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Committee on Trade and Environment

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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 (MEAs)

SUBMISSION BY NEW ZEALAND

1. There has been substantial discussion and analysis of elements of this agenda item in GATT/WTO over the past several years; both in the Committee on Trade and Environment and its preceding Sub-Committee, and before that, with respect to MEAs, in the Working Group on Environmental Measures and International Trade (EMIT).
2. New Zealand has participated actively in the on-going debate and carefully followed the analytical contributions and developing positions of other delegations. Drawing on previous analysis and discussion this paper suggests a possible way forward for clarifying the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes.
3. New Zealand's purpose in contributing this submission is to assist the Committee in formulating its report to the first biennial meeting of the Ministerial Conference scheduled to be held in Singapore in December 1996.

I. INTRODUCTION

4. Agenda Item 1 covers trade measures used in MEAs and those used in other contexts such as regional or bilateral agreements and unilateral measures. It also covers a range of potential environmental purposes which includes environmental problems of a global, regional, bilateral or purely domestic nature.
5. Table 1 below presents a simple categorization of these different contexts. Measures are divided according to whether they are unilateral or applied in the context of a cooperative international agreement, whether bilateral, regional, plurilateral or multilateral. Environmental purposes are divided according to whether the environmental problem being addressed is purely domestic or is global or transboundary in nature. This produces a four category matrix (I-IV) which, for illustrative purposes, will be used in subsequent discussion.

Table 1

	Unilateral	MEA or other cooperative
Domestic	I	II
Global or Transboundary	III	IV

6. The distinction between what is a global or transboundary issue and what is purely domestic can be difficult to determine. Some environmental problems may involve elements of both. To the extent it is argued that environmental issues are global or transboundary the scope for issues to be seen as domestic, and in particular the scope of Category I, is limited. The implications of such a limitation will be evident from the following analysis.

II. SCOPE FOR USE OF TRADE MEASURES FOR NON-TRADE OBJECTIVES

7. As a result of previous discussion and analysis under this agenda item there is now a better understanding among WTO Members that considerable scope exists for countries to use trade related policies to protect national environmental resources under WTO rules. This relates primarily to Categories I and II of Table 1.

8. Central GATT obligations include non-discrimination between domestic and imported products (national treatment), non-discrimination between different sources of imports (most favoured nation-MFN), and elimination of quantitative restrictions (on both imports and exports). Measures which are consistent with these obligations, whether taken for environmental or other non-trade policy reasons, are not vulnerable to challenge under GATT rules.

9. In addition GATT Article XX provides, in exceptional circumstances, for the taking of otherwise GATT-inconsistent measures which are either necessary for protection of human, animal, or plant life or health, or which relate to conservation of exhaustible natural resources if made effective in conjunction with restrictions on domestic consumption or production. Such measures, however, are not permitted to be means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restrictions on trade. Similar checks and balances are provided for specific types of measures under Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS).

10. These checks and balances are designed to allow the taking of legitimate measures while guarding against protectionist abuse. It has been emphasized that they do not call into question the environmental (or other non-trade) policy objective. That is a matter of national competence which is taken as a given. Rather they relate to whether the measures in question are unnecessarily disruptive of the multilateral trading system in achieving the chosen non-trade policy objective. Such an approach of policy targeting while minimizing spillover effects reflects good practice in policy design.

11. This leaves two main areas of possible conflict between GATT provisions and environmentally-motivated trade measures:

- (i) use of trade measures to help protect environmental resources that do not fall within the national jurisdiction of the country imposing the measure, nor necessarily affect solely or directly its own environment;
- (ii) discriminatory application of trade measures between countries, including trade provisions that apply separately to non-Members of an MEA or other forms of international agreement.

12. In respect of GATT rules the first type of possible conflict primarily relates to the national treatment obligation of non-discrimination between like products of foreign and domestic origin (Article III) and/or to the prohibition on quantitative restrictions on trade (Article XI). One particular example is measures which discriminate between products on the basis of the process or

production method (PPM) used. In some cases the PPM may be described as "unembodied"; a pure process element which has no effect on the characteristics of the resulting product. No basis exists in WTO rules for distinction between what are like products on the basis of such an "unembodied" PPM.

13. This first type of possible conflict covers what has been termed the extraterritorial or extrajurisdictional issue. This reflects the concepts of sovereignty and jurisdiction of nations pursuant to the United Nations Charter and the general principles of public international law, which were reaffirmed in the Rio Declaration. Under these principles States have sovereign jurisdiction over activities within their territory and in certain circumstances over actions of their nationals outside their territory. Extraterritorial jurisdiction, however, does not extend to the activities of nationals of other States.

14. Absent specific language to the contrary in GATT/WTO or specific agreement otherwise between the parties concerned therefore, measures taken by an individual country to address the effects of other countries' nationals occurring outside its jurisdiction cannot be covered by existing GATT exceptions.

15. The second type of possible conflict concerns breach of the other fundamental feature of the multilateral trading system, the most favoured nation (MFN) obligation contained in GATT Article I. This could involve discriminatory extension of trade restrictions or non-extension of trade preferences.

16. In cases where discrimination between countries is the only form of GATT inconsistency the chapeau requirement of Article XX is that:

" ... such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail ... ".

This suggests the mere existence of discrimination is not sufficient to automatically render a measure incapable of meeting the requirements to be covered by a GATT exception. Analysis¹ suggests, however, that it is not normally necessary to use discriminatory measures against non-parties.

17. These two areas of possible conflict may arise in respect of either or both of Categories III and IV of Table I and, in the second case possibly also in respect of Category II. The following analysis will concentrate initially on Category IV and in particular on MEAs addressing global or transboundary environmental issues.

III. TRADE MEASURES IN MEAs AND WTO PROVISIONS

A. USE OF TRADE MEASURES IN MEAs

18. As noted above, there is considerable scope for use of trade measures for environmental purposes consistent with GATT rules whether or not they are part of an MEA. Existence of areas of possible conflict, however, gives rise to concern that trade measures in MEAs can conflict with WTO provisions and that, because of this, WTO provisions could work to inhibit or prevent

¹See, for instance, TRE/W/8.

conclusion of future MEAs or undermine their effectiveness. However the details and nature of the multilateral trading system, as well as experience with existing MEAs, suggests this is unlikely.

19. Of the approximately 180 MEAs currently in force, only 18 contain trade provisions. Most of these are in the area of flora and fauna protection. At present none of the treaties or instruments adopted since UNCED (June 1992) contain trade provisions. Moreover, there has never been a GATT dispute settlement case involving use of trade measures pursuant to an MEA even though MEAs containing trade provisions have existed for many years.

20. The WTO as a multilateral treaty welcomes multilateral solutions to global and transboundary environmental problems. As was recognized at UNCED, such an approach is likely to be more effective and durable than unilateral trade measures. Governments at UNCED, however, also recognized the need for caution in negotiation of MEAs before using trade measures. The effectiveness of trade measures needs to be carefully considered against their apparent attractiveness. This reflects the fact that trade measures are seldom the first-best policy tool to achieve environmental objectives. It has also been noted that it is generally undesirable and not normally necessary to use discriminatory measures against non-parties.

B. PROPOSALS TO DATE

21. Against this background and pursuant to the invitation from governments at UNCED, WTO Members have been considering ways to more clearly define the relationship between use of trade measures in MEAs and WTO provisions. While there is not yet a consensus on a need to go beyond existing WTO provisions, including exceptions, to accommodate trade provisions taken in the context of an MEA, suggestions for how the potential problems might be addressed fall into two main groups. These are:

- *ex post* waiver approach: case-by-case granting of a waiver from GATT/WTO obligations; and
- *ex ante* "environmental window" approach: defining conditions for the use of trade measures in the context of an MEA which, if met, would ensure that the WTO would accommodate the measures.

22. A number of other suggestions have also been made, most of which seek to combine elements of both approaches. These include:

- an approach combining the *ex post* and *ex ante* approaches by defining criteria which would, *prime facie*, make the trade measures adopted pursuant to an MEA compatible with the GATT and then examining for each MEA whether the criteria were met;
- an approach which combined the use of generic criteria to cover some situations with provision for case-by-case examination of others; the three alternative means provided under GATT Article XX(h) for accommodating measures taken pursuant to intergovernmental commodity agreements was cited as a possible model;
- an approach similar to that in Article 104 of the North American Free Trade Agreement (NAFTA) providing that in the event of any inconsistency between NAFTA and specific trade obligations in listed MEAs, the obligations of the MEA shall prevail to the extent of the inconsistency.

23. This last approach is subject to the condition that where a party has a choice between equally effective and reasonably available means of complying with such obligations the alternative that is the least inconsistent with the other provisions of NAFTA is chosen.

C. FEATURES OF CURRENT PROPOSALS

24. These proposals have been the subject of considerable discussion both in the Committee and, for some, previously in the EMIT Group. As a result a number of features of each proposal have been identified, including the following elements.

i. Waiver Approach

25. In support of this approach it has been noted that it is already possible, through the provisions of WTO Article IX, to consider granting a waiver from GATT obligations or other obligations of the multilateral trading system for trade measures contained in MEAs on a case-by-case basis. Given the flexibility which exists under GATT/WTO rules for use of trade measures and the doubts which exist about the general effectiveness of trade measures as an environmental policy tool it was suggested that the scale of the remedy offered by the waiver approach (in respect of measures, not agreements) was appropriate for the scale of the problem.

26. Under the waiver approach, multilateral consensus would be established on the merits of the case. An MEA reflecting a genuine multilateral consensus among concerned countries should find broad support among WTO Members and consequently there would be little uncertainty about the chances of securing a waiver for trade measures included in it. The onus to demonstrate and convince others of the merits of the case would, however, remain on those countries seeking the waiver.

27. Against this approach concern was expressed that waivers are time limited and designed to deal with exceptional situations whereas environmental problems are increasingly recognized as requiring long-term global solutions. There was also a widespread feeling that it was desirable to provide, in advance, clear guidelines to negotiators of MEAs on inclusion of trade provisions. It was suggested that this could not be achieved by the waiver approach which, given its *ex post* nature, would also not provide negotiators of MEAs with the desirable degree of security that inclusion of trade measures would not subsequently be challenged.

28. It has also been noted that the Uruguay Round Understanding on waivers specifies that WTO "non-violation" dispute settlement action remains available in respect of measures for which a waiver has been granted. Thus, in the case of two countries A and B, Country A which considered a benefit accruing to it under the WTO was nullified or impaired by a measure imposed or maintained by Country B under a waiver could seek compensation to restore the mutual balance of rights and obligations between them. Given that Country B is not acting inconsistently with its WTO obligations, as defined by the waiver, its right to apply the measure is not in question. If Country A's complaint was upheld, however, Country B would be required to offer compensation or face offsetting withdrawal of concessions by Country A.

29. The potential for non-violation compensation should not necessarily be seen as a negative feature of the waiver approach. The opportunity to obtain compensation, if merited, may act to facilitate the granting of a waiver.

ii. Environmental Window Approach

30. A second approach discussed was the notion of creating an *ex ante* "environmental window". This would involve defining conditions for use of trade measures in the context of an MEA which, if met, would ensure that the WTO would accommodate the measures.

31. In support of this approach it was argued that its *ex ante* nature would give greater predictability and certainty to the negotiators of MEAs. However, based on perceptions about the scale of the problem noted above in discussion of the waiver approach, a number of questions were raised about the implications of the environmental window approach.

32. Doubts were expressed about whether trade measures exceeding the scope of existing GATT provisions were likely to be effective policy tools for inclusion in MEAs. Concern was also raised about what this approach might mean for the existing balance of GATT rights and obligations, especially in respect of some of the apparently more open-ended formulations of the window. It was thought unlikely that a single formula could be found to implement this approach which would be general enough to encompass all legitimate requirements, present and future, for use of trade measures in MEAs without opening the door to protectionist abuse.

33. Arising from these concerns, further discussion of the environmental window approach resulted in suggestions for a number of possible elements or criteria to define the scope of any window. These cover a mixture of process and substance considerations including the following:

- ensuring that an MEA reflects a genuine "multilateral" consensus through requiring:
 - negotiation of and participation in an MEA to be open on equitable terms to all interested countries;
 - broad participation of interested countries in both geographical terms and representing varying levels of development;
 - adequate representation of consumer and producer nations of the products covered by the MEA;
- determining whether, and to what extent, the trade measures must be specifically mandated in the MEA;
- ensuring that the trade measure is necessary to achieve the environmental objective of the MEA, including through consideration of:
 - the effectiveness of the trade measure in achieving the environmental objective;
 - whether the measure is the least trade-restrictive or distorting;
 - the proportionality of the measure to the need for trade restriction to achieve the environmental objective.

iii. Necessity and Specificity

34. The concept of necessity is commonly seen as pivotal. Since its inception, and reflecting previous international practice, GATT as an agreement on trade has provided for Member

countries to take measures for non-trade purposes which are inconsistent with their GATT obligations provided the measures are necessary to achieve the stated non-trade objective. As noted above, such an approach is embodied in GATT Article XX and, for particular types of measures, has been further elaborated through WTO TBT and SPS Agreements.

35. The plain meaning of the word necessary is "indispensable" or "essential". A measure is necessary to the achievement of an objective only if the objective cannot (reasonably) be achieved without it. This requirement for achievement means that for a measure to be necessary it must be effective, perhaps in conjunction with other measures, in achieving the objective. A measure which cannot contribute to achieving the stated objective cannot be necessary. However, not all effective measures can be seen as necessary.

36. It is precisely this type of plain meaning approach which has underlined the development of the concept in GATT/WTO. Several GATT panels² have found that a measure inconsistent with GATT obligations cannot be justified as "necessary" if alternative effective measures which are not inconsistent with GATT obligations are available. In cases where measures consistent with GATT obligations are not reasonably available, necessity requires the measure, among those reasonably available, which is least inconsistent with other GATT provisions to be chosen. The requirements of least trade-restrictiveness and proportionality embodied in WTO TBT and SPS Agreements have also developed from previous panel discussion related to the concept of necessity.

37. In each of the proposed approaches the issue of specificity is also important. From the WTO perspective, without sufficient specificity there is risk that any window would provide excessive scope for use of trade measures without sufficient safeguards.

38. From the environmental perspective, however, too great a degree of specificity might not be desirable or possible since in practice the measures contained in an MEA may have to be tailored by individual signatories to particular circumstances. The conditions influencing choice of trade measures may also change over the period of time the MEA is in effect.

39. Reflecting this reality, each of the proposed combination approaches outlined in paragraph 22 above involves some element of case-by-case testing. The nature of such testing is a significant consideration. A waiver-based approach involves what might be termed "positive" testing. In each instance the relevant measures are brought before the appropriate WTO body for specific decision about whether or not a waiver will be granted. Under an exceptions-based agreement, one expression of the environmental window approach, any testing is "negative". Decisions are required only in instances where measures are questioned through dispute settlement procedures available under the agreement.

iv. Policy Context

40. As is clear from the above summary of approaches and criteria suggested in GATT/WTO discussion to date, policy context has been an important consideration. A number of different contexts can be distinguished:

- trade measures between parties of an MEA that are specifically mandated in the MEA;

²See, for instance, Panel on United States-Section 337 of the Tariff Act of 1930 (BISD 36S/345) adopted on 7 November 1989. Panel on Thailand-Restrictions on Importation and Internal Taxes on Cigarettes (BISD 37S/200) adopted on 7 November 1990, and Panel on United States-Measures Affecting Alcoholic and Malt Beverages (DS23/R) adopted on 19 June 1992.

- measures between parties of an MEA which are taken pursuant to the MEA but are not specifically mandated in the MEA;
- measures imposed on non-parties to an MEA, either specifically mandated in the MEA or "pursuant" to the MEA.

41. In each of these contexts a range of possible measures may be envisaged. This includes extraterritorial or extrajurisdictional measures such as those based on unembodied PPMs.

IV. TRADE MEASURES OTHER THAN IN MEAs AND WTO PROVISIONS

42. Aside from MEAs, trade measures may be used for environmental purposes in other forms of cooperative international environmental agreement such as bilateral, regional or plurilateral agreements. Trade measures may also be used by individual countries. The discussion in Section II above is relevant also for measures used in these situations. The suggested approach developed in the following section deals initially with use of trade measures for environmental purposes in MEAs but also covers use of such measures in other contexts.

V. A SUGGESTED APPROACH

A. TRADE MEASURES IN MEAs

43. In the following section each of the above policy contexts is examined and, drawing on previous analysis and discussion, a possible way forward for resolving potential policy conflicts is suggested. In each case it is assumed that the agreement in question is an MEA according to the procedural criteria specified in paragraph 33 above.

i. Measures Between Parties

44. Most discussions on Item 1 to date have focused on the application of trade measures to WTO Members who are non-parties to an MEA. This is on the basis that application of measures between WTO Members who are party to an MEA is governed by general principles of public international law. When dealing with distinct international instruments covering the same subject matter these principles resolve potential conflicts of interpretation through considerations such as dates of the relevant instruments and specificity of the respective provisions.

(a) Specific measures

45. In practice countries which have reached specific agreement with each other in one international forum are unlikely to seek to challenge that agreement in another. In legal terms, however, it may be useful to codify this situation in order, for instance, to guard against unintended interpretive consequences of successive renegotiations of relevant instruments.

46. Such a codification could be similar to that contained in NAFTA Article 104. This would provide that, for WTO Member countries party to an MEA, specific trade measures included in the agreement which were inconsistent with the WTO would prevail between them to the extent of the mandated inconsistency.

47. Any such provisions could be jointly notified to the WTO by the parties to the agreement. For those parties, WTO dispute settlement would then not be available for any trade action within

the terms of the notified measures. Countries would have access to the MEA's own dispute settlement process, however. To avoid unintended interpretations countries would wish to ensure the nature of such measures was clearly defined, including terms of the product(s) to be covered and the duration of the measure.

(b) Non-specific measures

48. As has been noted above there may be instances where, for sound environmental reasons, trade measures included in an MEA may not be fully specified. In such cases, measures between parties of an MEA may be taken "pursuant" to the MEA without being specifically mandated in the MEA.

49. In this situation, following the principles of public international law, countries' rights and obligations under distinct but overlapping international agreements would be governed by the relative specificity of respective relevant provisions. Thus for two countries A and B members of both GATT/WTO and an MEA, Country A could have grounds for questioning the WTO consistency of a measure imposed by Country B "pursuant" to the MEA.

50. Take, for instance, the example of an MEA which mandates the limitation or phase-out of production of an environmentally damaging product that is a key input in the production process of a downstream industry. Of the two representative countries party to the MEA, Country B is sole producer of the controlled product while the downstream industry is located in both countries. Suppose that in implementing the MEA mandated controls on production of the environmentally damaging product Country B also imposes an export ban on the product. Country A may then wish to question the WTO consistency of the export ban which, in this case, is not contributing to the environmental objective of the MEA over and above the mandated imposition of controls on production levels but which is designed by Country B to advantage its domestic downstream industry.

51. From an environmental perspective the primary consideration in such a situation is that Country B should not be prevented from implementing the measure if it is necessary to achieve the environmental objective of the MEA. From the trade perspective Country A is concerned to be able to safeguard its interests against economic or trade protectionism disguised as environmental protection.

52. This suggests an approach in WTO of accommodating non-specific measures between parties to an MEA subject to their meeting defined criteria covering the aspects of necessity outlined in paragraph 33 above such as effectiveness, least trade-restrictiveness and proportionality. Such accommodation could be achieved either via the "positive testing" waiver approach or through the "negative testing" approach using dispute settlement when required. The latter approach is preferable as potentially the more liberal but would require a renewed political commitment from all WTO Members to respect and implement the findings of dispute settlement proceedings if measures are challenged. By stating these criteria against which trade measures in MEAs would be tested, the WTO might also help to avoid disputes.

53. Trade measures falling in this category would be notified to the WTO by the country imposing the measure. The possibility would also exist for countries on which the measure was imposed to explicitly agree to its imposition, perhaps reflecting bilateral or plurilateral negotiations under the auspices of the MEA. In such cases the measure could again be jointly notified to the WTO by the parties which so agreed and the procedures outlined in paragraphs 46 and 47 above for specific measures would apply.

ii. Measures in Respect of Non-parties

54. In addition to measures between parties, some MEAs have included provisions regulating trade between parties to the agreement and non-parties. Such measures have been included in MEAs for a variety of reasons, including:

- to promote universal participation in the MEA;
- to prevent transferral of environmentally harmful products or practices to non-parties to the MEA;
- to avoid circumvention of the measures applied by parties to the MEA;
- to ensure all importers and exporters are subject to the same environmental standards that apply to the parties; and
- to address concerns about the impact that uncontrolled production or consumption in non-parties would have on the effectiveness of the controls agreed by parties.

55. A common theme in the application of trade measures to non-parties appears to be concern about potential for "leakage" when addressing global or transboundary environmental problems. This relates to the possibility that activities by non-parties could seriously weaken or undermine the environmental benefits expected from commitments undertaken by the parties.

56. Equally there are a number of reasons why countries may decide not to become party to an MEA. Suggested reasons include:

- differences of view over the persuasiveness, acceptability or existence of relevant scientific evidence;
- differences of view over the priority to be attached to various environmental problems;
- differences in absorption capacity of different environments; and
- inability to afford participation in the MEA or adherence to the level of environmental standards required of parties to the MEA.

57. Such differences were acknowledged at UNCED which affirmed the environmental sovereignty of individual States along with explicit recognition of the concomitant requirement not to impinge on the environmental sovereignty of other States or to damage the environment beyond the limits of national jurisdiction.³

58. Under the principles of international law the rights and obligations that exist between two countries which are members of one agreement are not affected by the rights and obligations of one of them pursuant to another agreement. Thus if Country A and Country B are both Members of GATT/WTO but only Country B is a party to an MEA, Country A would be free to challenge in WTO a GATT-inconsistent measure implemented against it by Country B as part of the latter's obligations under the MEA.

³See, for example, Principles 2, 7, 11 and 14 of the Rio Declaration.

59. The respective concerns of countries A and B in this case are similar to the case of non-specific measures between parties to an MEA outlined above. From the environmental perspective of Country B the primary consideration is that it should not be prevented from implementing a measure which is necessary to achieve the environmental objective of the MEA. Country A, however, is concerned to be able to safeguard its interests against economic or trade protectionism disguised as environmental protection.

60. This again suggests an approach which is designed to ensure that measures which are inconsistent with GATT/WTO obligations do not go beyond what is necessary to achieve the environmental objectives of the MEA.

61. In this context it should be noted that concerns have been expressed in WTO discussions about the possibility that trade measures may be imposed on non-parties for competitiveness reasons. The notion that protectionist or WTO-inconsistent trade measures should be introduced to compensate for negative competitiveness effects of environmental policies, whether real or perceived, has been firmly rejected by OECD Governments.⁴ Consistent with this, the necessity-based approach suggested here would not provide accommodation for measures unrelated to achievement of the environmental objective.

62. Country A may also disagree about the environmental objective involved but the WTO, not being an environmental organization, must take the environmental objective as a given. Other avenues such as the International Court of Justice are available to dispute matters of environmental policy *per se*. Neither the WTO nor the multilateral trading system can be used to substitute for failures in international environmental policy making processes.

63. For countries which may potentially be non-parties to an MEA and are concerned about the possibilities of protectionist abuse, the procedural criteria attached to accommodation for use of trade measures in MEAs may provide some additional comfort. In practice, as will be further discussed below, procedural criteria are closely related to questions of necessity. Without adequate involvement of concerned countries representing sources of production or consumption related to the environmental problem, use of trade measures, whether consistent with GATT/WTO obligations or not, is unlikely to be effective in achieving the environmental objective.

64. It would be appropriated in this instance, therefore, to restrict the accommodation with respect to non-parties to instances where measures are specifically mandated in the relevant agreement. Particularly for those developing countries which may have limited capacity to pursue dispute settlement action in the WTO this could provide some additional procedural safeguard against protectionist abuse. It should also help ensure that cases where negotiators of environmental agreements consider that trade measures vis-à-vis non-parties are required reflect a genuine consensus that such measures will be effective in achieving the environmental objective.

65. Again, any trade measures applied would be notified to the WTO by the country imposing the measure with the possibility of joint notification by affected parties in cases of consensual application. In the latter instance the procedures for specific measures between parties outlined in paragraphs 46 and 47 would again be followed.

66. If an individual country party to an MEA wished to impose trade measures on non-parties going beyond the degree of GATT/WTO inconsistency specifically mandated in the agreement, existing provisions for seeking a waiver from WTO obligations could be followed. Alternatively, the country could seek an amendment to the MEA specifically authorizing the measure.

⁴Report on Trade and Environment to the OECD Council at Ministerial Level, May 1995.

B. TRADE MEASURES IN OTHER FORMS OF COOPERATIVE INTERNATIONAL AGREEMENTS

67. It is suggested that the same approach be followed with respect to accommodating use of trade measures in these forms of international environmental agreements as discussed above for MEAs. While the same approach may be followed, however, the environmental context it applies to will likely be somewhat different as could be the implications for various types of trade measures.

68. The procedural criteria outlined in paragraph 33 above for MEAs aim to ensure widespread representation of concerned countries in both the negotiation and implementation of the agreement. This is consistent with the admonition in Principle 12 of the Rio Declaration that:

"... Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."

69. Such an approach reflects the fact that solutions to global or transboundary environmental problems will be most effective when all countries which are sources of related production and consumption, are involved in the solution.

70. Following the procedural criteria therefore it is likely that most forms of cooperative international environmental agreement other than MEAs will be dealing with transboundary rather than global environmental issues. Exceptions may arise in cases where only a limited number of countries embody the sources of related production and consumption contributing to a global environmental problem. In instances where such countries are non-regional, a plurilateral agreement could provide a solution. In other, likely more rare situations, the solution to a global environmental problem may be found through a regional or bilateral agreement.

71. Whatever the case, however, the "interested" or concerned countries, meaning the countries which are sources of related production and consumption which contribute to the environmental problem and whose "participation" is required for any solutions to be effective, will be a limited and well defined group.

72. In terms of the application here of the policy contexts outlined above for accommodation of trade measures used in MEAs, such interested or concerned countries will then comprise both the "parties" to the agreement and the "non-parties" to the agreement in respect of which trade measures may be able to be justified under the substantive necessity related criteria of effectiveness, least trade restrictiveness and proportionality. Outside this group the broader membership of the WTO would be unaffected by the proposed accommodation.

C. UNILATERAL MEASURES

73. Lying outside the policy contexts discussed above is Category III in Table I; unilateral actions to deal with global and transboundary environmental problems. At UNCED it was recognized that global and transboundary environmental problems are by their nature beyond the control of individual nations. International cooperation was endorsed as the most useful and effective manner through which to address them. At the other end of the spectrum unilateral approaches to dealing with such issues were strongly discouraged, including in Principle 12 of the Rio Declaration:

"... Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."

74. As noted above, this reflects the fact that solutions to global or transboundary environmental problems will be most effective when all countries, sources of related production and consumption, are involved in the solution. It will seldom be the case that this condition is met by a single country. In cases where it is not met, it cannot be said that unilateral action would generally be effective.

75. It is possible that unilateral action could be effective in cases involving a single country source of supply. For instance, in a world in which only one country was able to produce an environmentally damaging product, elimination or control of production of the product by that country would be effective in reducing associated environmental degradation.

76. On the demand side, however, the situation is far less clear. For discussion purposes an extreme case of two countries will be used: Country A which produces and exports an environmentally damaging product and Country B which imports it. If Country B restricts or bans imports of the product the effects on production in Country A will at first depend on relative market size in the two countries.

77. If the export market is small relative to domestic consumption in Country A there will be little change in production levels. If the export market is relatively large there may be some associated reduction in production although the extent of such reduction will depend firstly on the relationship between export price and production costs and possibly also on alternative uses of associated resources. To illustrate the first point, if the export price significantly exceeded production costs a reduction in export opportunity could, depending on the price responsiveness of domestic demand, be offset by expansion of consumption in Country A. Effectiveness of unilateral action by Country B would therefore be reduced.

78. The opportunity cost response can occur even in the case where Country B constitutes the entire market for the product. A possible example of this arises in the case of timber. In such circumstances an import ban on timber in Country B would eliminate the value of forests in Country A as a timber resource. Even without domestic demand in Country A for firewood, the impaired economic value of the forest is likely to encourage its destruction to take advantage of alternative uses of the potential land resource.⁵

79. In general therefore it is clear that unilateral action to deal with global or transboundary environmental problems will seldom be effective. In practice, outside the special case in which a single country comprises the only source of supply and/or demand, effectiveness of any particular measure will depend on relative market power.

80. As noted in Section II above, under general public international law, unless there is an agreement to the contrary, an individual country has no legal basis for measures taken in respect of the activities of other countries' nationals occurring outside its territorial jurisdiction. Given that GATT/WTO provisions contain no reference to the contrary it is clear that a measure to which another country has not specifically consented and which is not consistent with GATT obligations cannot be justified under GATT exceptions.

⁵That would not occur where the highest alternative economic value involved retaining the integrity of the forest, for example private bioprospecting rights, or where the forest was legislatively protected in Country A. Effectiveness in the latter case, however, would not arise from action by Country B.

81. This underpinned the rejection of United States measures in the two recent tuna panel cases.⁶ The second panel also specifically considered the effectiveness issue concluding that trade measures taken by one country to force other countries to change their domestic policies, and which would be effective only if such changes occurred, could not meet the tests of Article XX exceptions.

82. The policy question in respect of unilateral extraterritorial or extrajurisdictional measures to deal with global or transboundary environmental problems is whether the current GATT/WTO prohibition on such measures should be relaxed given (i) the substantial international political consensus opposed to unilateral action in these circumstances, as evidenced by Principle 12 of the Rio Declaration cited above, and (ii) the fact that in general they will not be effective and therefore cannot be necessary to achievement of the stated environmental objective.

83. For the great majority of GATT/WTO Member countries which are smaller trading nations the threshold of effectiveness could not seriously be contemplated. Even if there are circumstances in which the criteria could be met, however, broader issues of environmental policy making should be considered including the replicability of successful unilateral approaches and their impact on prospects for resolution of international environmental problems where cooperation remains essential.

84. Based on these considerations, a renewed political commitment to respect existing provisions on unilateral extraterritorial or extrajurisdictional measures will be an important part of any outcome to work on trade and environment in GATT/WTO designed to facilitate greater accommodation of international environmental cooperation. This might involve incorporation in some form of relevant UNCED language. In instances where countries felt compelled to use non-conforming unilateral measures, WTO waiver provisions would remain available.

D. SANCTIONS

85. The above discussion deals with measures directly related to products, the production or consumption of which is contributing to an identified environmental problem. In some isolated types of global or transboundary environmental problem while it may be necessary to influence the behaviour of non-parties to an international environmental agreement in order to be able to achieve the environmental objective of the agreement it may not be possible to do so through measures directly related to production or consumption of the product concerned.

86. In such cases parties to the agreement may need to give consideration to use of trade sanctions vis-à-vis non-parties or non-complying parties which are unrelated to trade in the product concerned. Given the difficult international legal and political dimensions of this type of approach and the likelihood that it would only rarely be required, it is not suggested that specific accommodation beyond current GATT/WTO provisions be made. If WTO Members considered it appropriate, existing provisions in GATT Article XXI and GATS Article XIV*bis* covering actions mandated under the United Nations Charter could be noted.

⁶Reports of the Panels on United States: Restrictions on Imports of Tuna from Mexico.

E. FORM OF ACCOMMODATION

87. The Committee on Trade and Environment was established by the General Council and directed to report to the first biennial meeting of the Ministerial Conference. The Committee's terms of reference and the specific language of Agenda Item I relate to the provisions of the multilateral trading system, as embodied in the WTO, as a whole.

88. It is therefore appropriate that any accommodation for trade measures for environmental purposes also apply across the provisions of the multilateral trading system as a whole, at least in respect of Annex I of the WTO. Such an accommodation might take the form of an Understanding with specific references to other WTO Agreements as appropriate, for instance GATT Article XX exceptions and associated Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, GATS Article XIV exceptions and relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Any Understanding also need not encompass the outcome of the Committee's work only in respect of Agenda Item 1.

VI. CONCLUSION

89. This paper has outlined a recommended approach for formulating an Understanding within the WTO which would provide greater accommodation under WTO provisions (rules and associated exceptions) for use of trade measures for environmental purposes. Reflecting the considerable scope which exists under WTO rules for Member countries to use trade-related policies to protect national environmental resources, the Understanding would focus on use of trade measures in cases of global and transboundary environmental problems.

90. Such an Understanding would be applicable across the WTO as a whole and would build on existing approaches to dealing with measures taken for non-trade objectives contained in GATT Article XX exceptions and associated Agreements on TBT and SPS measures, GATS Article XIV exceptions and the various exceptions provisions of the TRIPs Agreement.

91. Reflecting the overarching international objective of making trade and environment mutually supportive of sustainable development, including at the global level, accommodation would be dependent on conformity of measures with both substantive criteria and procedural criteria reflecting the policy context in which the measures were taken.

92. The procedural criteria would help ensure that measures to be accommodated would be taken in the context of cooperative international agreements between concerned countries contributing to the environmental problem and its possible solution. The substantive criteria would help ensure that measures necessary for environmental purposes were not unnecessarily disruptive of the multilateral trading system in achieving the environmental objective. Together the criteria should ensure that legitimate environmental protection measures can be taken while safeguarding against protectionist abuse.

93. Under the proposed accommodation, within the context of a qualifying cooperative international environmental agreement, jointly notified specific measures applying between WTO Member countries parties to the agreement would prevail over WTO obligations between them to the extent of the mandated inconsistency. The same accommodation would apply in respect of other consensually applied and jointly notified measures.

94. In the case of non-consensual measures the accommodation would cover measures vis-à-vis non-parties specifically mandated in the agreement and measures between parties taken pursuant to the agreement but not specifically mandated in it. This could involve extraterritorial or extrajurisdictional measures including those based on unembodied PPMs. All such measures, however, would be testable through dispute settlement, if required, against the various necessity criteria including effectiveness, least trade-restrictiveness and proportionality. Trade measures against non-parties would also be tested against procedural criteria to ensure that the MEA represents a genuine international consensus.

95. The accommodation would not cover measures currently inconsistent with WTO obligations which are applied either unilaterally or vis-à-vis non-members to an agreement without being specifically mandated in the agreement. If countries wished to impose such measures, existing provisions for seeking a waiver from WTO obligations could be followed.

96. Such an outcome should be seen not only as an important safeguard for the multilateral trading system but also as beneficial for international environmental policy making and a key element in ensuring that trade and environment policies are mutually supportive in promoting sustainable development.

97. New Zealand looks forward to hearing the views of other delegations on this suggested approach and to working in the Committee to develop a consensus report for the Singapore Ministerial Conference Meeting.