# WORLD TRADE ORGANIZATION

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## ITEM 1: THE RELATIONSHIP BETWEEN THE PROVISIONS OF THE MULTILATERAL TRADING SYSTEM AND TRADE MEASURES FOR ENVIRONMENTAL PURPOSES, INCLUDING THOSE PURSUANT TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

Communication from New Zealand

## I. INTRODUCTION

1. There has been a series of exchanges and numerous detailed written contributions on Item 1, "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements" on the Committee on Trade and Environment's (CTE) agenda. New Zealand has participated actively in these exchanges and, drawing on previous analysis and discussion both in the CTE and elsewhere, we offer some further observations which might help to focus future discussions.

## II. DEVELOPING A BETTER UNDERSTANDING OF THE RELATIONSHIP BETWEEN MEAs AND THE WTO

2. There are approximately 200 Multilateral Environmental Agreements (MEAs) currently in force. Of these, only 20 contain trade provisions, with two categories - protection of fauna and flora and biosecurity regulation - accounting for more than half of these provisions.

3. Environmental considerations are reflected in a number of WTO instruments, most directly (though not only) in GATT 1994 (e.g. Article X(g)). Indeed, there is now a better understanding among WTO Members, whether or not they are party to an MEA, that considerable scope does exist for the use of trade measures for non-trade objectives, for example, to conserve "exhaustible natural resources". Such measures, however, are not permitted to be applied in a way that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade.

4. Given, therefore, that Article XX of the GATT 1994 permits certain policies and practices, which would otherwise be inconsistent with the WTO Agreements as "exceptions", it is important to identify the areas where there could potentially be a conflict between this provision and trade measures applied through an MEA. It should be noted that, in New Zealand's view, where MEAs have specifically mandated the Parties to take specific action against each other in certain circumstances, the normal rules of international law and treaty interpretation would provide little room for a party to such Agreements to contest the legality of the measures on WTO grounds. In sum, therefore, questions about the potential conflict between WTO provisions and MEAs are limited. Indeed, in New Zealand's view, they are only likely to arise where the provisions of an MEA are unclear as to the action they mandate, even among the Parties to it, or in situations where the Parties to an MEA are applying trade measures against a non-party. This is a tightly circumscribed area and it is important, therefore, not to exaggerate the likelihood of difficulties between the WTO Agreements and MEAs.

5. It appears to New Zealand that there are essentially two main areas where questions may arise. These are:

- The use of trade-related measures to protect environmental resources which are outside the jurisdiction of the country applying the measures; and

- the discriminatory application of trade measures, including provisions which apply differently to non-members of an MEA or other international agreements.

6. A further question may arise over the reference in Article XX to "measures necessary." This may allow Members of the WTO to question measures applied under an MEA which they consider to be "unnecessary."

7. In the specific context of MEAs, potential conflicts could be avoided by encouraging the clear drafting of trade-related provisions with a view to avoiding disputes. In addition, a robust dispute settlement system within MEAs could play a key role in resolving differences among Parties. As suggested by Canada, the development of general principles and criteria could also assist negotiators in the use of trade measures within MEAs. This, however, leaves the problem of MEAs currently in force which retain vague provisions, as well as the two categories of potential conflict identified in paragraph five above.

8. In light of the potential use of unilateral measures, it may be helpful to consider the findings of the Appellate Body which considered the meaning of both Article XX(g) and the chapeau to that Article in the case of *United States - Import Prohibition of Certain Shrimp and Shrimp Products.*[1] The Appellate Body in that case recognized the importance of protecting and preserving the environment, but also made clear that in adopting policies aimed at protecting the environment, WTO Members must fulfil their obligations and respect the rights of other Members under the WTO Agreement.[2] It held that a measure which was on its face fair and just could nevertheless be *applied* in an arbitrary or unjustifiable manner.[3] On the facts of that case it found that, among other things, a failure to have prior recourse to diplomacy as an instrument of environmental protection policy resulted in a unilateralism which was discriminatory and unjustifiable, and that a rigid and inflexible application of the measure in question resulted in arbitrary discrimination.[4]

## III. A SUGGESTED APPROACH

9. Multilateral cooperation and agreement to address global or regional environmental objectives clearly remains fundamental to the achievement of lasting solutions. Accordingly, trade measures taken unilaterally to address an environmental problem outside the jurisdiction of an importing country should, in general, be avoided. Indeed, the effectiveness of such a unilateral instrument needs to be considered carefully against its apparent attractiveness. Will the measure affect a change in the other country's policies? Such measures may lend themselves to protectionist abuse and have the effect of interfering with countries' ability to exercise their sovereign right to determine their own environmental policies. All of this reflects the point that trade measures are seldom the first best policy tools to achieve environmental objectives.[5]

[1] WT/DS58/AB/R, 12 October 1998.
[2] Paragraph 186.
[3] Paragraph 160.
[4] Paragraphs 172 and 177.
[5] An exception to this principle is the Convention on International Trade in Endangered Species of Flora and Fauna (CITES). This Convention was established to regulate and document international trade in endangered species. CITES provides for consultation on trade measures prior to implementation. The Convention has successfully applied trade measures for over 30,000 endangered species.

10. New Zealand is conscious of the difficulties inherent in adapting a "one-size-fits-all" approach to the establishment of rules designed to facilitate the clarification of the relationship between MEAs and the WTO Agreements. For this reason, New Zealand favours a more flexible approach to the matter. In this context, New Zealand considers that, before a decision to apply a trade measure is taken, it is important that consultation with the country or countries on which the trade measure is to be applied is undertaken. Such a consultative process could assist in providing the countries involved with an opportunity to consider a range of policy instruments suitable to resolve the specific environmental issue which has arisen. The principle behind the establishment of a consultative process, therefore, is to maximize the potential for an agreed solution, to minimize conflicts between parties on trade and environment related policies while at the same time avoiding inefficient environmental and economic outcomes.

11. To guide the consultative process between the parties, it is this paper's contention that first-best theory could be used. This is not a new approach. The exceptions in GATT Article XX, for instance, address situations where negative externalities need to be remedied. A first best approach is important because it can address the division between the private and the social cost at the source.[6] It ensures that global/national environmental concerns are met in a manner that is consistent with global/national trade concerns.

12. The first best instrument in a particular case will always be the least distortive and most efficient measure which can achieve a particular result. In the case of a dispute, for instance, a first best outcome which might be arrived at through a consultative process may be the transfer of technology. The transfer of equipment may achieve the primary objective, i.e. protect the environment, avoid a costly (in political and economic terms for all parties) dispute settlement case and thereby prevent the unilateral application of trade measures. If the transfer of technology was assessed as the first-best solution, but despite this a party pressed ahead with a unilateral trade measure, then it would be required to explain the reasons behind its rejection of a preferred instrument.

13. It should be emphasized that New Zealand does not believe that a consultative mechanism in and of itself would guarantee the delivery of an acceptable solution to all parties at all times. Rather, New Zealand considers that the establishment of such a mechanism may help to facilitate an improved understanding of different points of view and allow for the identification of a range of different policy options. In particular, a substantive and meaningful engagement by countries in a consultative process designed to identify first best policy options is likely to reduce the potential for discriminatory or arbitrary measures.

14. At the broader level of trade and environment policy, a further development which New Zealand supports is the establishment of an informal mechanism for dialogue to discuss and exchange information on trade and environment issues. This could involve, *inter alia*, UNEP, the WTO and MEA Secretariats, the members of these organisations as well as NGOs and industry. Such a mechanism would allow interested parties to develop a better understanding of trade and environment-related issues, in a forum which is not mandated to negotiate rules but is rather aimed at preventing conflict and improving cooperation and coordination amongst policy makers. Importantly, perhaps, this could be seen as a confidence-building measure that would respect the different negotiating roles of both trade and environment organisations, and aim at ensuring that potential

[6] In a simplified situation in which there are just two goods and an initial allocation of these goods between two individuals, if it is possible for a reallocation of these goods to take place, whereby one individual gains in satisfaction whilst the other is no worse off, then this change in distribution meets the first-best criterion.

questions or problems are identified and addressed at an early stage. The general aim would be to promote the mutually supportive role of trade and environment efforts.

15. The approach outlined above is provided to help focus future discussion of the utility of consultation as a means for the identification of alternative and least trade restrictive policies. Consultation is an important element, not only in respect of unilateral measures, but also in the context of MEAs. In this latter regard, New Zealand would note that some MEAs already contain detailed consultative mechanisms, such as the Montreal Protocol. We would further note that under some WTO Agreements, such as the Agreement on Technical Barriers to Trade, Members are required to notify and consult on draft technical regulations. These can include regulatory actions taken pursuant to MEAs.

## IV. CONCLUSION

16. The negotiation of MEAs remains an essential mechanism through which countries can address environment objectives. It is also recognized that trade measures will continue to be a feature of some MEAs and that therefore it is important to further develop our understanding of the relationship between such Agreements and WTO rules. While the range of potential conflicts between MEAs and the WTO Agreements is tightly circumscribed, questions will continue to arise when provisions of an MEA are unclear as to the action they mandate, even among the Parties to it, or in situations where the Parties to an MEA are applying trade measures against a non-party.

17. In the context of these observations, New Zealand suggests that the following issues could be usefully explored further:

- Encouraging the clear drafting of future trade-related provisions in MEAs as well as robust dispute settlement systems;

- considering the contribution that consultative mechanisms guided by first best principles developed within an MEA can make, including through ongoing exchange of experience with MEA Secretariats; and

- establishing an informal mechanism for a broader dialogue on the issues raised regarding the relationship between MEAs and WTO rules, which could include participation by WTO, UNEP, MEA Secretariats and members, as well as NGOs and industry.

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