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# International Trade and the Environment

Charles E. Di Leva

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**INTERNATIONAL TRADE AND THE  
ENVIRONMENT**  
**AN ADDRESS AT THE INTERNATIONAL  
LAW STUDENTS ASSOCIATION  
CONFERENCE AT PACE LAW SCHOOL**  
**OCTOBER 27-29, 2005\***

**Charles E. Di Leva†**

This presentation will focus on international trade and the environment, in particular, two issues: First, what is the impact of trade liberalization on the environment? Second, should environmental goals be incorporated in the rules of the World Trade Organization? [hereinafter WTO]

One view, which is frequently heard from those who protest against globalization, is that trade liberalization is inimical to environmental protection. In part, this is alleged because trade liberalization stimulates economic growth, placing a greater strain on environmental capital; it can lead to increased pollution, and it can further threaten natural resources and biodiversity.<sup>1</sup> Some developing country representatives, understandably, often react negatively to this argument. They fear that the success of this argument by some environmental-

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† Charles E. Di Leva, Esq. is Chief Counsel with the Environmentally and Socially Sustainable Development (ESSD) and International Law Unit of the World Bank Legal Department. Mr. Di Leva works on environmental, social, and international law issues, both on an operational level in relation to bank-financed projects, and within the context of policy development. The World Bank is one of the largest development institutions in the world and, at least from a macroeconomic viewpoint, has come out strongly in favor of trade liberalization. This means that Mr. Di Leva's work at the Bank has a strong nexus to trade issues. The views expressed in this paper are solely those of the author and should not be ascribed to the World Bank or any other institution.

<sup>1</sup> See, e.g., David Ehrenfeld, *Globalization: Effects on Biodiversity, Environment, and Society* (2003), [http://www.conservationandsociety.org/cs\\_1\\_1-essay.pdf](http://www.conservationandsociety.org/cs_1_1-essay.pdf).

ists, coming most frequently from those who reside in industrialized nations, will generate environmental policies that will act as a barrier to trade, just as their countries begin to emerge into industrialization that can provide the wealth necessary to help them overcome poverty.<sup>2</sup> It is understandable why they might find the environmentalists' argument hypocritical given the degree to which rich countries have been able to pollute along their path to wealth.

But there is also a very real concern that this new, increased flow of goods may lead to severe risks for developing countries. For example, one of the reasons behind the Stockholm Convention addressing the risks of persistent organic pollutants,<sup>3</sup> and the Basel Convention<sup>4</sup> on trans-boundary movement of hazardous waste, was to stem the flow of unwanted toxic chemicals and pesticides from the North to South. Often, these toxic products were those that industrialized countries no longer wanted to manage because they posed too great a risk in terms of liability, and were too costly to dispose of in their own countries.<sup>5</sup>

Another issue that frequently arises in the context of trade and the environment is the effect on developing countries from agricultural subsidies provided to farming enterprises within wealthy OECD (Organization for Economic Cooperation and Development) countries. Certainly, the existence of northern subsidies hampers the ability of developing countries to grow economically.<sup>6</sup> But there is also an interesting environmental twist to the issue when we consider the impact of subsidies, particularly agricultural subsidies, on ground water and health. An example is a study conducted a little over ten years ago in

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<sup>2</sup> See generally JAGDISH N. BHAGWATI, IN DEFENSE OF GLOBALIZATION 8, 144-45 (2004).

<sup>3</sup> Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532, available at [http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf).

<sup>4</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125, available at <http://www.basel.int/text/text.html>.

<sup>5</sup> See generally The Basel Action Network, *Exporting Harm: The High-Tech Trashing of Asia* (Feb. 25, 2002), available at <http://www.ban.org/E-waste/techno-trashfinalcomp.pdf>.

<sup>6</sup> See, e.g., Claire Godfrey, *Stop the Dumping! How EU Agricultural Subsidies are Damaging Livelihoods in the Developing World* (2002), available at [http://www.oxfam.org.uk/what\\_we\\_do/issues/trade/downloads/bp31\\_dumping.pdf](http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/bp31_dumping.pdf).

Japan.<sup>7</sup> At that time, Japan was producing a small percentage of the world's rice. There were very heavy subsidies to the rice industry in Japan, and complaints arose about health impacts from insecticides used on the rice crop. The study found that while Japan produced only 3% of the world's total rice product, 30% of all insecticide-use linked to rice crops globally occurred in the Japanese rice industry, a direct result from the heavy subsidization of the industry.<sup>8</sup> Thus, an interesting effect of agricultural subsidization is this parallel development of large-scale manufacturing in fertilizers and insecticides. Such practices demonstrate an increasingly interesting relationship among trade, agricultural products, and environmental impact.

A more favorable view of trade liberalization, espoused by some of my colleagues in the World Bank, is that liberalization can have a positive impact on the environment. They note that trade liberalization can lessen poverty and by doing so, free up capital for environmental investment.<sup>9</sup> In their view, this "win-win" proposition is part of the notion of sustainable development—the proposition that the pursuit of economic growth should not compromise the aspiration for a clean human environment.<sup>10</sup> The United Nations' "Millennium Development Goals," which have been endorsed by almost every member country of the United Nations, also support the idea that increasing trade capacity and flow of goods for developing countries is an important piece of the puzzle.<sup>11</sup>

There have also been efforts to respond to the call for sustainable development within the WTO. For example, a number of the WTO instruments, including the 1994 WTO Agree-

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<sup>7</sup> See, John Ligard, *Agricultural Subsidies and Environmental Change* in ENCYCLOPEDIA OF GLOBAL ENVIRONMENTAL CHANGE (2002) available at <http://www.wiley.co.uk/egec/pdf/GB403-W.PDF>.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., T. Ademola Oyejide, *Trade Reform for Economic Growth and Poverty Reduction* (July 2003), available at <http://www1.worldbank.org/devoutreach/july03/article.asp?id=204>.

<sup>10</sup> The Environmental Benefits of Removing Trade Distortions: The Win-Win Situations, [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_backgrnd\\_e/c4s1\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c4s1_e.htm) (last visited Apr. 14, 2006)

<sup>11</sup> UN Millennium Development Goals, <http://www.un.org/Millenniumgoals> (last visited Apr. 14, 2006).

ment,<sup>12</sup>the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)<sup>13</sup> —as well as the original General Agreement on Tariffs and Trade (GATT)<sup>14</sup> — reflect environmental concerns. These agreements, as well as the preamble to the new WTO Agreement, and as well as WTO institutional arrangements, such as the work of the Committee on Trade and Environment, demonstrate that to a certain extent, the WTO has tried to address environmental issues.<sup>15</sup> Further, in 1995, when the WTO launched the Doha round of negotiations, there were specific provisions in the Doha Declaration<sup>16</sup> dealing with the need to integrate environmental and developmental matters in global trade.

How, then, does the World Bank try to address the potentially adverse impacts of trade on the environment? Providing approximately US\$ 20 billion per year in loans and credits, the World Bank finances investments in developing countries, including infrastructure, health and education.<sup>17</sup> It also operates through development policy loans, often referred to in the past as structural adjustment lending.<sup>18</sup> These policy loans may include requirements that condition their disbursement on the borrower government agreeing to implement certain actions that may include national policy changes. Other international financial institutions (IFIs) follow similar types of practices, and efforts to harmonize the approaches among these institu-

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<sup>12</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>13</sup> The WTO Agreement 1994, WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Apr. 15, 1994, 1867 U.N.T.S. 493, available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm).

<sup>14</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 3715, 55 U.N.T.S. 194. See, e.g. Article XX(b) and (g).

<sup>15</sup> See generally Mandate of the Committee on Trade and Environment (1994), [http://www.wto.org/english/tratop\\_e/envir\\_e/issu1\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/issu1_e.htm) (last visited Apr. 14, 2006).

<sup>16</sup> World Trade Organization, Ministerial Declaration [Doha Declaration], Nov. 14, 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

<sup>17</sup> See generally The World Bank, <http://www.worldbank.org> (follow "About" hyperlink).

<sup>18</sup> See generally Investment and Development Policy Lending, <http://www.worldbank.org> (follow "Projects & Operations" hyperlink; then follow "Financing Instruments" hyperlink; then follow "Investment & Development Policy Lending" hyperlink) (last visited Apr. 14, 2006).

tions have sharpened in the past years, culminating in the Paris Declaration on Harmonization. Once more, to some members of the environmental and labor community, these financial flows from IFIs have sometimes resulted in policy changes or large-scale investments that seek to enhance economic growth at the expense of the environment or at the expense of the poor.<sup>19</sup>

To address some of these concerns, the World Bank has a number of 'safeguard' policies for investment projects, and has required consideration of environmental, social and poverty issues to address their potential impacts from development policy loans.<sup>20</sup> These safeguard policies and other policy measures help regulate aspects of the manner in which the World Bank carries out its investment lending. So, for example, all World Bank projects proposed for financing are subject to the World Bank's policy on environmental assessment.<sup>21</sup> As an example of how that and related safeguard policies work, this means that the World Bank will not undertake a project affecting natural habitats, without first considering the type of habitat and, where necessary, avoiding certain projects that will significantly degrade any critical habitat. It also means that if the World Bank finances a project that involves the use of agricultural pesticides or fertilizers, the borrower country must have a plan that deals with the potential impacts of those products.<sup>22</sup>

A recent interesting related policy development occurred earlier this year when the Bank revised its policy on Indigenous Peoples.<sup>23</sup> This policy has been frequently referred to in the debate concerning how international finance institutions should address the impacts of their investments relating to extractive industries.<sup>24</sup>

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<sup>19</sup> See, e.g., American Lands Alliance, *The World Bank: Global Forest Threat*, <http://www.whisperedmedia.org/wbforests.html> (last visited Apr. 14, 2006)

<sup>20</sup> *The World Bank Operational Manual: Operational Policies, Environmental and Social Safeguard Policies—Policy Objectives and Operational Principles* (July 2005), <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/023c7107f95b76b88525705c002281b1/2e19e5907aaa40e785257031005f083e?OpenDocument>. (last visited Apr. 14, 2006)

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> The World Bank Group launched the "Extractive Industries Review" in 2001 to examine its future role when involved with oil, gas, coal and other mining

Some of the factors that could be seen as precipitating the Extractive Industries Review (EIR) included the conflict between the Ogoni People of Nigeria and the Nigerian Government concerning oil extraction operations carried out for Royal Dutch Shell. Leading Ogoni tribal leaders protesting against the impacts of the oil operation were executed by the Nigerian government.<sup>25</sup> This led to a significant global outcry about the negative impacts of extractive industries on the poor, indigenous peoples, and the environment.<sup>26</sup> While the World Bank was not involved in that project, the World Bank Group (including the World Bank Group private sector arm, the International Finance Corporation) commissioned a review of extractive activities. The EIR was headed by the former Environment Minister of Indonesia, Dr. Emil Salim.<sup>27</sup> Dr. Salim had other non-Bank staff participating and assisting him in this process. The "EIR" Group recommended that there should be no extractive industry— no mining, no petroleum extraction— without the full, prior and informed consent of local people to the project.<sup>28</sup> The conclusion of the extractive industry review generated an extensive debate within the World Bank Group about how to address this and other recommendations, including issues pertaining to renewable energy, disclosure, and public participation. Eventually, a formulation to address this recommendation was adopted and reflected in the World Bank's Indigenous Peoples policy.<sup>29</sup>

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operations. The review sought to examine impacts of these operations and then look at them in the context of the World Bank Group "mission of poverty reduction and the promotion of sustainable development."

<sup>25</sup> For an in-depth account of the Ogoni struggle see Chinedu Reginald Ezetah, *International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L & COMP. L. REV. 811, 813 (1997).

<sup>26</sup> See, e.g., Judith Atiri, *Ken Saro-Wiwa: A Martyr for Peace in Nigeria*, THE NONVIOLENT ACTIVIST, May-June 2004, available at <http://www.warresisters.org/nva0504-1.htm>.

<sup>27</sup> Extractive Industry Reviews, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20169065~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited Apr. 14, 2006).

<sup>28</sup> Implementation of the Management Response to the Extractive Industries Review (Dec. 9, 2005), available at <http://www.worldbank.org> (follow "Topics" hyperlink; then follow "Oil, Gas, Mining & Chemicals" hyperlink; then follow "Extractive Industries Review" hyperlink) (last visited Apr. 14, 2006).

<sup>29</sup> See *supra* note 18.

A recent article highlights the impact of mining in developing country communities. The article stated some stunning statistics—that it can take thirty tons of gross extraction, and the use of thousands of gallons of cyanide solution, to extract just one ounce of gold.<sup>30</sup> The article also discussed the disappointments of Indigenous Peoples and local groups in the share of revenue from these operations.<sup>31</sup> This clearly points to a real connection between environmental impact and the global trade in natural resources.

Another area where the environment-trade nexus may face significant challenges in the near future involves the approach to address the impact from greenhouse gases (GHG). In that light, can we use ‘green-financing’ to reduce the impact of fossil fuels on the atmosphere? The World Bank, and now other banks, have set up funds that enable companies or governments who want to demonstrate a commitment to reducing emissions on a global basis, to purchase emission reductions from projects in developing countries.<sup>32</sup> As a result, financial flows are now taking place from the North to developing countries in the South to reduce greenhouse gas emissions, some of which involved the “trade” in GHG emissions. If governments develop legislation or trade practices that favor products or trade with Kyoto Protocol-compliant parties, an interesting future law school exam question might be this: Could a non-party to the Kyoto Protocol claim it was improperly subject to discriminatory treatment under WTO rules if it claims discrimination because its goods are not given the same treatment because they are produced in a more energy-intensive environment (i.e., use more greenhouse gases) than in countries that are party to the Kyoto Protocol?

Within the WTO there has already been a series of environmentally-related disputes.<sup>33</sup> Six of these occurred under the GATT, and three under the WTO,<sup>34</sup> including the well-known

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<sup>30</sup> Jane Perlez & Kirk Johnson, *Behind Gold's Glitter: Torn Lands and Pointed Questions*, N.Y. TIMES, Oct. 24, 2005, at A1.

<sup>31</sup> *Id.*

<sup>32</sup> See The World Bank Carbon Finance Unit, <http://www.carbonfinance.org> (follow “About Us” hyperlink) (last visited Apr. 14, 2006).

<sup>33</sup> Environmental Disputes in GATT/WTO, [http://www.wto.org/English/tratop\\_e/envir\\_e/edis00\\_e.htm](http://www.wto.org/English/tratop_e/envir_e/edis00_e.htm) (last visited Apr. 14, 2006).

<sup>34</sup> See *id.*



"Shrimp-Turtle" dispute.<sup>35</sup> One of the more recent and well-known disputes is known as the "Beef-Hormone" case.<sup>36</sup> In that suit, the U.S. cattle industry requested that the U.S. government bring a claim on their behalf against the European Union (EU) for precluding the import of beef treated with certain hormones.<sup>37</sup> The United States prevailed.<sup>38</sup> The United States also brought a case against the EU concerning its treatment of products containing genetically-modified organisms; that case has not yet been decided by the WTO.<sup>39</sup>

The economic impact of these cases can be quite severe. In one sense, it all began with the U.S. "Tuna-Dolphin" case.<sup>40</sup> U.S. law prohibited the taking of fish harvested using "non-dolphin-friendly" commercial fishing techniques.<sup>41</sup> The law similarly prohibited the importation into the U.S. of marine mammals harvested using "non-dolphin-friendly" commercial techniques, and this had an effect on U.S. trade, especially with Mexico.<sup>42</sup> Fishing, and the control of marine and water resources has often been a source of controversy between the United States and Mexico. The question that Mexico and other developing countries have raised in these cases is whether the United States is pursuing a policy simply to protect its own fish-

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<sup>35</sup> Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998). Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). For an overview of the "Shrimp Turtle" case see [http://www.wto.org/English/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/English/tratop_e/envir_e/edis04_e.htm).

<sup>36</sup> Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R (Aug. 18, 1997). Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998). For an overview of the "Hormones" case see [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also Appellate Body Finds EC Hormone Ban Inconsistent with WTO Obligations under SPS Agreement (Jan. 15, 1998) (on file with USDA), available at <http://www.usda.gov/news/releases/1998/01/0020>.

<sup>39</sup> Request for Consultations by the United States, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/1 (May 20, 2003). For an overview of the pending case, see [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds291\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm).

<sup>40</sup> The "Tuna-Dolphin" case was brought by Mexico against the United States under the old GATT dispute settlement procedure. The WTO panel report was never adopted, and the parties proceeded to address their differences outside the formal procedures. See [http://www.wto.org/English/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/English/tratop_e/envir_e/edis04_e.htm).

<sup>41</sup> Marine Mammal Protection Act of 1972, 16 U.S.C. § 1385 (2006).

<sup>42</sup> *Id.*

ing fleet or whether it is engaged in legitimate environmental protection.

The first GATT case found in favor of Mexico that the measures instituted by the United States ran afoul of GATT's provisions against trade discrimination, and found that the GATT exceptions did not allow the United States to raise environmental arguments as a defense.<sup>43</sup> But in 1995, after the WTO was launched and the world's trade dispute process was restructured, the appellate body of the WTO was asked again to look at a similar dispute, known as the "Shrimp-Turtle" case.<sup>44</sup> The Appellate Body concluded that it was legitimate to refer in WTO disputes to the international obligations member states agree to under multi-lateral environmental agreements (MEAs); these, like the GATT, are valid and concurrent international law instruments.<sup>45</sup> According to the Appellate Body, however, the United States had failed in that instance to engage thoroughly in dialogue with those countries it identified as potentially breaching U.S. environmental regulations.<sup>46</sup> To the Appellate Body, it was acceptable to put environmental protections in place, so long as the United States treated all trading partners equally; the United States, could not (as it in fact did do) offer technical assistance to some countries but not others.<sup>47</sup> As a result, the United States was required by the GATT to address and rectify this issue once more.

The "Shrimp-Turtle" case stands for the proposition that GATT Article XX(b) and (g) exceptions may be used to protect national exhaustible natural resources, but not in a discriminatory fashion. The result of this ruling meant that the WTO appellate body ultimately respected the international obligations assumed by the United States under the Convention on International Trade and Endangered Species (CITES).<sup>48</sup> Many in the environmental community were concerned because they felt

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<sup>43</sup> *Id.*

<sup>44</sup> *Supra* note 34.

<sup>45</sup> Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 185, WT/DS58/AB/R (Oct. 12, 1998).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* ¶¶ 172, 175, 186.

<sup>48</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, available at <http://www.cites.org/eng/disc/text.shtml>.

that multilateral environmental agreements, such as CITES, should be accorded the same deference in WTO dispute panels as the obligations member countries undertook under the GATT.<sup>49</sup> The “Shrimp-Turtle” decision was somewhat comforting to environmentalists, because it found that the United States could invoke the exception even without being party to an MEA, so long as it acted in a non-discriminatory fashion. In the context of multilateral agreements and trade, this point is key. Parties involved in economic activity need to act in a non-discriminatory manner when they apply environmental laws in their dealings with trading partners. Unilateralism tends to disguise arbitrary discrimination, which can undermine the multilateral trading system.

More recently, the United States has entered into a number of bilateral and regional trade agreements. The GATT and WTO authorize regional agreements, such as NAFTA, as sub-agreements to the WTO.<sup>50</sup> Included within NAFTA and like agreements, are environmental accords that are important to consider when looking at the impact of trade. However, the concern of some trade scholars and of some in the environmental community is that bilateral agreements may not offer the same kind of protection that one can have in a multilateral environmental agreement. These opponents feel that bilateral accords are less protective because the playing field may not be as level, or that they could generate proliferation of different standards of treatment and ultimately dilute the strength that comes from the uniformity offered by a global system of trading rules.<sup>51</sup> Some supporters of these bilateral agreements contend that they provide an opportunity to, in fact, expand the scope of environmental provisions attached to trade provisions.<sup>52</sup>

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<sup>49</sup> See Amicus Brief to WTO: Shrimp-Turtle Dispute (Sept. 1997), <http://www.field.org.uk/files/shrimpbrief.pdf>

<sup>50</sup> Marrakesh Agreement Establishing the World Trade Organization, *supra* note 12, art. V, XXIV, ¶¶4-10.

<sup>51</sup> See, e.g., Proliferation of Bilateral and Regional Free Trade Agreements May Threaten Multilateral Talks (Aug. 2003), at [http://www.globalization101.org/news.asp?NEWS\\_ID=57](http://www.globalization101.org/news.asp?NEWS_ID=57).

<sup>52</sup> See generally U.S. Agency for Int'l Development—Bilateral Agreements, [http://www.usaid.gov/our\\_work/environment/climate/policies\\_prog/joint\\_statements.html](http://www.usaid.gov/our_work/environment/climate/policies_prog/joint_statements.html) (last updated July 14, 2005).

It is also important to note that some multilateral environmental agreements do, indeed, contain trade measures. For example, CITES,<sup>53</sup> the Montreal Protocol,<sup>54</sup> the Convention on Prior Informed Consent,<sup>55</sup> and the Basel Convention on Transboundary Movements of Hazardous Waste<sup>56</sup> have provisions that deal with the trade in those regulated goods that fall within the mandate of the relevant treaty. These multilateral environmental agreement provisions highlight the question asked by many in the environmental community during the launch of the WTO Doha Round in 1995: What if MEA-related disputes are brought to the WTO system—should the WTO opine on the relationship between the WTO and MEAs? For example, if a member country was to bring a dispute to the WTO under the SPS Agreement (such as what happened in “Beef-Hormone”), and the panel or the appellate body applied the risk assessment test set out under that agreement, what would happen to the precautionary approach or principle claimed to be enshrined in some multilateral environmental agreements?

The environmental community wanted to resolve this question as part of the Doha round. The difficulty in seeking to resolve this matter, of course is that there is no universal membership between parties to the WTO and parties to MEAs. As a result, disputes could conceivably arise between a country that is a party to the WTO and a country that is not party to the WTO (but which is a party to a multilateral environmental agreement) and vice-versa. How the panel or appellate body would resolve disputes of this kind has been the source of speculation.<sup>57</sup> For various reasons, this issue was not included at the Doha round.

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<sup>53</sup> CITES, *supra* note 48, art III-V.

<sup>54</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, art. IV, available at <http://www.globelaw.com/Climate/montreal.htm>.

<sup>55</sup> The Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 38 I.L.M. 1, U.N. Doc. UNEP/FAO/PIC/CONF/5, art. X-XI, available at <http://www.pic.int/en/ConventionText/ONU-GB.pdf>.

<sup>56</sup> Basel Convention, *supra* note 4, art. IV-XI.

<sup>57</sup> As this presentation was being prepared, the WTO Dispute Panel addressing the Dispute between the United States and the European Union concerning genetically modified organisms had the potential to shed light on this issue. This possibility is because of the claim by the European Union that the Panel should

An important and interesting example of the relationship between trade and the environment is the area of invasive plant species. The tremendous damage caused in the Great Lakes region by zebra mussels that came into the United States when unknowingly collected abroad by ocean-going vessels, and discharged in ballast water highlights the connection.<sup>58</sup> Other invasive types of species have also entered into U.S. domestic ecosystems; most recently, the snakehead fish in Maryland.<sup>59</sup> The snakehead was brought to the United States from Asia as an ornamental fish, and has now been discovered in the Potomac River. The snakehead is able to out-compete local species, thereby eliminating native species from their local habitat. The Maryland Department of the Environment has been dumping large quantities of Rotenone (which is a highly toxic poison) in some surface-water bodies to rid the waters of the snakehead.<sup>60</sup> Studies have indicated that there is an annual adverse global impact of \$1.4 trillion as a result of the harm caused from invasive species.<sup>61</sup> If we are advocating increased trade liberalization, this is will be accompanied by an increased movement of goods, and thus the likelihood of such invasive species will increase.

Returning to the point about MEA relevance in the WTO regime, there has been a lot of legal debate and many interesting law review articles about what could happen to multilateral environmental agreements if all cases are brought under the

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apply two international agreements to which the United States is not a party – the Convention on Biological Diversity, and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. *See generally for treatment of this subject*, Environment Backgrounder: The Relationship between MEAs and the WTO: General Debate, [http://www.wto.org/english/tratop\\_e/envir\\_backgrnd\\_e/c5s1\\_e.htm](http://www.wto.org/english/tratop_e/envir_backgrnd_e/c5s1_e.htm); Report on Trade and Multilateral Environmental Agreements, Marcus Knigge (June 2005), <http://www.ecologic.de/download/projekte>. For a series of articles related to this topic, see <http://www.trade-environment.org/page/theme/meas.htm>.

<sup>58</sup> Great Lakes— Invasive Species, <http://www.epa.gov/glnpo/invasive> (last visited Apr. 14, 2006).

<sup>59</sup> U.S. Fish and Wildlife Service, Snakeheads— The Newest Aquatic Invader (July 2002), <http://www.dnr.maryland.gov/fisheries/education/snakehead/snakeheadfactsheetedited.pdf>.

<sup>60</sup> DNR Completes Rotenone Application; More Than a 120 Snakehead Fish Dead (Sept. 4, 2002), <http://www.dnr.state.md.us/dnrnews/Pressrelease2002/090502.html>.

<sup>61</sup> Convention on Biological Diversity, Invasive Alien Species Introduction, <http://www.biodiv.org/programmes/cross-cutting/alien/default.shtml#notes>.

WTO regime.<sup>62</sup> But, as discussed, there have been really very few cases on this point. Only twenty of the MEAs contain trade provisions and no dispute has strictly addressed the MEA itself. CITES was referred to in the U.S. in the “Shrimp-Turtle” case; however, CITES was not the ultimate basis for deciding whether or not U.S. conduct was discriminatory.<sup>63</sup>

Should environmental goals be incorporated into the rules of the WTO? Does the question even need to arise? As the appellate body decision in the U.S. “Shrimp-Turtle” case pointed out, WTO law needs to be consistent with international law.<sup>64</sup> One argument that environmental goals should be incorporated into the WTO’s decision-making is that trade should always occur in an environmentally sustainable manner, and while MEAs generally have provisions addressing potential disputes between the parties, only the WTO and its sanctions-based dispute settlement system is genuinely established to be effective in bringing about compliance with assumed obligations.<sup>65</sup> One benefit to having the WTO handle these kinds of disputes is that it gives nations a greater reason to work collaboratively.<sup>66</sup> Moreover, having WTO dispute settlement bodies resolve disputes can reduce the potential for forum shopping. By the same token, however, environmentalists have a concern that the strength of WTO dispute-settlement procedures will compel parties only to seek dispute resolution through the WTO system. Parties in the WTO system may then ‘lock-in’ to WTO dis-

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<sup>62</sup> See *supra* note 55.

<sup>63</sup> See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

<sup>64</sup> “Shrimp-Turtle” held that because the GATT is to be applied in a manner consistent with the Vienna Convention on the Law of the Treaties, the panel or appellate body will apply all relevant international law when settling a dispute between member states, including international environmental law. See *id.* ¶¶ 114, 131, 158.

<sup>65</sup> See, e.g., The Center for International Environmental Law and the WTO, [http://ciel.org/Tae/Trade\\_WTO.html](http://ciel.org/Tae/Trade_WTO.html) (last updated Apr. 26, 2005).

<sup>66</sup> Skeptics can point themselves to the-anything-but-harmonious relations between the U.S. and the EU in dealing with the Airbus and Boeing matter. The United States Mission to the European Union, U.S. Requests WTO Dispute Settlement Panel over Airbus (May 3, 2005), <http://www.useu.be/Categories/AircraftSubsidies/May3005USAirbusWTO.html>.

pute resolution, and avoid other possibly more appropriate (environmentally friendly) means of resolution.<sup>67</sup>

It is abundantly clear that it is important for the environmental community to engage with the WTO. Because the WTO remains a trade organization, the dispute resolution system that it offers will be more populated by those who are expert in trade as opposed to other disciplines. However, it is clear that there is a degree of willingness to bring in environmental and health experts as panelists and advisors. The WTO Dispute Settlement Understanding makes clear allowance for this to occur. Anecdotal information indicates that this has taken place in the decision-making on the GMO case.<sup>68</sup>

An important question remains for developing nations: how *should* they negotiate with developed countries on whether to include environmental provisions in regional or bilateral trade agreements? This was certainly one of the issues that Central American countries faced in the negotiations regarding the Central America Free Trade Agreement (CAFTA).<sup>69</sup> Do stronger environmental provisions inure to their benefit because of their ability to offer “ecosystem services”? What will be the impact on their extensive biodiversity? Some critics contend that the new agreement makes it more difficult for a country like Costa Rica to protect its biodiversity from commercial use.<sup>70</sup> But it was not only the developing countries addressing this argument. The U.S. environmental and labor community fear that the agreement will result in both a loss of environmental protection and an inequitable movement of labor services to the South.<sup>71</sup> Thus, it is striking how differently environmental

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<sup>67</sup> See, e.g., The World Trade Organization and Ecotourism— International Forum on Globalization, The WTO and Governance (Nov. 2002), <http://www.ifg.org/analysis/wto/cancun/etourvm.htm>.

<sup>68</sup> See *supra* note 36.

<sup>69</sup> Central American Free Trade Agreement, 43 I.L.M. 514 (2004). See The Ambassadors Review, CAFTA: A Narrow Passage Through Troubled Waters (Fall 2005), <http://www.americanambassadors.org/index.cfm?fuseaction=Publications.article&articleid=87> (last visited Apr. 14, 2006).

<sup>70</sup> See Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO Agreement) Article 13, “Right to seek Information.”

<sup>71</sup> See, e.g., Global Policy Forum— CAFTA’s Weak Labor Rights Protections: Why the Present Accord Should be Opposed (Mar. 2004), <http://www.globalpolicy.org/soecon/trade/2004/04caftahrw.htm>.

groups and the government view the same agreement, with most environmental groups decrying CAFTA as a weakening of the environmental provisions contained in the NAFTA and its environmental side accord, while the government claims CAFTA is a new and improved approach toward the environment.

Further, with the leverage that a large developed country can exert over a small country seeking to export its limited array of products, an important question remains unanswered: Is it useful to partake in a single-undertaking trade negotiation? Some in small-island developing states have argued that WTO participation can actually leave them worse off economically than if they had never joined the WTO system because of the existing preferences they would have to give up.<sup>72</sup> One has to look at both development aims of that country, and the future for specific export products in order to ascertain the results and whether the restrictions and benefits of a trade agreement will be worthwhile. Where smaller countries must give up certain preferences, or expect that they will have to open up natural resources at a faster pace, there may be reason for prudent measures.

The argument that trade liberalization serves as a rising tide that lifts all boats is a powerful one. As often presented within the World Bank, this argument analyzes macroeconomic goals and whether the increased trade flow is able to “trickle down” the benefits through society, an underlying theme to Doha in 1995.<sup>73</sup> It was argued that the trading system in place since 1947 helped break down trade discrimination between wealthy countries and those countries that required assistance. Indeed, trade flows have increased and greater wealth has emerged in important markets such as in China, Russia, or India.<sup>74</sup> On the other hand, the disparity between rich and poor

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<sup>72</sup> See, e.g., Michael Witter et al., *Measuring and Managing the Economic Vulnerability of Small Island Developing States* (May 2002), available at [http://www.sidsnet.org/docshare/other/Jamaica\\_rt\\_Economic\\_Vulnerability-Paper.doc](http://www.sidsnet.org/docshare/other/Jamaica_rt_Economic_Vulnerability-Paper.doc).

<sup>73</sup> See, e.g., Thomas W. Hertel & L. Alan Winters, *Poverty Impact of a WTO Agreement: Synthesis and Overview* (Aug. 11, 2005), available at [http://sitere.sources.worldbank.org/INTRANETTRADE/Resources/Topics/285683-1109974429289/Chapter1\\_OverviewFinal.pdf](http://sitere.sources.worldbank.org/INTRANETTRADE/Resources/Topics/285683-1109974429289/Chapter1_OverviewFinal.pdf).

<sup>74</sup> See *id.*; see also *supra* note 2 (Bhagwati's defense of globalization with regard to developing countries).



has increased in many developing nations.<sup>75</sup> Ultimately there appears to be a greater impact on the poor, and a demonstrable inability to distribute the benefits of trade liberalization as equally as is hoped.

The key question is how to strike the right balance between economic, environmental and social protections. The World Bank was recently involved in the Millennium Ecosystem Assessment Study, which looked at the state of the world's ecosystems. Using scientific studies from around the globe, it indicated that most of our ecosystems are severely stressed.<sup>76</sup> Although globalization has demonstrated an increased movement and flow of goods, so too has environmental stress increased. It remains crucial that we look closely at these social and environmental indicators when considering the relationship between economic growth and trade and the distribution of benefits and impacts.

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<sup>75</sup> See, e.g., 'Trade Liberalization Statistics—Poverty, [http://www.gatt.org/trastat\\_e.html#poverty](http://www.gatt.org/trastat_e.html#poverty).

<sup>76</sup> Millennium Ecosystem Assessment, Experts Say that Attention to Ecosystem Services is Needed to Achieve Global Development Goals (Mar. 30, 2005), <http://www.maweb.org/en/Article.aspx?id=58>.