to take measures in cases of emergency where sufficient scientific evidence does not yet exist to support definitive measures. Following the bovine scare in 1996 relating to bovine spongiform encephalopathy ("mad cow disease"), and in the absence of sufficient scientific evidence, several emergency bans were introduced. In accordance with the SPS Agreement, however, these could only be provisional. In the long term, governments must conduct scientific risk assessment and

However, even in the light of the same scientific evidence, different societies have different preferences for the management of risk. It also creates the possibility of abuse of measures for protectionist purposes.

It is in this sense that the recent dispute on meat treated with hormones heralds future potential problems for the WTO. The European Union ban on meat products containing hormones went into effect in 1989; it applied to animals treated with hormones in order to promote growth, as the EU maintained that there was a carcinogenic effect associated with human consumption of the hormone-treated beef. When the case was dealt with by a WTO panel, the panelists rejected the EU arguments due to a lack of scientific evidence of a health and safety risk. They concluded this after consulting scientific experts, and there was general agreement that the hormones posed no risk. The panel did not consider information presented by public interest groups. In the proceedings, international standards played an important role—in particular, the use of the Codex benchmark standard. The European Union argued that Codex did not represent a consensus-based standard for minimum residue levels of growth-promoting hormones, since it was adopted by a vote of 33–29, with 7 abstentions. From an operational perspective, the SPS Agreement [illegible]

The panel also considered whether the precautionary principle could provide justification for the ban in the absence of scientifically based risk assessment. It noted that the precautionary principle was incorporated into the SPS Agreement through the use of emergency measures permitting members to provisionally introduce measures that are not supported by "sufficient" scientific evidence until this evidence is obtained. In the hormone case, emergency measures as such were not under discussion, as the ban did not relate to "provisional regulations." The EU Directive was a definitive regulation.

[illegible] was restricting the importation of hormone-treated beef when scientific risk assessments could not take account of the fear of society toward the potential risk involved. In fact, the Appellate Body concluded that the precautionary principle awaits confirmation as a customary principle of international law.

The lack of clarity as to the application of the precautionary principle in specific situations has a number of potentially important implications for the WTO. In the absence of agreement outside the WTO on how it is to interpreted in specific cases means that the WTO will find itself in a situation where it is the arbiter

controversies. Indeed, the WTO has already been described as the "World Trans Science Organization, a global meta-regulator." It resolves "scientific issues such as carcinogenicity, adopts policies concerning the acceptable levels of risk or scientific uncertainty, and makes decisions about appropriate levels of health and safety."[22] It is of primary importance for the WTO that ongoing negotiations outside in areas where precaution is important, such as how to deal with trade and labeling of products derived from GMOs, are successfully completed.

Committee on Trade and the Environment

The Committee on Trade and the Environment (CTE) was established in January 1995. The Committee reports to the WTO General Council. It is mandated to address a variety of areas of work and to recommend whether any modifications to the rules of the multilateral trading system are required to permit a positive interaction between trade and environment measures. The CTE includes all WTO members and a number of observers from intergovernmental organisations. There are no observers from non-governmental organisations (NGOs) despite a number of requests to be present at CTE meetings. The CTE has a standing agenda, and meets formally at least two times a year and in an informal mode whenever considered necessary. It addresses - inter alia - the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes; in particular, the relationship between WTO rules and compliance procedures, and those of the multilateral environmental agreements.[23]

The CTE has been soundly criticized[24] and accused of failing, among other things, in its task of recommending modifications of the provisions of the multilateral trading system "to enhance a positive interaction between trade and environmental measures and for the promotion of sustainable development." As

[22] See Vern R. Walker, " Keeping the WTO from Becoming the World Trans Science Organization: Scientific Uncertainty, Science Policy, and Fact-finding in the Growth Hormones Dispute," *Cornell International Law Journal*, Vol. 31, 1998, pp. 251–320. Questions of trans-science in this context are considered to be "those which can be asked of science and yet which cannot be answered by science."

[23] A number of MEAs have trade-related provisions that raise questions with respect to their WTO conformity. A detailed description of the WTO relevant measures in eleven environment conventions containing trade measures can be found in WTO (19 September 1996), for example, Steve Charnovitz, "A Critical Guide to the WTO's Report on Trade and

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a result, various environmental groups have proposed "mainstreaming" environment issues by factoring environmental concerns into the WTO across the board. In this scenario, each relevant WTO Committee would deal with environment under its area of authority. While this may hold some appeal, it is difficult how it would operate in practice. In a formal sense it is not clear how the process could be established and in a very practical sense, resources devoted by governments to questions relating to the environment are already spread thinly in WTO meetings. This is evidenced, for example, by the small number of developing country delegations that are active in the CTE. Mainstreaming may just lead to a dilution of already inadequate resources and a further minimization of attention paid to trade and environment issues.

Nevertheless, there is certainly a need to monitor the manner in which environmental concerns are dealt with in the various post Qatar negotiating groups. In this respect there is a potentially important role for the CTE. It could, for example, provide the forum where those countries that have chosen to conduct reviews of the trade and environment linkages of the negotiations present their results. It could also provide the focal point for the identification and discussion of links between the various elements of the negotiating agenda and the environment. This role could be further broadened if a similar mandate was given to the Committee on Trade and Development (CTD). The CTE and the CTD could each provide a forum to identify and debate the developmental and environmental aspects of the negotiations, including the synergies between trade liberalization, economic development and environmental protection. The work of the two bodies would be complementary and would help to ensure that

There is also an important role for the CTE in terms of future relations with MEAs. At the time of its inception there was active discussion in the CTE on the relationship between the WTO and MEAs. This has served a useful purpose. It could be argued that one of the reasons that there has never been a dispute relating

to an MEA brought to the WTO is because of the increased understanding created through information sessions in the CTE where the secretariats of environmental agreements have been invited to present relevant information with respect to the rules of their agreements.[25] These sessions have clearly facilitated a mutual understanding of the linkages between the multilateral environment and trade agendas, and built awareness of the use of trade-related measures in MEAs.

This debate has recently been enlivened with a number of far-reaching formal proposals to the CTE by governments. This is perhaps a reaction to the commercial, political and social importance of some recent MEAs that could well impact on trade, and the claim that that the lack of clarity between WTO and MEA rules has lead to confusion in the negotiation of the MEA. It has been argued that the negotiations surrounding the Bio-safety Protocol, for example, proved to be difficult, "precisely because of the lack of clarity with regard to the relationship of the Protocol to the WTO".[26] The renewed interest could also be due to high profile trade and environment disputes that have come to the WTO in recent times, and recognition of the fact that they probably never would have arisen had an effective MEA been in place. An additional consideration is that the debate in the WTO has been enriched with a large amount of useful work being undertaken by reputable non-governmental organisations, intergovernmental institutions and academics.

In Qatar in November 2001, trade ministers launched a new Round of multilateral trade negotiations, and brought precision to how they want to deal with the WTO and MEAs. With a view to enhancing the mutual supportiveness of trade and environment, they agreed to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements; procedures for regular information exchange between MEA Secretariats and the relevant WTO committees; and, the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

Market Access:

[25] The most recent of these information sessions was held on 24 October 2000. The following Secretariats responded to questions from CTE Members: the Convention on the International Trade in Endangered Species of Wild Fauna and Flora; the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal UNEP Chemicals on the Rotterdam Prior Informed Consent Convention and the draft Persistent Organic Pollutants Convention; the Intergovernmental Forum on Forests); the UN Framework Convention on Climate Change and the Executive Secretary of the Convention on Biological Diversity also attended this session. For a report on the

In discussions pertaining to improved market access through negotiated trade liberalization, there have been calls for a multilateral framework for the assessment of expanded trade on the environment.[27] After making such a proposal in 1994, the Commission on Sustainable Development was mandated by governments to provide the institutional coordination necessary to undertake an assessment of the environmental and social development aspects of trade policies. At the High Level WTO Symposium on Trade and Environment held in March 1999, the United States announced that it will join the European Union and Canada in carrying out an assessment of the implications of the post-2000 WTO negotiations on the environment.

Work has proceeded in the CTE, however, with a narrower focus on identifying sectors where environmental benefits follow trade liberalization.[28] Notwithstanding the complexities of the task, a number of conclusions can be drawn that enable priorities to be assigned to various sectors.[29] In the Qatar Declaration, Ministers instructed 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 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.

While there has been some discussion in the WTO of the possibility of all Members agreeing to carry out such environmental impact assessment studies, the idea has not gained broad based support. For most countries, whether or not to conduct such studies is a national choice with little to do with the work of the WTO as such. In addition, the task of evaluating the environmental benefits derived from removing trade restrictions and distortions is complicated not only by the complexity of the changes in the resource usage and consumption patterns that follow trade liberalization, but also by the limited capacity to measure the environmental impact.

The work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee on Trade and Environment is to 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 the work carried out in accordance with the ministerial declaration is to be compatible with the open and non-discriminatory nature of the multilateral trading system, 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

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[27] See for example WWF International Initiative on Environmental Assessment of Trade *Liberalisation in the WTO*, WWF Discussion paper, March, 1999.

[28] Comprehensive work has been done in this area by the OECD secretariat. The secretariat has studied the environmental effects of trade liberalisation in three sectors: environmental goods and services, the freight sector and the fossil fuel sector. See, for example, OECD, *Environmental Effects of Liberalising Trade in Fossil Fuels*, COM/TD/ENV(98)129, 25 November 1998.

[29] For an analysis on a sector by sector basis of the environmental implications of

In the more colloquial language, this is a response to the fact that WTO members have been exploring the possibilities of trade liberalization in industrial countries where "win-win" scenarios exist. Industrial countries win when they remove trade restrictions that are environmentally harmful in their own countries. And developing countries win when exports grow following the removal of environmentally harmful trade restrictions in the importing developed countries.

There is, in fact, a third win. Numerous empirical studies have demonstrated that the link between trade liberalization and economic growth is unequivocal. Empirical evidence supports the contention that countries that have opted for an outward-oriented development strategy have been the fastest growing in the developing world. This does not mean, however, that the link between growth and liberalization cannot be challenged. Economic growth may lead to more wealth but does not in itself ensure an egalitarian society. Nor does it mean that growth will automatically lead to an improvement in the environment. Nevertheless, higher gross domestic product per capita and fewer resources used to produce each unit of output mean higher national income and more resources available for the implementation of sound environmental policies.

One important question is whether win-win situations do in fact exist in practice as well as in principle. From a trade perspective, different environmental endowments (such as the physical capacity to absorb pollution) are themselves a basis for differences in trade comparative advantage. Furthermore, different societies and individuals within them also have different levels of tolerance with respect to environmental degradation. As long as national sovereignty prevails with respect to environmental priorities, the extent to which externalities are internalized will be determined by awareness of the environmental problem, the government's capacity to adopt the necessary policy measure to deal with it, the nation's physical capacity to absorb the environmental damage, and societal preferences relating to environmental conditions and the quality of life. This in turn will influence the impact on relative prices nationally and internationally. Trade restrictions can distort the well functioning of markets, and thus the exploitation of comparative advantage, just as they can frustrate the implementation of sound environmental

Discussion in the CTE has revealed that win-win situations exist in practice as well as in principle. In the case of fisheries, a sector of considerable importance to developing countries,[30] the link between depleted fish stocks and bad government policy seems to be well accepted. Fisheries subsidies are widespread, distorting trade and undermining the sustainable use of the resource base. One reason for giving priority to this sector is that useful substantive work has already been done in the WTO, by non-governmental organisations and elsewhere and there is now concrete evidence that

[30] Developing countries account for over one half of world trade in fish and fish products; in 1996, exports exceeded imports by [illegible] billion dollars. See FAO, *State of World Fisheries and Aquaculture*, Rome 1998.

At the Ministerial Conference in Doa, Ministers agreed to negotiations aimed at clarifying and improving disciplines under the Agreement Subsidies and Countervailing Measures while taking into account the needs of developing and least-developed participants. In the context of these negotiations, the intention is to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.

There are also win-win possibilities in the sector of agriculture. Agricultural subsidies have lead to intensified land use, increased applications of agrochemicals, the adoption of intensive animal production practices and overgrazing, the degradation of natural resources, loss of natural wildlife habitats and biodiversity, reduced agricultural diversity, and the expansion of agricultural production into marginal and ecologically sensitive areas. Agricultural assistance through output-related policies in many industrial countries has imposed high environmental costs on other nations which have a comparative advantage in agricultural production and trade.

Not all subsidies are of course harmful. Adopted during the Uruguay Round, the Agreement on Agriculture seeks to reform trade in agricultural products and provides the basis for market-oriented policies. In its Preamble, the Agreement reiterates the commitment of Members to reform agriculture in manner which protects the environment. Under the Agreement, domestic support measures with minimal impact on trade (known to as "green box" policies) are excluded from reduction commitments. These include expenditures under environmental programmes, provided that they meet certain conditions. The exemption enables Members to capture positive environmental externalities.

In additions, WTO Agreements do not prohibit subsides per se. The WTO Agreement on Subsidies, which applies to non-agricultural products, is designed to regulate the use of subsidies. Under the Agreement, certain subsidies are referred to as "non-actionable". These are generally permitted by the Agreement. Amongst the non-actionable subsidies mentioned, are subsidies to promote the adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms. Such subsidies, however, must meet certain conditions. Making such subsidies non-actionable enables Members to capture positive environmental externalities when they arise.

A further sector where liberalization could be beneficial for all is trade in environmental goods and services (pollution control equipment, for example, or solid waste management). The value of world production in this sector is considerable and has been estimated to be in the order of $450 billion a year.[62] In this sector, as in others, it is in the interest of all WTO members that environmentally sound goods and services be made available on the international market at the cheapest prevailing world prices. After studying liberalization in

[62] See OECD, *Future Liberalisation of Trade in Environmental Goods and Services*,

Buying goods and services at world market prices is of course an option available to all countries, as governments can unilaterally remove barriers to imports in these goods and services and so serve their own interests. In practice, however, governments seek "concessions" in negotiations even when acting in their own interests, and the possibility of obtaining such concessions is greatest in multilateral rounds of negotiations where the removal of barriers to imports in one sector can traded off against liberalization in another. In recent years, however, traditional cross-sectoral trade-offs have not always been necessary to encourage governments to enter into sectoral trade liberalizing negotiations. Reaping the advantages that ensue from trade liberalization and a more efficient resource use on both the consumption and production side has been the driving force in a variety of sectors; examples include information technology, pharmaceutical products, basic telecommunications, and financial services. It seems reasonable that WTO sectoral negotiations should extend to environmental goods and services.

Importantly, in all these areas of improved market access that are linked to better environmental governance, no change in WTO rules is required; simply a change in negotiating and other priorities.

Assessment

A number of the potential changes for the WTO in terms of its role in global environmental governance - such as a reinterpretation of non discrimination - would require consensus in the WTO. Experience has shown that changes to GATT rules were rare, even with far fewer countries involved. Since the establishment of GATT in 1948, there were only two amendments—one in 1955 and another in 1964,[34] and there is no indication that the things will be different in the future. This is not surprising. As noted, consensus would require 142 countries at very different levels development and with very different priorities to agree. Further, given the contractual nature of WTO agreements, members will only agree to a rule change if the outcome is clear and without risk. The dispute settlement process, with the threat of retaliation and compensation is the Damocles' sword hanging over those that have to live with the interpretation of the new rules. A further consideration is that change in WTO rules will be resisted by those who believe that first GATT, and now the WTO, have

[33] Results reported in OECD, *Report on Trade and Environment: Council at Ministerial Level*, 26-27 May 1999, C/MIN(99), 12 May 1999.

[34] There have been, however, understandings negotiated in the Uruguay Round relating to some of the principal GATT articles.

Notwithstanding the probable resistance to changing WTO rules, the GATT, and now the WTO, have proven to be flexible instruments where "changes" have been possible through techniques that have ranged from simple non-enforcement of certain rules (such as Article XXIV of the GATT 1994) to a variety of relatively informal actions or interpretations through the dispute settlement process. The question then is whether these non-rule change options can be used to alter the traditional interpretation of terms such as "like products" and providing for discrimination among imports on the basis of production methods. Such changes would profoundly alter the role of non-discrimination that lies at the heart of the WTO legal system and would be strongly resisted.[36] In my view this is inadvisable. It has already been argued by some members that the Appellate Body has extended its authority beyond that granted to it by members, and is playing a role in policy formulation through litigation. The DSU limited the jurisdiction of the Appellate Body to issues of law covered in panel reports and to legal interpretations developed by panels, and prohibited the Appellate Body from adding to or diminishing the rights and obligations [illegible]

In my view, the solution to dealing with the use of non-conforming WTO measures to deal with environmental concerns lies in the existence of effective multilateral environmental agreements to deal with trans-boundary environmental problems.[38] If agreed standards and trade measures are adopted by WTO members [illegible], and the WTO members agree to forgo their WTO rights not to be discriminated against, then there seems little reason why the WTO members should not [illegible] this fact [illegible] environmental [illegible] approach adopted by the Appellate Body [illegible] standards [illegible] over the possible [illegible] of its [illegible] support [illegible] by for example [illegible] the [illegible] of dispute settlement [illegible] members [illegible]

What is sure, however, is that the members of the WTO have no desire to become arbitrators on matters well outside the realm of conventional trade policy considerations. To expect to find solutions requiring multilateral agreement in the case of disputes involving food safety or protection of endangered species that[37] WTO becomes both the body that establishes the standards and enforces them.

[36] This concern manifests itself in a resistance to any attempts to provide for the extension of domestic production standards in industrial countries into developing ones in order for their exports to be acceptable for import. The strength of feeling on this matter on the part of many developing countries cannot be overstated, and was recently evident in the discussion of an Appellate Body ruling that appeared to leave the question open. See the remarks by of a number of developing countries in WTO, *Minutes of Meeting of the Dispute Settlement Body*, WT/DSB/M/50, 14 December 1998, discussing the shrimp-turtle dispute, where it was argued that dictating fishing practices in other countries was an encroachment on national sovereignty.

[37] See comments by Malaysia, India, Pakistan and others in WTO, *Minutes of Meeting of the Dispute Settlement Body*, WT/DSB/M/50, 14 December 1998.

[38] See Gary P. Sampson, "Effective Multilateral Environmental Agreements and Why the

cannot be settled bilaterally is not reasonable. Nor should the problem be relegated to a dispute settlement process where trade officials on a de facto basis take decisions that will almost by definition (because there is no agreement at the national level) be unpopular with large parts of the public. The way to deal problems such as how to deal with risk management in a WTO context must be discussed in terms of policy choices relating to the use of the precautionary principle, not litigation. There must be a coherent approach to dealing with problems where scientific evidence alone does not make the policy choices clear. Such issues can not be dealt with through the rough and tumble of daily negotiations.

On the other hand, where there is scope for a greater role in environmental governance for the WTO, however, is in improving the market access within the context of win win scenarios. There are many good reasons for promoting a win-win approach. It would give force to the commitment of WTO members to use the world's resources optimally and in accordance with the objective of sustainable development. It would provide evidence of their desire to protect and preserve the environment and to enhance the means for doing so precisely when they are being criticized for not doing enough. Viewed constructively, by adopting a win win approach, public support can be garnered for undertaking reform in sectors where some interest groups may be adversely affected by policy reform, but where reform is in the interests of the community at large. The initiative is already viewed positively by some environmental nongovernmental organizations that have been hostile to the WTO in other areas. In addition, improving market access holds attraction for developing countries where few other advantages are seen in the trade and environment debate.

There is also scope for imaginative proposals for changes in processes that would remove some of the pressure for rule and process change in the WTO. In the words of the President for World Wide Fund for Nature International with respect to the WTO Dispute Settlement Mechanism: The speed, power, and efficiency of the system are both frightening and fascinating to environmental groups. It is the very power and authority of the system that has led to calls

for reforms".[39] He notes that because of its adversarial nature, formal WTO dispute settlement may not be the best means to resolve disputes of this kind. He suggested that WTO members should explore the establishment of multi-stakeholder consultative processes in which relevant facts could be put on the table by all interested parties from governments, non-governmental organisations, industry, academia and local communities. In fact, the Dispute Settlement Understanding formally creates the option of parties to the potential dispute to request the good offices of the Director-General to engage in consultations to settle the dispute. Such a consultative process could assist in providing the countries involved with an opportunity to consider a range of policy instruments suitable to resolve any trade related environmental issue which may have arisen.

Conclusion

In attempting to bring more coherence to global formulation, there are those that see the vacuum at the international level being at least partially filled with the WTO taking on even more responsibilities. The argument at its most fundamental level, is that there currently exists a strong multilateral rules-based trade regime - attained through the WTO - and this is essential to developing an effective system of governance of the global market. It is reasoned that the trading system can not act in isolation when there exists a wide variety of issues such as the environment, that belong on the international agenda and which are directly affected by trade itself or the rules that govern it. Without a common appreciation of the role of the WTO, the end result is that many think it is acting irresponsibly or somehow not fulfilling its part of former and future Director Generals of the WTO.

The fact of the matter is that there is no world government or supra-national body to determine the appropriate division of labour among existing multilateral institutions. There clearly needs to be a coordinated response on the part of the institutions involved and a coherent approach to policy formulation at the global level. The key question is how can this be done. Many proposals have been forthcoming on the

[39] Sanctions, Martin (2000) in Gary P. Sampson (ed.) *The Role of the WTO in Global*