Unilateral trade restrictions fall into one of three categories (Table 1). They may be direct restrictions on trade (such as the US ban on harp seal products). In this case they run counter to Article XI unless they meet the terms of the Article XX exemptions. They may relate to a characteristic of the product, such as its packaging, which is termed a product standard. If the restrictions discriminate against other producers then they are counter to Article III. Even where they are not discriminatory, agreements such as that on Technical Barriers to Trade (TBT) may make them WTO illegal. Finally, restrictions might be introduced, not because of a characteristic of the product, but because of the way it was produced. This is termed a restriction related to production and process method (PPM) standards. The majority of objections to imports on environmental and animal welfare grounds are to do with the way the item is produced.

Why would any country want to influence the process methods in another? In general, the reasons are either environmental (in broad terms) or economic. In the US Shrimp-Turtle case, the US Government was clearly influenced by both considerations. It wanted to 'save' turtles, but it also wanted other fishing nations to introduce the same fishing technology so that its own fishermen were not put at an economic disadvantage.

Until the Appellate Body report on the US Shrimp-Turtle case, it appeared as if the WTO dispute settlement mechanism had ruled-out the legality of any unilateral trade measures applied on an extra-territorial basis to coerce other countries to change their internal policies. The situation is now much more uncertain. However, there are three key considerations that call into question the use of unilateral trade measures under any circumstances. These are:-

- Can there be an unambiguous definition of what is environmentally bad in any particular situation?
- Who should decide when a measure is bad for the environment in any situation?
- Is it possible to distinguish between measures taken for primarily environmental reasons from those taken for primarily commercial trade protectionist reasons in any particular situation?

In our experience, when these questions are carefully and honestly considered, the adoption of unilateral trade measures in the name of environmental protection can be seen to be a very unattractive tool to achieve any policy objective which is both effective and equitable.

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POLICY THINK TANK SERIES NO. 12

Sustainable Use, WTO and MEAs such as CITES

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The WTO promotes trade liberalisation while CITES uses trade measures in its attempts to protect wild species. So there is good reason for thinking that the two may conflict. To date, no state has attempted to take formal proceedings against CITES measures on the grounds that they conflict with WTO rules. However, fear that this may happen is driving a large section of the environmental community to move pre-emptively to change the WTO so that CITES issues are exempt from its processes. Starting from a somewhat different perspective, that of Community groups in southern Africa, this paper analyses the appropriate relationship between the WTO and Multilateral Environmental Agreements (MEAs) such as CITES.

Trade Measures for 'Environmental Protection'

There are two sorts of trade restrictions which are applied in the name of 'environmental protection': we term these 'unilateral' or 'pursuant' measures. In simple terms, unilateral restrictions are unashamedly taken to satisfy a domestic agenda while pursuant measures are so named because they are applied pursuant to a multilateral environmental agreement[1]. Thus southern African countries and the USA, for example, are united in their refusal to accept commercial imports of Appendix I CITES species.

a) Unilateral measures

Unilaterally-imposed trade restrictions have always been a major tool to effect change in policy and some observers would claim that there cannot be multilateralism without unilateralism because in a world where different members of the international community hold alternative views unilateral, power-based measures are necessary to bring all parties to the negotiating table. It is, for example, often stated that slavery only came to an end because of unilateral action. The WTO, however, is designed to turn a power-based system to one based on rules in which unilateralism is unwelcome - and this is clearly to the benefit of the developing world.

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b) WTO and the Multilateral Environmental Agreements

Though it has been correctly pointed out on many occasions that there has never been a formal dispute of any sort in this area, it has long been recognised that there is potential conflict between the WTO rules and restrictive trade practises taken pursuant to some multilateral environmental agreements (MEAs). At the moment trade measures are inherent to the Montreal, Basel and CITES treaties that include them as sanctions or direct measures to protect the environment

It was hoped by many that the Committee on Trade and Environment (CTE), which was the main institutional development in the Uruguay Round, constituted to look at MEA's, environmental taxes, ecolabelling and other issues, would anticipate problems of this sort and suggest fixes (such as an amendment to GATT/WTO to give more generous exceptions to MEAs). However, the committee has been unable to make conclusive recommendations. (It was clearly unable to 'deliver' in this regard to the Ministerial Conference in Singapore in 1996, but it did clearly lay out the issues and thinking of Parties and thus its mandate was extended).

One option is to ignore the problem until a dispute is raised, but many developed countries are concerned about the status quo, calling for peremptory measures to avoid conflict. The EU, for example, has expressed concern that "the WTO legal system should provide increased legal certainty concerning the use of trade measures in Multilateral Environmental Agreements (MEAs) to prevent conflicting between the two sets of rules"[1].

Where the WTO and restrictive trade provisions of MEA's clash one can address the problem by:

i) Creating a balancing Mechanism
ii) Determining one is superior to the other
iii) Modifying one or both systems

Within much of the developed world there is an overwhelming desire for generous exemptions to be crafted for measures taken pursuant to an MEA. Trade measures might be legitimized by:

i) Amending Article XX to include a new exemption
ii) Encouraging members seek a waiver from WTO obligations
iii) Creating a list of MEA's which prevail over the GATT

In Europe, voices in opposition to this position are rare. However, many resource-rich developing countries feel that the WTO should have a say even where measures are taken pursuant to an MEA. Developing countries often feel unfairly disadvantaged by MEA regulations and wish to retain the possibility of appeal to the WTO dispute settlement process as a last resort.

In this regard, developing countries argue that the move to exempt MEAs makes three key assumptions - that each MEA: -

i) Is dealing effectively with the relevant environmental threat?
ii) Is truly a platform for consensus?
iii) Has an effective dispute settlement mechanism.

Furthermore, it is clear that the trade restrictions allowed by an MEA might be disproportionate and counter to the WTO principle that, even where they are allowed, trade measures should be the least restrictive necessary to achieve a policy objective.

Where any of these things is in question then developing countries are surely justified in asking if it is appropriate to deny the WTO a say?

These are not new arguments - they have been considered by the Committee on Trade and Environment and elsewhere[2] - and it has been recognised that any exemptions for MEA's ought, perhaps, to depend on consideration of the way that the MEA is designed.

Unfortunately, there has been no real progress on these matters within CTE, and no changes have been forthcoming. As a result we conclude that there are three most likely scenarios through which the potential conflict between WTO and the MEAs might resolve itself.

- First of all, the measures taken by MEAs might be legitimised within the WTO.
- Secondly, resolution could be left to the WTO dispute mechanism which will gradually build up legal precedent, case by case, which will be applied when a dispute on the conflict between the WTO and an MEA finally occurs.
- As an alternative to both of these, the MEAs themselves might take steps to avoid conflict by examining their effectiveness, reviewing their operations to

[1] Message of the European Community to the World Trade Organisation High Level Symposium on Trade and Environment, March 1999.

[2] At the High Level Meeting on Trade and Environment, Canada submitted a paper that set out criteria on the use of trade measures in MEAs.

incorporate WTO principles (such as least trade restrictive practices) and creating their own compulsory and binding dispute settlement mechanisms.

i) Development of WTO jurisprudence which can be applied to MEAs

As a leader amongst developing countries, the US appears to have realised that it cannot garner the support necessary (especially from developing countries) to amend Article XX to exempt MEA's from WTO rules, but will instead "rely on WTO panels and appellate bodies to interpret WTO rules in relation to trade sanctions imposed for environmental protection purposes on a case by case basis."[3] This is an important development because such an approach is highly risky for resource-rich developing countries. After 129 distinct disputes, 21 panel reports and 17 Appellate Reports it is commonly held that WTO is evolving as a legal system and if the Appellate Body (a key part of the Dispute Settlement Understanding) makes liberal decisions as to the acceptability of coercive extra-territorial measures (as it appears to have done in its finding on the Shrimp-Turtle dispute) then it is unlikely that any subsequent ruling could make the interpretation of the rules more restrictive again. To demonstrate how unpredictable the process is, consider that after the 1991 & 1994 US Tuna-Dolphin and 1998 US Shrimp-Turtle Panel Decisions it appeared that trade restrictions did not fall within the scope of the Article XX (g) exemption if they attempt to coerce foreign countries to modify their domestic regulations[4]. The simple interpretation of this was that extra-jurisdictional measures of this type are GATT illegal. A state could not use trade measures to force its particular moral or environmental priorities on a foreign country. However, panel decisions are only binding for the direct parties to a dispute. Decisions need not be accepted or followed by subsequent dispute settlement panels and the 1998 US Shrimp-Turtle Appellate Body Report found that it was not the extraterritorial element of environmental standards, which was GATT incompatible, but the arbitrary manner of application. So, it appears that unilateralism which targets foreign production and process methods are now acceptable within the WTO, though with certain constraints of application.

Finally in this regard, while it is clear that many countries are keen to see an enhanced principle and rule based adjudication within the WTO, some developed countries appear to be particularly keen that the systems develop towards some sort of 'World Trade Court'. The significance of this is that such a 'Court' might be able to deem itself 'not competent' where disputes are political, cultural or environmental, thus creating another mechanism that can prevent an effective challenge to some types of unilateral trade measures.

ii) Steps which can be taken within the MEAs to attenuate potential conflict with WTO

Where MEAs include trade measures that potentially conflict with the principles and articles of WTO agreements, the MEA can take significant steps to reduce the likelihood that any dispute relating to any trade measure pursuant to their articles will be taken to the WTO. Working with the WTO Secretariat, MEA Parties and Secretariats can draw up criteria of "WTO compatibility". This would include, inter alia, determination of whether the MEA:-

- Is the most effective mechanism for dealing with the environmental problem.
- Allows equivalent treatment of members and non-members.
- Is it truly a platform for international consensus (does it allow unilaterlism).
- Has an effective dispute settlement mechanism.

In addition, the MEA should give express recognition that it takes into account WTO principles including the requirement that trade measures should be least restrictive to achieve the desired end, that they should not be arbitrary or unjustifiably discriminatory, or a disguised restriction on trade.

Where CITES is concerned, it is hardly likely that the Parties and the Secretariat will be satisfied that the dispute settlement mechanism is effective. There are likely to be concerns about stricter domestic measures - and there may even be room for debate as to the very assumptions, which underlie the convention (that all commercial trade in endangered species is incompatible with conservation).

Discussion and Conclusions

The proponents of the sustainable use of natural resources should not take a black or white view of the wildlife trade. Unlike the preservationists within CITES, who see no positive role for trade, advocates of sustainable use recognise that, in the appropriate circumstances, trade can play a beneficial role. At the same time, however, they must acknowledge that the regulation of the wildlife trade is important if conservationist goals are to be achieved.

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[3] Inside US Trade - Volume 17 (12) March 26 1999

[4] e.g. 1994 Tuna-Dolphin Panel: "*If...Article XX(b), were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which seriously required such changes to be effective, the objectives of the General Agreement would be seriously impaired*."

Given this nuanced perspective on the connections between trade and conservation, a commitment to sustainable use does not issue directly in a specific view of the appropriate relationship between CITES and WTO. While many advocates of sustainable use would hold that CITES has not shifted sufficiently from its anti-trade starting point, it does not follow that the solution must be to make CITES subordinate to the trade liberalising stance of WTO. Since decisions about the application of trade measures to the wildlife trade are best made not on the basis of an *a priori* opposition to or support of trade liberalisation, but in the light of the circumstances prevailing in the individual case, there is a case for thinking that CITES should retain some autonomy in making decisions about which trade measures to apply. This position can be consistently combined with pressing the case for CITES' continued evolution in the direction of support for sustainable use.

On the other hand, if CITES is to play a role in promoting the constructive utilisation of wildlife, it is important that decisions are taken on a multilateral rather than a unilateral basis. As has been seen, the decisions of the WTO dispute panels have typically expressed support for multilateral decision-making. Nevertheless, there remains some ambiguity about the distinction between multilateral and unilateral measures. CITES is a multilateral treaty that allows scope for unilateral measures. It is, therefore, equally unattractive for supporters of sustainable use for CITES to be completely exempt from any of the provisions of the WTO in a way which entirely removes the possibility of any appeal to the WTO's dispute settlement mechanism.

In light of these comments, and in view of the analysis made in this paper the following conclusions are drawn as to the best approach for resource-dependent countries to the relationship between the WTO and MEAs such as CITES.

First of all, given that it is difficult both to distinguish between measures taken for primarily environmental reasons from those taken for primarily commercial trade protectionist reasons as well as decide what is unambiguously bad for the environment in any situation, it is appropriate to reject the unilateral imposition of trade restrictions under most circumstances. Next, it is appropriate to avoid a situation in which the WTO dispute settlement mechanism is allowed gradually to evolve a jurisprudence, which defines the relationship between the WTO and MEAs. This will almost certainly favour the view of developed countries. The idea of a 'world trade court', which can decide for itself whether or not trade disputes are within its competence, is not attractive. Instead, the WTO should encourage the MEAs to undertake their own internal review and reform to assess the way they use trade measures, to determine the effectiveness of their dispute settlement measures and to incorporate WTO principles as far as possible. Even though we believe it is essential that resource-rich developing countries be able to use the dispute settlement mechanism of the WTO as the final arbiter in disputes over unilateral trade measures with an environmental flavour, if the MEAs are prepared to review their mechanisms then it may then be possible and acceptable for the WTO to develop criteria for limited exemptions for trade measures pursuant to MEAs.