

Fisheries Conservation and Trade Rules

*Ensuring That Trade Law Promotes
Sustainable Fisheries*

**A Report by
David R. Downes and Brennan Van Dyke**

CIEL - Center for International Environmental Law

The Center for International Environmental Law (CIEL) is a non-profit organization founded in 1989 to bring the energy and experience of the public interest environmental law movement to the critical task of strengthening, developing and implementing international environmental law, policy, and management throughout the world. CIEL works with non-governmental organizations, governments, and international agencies to promote sustainable societies through law, to incorporate fundamental principles of ecology and democracy into law, to support public interest movements around the world, and to educate and train public-interest-minded environmental lawyers. Program areas include biodiversity and wildlife, the global commons, international financial institutions, law and communities, trade and environment, capacity building, and a joint research program with the American University's Washington College of Law. For more information about CIEL, please view our web page or write to us to request an annual report.

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PREFACE

Citizens of both developed and developing countries want environmental quality. They want an environment that supports their health and the health of their children. They want to know that their natural heritage of resources like fisheries and forests will not be exhausted, but will continue to support prosperity and a high quality of life for them and their children. It is now understood that environmental protection and sustainable use of resources are integral elements of long-term prosperity.

At the same time, the economies of the large majority of countries, whether developed or developing, are increasingly dependent upon the flow of trade within the context of a global economy. Liberalized trade can stimulate creation of jobs, increase efficiency of production, and lower prices of consumer goods. Most countries look to the multilateral trading institutions and rules of the WTO to strengthen the stability and fairness of the world trading system. The WTO's promise of enhanced access to markets is seen as a key ingredient for national development.

The question, therefore, is not whether trade or environment prevails. The question is, how can our societies effectively achieve both environmental and trade goals? Part of the answer is that measures for environmental protection that affect trade must be designed in light of trade concerns. Equally important, measures for liberalizing trade that affect environment or environmental policy must be designed and implemented consistent with environmental goals. This paper identifies steps that are needed to make these two evolving systems of law and policy mutually supportive.

For example, the authors argue that countries must retain the power to impose trade measures, such as import bans, to protect marine living resources. At the same time, the authors emphasize that the power to impose trade-related environmental measures must be carefully limited according to rules that prohibit protectionist measures and arbitrary barriers to market access. Their arguments address legitimate concerns of both developed and developing countries, and take into account both trade and environmental policy goals.

This report seeks to provide similarly nuanced answers for a range of trade and environment issues that arise in the context of the conservation of fisheries. Greenpeace and CIEL are pleased to present this contribution to a reasoned resolution of trade and environment tensions, as a step toward addressing the global crisis of fisheries.

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Executive Summary

The world's fisheries are in crisis. Approximately two-thirds of the world's marine fisheries are exploited at or beyond their capacity for sustainable production, and some have already collapsed. Fishing activities are also harming target species, non-target species, habitats and ecosystems. To avert this crisis, the governments of the world must implement ecologically sustainable fisheries management practices, such as those advocated by Greenpeace (included as Annex I).

The market for fish is increasingly a global market. Exports of fishery commodities constitute some 40% of total catch by weight, suggesting that trade and trade policy have significant implications for fisheries conservation. Not surprisingly, some of the most prominent disputes involving trade and environment have involved marine products. Yet, there has been little systematic study of the linkages between trade and fisheries.

This report provides an initial overview of international trade law and trade-related policy measures that could help implement ecologically responsible fisheries practices. The report explains how current trade and investment rules could impede or support the following trade-related conservation measures:

- The regulation of fisheries products to promote sustainable harvesting;
- The implementation of international and regional agreements that authorize the use of trade measures to promote sustainable fisheries management practices;
- Other uses of trade measures to promote sustainable consumption of fisheries products;
- The use of eco-labeling to inform consumers of environmental impacts of fisheries products;
- The elimination of subsidies that promote overfishing and other environmentally harmful practices;
- The establishment of conditions on foreign direct investment to enhance a country's capacity to protect fisheries;
- The regulation of foreign access to fisheries to implement sustainable fisheries management requirements;
- The application of the precautionary approach in regulating fisheries products.

For each of these issues, the report identifies potential conflicts and recommends steps to integrate conservation and trade policy objectives.

Trade-Related Conservation Measures Based on Non-Product Related Criteria.

Conflicts between principles for ecologically responsible fisheries and trade rules

typically arise when regulations are applied to fisheries products as a means for achieving ecologically responsible fisheries practices. Regulatory distinctions among products based upon non-product related criteria – in particular distinctions based upon production and processing methods (PPMs) – will be an essential part of the implementation of sustainable fisheries principles in a market economy.

Conflicts arise because trade rules have generally been interpreted to forbid the regulation of imported products according to PPM or other non-product related criteria. From the trade policy perspective, a blanket PPM prohibition is a simple rule for guarding against protectionist regulations of imports and what has been called “eco-imperialism,” where a country conditions access to its markets upon compliance with specific environmental standards, putting economic pressure on other countries to match those standards or lose market access. The problem is that the PPM prohibition is over-inclusive and could preclude the use of important conservation measures.

One legal mechanism for allowing PPM distinctions for environmental purposes while acknowledging trade policy concerns is Article XX of the GATT, which provides for general exceptions to GATT obligations. We recommend that Article XX be interpreted to define specific conditions under which countries may apply PPM-based distinctions, by reference to the following factors:

- Whether the measure is based on an internationally or regionally recognized standard developed through consultation with stake-holders from different regions.
- Whether a multilateral agreement or other international instrument recognizes the environmental benefits of taking the measures being enforced through the trade measure.
- Whether the nation or bloc imposing the measure made prior good faith efforts to stimulate international agreement on the need for such a measure.
- Whether the nation or bloc imposing the measure offered appropriate financial and technical assistance to developing countries and their industries seeking to meet the standards called for by the measure.
- Consistent with the principle of common but differentiated responsibilities, whether the measure makes other appropriate provision for developing countries to achieve compliance.
- Whether the measure focuses on the objective of managing domestic consumption of the regulating country rather than on changing policies of other countries.
- Whether the measure avoids singling out an environmental problem peculiar to some foreign producers, or to foreign as opposed to domestic producers.

Implementing Conservation Trade Measures Under Multilateral and Regional Fisheries Instruments

Conservation trade measures implemented pursuant to multilateral environmental agreements (MEAs) or regional fisheries management organizations (RFMOs) in contrast to

measures initiated by a single nation or economic bloc, should be presumed to qualify for Article XX protection from general WTO rules. MEA and RFMO measures should also receive the deference provided to international standards under the Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade. Such measures are unlikely to reflect protectionist or “eco-imperialist” motivations, having been negotiated and elaborated in multilateral processes in which many different countries and blocs of countries had decision-making power. MEA and RFMO negotiators can also take into account the best available scientific information through sophisticated international institutions aimed at translating scientific evidence into policy and legal response.

MEAs of particular interest to the implementation of principles for sustainable fisheries management include the U.N. Convention on the Law of the Sea (UNCLOS), the U.N. Agreement on Straddling Stocks and Highly Migratory Fish Stocks, the Food and Agricultural Organization’s Code of Conduct for Responsible Fisheries, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), the Convention on Biological Diversity, and the International Convention for the Regulation of Whaling.

RFMOs, like MEAs, screen out protectionist and eco-imperialist motivations, as their negotiators also represent a broad range of relevant interests. And RFMOs embody the international community’s best effort to design conservation regimes based on the relevant science. The RFMOs’ rulemaking and enforcement powers are recognized under the Straddling Stocks Agreement, an international agreement elaborated under UNCLOS. UNCLOS has been ratified by over 100 countries and is also generally recognized as customary international law on living marine resources.

Defining Criteria for the Use of National Trade Measures

The imposition of measures defined by national authorities can serve a useful function by catalyzing international action and reducing the environmental impacts of domestic consumption. Yet such measures raise serious questions of equity between trading partners, especially between developed and developing countries.

Governments need to develop a set of criteria along the lines of those enumerated above for evaluating the conditions under which national and supranational trade-related conservation measures are legitimate. These criteria should serve both for purposes of policy (defining the conditions under which such measures are appropriate) and for purposes of law (evaluating whether a measure, if not authorized under a multilateral agreement or RFMO, satisfies the requirements of WTO rules).

Applying Ecolabeling and Certification to Traded Fisheries Products

Ecolabeling, or placing environmental information on consumer packaging, is a market-based mechanism that enables “green” producers to communicate to “green” consumers. It responds to the rights of consumers to be informed about the products they buy and has the potential to create economic incentives for green production through gains in market share and

possibly price advantages. Ecolabeling, if mandated by government regulations, clearly comes within the scope of WTO rules. Private, voluntary labeling schemes, too, appear to be indirect targets of certain trade disciplines, in particular the obligations under the TBT Agreement's Code of Good Practice.

Because ecolabeling for fisheries products would include PPM-based distinctions, there is the potential for conflict with WTO rules. Yet, ecolabeling is perhaps the least coercive market-based incentive for conservation available. If trade policy were to block this minimal step toward correcting market failures represented by externalized costs, it would represent a tremendous set back for sustainable development and would risk a backlash against the multilateral trading system.

International cooperation to develop criteria for ecolabels is, however, necessary to address the understandable fears of countries that ecolabeling could sometimes operate as a disguised form of protectionism or arbitrary discrimination. Ecolabeling schemes should not operate as barriers to market access, but rather as measures to increase access to green consumer markets and to encourage truly sustainable fisheries and the long term availability of aquatic resources.

Eliminating Destructive Subsidies While Enhancing Positive Incentives

Government subsidies to the fishing industry encourage the expansion of fishing capacity and are widely recognized as a major underlying cause of the overexploitation of fisheries. Urgent action is needed to reduce or eliminate subsidies and WTO rules could provide an avenue for doing so. Although the WTO Subsidies Agreement has yet to be interpreted, its provisions appear to prohibit many of the practices that many WTO Members currently use to subsidize their fishing fleets.

The destructive impacts of fisheries subsidies are of concern to many countries. Discussions on reductions in these subsidies are likely to intensify in the WTO. The advantage of holding such discussions within the WTO is that WTO agreements employ stronger enforcement mechanisms, in the form of trade sanctions, than environmental agreements. On the other hand, the WTO has little if any expertise on fisheries conservation, operates largely without effective public consultation, and has almost no institutional commitment to sustainable development or conservation. To increase access to relevant information and expertise, and to ensure that conservation objectives are fully taken into account, the discussions should be undertaken in partnership with other institutions, in particular the FAO, and with input from others such as the Convention on Biological Diversity.

Within these discussions, governments should examine the full range of subsidies issues. This should include the question whether governments confer a subsidy when they give private businesses access to publicly-owned fisheries at below market value. Another important issue involves agreements providing for developed country vessels to gain access to fisheries in the EEZs of developing countries, where access is underpriced or fees are subsidized.

Some government support programs, such as compensation plans to help workers who are displaced by fishing capacity reductions or who are affected by transitional programs, could encourage the reduction of excess fishing capacity. In the context of talks on fisheries subsidies, it will be important to develop a typology of positive measures that should be permitted under current and future trade-disciplines. Yet, even pro-environmental subsidies, if implemented on a national scale within the context of a global marketplace, risk distorting prices to the point of making the same environmental practices in poor countries uncompetitive. As a rule of thumb, it is better to advocate for an international framework for subsidies.

Addressing Conservation Issues Relating to Investment Liberalization

Foreign direct investment (FDI) has significant environmental impacts. These impacts result not from the transfer of capital itself, but from the activities supported by the investment, such as the construction of a dam or the expansion of a fish processing plant. The environmental dangers are acute where investment occurs in countries without the legal, institutional or technical capacity to regulate the scale of economic activity that typically accompanies an influx of foreign capital.

Currently, OECD governments are seeking to negotiate a multilateral agreement on investment (MAI), and WTO members are likely to begin informal talks on investment liberalization in the Summer of 1998. Unfortunately, sustainable development goals remain outside the current terms of the intergovernmental debate. Rather, talks focus exclusively on expanding the rights of investors, with no consideration of investor responsibilities. Any agreements coming out of these talks should impose minimum standards on multinational corporations to ensure that the activities supported by their investment will promote sustainable development.

Not only does the current draft of the MAI miss the opportunity to direct private investment toward sustainable projects, but obligations currently included in the MAI would cause serious problems for fisheries conservation. The problems fall into three categories:

- The **national treatment** provision requires countries to treat foreign investors as they do domestic investors. This rule could reduce countries' power to provide limited access to fisheries only to nationals that historically have depended on the particular resource for subsistence.
- The **expropriation** provision requires government compensation for expropriation of investment, where "expropriation" is defined to include regulatory measures. Such a rule could interfere with a government's efforts to modify conditions placed upon the granting of a fishing permit according to changes in ecological conditions.
- The **prohibition on "performance requirements"** prohibits countries from requiring foreign investors to confer local benefits, such as transfer of technology, in exchange for entry. The removal of these measures severely limits developing countries' ability to use investment policy as a tool to promote sustainable social, economic or environmental objectives, through the very transfer of technology emphasized in the 1992 Rio Agreements.

As future multilateral investment agreements are developed, public awareness about

fisheries conservation measures that could be threatened by investment rules must be increased. It would also be useful to research cases where multinational corporations have made foreign direct investments in developing countries and analyze their environmental impacts, comparing them to impacts of similar investment by domestic businesses. More generally, any investment agreement should include provisions that will ensure that international investment agreements promote rather than hinder sustainable development. Future discussions on investment liberalization should reconsider previously proposed language that threatens environmental protection measures and consider additional requirements for investor responsibility to conserve natural resources like fisheries.

Biosafety: Regulation of the Impacts of Genetically Modified Organisms on the Marine Environment

The introduction of alien species and genetically modified organisms (GMOs) into the marine environment is a practice that raises concern for the stability of wild fisheries. Consistent with the precautionary approach, Greenpeace's sustainable fisheries principles oppose the manipulation of the gene pools of wild fisheries. Biosafety - which encompasses the management of the environmental impacts of GMOs introduced into the environment - must be pursued through appropriate regulation that requires GMO producers to be accountable for environmental risks.

Currently, international negotiations for a protocol on biosafety are underway within the framework of the CBD. The biosafety protocol is likely to contain provisions on measures that countries of import can impose to protect against the environmental risks of imports of GMOs. Such import control measures are also the subject of the SPS Agreement. Some governments have advocated the inclusion of a provision in the biosafety protocol that would ensure that the protocol does not alter rights or obligations under existing agreements, like the SPS Agreement. Since the SPS Agreement is unlikely to incorporate the precautionary approach in the foreseeable future, this threatens to undermine the environmental goals of the negotiations on the protocol. The biosafety protocol should not include such a "savings clause," and WTO Members should ensure that the SPS Agreement is integrated consistent with the precautionary approach and the text of the biosafety protocol that will eventually result from current negotiations.

I. Introduction

This report provides an overview of the linkages between international trade rules and fisheries management and conservation. Based upon this overview, the report identifies options for action on current and future trade issues. The goal is to inform a broad audience of trade and environmental policymakers and NGOs about the important relationships between trade rules and fisheries management. We hope to empower environmental officials so that they can promote the implementation and interpretation of trade rules in ways that support, rather than hinder, incentives for responsible fishing. At the same time, we seek to encourage trade policy makers to promote incentives for responsible fishing, through appropriate implementation, interpretation and reform of trade law.

From the 1950s to the late 1980s, the world harvest from wild fisheries multiplied five times. The world harvest from wild fisheries (excluding aquaculture) reached 102,184,000 metric tons in 1993 (FAO 1996). According to the FAO, some two-thirds of the world's marine fisheries are exploited at or beyond their capacity for sustainable production (FAO 1995b). In addition, many fisheries are threatened by land based pollution and coastal development. Fishing also has major impacts on non-target species, habitat and ecosystems.

International trade plays a major role in the fisheries sector. 1993 world exports of fishery commodities (from both wild fisheries and aquaculture, and including shellfish) were estimated to equal 40.85% of total world catch by weight (FAO 1995a, p.15). These exports were valued at over US\$4.1 billion (FAO 1995a, p. 19). Fishery products now constitute one of the most valuable exports for developing countries, surpassing coffee, bananas, tea and rice (Stone 1997, pp. 519-520).

Resolution of the fisheries crisis will require the implementation of principles for ecologically responsible fisheries along the lines of those advocated by Greenpeace (included in Annex I). The Greenpeace principles establish basic performance criteria for fisheries. For example, target stocks should be maintained at a high proportion of the biomass that would exist in the absence of fishing. Bycatch must be reduced to levels approaching zero. Destructive impacts on habitats (such as coral reefs, seagrass beds and bottom substrate) must be eliminated. Throughout, the principles highlight the precautionary approach.

The Precautionary Approach and the WTO

Sustainable fisheries will require comprehensive application of the precautionary approach, as reflected in Greenpeace's principles for ecologically responsible fisheries (see Annex I). The precautionary approach was endorsed by most of the world's governments as Principle 15 of the 1992 Rio Declaration, which provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." It has been recognized in other international agreements and cited as a principle of customary international law by international jurists.

Consistent with this, Greenpeace's principles state that fisheries activities should always be conducted so as to ensure that marine species and ecosystems will not be seriously or irreversibly harmed. A fishery should not be established until a verifiable, scientifically-based management procedure with clear objectives has been developed. New fishing methods and gear should be used only after a scientific environmental impact assessment has been produced demonstrating the new alternatives will not harm target fish populations, other associated species or their habitats.

Unfortunately, the WTO and its rules embody a viewpoint that often conflicts with the precautionary approach. The WTO exists to remove barriers to trade. From this perspective, regulations that restrict economic activities like fishing are suspect, because they can operate as trade barriers. Thus, Article XX(b) of the GATT, for instance, allows exceptions to GATT principles only if they are "necessary" to protect human, animal or plant life or health. Similarly, the TBT and SPS Agreements forbid measures that pose "unnecessary obstacles to trade."

Yet a recent WTO panel decision commented that "the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement." *EC Measures Concerning Meat and Meat Products (Hormones): Complaint by the United States: Report of the Panel*, WTO, WT/DS26/R/USA, ¶ 8.157 (August 18, 1997). Article 5.7 provides for the adoption of "provisional" measures "[i]n cases where relevant scientific evidence is insufficient." Members employing provisional measures must seek to obtain additional information for "a more objective assessment of risk" and review the measures within a "reasonable period of time." The appellate body decision reviewing the same controversy noted that the principle "is reflected also in the sixth paragraph of the preamble and in Article 3.3." (*EC Measures Concerning Meat and Meat Products (Hormones): A Report of the Appellate Body*, WTO, WT/DS26/AB/R, WT/DS48/AB/R ¶ 124 (January 16, 1998). Nevertheless, the appellate body limited the impact of the precautionary principle on WTO jurisprudence. The precautionary principle, the body cautioned, "does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (ie. customary international law) principles of treaty interpretation in reading the provision of the *SPS Agreement*." (Ibid.) It seems, therefore, that where the SPS Agreement's application would conflict with the requirements of the precautionary principle (see Part IV.F) the WTO is willing to undermine the precautionary approach to environmental regulation.

As the implementation of existing WTO Agreements progresses, and with the continuing negotiation of new agreements, WTO rules are affecting a broadening range of regulatory activities. Consequently, the need to integrate the precautionary approach into the WTO rules becomes ever more urgent. Thus, in an *amicus curiae* or "friend of the court" brief submitted in August 1997 to the WTO panel reviewing the Shrimp/Turtle case, CIEL argued that the precautionary principle requires the WTO to interpret Article XX in a way that allows governments broad discretion to implement cost-effective measures to protect endangered sea turtles from the final, irreversible fate of extinction. Article XX(g) of the GATT would seem to permit precautionary approaches, in that it requires only that trade related environmental measures be "related to" the conservation of an exhaustible natural resource and "taken in conjunction with" similar domestic restrictions.

Ideally, the WTO would consider the precautionary principle in a broader context than the confines of dispute settlement, because disputes often raise issues within unusual contexts, and "hard cases" make bad law. For instance, the triennial review of the SPS Agreement (which is already underway) would provide a better chance to reflect on how to interpret WTO sanitary and phytosanitary rules consistent with this fundamental principle of health and environmental regulation. Environmental and public health advocates and officials should monitor WTO

activities — in particular dispute settlement proceedings, and SPS and TBT Committee reviews — and seek opportunities to integrate the precautionary principle into WTO rules. They should also educate the public on the risks to the environment and biodiversity posed by the WTO's narrow interpretation of the precautionary approach.

Trade law is relevant to a number of the reforms that would be necessary to implement these principles, including social and economic reforms, government reforms, and market reforms. Certain of these reforms -- in particular the market reforms -- raise trade-related issues. Several of them encounter conflict with trade policy, unless that policy is reshaped to incorporate principles of sustainable use. Other reforms might be supported by trade rules, particularly those found in the WTO Subsidies Agreement.

The fisheries crisis is an international problem, reflecting the fact that marine ecosystems span national boundaries, as well as the importance of exports in the fisheries sector. Thus, this report emphasizes the need to strengthen and implement conservation requirements of key international or regional instruments in order to implement principles for ecologically responsible fisheries. Key instruments include the UN Agreement on Straddling Stocks and Highly Migratory Stocks, the FAO Code of Conduct for Responsible Fisheries, the Convention on International Trade in Endangered Species, the Convention on Biological Diversity, the International Convention on the Regulation of Whaling, and the European Union Common Fisheries Policy. Much of our analysis also concerns the threats and opportunities that various trade rules pose for the objectives and operation of these instruments.

II. Background on Trade Rules and Forums of the World Trade Organization (WTO)¹

We live in an increasingly integrated global economy, governed by a powerful set of international and regional trade institutions and rules. With the increase in international trade in fish and fish products, these institutions and rules are of growing importance for fisheries management. Historically, the most important of these rules were set out in the General Agreement on Tariffs and Trade (GATT of 1947) and subsequent agreements between various GATT Contracting Parties. These various agreements formed a patchwork of international trade rights and obligations, and each GATT Party belonged to a different package of agreements.

In 1994, most of this patchwork of rules of international trade was consolidated by the Final Act of the Uruguay Round of multilateral trade negotiations. The Final Act promulgated the Agreement Establishing the World Trade Organization (WTO Agreement) and subsumed within the WTO's province the GATT of 1947, modified slightly (GATT of 1994). The Final Act also incorporated many additional, independent agreements.

The following provides a brief introduction to the structure of the WTO, some background on the GATT's core principles and environmental exceptions, and an overview of the relevant independent agreements that comprise the WTO Agreement.

A. The WTO System

The Final Act is structured as an “all or nothing” package to which all Members of the WTO (currently 131) must subscribe. This package consists of:

- the GATT 1994, which is made up of the GATT 1947, certain legal instruments entered into under the GATT 1947, and certain listed prior Understandings regarding the application of various GATT provisions;

- the Uruguay Round Protocol to the GATT 1947;

- the various separate Uruguay Round Agreements, such as the TBT Agreement, and the Subsidies Agreement discussed below; and

- the various annexes to the Uruguay Round’s Final Act (such as the TRIPs Agreement and the Dispute Settlement Understanding also discussed below).

The hierarchy of these documents is set out in the “*General interpretive note*” to Annex 1A of the Agreement Establishing the WTO. It states that where GATT 1994 conflicts with one of the listed Uruguay Round Agreements, then the latter prevails.²

While the WTO is only a few years old, it builds upon a substantial institutional base which evolved over a period of forty years under the GATT. In addition to the Secretariat, the formal bodies of the WTO include the WTO Council (composed of the Members), and the various other bodies of the WTO, most of which are listed below. Furthermore, the WTO as a functioning institution can be understood to include the trade representatives on staff at the many country missions in Geneva (von Moltke 1996). The overall resources of this establishment, therefore, are considerable, although they include very little expertise regarding environment or sustainable development. Other relevant WTO bodies include:

- The Dispute Settlement Body;

- The WTO Committee on Trade and Environment (CTE);

- The TBT Committee;

- The SPS Committee;

- The TRIPs Council;

- The Committee on Subsidies and Countervailing Measures.

The WTO does not have a special agreement on fisheries. During the Uruguay Round of negotiations, some countries pushed to include fisheries in the agriculture agreement, but without success. Thus, fisheries subsidies and trade measures, unlike their agricultural counterparts, are not governed by a special set of rules, but are covered instead by the general requirements of the WTO, including the tariff bindings negotiated by the Member states, which cover a number of products in the fisheries sector.³

B. The WTO Understanding on the Settlement of Disputes

The WTO Understanding on Dispute Settlement establishes one of the most potent dispute settlement systems in existence at the international level. Dispute settlement proceedings, by default, are likely to be one of the main ways that the WTO deals with trade and environment issues in the next several years.

Under the GATT 1947, a GATT Party in a dispute could simply block the adoption of a final panel report. Under the dispute settlement procedures of the WTO, however, reports of

panels, or of the standing appellate body which hears appeals from panels, are automatically adopted unless the membership as a whole decides by consensus against their adoption. That is, a report is rejected only if all Members, including the winner of the dispute, agree to reject it; it is no longer the sole prerogative of the loser to veto a panel report. Unlike the dispute-resolution mechanisms defined under many other international agreements, the WTO dispute settlement system can handle large numbers of disputes with relative efficiency (although at present the legal division, which provides technical support to the panels, is understaffed relative to the number of cases pending and anticipated).

If a WTO Member enacts a trade measure that is found to be inconsistent with its WTO obligations, the Member faces a difficult choice. It must lift the measure, or it will be required either to compensate the challenging party for the harm caused by the measures, or to suffer the effects of proportionate retaliatory measures from the challenging Member.

Of special concern for environmentalists is the fact that WTO dispute settlement panelists do not necessarily have training in environmental science or policy, or even in international law other than trade law. The primary qualification for membership on a WTO panel is familiarity with international trade law and policy. While panels may request independent scientific or legal expertise to assist them in adjudicating disputes that raise non-trade issues, they have no obligation to do so. Thus, sensitive issues involving the relationships between trade and environmental policies and laws may be resolved by trade experts who have inadequate understanding of environmental science, policy and law, little interest in sustainable development and little sympathy for the goal of environmental protection.

C. The General Agreement on Tariffs and Trade 1994 (GATT 1994)

The GATT 1994, like most of the other WTO Agreements, regulates trade in goods (as opposed to trade in services). It can be viewed as the overarching agreement, which applies whenever its provisions do not conflict with the more specific WTO Agreements (see Part I.A above). The GATT is founded on three core principles: the most favored nation obligation; the national treatment obligation; and the prohibition on quantitative restrictions.

1. Most Favoured Nation (MFN) Obligation

The most favoured nation obligation (MFN) arises under Article I of the GATT (WTO 1994; see also Jackson 1994, pp. 133-48). This obligation requires a WTO party to extend immediately and unconditionally any privilege or advantage it provides to a product to “like products” imported from, or destined for, any other WTO Member.⁴ This obligation prohibits a Member from playing favorites among its WTO trading partners. It is important to note that the MFN obligation does not distinguish between multilateral and unilateral measures. In fact, with a few exceptions, such as commodities agreements, the WTO Agreements do not refer specifically to multilateral measures.

The MFN obligation has major implications for efforts to promote sustainable fisheries. For example, assume that a country decides to impose a restriction on imports of fish products,

based on whether the fish products were harvested in a sustainable manner according to nationally or internationally established criteria. The fishing fleets of some trading partners would fail to meet the criteria, and imports from these fleets would be restricted. Fishing fleets from other nations might operate in accordance with these criteria and their products would be imported without restriction.

The trading partner whose fish products were restricted could object that the restriction violates the MFN obligation. The argument would be that a fish product harvested unsustainably is “like” a fish product that has been harvested sustainably under the MFN rule (as it has been most often interpreted), because both products have the same physical characteristics. Thus, they must both be imported on the same basis.

2. National Treatment Obligation

The GATT’s national treatment obligation arises under Article III and requires each WTO party to treat imported products no less favorably than “like” domestic products.⁵ In contrast to the MFN obligation, which prohibits discrimination between the like products of *competing foreign* producers, national treatment prohibits internal measures which discriminate between the like products of foreign and domestic producers.⁶

The national treatment obligation could prove to be a real barrier to the implementation of national measures to promote sustainable fishing practices. If the hypothetical country in the MFN example above were to have a domestic fishing industry whose products had to compete with the restricted, unsustainably-harvested imports, the import restriction might be found to violate the national treatment as well as the MFN rule, and for the same reason — because an import restriction based on a criterion that does not affect the product itself would discriminate between “like products”.

Even if a country were not to impose a trade ban, other kinds of differential treatment could be challenged under this principle. For instance, if a country were to impose a tax that had the effect of forcing its fishing industry to internalize the full range of externalized environmental costs of fishing practices, it would naturally wish to enact a measure to protect that industry from imports whose cheaper prices derived from a failure to internalize such costs. However, this corollary measure would probably be challenged as conflicting with the national treatment provision of the GATT, because the trade system might consider the domestic tax to be imposed on the production of the product, not on the product itself. Consequently, the duty or tariff on the imported products would constitute less favorable treatment of domestic like products.

This problematic definition of “like product” for purposes of the most-favoured-nation and national treatment obligations has a long history. The traditional test for “like product” has focused on the characteristics of the product itself, rather than on how it was produced. To determine “likeness” a 1970 GATT Working Party on Border Tax Adjustments report suggested considering: “the product’s end-uses in a given market, consumers’ tastes and habits, which change from country to country, the product’s properties, nature and quality.” Subsequently, these criteria have been used by many GATT panels.

The problem with this approach, from the environmental perspective, is that it does not permit countries to discriminate according to how a product is produced. For example, where the physical characteristics of two products are the same, a country cannot discriminate on the basis that the first was produced using environmentally sound technology, and the second in a way causing severe environmental damage. Thus, the application of different measures to each of these products, which is consistent with efficient economic policy (e.g. full cost internalization) and sound domestic environmental policy (e.g. polluter pays principle, and precautionary principle), is not generally permitted by Article III as it has been interpreted.

In contrast to the traditional test, some GATT panels have suggested more flexible interpretations of “like product”. One such decision determined “likeness” according to whether “less favorable treatment [is] based on a regulatory distinction taken so as to afford *protection to domestic production*.”⁸ Thus, discrimination between similar products may be permissible where it serves a domestic policy end apart from the protection of domestic industry.⁸ However, even under this alternative test, a legitimate policy goal cannot justify a regulatory distinction which does not directly relate to the product itself, rather the regulatory distinction must be “based on factors [] directly relating to the product as such.”⁹

It is clear that eventually the trade system must embrace at least some discrimination between products according to how they are produced. The environmental concern regarding the more limited WTO interpretation of “like product” is that it will invalidate all trade measures based on production or processing methods (PPMs) distinctions that do not have an effect upon the nature of the final product itself. Many environmental impacts associated with products arise during the production and processing stages of the products, so a ban on PPM-based environmental measures could invalidate a huge range of environmental regulations. However, even if PPM-based measures were found to be inconsistent with the most favoured nation and national treatment obligations, they might be permitted if they were covered by the exceptions to the general GATT rules under Article XX (note, however, that it is unclear whether this argument would apply to the TBT and SPS Agreements). Part IV.A presents an analysis of trade rules that would strike a balance between trade and environmental policy goals so that appropriate PPM-based regulations could be maintained.

3. Prohibition on Quantitative Restrictions

The GATT’s third core principle is Article XI’s prohibition on quantitative restrictions. It covers bans, quotas, and licenses on exported and imported products. Article XI includes exceptions allowing countries to impose quantitative restrictions, but these exceptions are generally inapplicable to environmental issues.

The term “quantitative restriction” is so loosely defined that it could include any and all non-monetary restrictions on imports or exports. Such a literal interpretation would, however, be absurd; for example, it would make the entire TBT Agreement redundant. In fact, if a measure were to qualify as an acceptable technical regulation or point of importation measure, and its application functions to ban or embargo foreign goods from importation, as a general matter the

measure is not deemed to be a quantitative restriction.¹⁰ Yet it is possible that future WTO panels will interpret Article XI in expansive ways that would interfere with environmental regulations as applied to imports.

Indeed, the rule against quantitative restrictions has already been applied to invalidate import restrictions intended to protect marine species. In the Tuna/Dolphin case, a GATT panel ruled that the US violated this requirement by banning imports of tuna products that had been harvested in a manner deemed excessively harmful to dolphins (for more discussion see the box on page 27.) Thus, even if the national treatment and MFN obligations were held to permit PPM-based restrictions through a more flexible interpretation of the concept of “like product,” the prohibition against quantitative restrictions might still block the use of such measures.

4. Environmental Exceptions under Article XX

A WTO party may take a measure that violates one of the above noted GATT obligations if it can justify the breach by one of the exceptions found in GATT’s Article XX. Article XX paragraphs (b) and (g) (the “environmental exceptions”) permit WTO Parties to take measures to protect the environment. Under Article XX(b), a WTO party may take trade measures that are “necessary” to protect the life or health of humans, plants or animals. Similarly, under Article XX(g) a party may take trade measures that are “related to” conserving exhaustible natural resources, so long as such trade measures are “made effective in conjunction with” domestic limits on the resource’s use. Measures taken under Article XX may not operate in a manner that “would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”¹¹

Article XX(b). The term “necessary” in paragraph (b) has been interpreted narrowly by GATT panels. In interpreting other such general and elastic terms, GATT panels have consulted supplementary aids such as negotiating history. In the case of XX(b), however, GATT panels have ignored negotiating history and instead have ruled that “in the ordinary meaning of the term, ‘necessary’ meant that no alternative existed.”¹² Using this definition, panels have fashioned a least-trade-restrictiveness test for Article XX(b)’s necessity requirement.¹³ For example, the Tuna/Dolphin I Panel, in reviewing whether the United States had taken the least GATT inconsistent approach to preserving dolphins, noted that:

The United States had not demonstrated to the Panel ‘as required of the party involving an Article XX exception’ that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.¹⁴

Commentators have relied on this language to argue that had the US measures been taken under such an agreement, the Panel might have been inclined to find them the least GATT inconsistent method of dolphin preservation.¹⁵

Article XX(g). Although the words “relating to” in Article XX(g) imply a lower threshold than the word “necessary” in Article XX(b), panels initially applied the same analysis

to both of the environmental exceptions. However, the WTO's appellate body has ruled that the two paragraphs must be treated differently, according to the ordinary meaning of their words. In order for a measure to be deemed "related to" the conservation of an exhaustible natural resource, the appellate body has explained, it must not be "incidentally or inadvertently" aimed at such conservation.¹⁶ And, in order for a measure to be considered to have been "made effective in conjunction with" domestic restrictions, it must "come into effect" "together with" domestic restrictions also aimed at such conservation "with some degree of even handedness."¹⁷ This suggests a more environmentally friendly reading for Article XX(g).

The chapeau to Article XX. Another set of requirements that measures must meet in order to qualify for Article XX protection are found in the Article's introductory paragraph, referred to as the chapeau. The chapeau requires that measures not be applied in a manner which constitutes either:

- arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- a disguised restriction on international trade.

Only one WTO case has reviewed the chapeau in detail. According to the Appellate Body in the Reformulated Gasoline case, the purpose of the chapeau is to ensure that Article XX protection is not abused. At the very least, the chapeau seems to require that the country seeking Article XX protection has adequately explored ways of mitigating unfavorable treatment of foreign products to ensure that any residual discrimination was "merely inadvertent or unavoidable."¹⁸

Because Article XX's environmental exceptions have been interpreted so narrowly in past trade panel decisions, it cannot be assumed that they will protect trade related measures taken to promote fisheries conservation that are found to violate any of the three primary GATT obligations outlined above. For example, from an environmental perspective, it might be assumed that a measure which restricts imports of fish products harvested in an unsustainable manner meets the basic requirements of the environmental exceptions. Unfortunately, past interpretation of these provisions as applied to imported fish products interpreted "necessary" and "related to" to mean that which does not force other countries to change their policies and practices when operating within their own jurisdiction.¹⁹ Consequently, an import measure that discriminates on the basis of harvesting techniques permitted in another country might not qualify for Article XX protection under this interpretation.

Future panels, however, do not have to follow previous decisions (i.e. there is no principle of "stare decisis" in WTO dispute resolution). In addition, the main panel decision that interpreted these provisions in such a way (*Tuna/Dolphin II*) was never adopted, because it was blocked under the old GATT rules. In theory, therefore, the exceptions could be interpreted more broadly in the future. In practice, however, there has been little if any change in the institutional habits and outlook that drove previous decisions.

D. The Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement is intended to ensure that WTO Members do not use technical regulations and standards as disguised measures to protect domestic industries from foreign competition. It is also intended to reduce the extent to which technical regulations and standards operate as barriers to market access, primarily by encouraging their harmonization. Harmonization is expected to reduce the obstacles to trade that can result from the difficulty of complying with the numerous, sometimes incompatible, standards and regulations for products that may be found in various countries.

The TBT Agreement creates different but related obligations for two defined categories of measures: regulations and standards. A “technical regulation” establishes mandatory requirements for products or related processes and production methods (PPMs). A “standard,” in contrast, establishes *voluntary* requirements for “products or related processes and production methods.” Both regulations and standards may also relate to “terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method ” (TBT Agreement, Annex 1).

It is probable, although not entirely clear, that the TBT Agreement covers labeling standards concerning non-product-related criteria. Non-product-related criteria are criteria that distinguish between products according to factors that are not related to the characteristics of the product itself (for example, standards relating to the environmental impacts of the production process or method (PPMs)).

The TBT Agreement applies indirectly to private and voluntary labeling schemes, through the Agreement’s Code of Good Practice for the Preparation, Adoption and Application of Standards (the Code). Under the Code, governments with territorial jurisdiction over a private voluntary program are obligated to “take such reasonable measures as may be available to them” to ensure compliance with the Code, including its most-favoured nation (MFN) and national treatment (NT) obligations. Analogous language found in the GATT requiring countries to take such reasonable measures as are available to them has been interpreted by past dispute panels to require governments to employ all constitutionally available means. For example, this language might be interpreted to require a government to condition discretionary funding on compliance with the TBT Agreement.

The rules of the TBT Agreement, including its Code of Good Practice, prohibit both regulations and standards from discriminating between domestic products and foreign products that are alike (national treatment) and between “like” products from different WTO Members (“most-favoured-nation”).²⁰ In addition, Members must ensure that central governmental standardizing bodies improve transparency and involve interested parties in standard setting; take reasonable measures to ensure that regional standardization bodies of which they are Members do the same; and make reasonable efforts to harmonize technical rules at the international level.

Further, the TBT Agreement requires Members to use international standards “as a basis for their technical regulations” unless the Member can demonstrate that the relevant international standard “would be an ineffective or inappropriate means for the fulfilment of a legitimate objective” (which includes the protection of human, animal or plant life or health). Standards and

regulations must not constitute unnecessary obstacles to trade, although if a regulation (and presumably a standard) is based upon an international standard, it is presumed not to create such an obstacle.

The TBT Agreement does not contain an explicit exception for measures taken to protect the environment. The preamble, however, states that “no country should be prevented from taking measures necessary to ensure . . . the protection of human, animal or plant life or health, [or] of the environment . . . at the levels it considers appropriate,” paralleling language found in the environmental exception under Article XX.

Currently, the biggest environmental issue related to the TBT Agreement concerns ecolabeling. Ecolabeling of products produced from biological resources, such as forest and fishery products, depends upon making distinctions between products according to how they are produced. Yet the TBT Agreement contains language based upon GATT language which has been interpreted to forbid such discrimination. Worse yet, the TBT Agreement does not even contain an explicit exception for environmental measures. Equally disturbing is the fact that the TBT Agreement applies not only to government regulation but also to private, non-governmental and voluntary labeling.

In sum, without a new, more environmentally informed approach to interpretation, the TBT Agreement could create serious obstacles to efforts to inform consumers so that they can make responsible choices about fishery products. This could drastically diminish the extent to which today’s increasingly market-oriented economies can develop economic incentives to encourage ecologically responsible fisheries. Part IV.B proposes a better approach to interpretation of the TBT Agreement that acknowledges trade policy concerns while ensuring that society can make full use of ecolabeling as a tool for sustainable development.

E. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

The SPS Agreement governs regulations aimed at protecting human, animal and plant life and health within the territory of a WTO Member from risks due to diseases, pests, disease-carrying organisms, and disease-causing organisms, as well as from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs. The Agreement requires Members to “ensure that any sanitary and phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, [and] is based on scientific principles ... [and] sufficient scientific evidence” (SPS Article 2.2). “In cases where relevant scientific evidence is insufficient, [however,] a Member may provisionally adopt [SPS] measures on the basis of available pertinent information, including that from the relevant international organizations as well as from [SPS] measures applied by other Members” (SPS Article 5.7).

In addition, Members must ensure that their SPS measures are consistent with the non-discrimination principles of most-favoured nation and national treatment.²¹ Furthermore, SPS measures “shall not be applied in a manner which would constitute a disguised restriction on international trade” (SPS Article 2.3).

SPS measures “which conform to international standards, guidelines or recommendations shall be . . . presumed to be consistent with the relevant provisions of this Agreement and of the GATT 1994” (SPS Article 3.2). A Member may maintain an SPS measure which would result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.²²

In sum, the SPS Agreement sets maximums, but not minimums, for SPS regulations. It establishes procedures by which WTO Members can weaken or eliminate other countries’ protective regulations, but does not establish a means for encouraging countries to strengthen SPS protections.

From a trade perspective, this appears reasonable, because SPS measures have sometimes been used to protect domestic industry. From a marine conservation perspective, however, this is exactly the opposite of what is needed. For example, unwanted introductions of alien species are one of the biggest threats to marine biodiversity, and with the growth in international transport, there is an urgent need for a systematic improvement and strengthening of measures to prevent and control introductions. Specific challenges under the SPS Agreement could weaken or void import restrictions that protect against alien introductions. Steps to address this potential problem are discussed in Part IV.F.

F. The Agreement on Subsidies and Countervailing Measures (Subsidies Agreement)

The Subsidies Agreement imposes restrictions on the power of WTO Members to provide subsidies to industry. It defines a subsidy to include the conferral of a benefit to industry resulting from a financial contribution by a government or any public body within a Member’s territory involving: direct transfers of funds, foregone government revenues (such as tax credits), provision of goods or services other than general infrastructure, purchases of goods, or provision of income or price support as provided under Article XVI of GATT 1994. Such activities are also covered if the government arranges for them to be carried out by a funding mechanism or private body.

If a subsidy is “actionable” as defined under the Agreement, it can be challenged by another Member. A subsidy is actionable if (1) it is “specific,” and (2) it causes adverse effects to the interests of another Member through injury to that Member’s domestic industry, serious prejudice to that Member’s interest,²³ or nullification or impairment of benefits to that Member under the GATT 1994.²⁴ A subsidy is “specific” if it is made available only to a certain enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority.

The Subsidies Agreement defines several specific categories of subsidies that are exempt from challenge. One exception allows Members to provide “assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms.” Such assistance must be a one-time measure only, may cover only 20% of the costs, and is subject to certain other limitations. This exception contemplates upgrades in pollution technology applied to industrial production, and is

not clearly applicable to the type of assistance that would encourage the reduction of capacity (Milazzo 1997, p. 14), although it might apply to incentives for converting to less destructive gear or more energy-efficient technology.

A WTO Member that objects to another Member's policy on the ground that it is an actionable subsidy can respond in either of two ways. First, the Member can file a challenge under the WTO dispute resolution procedures. Second, the Agreement authorizes a Member to establish and impose, according to defined procedures and criteria, a countervailing duty on imports deemed to be subsidized.

The Subsidies Agreement is a trade instrument that could "help" rather than "hinder" the achievement of principles for ecologically responsible fisheries. It is widely recognized that overcapacity is a leading underlying cause of fisheries overexploitation, and subsidies are a major contributing factor to overcapacity. Currently, there is significant interest within the WTO in disciplining fishing subsidies through the application of WTO subsidies rules. Fisheries conservationists will need to get involved to take advantage of this momentum and ensure that the process moves in the right direction and involves the right players (see Parts III.C & D for further discussion).

G. Investment Liberalization: The Agreement on Trade-Related

Investment I

The Agreement on Trade-Related Investment Measures (TRIMs Agreement) includes limited provisions for investment liberalization. Seeking greater liberalization of investment, developed countries are working within the Organization for Economic Co-Operation and Development (OECD) to negotiate a Multilateral Agreement on Investment (MAI). The negotiations intend to open the final agreement to ratification by all countries. In mid-1998, the WTO Members are likely to launch informal "mini-rounds" of negotiations in preparation for the millennium round of trade negotiations; investment is expected to be on the agenda. The OECD MAI agreement may be offered as one proposed model for a binding investment liberalization agreement within the WTO regime. Some, but not all, developing countries oppose the development of an investment liberalization agreement within the WTO regime.

The MAI, as it has been conceived in OECD negotiations, could do more damage to fisheries conservation efforts than all the existing WTO Agreements combined. To date, the MAI draft includes minimal provisions aimed at the protection of the environment (OECD 1996). In contrast, it includes three types of proposed measures that would severely threaten important conservation laws and policies:

- (1) Requirements that countries treat investors according to the national treatment and most-favoured-nation principles, which could reduce countries' power to limit access to fisheries;
- (2) Measures requiring compensation for expropriation of investment, and defining expropriation to include measures "tantamount to investment" such as regulations that reduce the owner's ability to use property, which could interfere with efforts to control the use of fishing permits or revoke permits held by wrongdoers; this could be a particular problem with individual transferable quotas (ITQs), which have many of the characteristics of private property;

and

(3) A prohibition on “performance requirements” under which foreign investors must take steps to confer local benefits, such as employing a certain percentage of domestic workers, or arranging for some type of technology transfer.

H. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) is relevant to the issue of sharing benefits from genetic resources. The Agreement establishes minimum standards for intellectual property rights (IPRs), which in many cases has required developing countries to expand the strength and scope of protection. In particular, Article 27 requires WTO Members to recognize patents on nearly all types of products and processes, including modified microorganisms, and “micro-biological processes.” Under Article 27.3(b), Members must protect plant varieties either through patents or an “effective *sui generis* system” or both. Under that Article, Members retain the discretion whether to recognize patents on plants or animals, or “essentially biological [but not microbiological] processes for the production of plants or animals.” Pursuant to these provisions, many WTO Members have revised their patent legislation to include products previously excluded from patenting, including genetically modified microorganisms.

The Agreement establishes a Council for Trade-Related Aspects of Intellectual Property Rights to monitor the operation and implementation of the Agreement. The TRIPs Council will review Article 27.3(b) of the TRIPs Agreement in 1999. The United States, at least, and probably some other developed countries, will push to expand Article 27.3(b)’s requirements so that countries no longer have the option of excluding modified plants and animals from patenting. Many developing countries, on the other hand, are concerned that life patenting does not promote the equitable sharing of benefits between North and South, and also poses ethical issues.

The TRIPs Agreement’s patent requirements include an environmental exception, allowing WTO Members to exclude products or processes from patenting where “the prevention within [national] territory of their commercial exploitation . . . is necessary to protect *ordre public* [public order] or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment” (TRIPs Article 27.2).

While intellectual property law’s overall social and economic implications are growing, the TRIPs Agreement has only an indirect relationship to fisheries conservation, through issues involving “bioprospecting”, in which firms and government agencies from industrialized countries are prospecting for sources of new products in biodiversity-rich marine habitats such as coral reefs, often in developing countries. The TRIPs Agreement requires developing countries to strengthen the legal protection of IP rights, which operates to the advantage of industrialized country inventors, while bioprospectors avoid paying significant compensation or consulting with local communities or indigenous peoples (see box, p. 48, Controlling Access to Marine Genetic Resources, for further discussion).

III. Background on Multilateral and Regional Instruments Relevant to

Conservation

This Part provides background on multilateral environmental agreements (MEAs) and other international instruments that are relevant to fisheries issues. It also reviews the European Communities' fisheries policy. MEAs are essential tools for achieving a shift to ecologically responsible fisheries. Fisheries management requires the cooperation of all the countries whose activities affect a fishery, through fishing operations of vessels flying their flags or controlled or owned by entities based within those countries or through any activity having an impact.

In addition, MEAs are needed to address trade-related issues. MEAs such as CITES foster the international cooperation that is often necessary to control the impacts of trade itself. Moreover, MEAs may serve as useful forums for countries to elaborate shared standards for sustainable production in fisheries.²⁵ Such standards will be needed as reference points for the regulation of products that move in international trade. While the WTO will clearly have a role in evaluating whether the regulation of imported products is consistent with WTO rules, its trade-oriented approach must be balanced within the international legal system by conservation-oriented approaches of other multilateral regimes.

A. The U.N. Agreement on Straddling Stocks and Highly Migratory Fish Stocks

The U.N. Agreement on Straddling and Highly Migratory Fish Stocks was adopted by the U.N. General Assembly in 1995. It had been signed by 59 nations and ratified by 15 as of August 4, 1997. It will enter into force after 30 countries have ratified it. While it does not advance as far as conservationists had hoped, it is nevertheless a landmark step forward in implementing the fisheries conservation principles found in the U.N. Convention on the Law of the Sea (UNCLOS). Key provisions include:

requiring States engaged in fishing to adopt measures to ensure long term sustainability of the relevant fish stocks, including measures to prevent overfishing and eliminate excess fishing capacity;

basing measures on best available scientific evidence;

taking a precautionary approach;

adopting an ecosystem approach that considers dependent and associated species;

taking into account the interests of artisanal and subsistence fishers.

Under the Agreement, these requirements are to be implemented through regional fisheries management arrangements or organizations (RFMOs), whose Members consist of relevant coastal States as well as fishing States. RFMOs are authorized to take action consistent with international law to deter activities by RFMO non-Parties as well as Parties that act inconsistently with the RFMO's conservation restrictions.

Perceived conflicts with WTO rules might arise if a RFMO were to impose trade sanctions for violations of fishing rules. A non-Party to the RFMO, in particular, might challenge a trade sanction as a PPM-based discrimination that violated WTO obligations such as

the national treatment requirement. Such measures should, however, be found consistent with WTO rules, through the Article XX exception (see Part IV.A.1).

B. The Food and Agriculture Organization (FAO) Code of Conduct for Responsible

The FAO Code of Conduct for Responsible Fisheries (FAO Code) is a non-binding instrument adopted by the FAO in 1995. It covers a range of fisheries-related activities, including fisheries management, fishing operations, post-harvest practices and trade, and fisheries research.

The Code includes many provisions that support a shift to ecologically responsible fishing. For example, it calls on governments to apply the precautionary approach, stating that the absence of scientific certainty should not be a reason for failing to take action (FAO Code Article 6.5). It also provides that governments should reduce the use of destructive fishing technologies, and eliminate extremely destructive techniques such as poison and explosives. In addition, the Code provides that States should protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to their livelihoods, as well as preferential access to traditional fishing grounds “where appropriate” (FAO Code Article 6.18).

The bulk of the Code consists of guidelines for fisheries operations, gear, methods, and management systems, and has little to say about what kinds of incentives countries should use to encourage fishers to follow these guidelines. However, Article 11, on “Post-Harvest Practices and Trade,” does raise a number of issues relating to incentives as well as other trade issues, discussed in Part IV.D. Trade-related issues might arise should the Code become a basis for deciding whether products have met production standards and qualified for trade-related incentives such as ecolabeling.

C. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was adopted in 1973 and came into force in 1975, and had 143 Parties as of January 1998. The objective of CITES is to prevent the overutilization of species due to international trade, so as to ensure the sustainability of international trade in animal and plant species, including subspecies and populations. The Parties meet in periodic Conferences of Parties (COP) to assess implementation and make recommendations to improve CITES’ effectiveness. During COPs, the Parties:

identify species that are or may be threatened by trade, listing them on Appendix I to CITES. They also identify species that may become threatened unless international trade is regulated, listing them on Appendix II. These determinations are made based on biological criteria and evidence concerning the species’ status and threats to their survival. Specimens of listed species can be traded only with permits from the country of export; Appendix I species must also have prior permits from the country of import. Commercial trade is forbidden for species on Appendix I. While not banned, it is strictly regulated for

species on Appendix II, and Parties are to monitor trade impacts and adjust regulation as needed (de Fontaubert et al. 1996, p. 62).

The Parties may make reservations on the listing of particular species when ratifying, accepting or approving CITES or at the time the species are listed. Parties that do so are treated as non-Parties vis-à-vis that species (CITES Article XV).

CITES establishes a Secretariat to assist Parties with implementation. In addition, the Parties have established several permanent committees, including four functional committees (Animals, Plants, Identification Manuals, and Nomenclature) and the Standing Committee, which supervises the Secretariat and provides general policy and direction between COPs. Temporary working groups addressing specific issues are appointed on an as-needed basis. CITES has no central scientific committee; each Party appoints management and scientific authorities responsible for national scientific decisions.

Where demand for wildlife products traded internationally is directly driving the overexploitation of a species, CITES plays a critical role in reducing the threat of extinction. In this respect, CITES supports the implementation of several important principles: that fishing should not jeopardize any species' ability to withstand environmental fluctuations, that target stocks should be maintained at a high proportion of the biomass that would occur in the absence of fishing, and that a nation's fisheries export should not be at the expense of the environment or domestic consumption needs.

A number of marine species are listed under CITES. For example, sea turtles and great whales are listed in Appendix I, and all cetaceans not listed in Appendix I and most species of coral are listed in Appendix II.²⁶ However, to date there has been resistance to the inclusion on CITES Appendices of species of fish subject to large scale commercial harvesting.

Technically, CITES should apply to major commercial fish species, just as it applies to other species of wildlife that are harvested from the wild. There are several reasons, however, why Parties might hesitate to move forward in this area. Fisheries management is traditionally a subject of international law, which has built up a substantial body of agreements and doctrine, most recently including the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement or SSA). While not particularly successful in achieving conservation, this body of law is distinct from CITES and has been developed within the domain of RFMOs and international organizations such as the FAO, that are not traditionally associated with UNEP (which administers the CITES Secretariat). At the national level, distinct sets of regulations typically cover fisheries and endangered species, and governments may be organized so that the agency that manages fisheries regulation is different from the agencies designated as management and scientific authorities for CITES. Thus, when CITES begins to address trade in commercially harvested fish species, it is expanding into an area which had already been the subject of national and international law well before CITES was negotiated in the 1970s. Of course, economic interests in the fishing industry are also hostile to the application of CITES, fearing that it would be too effective in restricting trade pressures on listed fish species, diminishing their profits.

Looking at the international system as a whole, however, it will be important that CITES cover such commercially harvested species of fish. Properly understood, CITES does not compete with other regimes relating to fisheries. Rather, it is a “backstop” which protects a species when all other measures have failed and trade has threatened or may threaten the species with extinction. In this sense, CITES is perfectly complementary with fisheries management regimes, as well as the WTO regime.

In such cases of trade-driven over-exploitation, CITES will be an important tool for sustainable management of fisheries. Thus, CITES should list commercial fish species threatened by trade. Yet advocacy on this point must be realistic. It will take time to expand CITES in this direction; moving too fast could put stress on CITES as an institution and take away energy from more immediate issues where progress could be made more easily.

The best strategy will probably be to set up a working group under CITES, modeled after the Timber Working Group set up at the Ninth Conference of the Parties (COP 9).²⁷ At COP 10, held in Harare, Zimbabwe, in June 1997, however, the CITES Parties considered and rejected such a proposal from the US to establish a Working Group on Marine Fish Species “to facilitate legitimate trade in marine fish species in CITES Appendix II that are subject to large-scale commercial harvest and international trade.”²⁸ Environmentalists should continue to press for the establishment of such a working group. At the same time, they should press for listing of species of fish which are threatened by trade or where trade pressures contribute to the threats to the species. In addition, they should encourage the CITES Standing Committee to recommend, and individual Parties to impose, wildlife trade bans against Parties that do not comply with CITES trade restrictions regarding marine species, where the criteria for such measures outlined in Part IV.A.2 have been met.

In addition, the precautionary approach, as expressed in CITES listing criteria (see Resolution 9.24) must be implemented whenever needed to protect marine species threatened by international trade. In general, environmental groups should promote public awareness about the need for CITES as a tool to protect local and regional ecosystems against destructive pressures from global markets.

D. The Convention on Biological Diversity

The Convention on Biological Diversity (Biodiversity Convention) is one of the agreements signed by over 150 countries at the Earth Summit in Rio in 1992. As of July 1997, it had 167 Parties. The Convention’s three objectives include the conservation of biodiversity, the sustainable use of its components, and the equitable sharing of benefits derived from genetic resources. The Convention establishes a framework of general, flexible obligations that Parties must apply at the national level in order to achieve its objectives with respect to all biodiversity, including all marine biodiversity within its national jurisdiction.

Trade creates pressure to harvest wild species such as timber or fish, and to convert habitat for activities such as farming or mariculture. Thus, many requirements of the Biodiversity Convention (most of them applying “as far as possible and as appropriate”) are relevant to trade

issues. For instance, Article 6(b) requires Parties to integrate biodiversity into relevant sectoral and cross sectoral plans and policies. Articles 7(c) and 8(k) require Parties to identify processes and categories of activities that threaten biodiversity and regulate them. Article 14 provides that Parties shall establish procedures for environmental impact assessment of projects, as well as arrangements for considering impacts on biodiversity of programs and policies. Also relevant are the Convention's provisions relating to the sharing of benefits from genetic resources.

The Convention establishes an international structure to support national implementation and to promote continued international cooperation.²⁹ This structure includes a permanent Secretariat; a Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA); a Clearing House Mechanism to exchange and share information in support of scientific and technical cooperation; and a multilateral fund to help finance implementation in developing countries, supported by developed countries and currently operated by the Global Environment Facility. Beginning in 1994, the Parties have held periodic Conferences of the Parties to elaborate and build on the Convention, for instance by negotiating protocols (follow-up treaties on specific issues). In 1998, they will submit their first national reports on implementation to the COP.

There are three issue areas in which the Biodiversity Convention may play an important role. First, the Convention could serve as a forum within which governments could develop a shared understanding on what constitutes sustainable production in fisheries (see Part IV.B). Governments applying trade-related measures such as ecolabels or import bans to imported products could do so by reference to this understanding, which would serve as an international standard that would receive deference under WTO rules, if they are properly interpreted.

Second, the Convention establishes principles for sharing benefits from the use of genetic resources -- the source of all biodiversity -- between providers of genetic resources from one country and users in another country. Marine genetic resources are increasingly the subject of research aimed at developing new commercial products such as pharmaceuticals. Properly implemented, the Convention could help countries gain a greater share of the revenues from product development based on sustainable harvesting of their marine biodiversity (See box, p. 48, "Controlling Access to Marine Genetic Resources").

Third, the Convention Parties are now negotiating a protocol on "biosafety" -- the regulation of genetically modified organisms (GMOs) to protect the environment. As discussed in Part IV.F, the protocol should address the risks of GMOs in the marine environment, and should be understood to be the international regime for biosafety, having priority over WTO rules in the event of any perceived conflict.

E. International Convention for the Regulation of Whaling (ICRW)

The International Convention for the Regulation of Whaling (ICRW) was established in 1946 with the objective of protecting all species of whales from overfishing and restrict fishing to those species best able to sustain exploitation. Of the 39 parties, two, Japan and Norway, are principal whaling nations. A third whaling nation, Iceland, has withdrawn from the ICRW.

The ICRW established the International Whaling Commission (IWC) composed of representatives from the ICRW's members. At periodic meetings, the IWC revises the ICRW's Schedule, which establishes binding regulations limiting whaling through quotas on harvesting of species, seasons, sanctuary zones, and limits on size and gear (ICRW Article V). An exception in the ICRW, however, allows members to permit their nationals to conduct whaling operations for "scientific research" in spite of the Schedule's restrictions (ICRW Article VIII). In addition, if a member objects to items placed upon the Schedule within a certain period of time, it is not bound vis-à-vis those regulations. The Governments are responsible for enforcing the regulations within their own jurisdictions and the text of the ICRW does not provide for collective action against violating states.

In 1982, the members declared a moratorium on all commercial whaling, effective from 1985/86 which continues to date. Norway, however, has reserved the right to whale according to nationally set limits for its coastal whaling operations of the minke species (IWC 1997a). Furthermore, the moratorium does not affect aboriginal whaling operations permitted in Greenland, Russia, St. Vincent and The Grenadines, and Alaska (IWC 1997b). In 1994, the IWC established a whale sanctuary in the Southern Ocean, to which Japan filed an objection.

The ICRW does not raise significant trade related issues in itself. Its relationship with CITES, however, has excited recent controversy. In 1983, the CITES Parties listed on Appendix I all whales regulated by the ICRW, and for which the IWC had set a zero catch quota for commercial whaling. At the tenth COP of CITES, the Japanese and Norwegian delegations proposed to downlist meat from certain species of whales (Prop. 10.19 - 10.22). Norway is not bound by the IWC moratorium as it lodged an objection to the prohibition; Japan is not bound by the CITES listing because it registered its reservation to the listing. The proposal advocated a transfer of certain populations of minke and gray whales from Appendix I to Appendix II. Both countries proposed split listing of "geographically isolated stocks" as permitted by CITES' provisions to allow for trade of Appendix II species. The proposals were rejected by secret ballot. Had the proposals been accepted, whale meat from these species could have been traded commercially, even though commercial harvesting of the same whales is technically forbidden under the ICRW.

In essence, this proposal sought to undercut the IWC by gaining legitimacy under CITES for certain uses of whales that are still condemned under the IWC. The CITES Parties, however, agreed to defer to the judgment of the IWC -- recognized as the international specialized body for whales -- on the conservation status of whales. Since the IWC maintains its commercial moratorium, CITES maintained its ban on commercial trade in whale products. The proposals' sponsors protested that the CITES' listings were based not on scientific findings, as required by the Convention, but on "political considerations." The relationship between CITES and other MEAs, especially the linking of MEA obligations to CITES, is likely to remain a contested subject in future COPs.

F. The EU Fisheries Policy

The Common Fisheries Policy (CFP or Policy) was first established in 1970 when the

European Union (then the European Economic Community) developed a common organization of the market in fisheries products. The Policy has been amended frequently since then and in 1992 the Community completely revamped the Policy to address concerns raised by seriously depleted fish stocks in EU waters, the extension of Exclusive Economic Zones to 200 nautical miles, restrictions on EU vessels' access to foreign fishing waters, and the accession of Spain and Portugal to the EU (Council Regulation No. 3760/92).

The objective of the Policy is to provide for the conservation and management of fishery resources while maintaining and strengthening the fisheries industry. The CFP covers aquaculture, the exploitation of fishery resources, and the processing and marketing of fish products where carried out on Member States' territory, in EU fishing waters, or by EU vessels.³⁰

While it is a regional instrument, the CFP is very different from policies and measures adopted under RFMOs, because the CFP represents a policy to manage an industrial sector adopted by a regional organization with the goal of economic integration, while RFMOs are institutions intended to conserve biologically defined stocks of living marine resources established by a variety of States with a common interest in the conservation and use of those resources.

New regulations and amendments to existing EU regulations are passed by the Governing Council of the European Union. The Directorate-General for Fisheries (DG XIV) is the responsible department in the European Commission which advises the Council. Several permanent committees, such as the Scientific, Technical and Economic Committee for Fisheries and the Management Committee for Fishery Products, assist the Commission in the implementation of the Policy.

The Policy limits the exploitation of fisheries by restricting the volume of catches -- establishing total allowable catches (TACs) and dividing them up as quotas among the Members -- and controlling the fishing effort -- restricting the number and type of vessels and time spent at sea. It also conditions access to the resources upon compliance with technical conservation measures regarding gear, net mesh size, bycatch and fishing zones. These measures apply to vessels fishing in EU waters and some apply to EU vessels in non-EU waters.³¹ They also apply to foreign vessel fishing in EU waters.³²

The conservation scheme is managed through a licensing system (Reg. No. 3760/92, Article 5). Each Member State issues and manages licenses and special permits for its vessels while the Commission does the same for third country vessels fishing in EU waters. In addition, the Member States are responsible for obtaining fishing permits for their vessels fishing in foreign waters under agreement between the EU and the third country (Council Reg. No. 3317/94).

Council Regulation No. 2847/93 establishes a control system which monitors landing, selling, transporting and storing fish, and recording landing and sales of all operators across the industry within the EU and within the maritime waters subject to the sovereignty or jurisdiction of the Member States. The EU's policy on the common organization of markets is detailed in Council Regulation No. 3759/92. The Policy imposes common marketing standards for fishery and aquaculture products which classify by quality, size or weight, packaging, presentation and labeling. Fisheries products may not be marketed in the EU unless they satisfy these standards

(Article 2). The labeling requirements do not reflect any ecological standards and the European Commission does not have any plans to develop eco-labels specific to the fisheries sector in the near future.³³

The EU Policy contemplates that production and marketing activities are conducted primarily through producers' organizations. To facilitate their formation and operation, Member States grant producers' organizations progressively diminishing payments in their first three years following recognition (No. 3759/92, Article 7). Membership in these organizations is voluntary. However, producers not Members of a representative producers' organization may be obliged to comply with the organization's marketing and production rules and its rules on the withdrawal of products (Ibid. Article 5).

Product withdrawal is a key component of the market intervention scheme (Ibid. Article 8). If the selling price of a product falls below a pre-determined price, the producers' organizations may withdraw the product from the market and indemnify their Members for quantities withdrawn. This compensation scheme is financed partly by contributions from the organizations' Members and partly by EU funds (Ibid. Articles 9-17).³⁴

The framework for trade with third countries consists of a common customs tariff, a reference price scheme and safeguard measures. The common customs tariff (CCT) is supposed to apply uniform duties to imported products regardless of the point of entry into the common market and country of origin. However, quotas or suspensions of CCT tariff duties established unilaterally or by treaty exempt nearly two-thirds of EU imports from this requirement. (Fisheries Fact Sheet III-2, June 1996).

Under Article 22 of No. 3759/92, the Policy establishes the reference pricing system, creating a set of reference prices for various categories of fish products. When significant quantities of given fisheries products are imported at real prices below their reference prices, the EU may abolish the autonomous suspension of CCT duties, require an increase of the real import price at least equal to the reference price, or levy a countervailing charge equal to the difference between a product's real and reference price up to a limit of the "tariff binding" (ceiling tariff rate) to which the EU committed in the Uruguay Round. While this measure is obviously designed to protect EU producers, it appears to be within the bounds of conduct permitted under WTO rules. Under emergency conditions, the safeguard clause allows the EU to apply "appropriate measures [against] trade with third countries" if the market in fisheries products "is threatened with serious disturbances which may endanger the objectives of [the European] Union Treaty" (Reg. No. 3759/92, Article 24).³⁵

To address the twin problems of overcapacity and reduced stocks, the European Community heavily finances the restructuring of the industry. The EU provides assistance to promote more selective fishing, as well as to make the industry more competitive. Through the Financial Instrument for Fisheries Guidance (FIG), the EU contributes funding for the adjustment and reduction of fishing effort, renewal and modernization of the fishing fleet, modernization of fishing port facilities, improvement of processing and marketing operations, and development of aquaculture. Various socio-economic measures supporting fishermen, such as early retirement and severance grants, are financed from a pool of structural funds. The PESCA Community Initiative focuses on the market-related aspects of the fishing industry,

financing various projects such as fishermen training and retraining and improvement of services to businesses (Fisheries Fact Sheet IV-1 to IV-2). The success of EU restructuring efforts to date is questionable at best (see Part IV.C).

Another significant aspect of the adjustment effort, which is highly problematic from the standpoint of conservation, is the redeployment of EU vessels to the waters of third countries, implemented through bilateral fishing agreements involving reciprocal access to resources (Norway, the Faroes, Iceland and the Baltic Republics), access to surplus stocks (pending ratification by Canada), access to fishery stocks in return for market access (currently none), access to stocks in return for financial compensation (African, Caribbean and Pacific nations), and access to stocks for payment and market access (Greenland) (Fisheries Fact Sheet V-1) (see Part IV.C).

Recently, the EU concluded a new type of fishing arrangement based on joint ventures between EU vessels and third country fishing industry. In these “second-generation” agreements, such as the one recently signed with Argentina, the EU offers trade concessions and finances scientific and technical cooperation programs in return for access to resources.

IV. Trade/Fisheries Linkages: Analysis and Recommendations

A. Trade Related Conservation Measures Applied to Products

Based on No

Conflicts between principles for ecologically responsible fisheries and trade rules typically arise when regulations or market-based mechanisms are applied to fisheries products as a means for achieving ecologically responsible fisheries practices. Regulatory distinctions based upon non-product-related criteria -- in particular distinctions based upon production and process methods (PPMs) -- will constitute the backbone of a regulatory scheme to promote sustainable fishing practices. Trade-related measures will be important for achieving effective enforcement of conservation regimes.

PPM-based regulatory distinctions have, however, been disfavored under WTO rules. If a governmental regulation is applied to discriminate against an imported product because the product was not produced in compliance with principles for ecologically responsible fishing, the regulation might be found to conflict with WTO rules as they have been interpreted. In fact, restrictions on imports of fisheries products based on how they were harvested have already sparked three of the leading trade and environment disputes to date: the Mexican GATT challenge to the US ban on tuna (*Tuna/Dolphin I*), the EU GATT challenge to the same US law (*Tuna/Dolphin II*), and the WTO case in which India, Malaysia, Pakistan and Thailand have challenged a US ban on shrimp caught without turtle excluder devices (*Shrimp/Turtle*).

Already, in the two Tuna/Dolphin GATT cases, bans on fish imports produced through environmentally destructive methods have been found to violate the GATT. Ecolabels, as applied to imports, could raise similar issues under the GATT or the TBT Agreement. Also at risk of conflict would be taxes that aim to internalize environmental costs by imposing higher tax rates on products produced through environmentally destructive methods. Imposing equivalent

taxes on imports through border tax adjustments would probably be necessary in any country with a significant fishing industry and substantial fisheries product imports (*cf.* Annex I, ¶ 44).

In the long run, the “blanket opposition to non-product-related distinctions, including PPM-based distinctions ... is untenable from the perspective of environmental policy” (Cook, et al. 1997, p. 31). This is because “[d]istinguishing among products on the basis of how they are produced and disposed of will be an essential part of a market-based shift to sustainable production” (Ibid.). Nevertheless, it has been difficult to convince WTO representatives and bodies to abandon the presumption against non-product-related criteria. From the trade policy perspective, a blanket PPM prohibition is a simple, if overinclusive, rule for guarding against protectionist regulations of imports.

It also guards against what has been called “eco-imperialism,” in which a country conditions access to its markets upon compliance with its environmental standards, putting economic pressure on other countries (frequently less developed than the importer) to match those standards or lose market access. If non-product-related distinctions were generally valid under GATT principles, it would be more difficult for trade panels to find principled rationales for preventing a WTO Member from adopting discriminatory measures based on problematical rationales. An example would be a requirement that all imports be produced by workers receiving the same benefits as the importing country’s domestic workers, which was the issue in the Belgian Family Allowances Case.

Conflicts Between Marine Conservation and Trade Rules: The Tuna/Dolphin Cases

The use of non-product related criteria was a central issue in the Mexico and EU challenges to the US ban on imports of tuna caught in a manner that killed dolphins. These challenges, brought under the GATT, were against the US Marine Mammal Protection Act (1984), which aimed to decrease foreign kills of dolphins, by prohibiting the import of yellowfin tuna from nations unless they adopted programs to regulate their tuna fleets that lowered dolphin mortality rates to levels comparable to those inflicted by the United States tuna fleet. The US required its domestic tuna industry to use techniques for catching tuna that minimized harm to dolphins (i.e. fishers could not set nets on the dolphins usually found associated with schools of tuna in the Eastern Pacific).

The United States banned imports of tuna from Mexico because Mexican fishermen still used methods of catching tuna that killed large numbers of dolphins. Mexico objected to the embargo before a GATT panel, which ruled in favor of Mexico in 1991. In 1994, in a separate challenge, the EU also obtained a ruling against the US.

The GATT panels found that the US import restriction violated GATT's prohibition against quantitative restrictions. The panel also held that the import restriction could not be considered a permissible point of importation measure (a variety of internal measure) essentially because it did not apply to the product itself, but regulated the method for producing the product. The first panel ruled that the measure did not qualify for the environment and natural resources exceptions of Article XX, on the ground that it improperly attempted to protect resources outside the national jurisdiction of the United States. The second panel also ruled that the measure did not fit within Article XX, but based its ruling on a different ground, that the measure sought to pressure other countries into changing their policies.

The panel reports were not adopted by the GATT as legally binding, because under the GATT a single country could block the decision to adopt a report (whereas under the WTO, a decision, unless appealed, is automatically binding unless *all* WTO members object to it). Recently, the United States and Mexico, along with other Latin American nations, reached a regional agreement on compromise standards for tuna fishing impacts on dolphins.

One legal mechanism for allowing PPM distinctions for environmental purposes while acknowledging trade policy concerns is Article XX of the GATT, which provides for exceptions to GATT obligations. If PPM distinctions are forbidden under general GATT rules, then Article XX should be interpreted to define the specific conditions under which Members may apply PPM based distinctions. So far, however, GATT, and most WTO, panels interpreting Article XX have taken a very narrow view of its exceptions.³⁶ Environmentalists need to develop an alternative definition of the Article XX exceptions, and persuade WTO Members to adopt it. In Part A below, this report proposes an alternative interpretation of Article XX that would protect PPM measures tailored to achieve conservation goals while acknowledging trade policy concerns. Part IV.B proposes an analysis for analogous issues under the TBT Agreement.

The first hurdle under Article XX of GATT 1994 is to satisfy the terms of the specific exception concerning measures “relating to” exhaustible natural resources. Fisheries or associated marine species have been found by previous panels to fit within the definition of exhaustible natural resources. The conservation measure seeking Article XX protection must be shown to be “related to” the protection of the resource. In *Tuna/Dolphin II*, the GATT panel determined that a measure which would condition market access on the establishment by another country of laws requiring or prohibiting certain PPMs would so seriously threaten the right of market access that it could not be related to the conservation of a resource. Subsequently, but respecting a non-PPM regulation, the Appellate Body of the WTO has interpreted this provision to require only that there be a “substantial relationship” between the environmental measure and the conservation goal, and not just incidental or inadvertent protection of the resource.

The second hurdle under the chapeau of Article XX is that the environmental measure be neither a disguised trade restriction nor an instance of arbitrary or unjustifiable discrimination. One recent WTO appellate body decision stated that the chapeau establishes a sort of due diligence obligation that requires the Member to consider adopting less facially discriminatory alternative measures and to take into account negative impacts the proposed measure could have on foreign entities, to the same extent they are taken into account for domestic entities.

The TBT Agreement, in contrast to the GATT, does not include an explicit environmental exception. However, it should be interpreted in a manner that would also allow countries to regulate products according to legitimate PPM distinctions. One means for achieving the proper result in the TBT Agreement would be to interpret the “like product” term used in its most favoured nation and national treatment provisions according to the “minority test” used by some GATT and WTO panels to determine the likeness of products. As discussed in Part II.C.2 above, this “minority test” allows PPM-based distinctions between products to be made where the distinctions serve a domestic policy end apart from the protection of domestic industry. Environmentalists should also encourage WTO Members to accept this alternative interpretation of “like product”.

As a general rule, a PPM measure derived from an international standard or an international legal obligation should be found to qualify for the exceptions under Article XX. This will be especially true where the international standard was established after express

consideration of potential trade implications.

1. Implementing Trade Measures Pursuant to Multilateral Environmental

Agreements (M

Measures taken pursuant to MEAs should be excepted under Article XX. To date, no such measure has been challenged under the GATT or WTO. Yet, in light of GATT and WTO panel decisions to date, it remains unclear whether GATT's provisions will be interpreted in a manner tolerant to MEAs, in the absence of educational efforts and political pressure by environmental experts, officials and advocates.³⁷

Measures implemented under MEAs should fall within Article XX because they are unlikely to reflect protectionist motivations, having been negotiated and elaborated in multilateral processes in which many different countries and blocs of countries had decision-making power. They also draw upon the best available science at the international level, processed, in many cases, through sophisticated international institutions aimed at collecting scientific evidence and translating it into political and legal decisions.

Such measures should also receive the deference provided for under the SPS and TBT Agreements. The TBT Agreement states that measures applied to imports that are based on international standards are presumed not to create unnecessary obstacles to trade. The SPS Agreement provides that such measures are presumed to be consistent with the requirements of the SPS Agreement and with the GATT 1994 as well.

CITES. Shortly before COP 10 in Harare, Zimbabwe, in June 1997, some participants preparing for the meeting made informal suggestions that some proposed CITES listings might violate GATT obligations and were therefore impermissible. In particular, certain proposals for so-called "split listing" of species were questioned. Split listing is a CITES technique to promote the protection of endangered populations of a species while permitting controlled trade of non-threatened populations of the same species. If a species is endangered in one country but not in others, the Parties may restrict trade of specimens originating in the former country by listing the country's populations of the species in Appendix I, while imposing less strict limits on trade of specimens originating from the other countries. Thus, a CITES Party may import species from one country while restricting imports of the same species from another.

Yet under the reasoning of past GATT and WTO panel decisions, specimens from any population of the same species would probably be considered "like products" because they have similar physical characteristics and end uses. Thus, if a CITES Party is also a WTO Member and it restricts imports from listed populations while permitting imports from unlisted populations of the same species, it might be seen as violating the GATT's MFN obligation or its prohibition against quantitative restrictions.

Other CITES provisions could raise WTO concerns. The Parties must enforce the provisions of CITES by penalizing violators and confiscating prohibited specimens (CITES Article VIII). Further, the Convention permits the Parties to enact domestic measures on international trade of endangered specimens that are stricter than measures imposed on domestic

trade and does not prohibit the Parties from instituting domestic measures to restrict or prohibit trade in species not listed on any of the appendices (CITES Article XIV).

While the text of CITES does not provide for collective action against non-compliant Parties, the Standing Committee has in the past proposed that Parties implement domestic measures, in effect calling for collective trade embargoes. These recommendations, while not legally binding, are influential. For example, in 1991 the Standing Committee recommended a prohibition against trade in certain endangered species products with Thailand (lifted in 1992) for failing to implement effectively the provisions of the Convention. Similar embargoes may be used against non-Parties for refusal to supply comparable documentation to satisfy the permit requirements. These measures could raise national treatment and MFN objections.

The better view, however, is that CITES measures fit perfectly within the exceptions for environment and natural resources measures under Article XX of the GATT. Since measures taken under CITES are based on deliberative, scientific-based data and a multilateral decision passed by two-thirds or more of 138 Parties, they are unlikely to be protectionist or arbitrarily or unjustifiably discriminatory. Thus there is little chance of a direct conflict between the WTO and CITES. Both regimes have strong political support in the international community.

Nevertheless, there is a risk that a perception that proposed CITES measures are incompatible with WTO rules might “chill” the development of creative mechanisms under CITES. Such misperceptions could also hinder the listing of any commercial fish species threatened by trade. Thus, environmental officials and groups must arm themselves with arguments to explain why CITES measures are consistent with WTO rules. They should also take care to defend CITES, including proposed CITES listings, against challenges based upon WTO rules, because of the need to ensure that trade rules do not interfere with trade measures formulated under MEAs, the preeminent forums for defining the measures needed to protect the environment at the international level (see CIEL 1997a).

RFMOs. Regional fisheries management organizations or arrangements (RFMOs) established or recognized under the UN Straddling Stocks Agreement (SSA) are critically important institutions for achieving the sustainable management of fisheries. Measures taken under RFMOs are substantially the same as MEA measures and should likewise be protected from trade challenges. The RFMOs’ rulemaking and enforcement powers are recognized under the SSA. As noted, the SSA is an international agreement with 59 signatories, which was elaborated under the UN Convention on the Law of the Sea (UNCLOS). UNCLOS has been ratified by over 100 countries and is generally recognized as customary international law with the possible exception of the provisions regarding mining on the deep seabed. Equally important, RFMOs, like MEAs, screen out protectionist motivations because they include countries representing a variety of relevant interests; and they embody the international community’s best effort to design a conservation regime based on the best relevant science.

RFMOs are the linchpins of the Straddling Stocks Agreement. Under that Agreement, both relevant coastal states and states whose vessels fish for the relevant stocks have a duty to cooperate with the RFMO, and to comply with the conservation measures established by the

RFMO. States participating in an RFMO “shall take measures consistent with [the SSA] and international law to deter activities of [vessels of non-participating States] which undermine the effectiveness of [RFMO] conservation and management measures” (SSA Article 17.4).

Already, one RFMO has authorized its members to impose trade measures to support compliance with its conservation requirements. At its annual meeting in November 1996, the International Commission for the Conservation of Atlantic Tunas (ICCAT) authorized member countries to impose bans on the import of bluefin tuna from Belize, Honduras and Panama.³⁸ These non-member countries had failed to comply with ICCAT catch restrictions after their non-compliance had been highlighted at the ICCAT’s 1995 meeting. At the same time, ICCAT established penalties to be imposed on members if they overharvest tuna beyond specified quotas. Successively severe penalties include fines equivalent to the value of overharvests, reductions in future quotas, and import bans as a last resort.

In addition, port States have “the right and the duty to take measures, in accordance with international law, to promote the effectiveness of [RFMO] conservation and management measures” (SSA Article 23.1). Thus, “States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of [RFMO] conservation and management measures on the high seas” (SSA Article 23.3). This language empowers any State to enforce an RFMO trade measure against shipments of catch taken in violation of RFMO measures.

Trade measures are the most powerful enforcement tools commonly available in international law. Hence, they will be important for achieving compliance with RFMO requirements. For this very reason, opponents of RFMO conservation efforts will look for ways to oppose trade related measures. They may argue that trade measures are not “consistent with ... international law,” because they violate trade law principles. Environmentalists and countries that wish to promote sustainable fisheries management will need to be ready to demonstrate that in fact such measures are proper under international law.

The WTO needs to develop interpretations of the WTO Agreements that support national implementation of trade measures pursuant to MEAs, RFMOs and other obligations under international environmental law. At the same time, such interpretations must ensure the fair treatment of developing countries in the use of trade measures in MEAs, including the implementation of the common but differentiated responsibility principle, where relevant.

2. Defining Criteria for the Use of National Trade Measures

The imposition of measures defined at the national and supranational level can serve a useful function by catalyzing international action. Yet such measures also raise serious questions of equity between developed and developing countries, and general issues of fairness, since major trading powers are much more able to impose such measures. Consistent with these concerns, Principle 12 of the Rio Declaration, agreed upon at the 1992 Earth Summit, provides that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the

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

The Rio consensus, in other words, was that unilateral trade measures are discouraged but not forbidden. From a sustainable development perspective, countries that import products should not lose entirely their responsibility to manage the environmental impacts of their own consumption, and their power to prod international action on environmental problems. Yet at the same time, leaving countries entirely free to impose trade restrictions based upon environmental standards of their own making poses several risks. One is the risk of disguised protectionism. Another is the risk that countries will impose standards based upon a parochial concept of environmental quality that inadvertently discriminates against other countries.

Of even more concern is the danger that developed countries that are major trading powers will fail to take into account the difficulties facing their developing country trading partners that are locked into export dependency in a global market. The result could be to roll back the limited market access gains made in the Uruguay Round, hampering the developing world’s efforts to achieve development and alleviate poverty.

Environmental groups need to press governments and the WTO to develop a set of criteria for evaluating whether national and supranational measures qualify under Article XX as exceptions. The criteria should involve the following factors:

Whether a multilateral agreement or other international instrument recognizes the environmental benefits of taking the measures being enforced through the trade measure;

Whether the nation imposing the measure made prior good faith efforts to stimulate international agreement on the need for such a measure;

Whether the nation imposing the measure offered appropriate financial and technical assistance to developing countries and their industries seeking to meet the standards called for by the measure;

Consistent with the principle of common but differentiated responsibilities, whether the measure makes other appropriate provision for developing countries to achieve compliance (this might include, for example, additional time allowed for developing countries to phase in the required standards);

Whether the measure focuses on the objective of managing domestic consumption, rather than changing the policies of other countries;

Whether the measure avoids singling out an environmental problem linked to an ecological condition that is peculiar to only some foreign producers, or to foreign as opposed to domestic producers. (In other words, whether the measure avoids discriminatory approaches such as banning imports of tropical timber while permitting trade in temperate timber, whether or not it is sustainably produced.)

Whether the measure is based upon a relevant regional or international standard that was developed in a process in which all stake-holders committed to sustainable development could participate.

These criteria should serve both for purposes of policy (defining the conditions under which such measures are appropriate) and for purposes of law (evaluating whether a measure, if not authorized under a multilateral agreement or RFMO, satisfies the requirements of WTO rules). Environmentalists should advance those criteria in the relevant forums of the WTO and in the national capitals of countries interested in protecting fisheries.

At the same time, environmentalists and environmental officials should keep those criteria in mind when designing or proposing any trade-related fisheries conservation measure, whether proposed in a national legislature, a national fisheries agency, an RFMO meeting, an international meeting of a body such as the FAO Committee on Fisheries, or a WTO dispute settlement panel.

As discussed in Part III.F above, the EU Common Fisheries Policy (CFP) is the governing instrument in the EU for the conservation and management of fisheries in EU waters, for operations of vessels whose flag states are EU Members, and for processing and marketing of fish products in EU Member states' territories. The criteria for evaluating unilateral trade-related measures outlined in the preceding section, are also relevant for regional supranational measures such as those established under the CFP.

The GATT addresses regional customs unions and free-trade areas in Article XXIV. It imposes certain obligations, such as notification requirements and requirements that WTO Members participating in such regional institutions and agreements avoid increasing duties or making other trade regulations more restrictive than they were before the union or free-trade area came into existence. In general, however, these provisions would not affect the analysis of national measures discussed at the beginning of this section.

Import restrictions imposed by a regional economic organization such as the EU that applied to non-Members of the organization would be treated according to the same analysis that would be applied to measures imposed by a single WTO Member. Imposing the same licensing requirements on EU and non-EU vessels operating in EU waters should not raise an issue, as long as the measures are non-discriminatory. As for restrictions on imports, if a regional organization such as the EU were to impose a ban on imports of fish products on the basis that they were unsustainably harvested, the restriction might be found to violate EU Members' GATT obligations in that it discriminated based upon a PPM-based distinction.

B. Applying Ecolabeling and Certification to Traded Fisheries Products: Bridging North-South Divides Through International Approaches

Ecolabeling is a market based mechanism currently receiving heightened attention. Ecolabels inform consumers of the environmental impacts associated with a labeled product. This information allows consumers to exercise preferences for "green" products. Many environmentalists hope that ecolabeling will serve as a powerful tool for rewarding green producers by enabling them to communicate to green consumers, thus gaining market share, and possibly a price advantage. Many ecolabels provide information on the environmental impacts of

PPMs.

Ecolabeling is linked to the concept of “certification.” That is, ecolabels, to be reliable sources of information for consumers, must be affixed only to products that have been certified by an independent third party as complying with certain content and/or production standards.

Ecolabeling, if mandated by government regulations, clearly comes within the scope of WTO rules. Although one might assume that private, voluntary ecolabeling schemes would not be covered by trade rules, in fact they, too, appear to be subject indirectly to certain trade disciplines, in particular the obligations found in the TBT Agreement’s Code of Good Practice.³⁹ Given past GATT and WTO cases involving PPM measures, it is possible that a voluntary, non-governmental scheme for labeling products according to the environmental impacts of their PPMs would be held inconsistent with WTO rules.⁴⁰

In fact, the current political climate in trade circles is hostile to ecolabeling. Developing country governments in the WTO Committee on Trade and Environment have expressed fear that it will be a pretext for closing the market access they gained in the Uruguay Round. Many mainstream companies and trade associations in industrialized countries are equally hostile, fearing that ecolabels could put them at a disadvantage, compared to innovative producers that use more environmentally friendly production methods. They have launched well-organized and well-financed campaigns to use trade rules to block ecolabels.

Yet, ecolabeling is perhaps the least coercive market-based incentive for conservation available. If trade policy were to block this minimal step toward correcting the market failures represented by externalized environmental costs, it would be a tremendous set back for the environmental community and would risk backlash against the multilateral trading system. Thus, all concerned have an interest in avoiding conflicts between ecolabeling and trade rules.

International cooperation to develop criteria for ecolabels is necessary to address the understandable fears of developing countries that ecolabeling could be a disguised form of protectionism. Even in the absence of protectionist motivation, national or regional approaches run the risk of producing standards that are inadvertently biased against foreign competitors, because they may reflect a limited or parochial understanding of economic, social and ecological conditions.

Thus, processes for developing labels and standards should be open to broad participation by relevant industry, environmental groups, development groups and scientists. At the same time, institutions developing standards will need to define minimum criteria for who can become a member and make decisions. They should not have to accept as members companies or trade associations that are unwilling to commit to basic principles of sustainability.

With respect to the labeling of fish products, standard-setting institutions will need to take into account a range of criteria and issues, including all of the conservation and social issues relevant to achieving ecologically responsible fisheries. The institutions will also need a governance structure that gives all interested parties a voice in standard-setting (including artisanal, traditional and indigenous producers, developing countries, and small and medium-

sized enterprises) while avoiding either an imbalance or a deadlock among interest groups. Additionally, ecolabeling schemes must incorporate and implement appropriate financial and technical assistance to needy producers in developing countries, in particular small and/or traditional producers. The institutions will need to establish some strict criteria for what qualifies as sustainable or environmentally-friendly, while at the same time taking into account the ecological and other differences among fisheries from region to region and locality to locality. Finally, both standards and certification procedures should provide for differentiated treatment of producers in developing countries, where appropriate, through measures such as longer phase in periods. Labeling initiatives that are consistent with these principles should be found consistent with the provisions of the TBT Agreement.

Which institution or institutions are most likely to satisfy these difficult requirements? They could be private and non-governmental. Voluntary certification/labeling schemes could evolve to the point of serving as de facto international standards, without intervention from any intergovernmental process. Arguably, this has happened with the standards set by the International Federation of Organic Agricultural Movements (IFOAM), for example, which are the basis for national organic farm certification labeling in several countries. In timber, the Forest Stewardship Council is making admirable efforts, although not without controversy.

In the fisheries sector to date, there is no dominant private contender. It is critically important that the right institution or mix of institutions become involved in standard-setting for fisheries. Some segments of industry are looking for ways to gain the “green” cachet. The conservation community must actively steer industry in the right direction. Several institutions have the potential to affect the development of standards that could eventually serve as criteria for application of market mechanisms such as ecolabels. Relevant institutions include the Marine Stewardship Council (MSC), the ISO, the FAO through the Code of Conduct for Responsible Fisheries, and the Biodiversity Convention with its Jakarta Mandate on coastal and marine biodiversity.

The Marine Stewardship Council (MSC). The MSC was initiated and is currently led by the World Wide Fund for Nature (WWF), the world’s largest conservation organization, and Unilever Corporation, which is number 21 on the Fortune 500 list and one of the largest fish product companies in the world. The plan is for the MSC to develop criteria for ecologically sound or “well-managed” fisheries, and to certify products from specific fisheries, which could carry the MSC logo (to be designed). WWF and Unilever have conducted a series of regional and international workshops to develop draft criteria. The workshops have included a fair range of participants and recent drafts include a number of commendable elements. Next, they plan pilot projects in selected fisheries in various regions including North America and Southeast Asia. The MSC is a UK non-profit corporation, but as yet has no board, no permanent staff, and no permanent governance structure. Unilever has publicly committed to buying only from certified fisheries by 2005.

While it is an ambitious response to an urgent need, the MSC has been severely criticized. The MSC has publicly stated that it will focus on accrediting large industrial-scale producers, preferably those with dominant market shares. Predictably, this has alienated small community-based producers. Its proposed governance structure does not yet include a

mechanism that would ensure impartiality in the development and application of standards and guard against undue influence due to Unilever's dominance of the institution. The MSC as proposed does not adequately separate the functions of setting standards for practices in fisheries, accrediting organizations that will certify producers as meeting those standards, and certifying organizations for meeting those standards. To date, the MSC also seems to have ignored the often-severe impacts from post-catch processing.

The International Organization on Standardization (ISO). ISO is an international federation of national standardization bodies from some 100 countries which work together to set industry-wide standards for a range of goods and services. ISO's objective is to facilitate trade through the harmonization of standards. Compliance is strictly voluntary, but the strength of industry reliance on ISO standards often puts heavy pressure on producers to comply. The manufacturer itself may declare its products in compliance, or an independent body may certify compliance.

ISO has yet to engage in activities specific to the fisheries sector. At present, a significant proportion of ISO's membership opposes the development of environmental standards for particular sectors. However, many in the institution would like to see it move in that direction. Reflecting this tension, ISO has established a working group on forestry, but the group currently has no mandate to develop draft standards (only to develop a technical reference guide for the implementation of ISO environmental management system standards in the forestry context). Some countries are pushing for it to do so, while others oppose such a step.

ISO is developing standards for environmental management systems of corporations: the ISO 14000 series. Many in the WTO and ISO seem eager to position ISO as the authoritative international standard-setter for certification of environmentally sound production. At the same time, a number of governments are moving to incorporate ISO standards by reference into environmental regulations.

From the environmentalist perspective, however, ISO lacks the capacity to play such a role. ISO's objective is to facilitate trade, not to protect the environment or natural resources. In other words, its main goal is to achieve harmonized standards, without reference to whether those standards actually protect the environment. If countries were to begin to adopt standards produced by an entity like ISO, then global standards might be so lax that unsustainable producers could gain certification, consumer confidence in labels would dwindle, and the potential for ecolabeling to harness the power of the market would be lost.

The FAO Code of Conduct for Responsible Fisheries. As discussed in Part III.B, the Code includes a number of requirements that would greatly support the achievement of ecologically sustainable fisheries. Some of these relate to trade. Article 11 of the Code on "Post-Harvest Practices and Trade," provides that States "should ensure that international and domestic trade in fish and fishery products accords with sound conservation and management practices through improving the identification of the origin of fish and fishery products traded" (FAO Code, Article 11.1.11).⁴¹ Article 11 also provides that "States, noting the existence of different production methods, should through cooperation and by facilitating the development and transfer

of appropriate technologies, ensure that processing, transporting and storage methods are environmentally sound” (FAO Code, Article 11.1.7).

On the other hand, the Code also includes some references to trade policy that are highly problematic. As discussed, WTO rules, if interpreted along the lines of past panel decisions, could interfere with efforts to develop ecolabeling schemes or other measures that distinguish among products according to PPMs. Thus, it is troubling to find that the Code gives unqualified deference to WTO rules. It provides that its provisions “should be interpreted and applied in accordance with the principles, rights and obligations established in the [WTO] Agreement”(FAO Code, Article 11.2.1).⁴² Similarly, the Code states that “[f]ish trade measures ... to protect human or animal life or health, the interests of consumers or the environment, should ... be in accordance with internationally agreed trade rules, in particular [those of the SPS and the TBT Agreements]” (FAO Code, Article 11.2.4).

The various WTO Agreements have yet to be interpreted authoritatively. Informal interpretations of the GATT and the SPS Agreement, advanced by many WTO Members to date, however, would serve to undermine environmental protection. WTO panels have shown little sympathy for or understanding of environmental issues. Thus, this type of “WTO savings-provision” is deeply troubling.

The FAO plans to provide continuing technical assistance on implementation of the Code to its member States as well as technical guidelines on implementation. In this process, environmental groups have a chance to educate fisheries officials about how PPM certification and labeling of products, particularly international approaches, are important tools for sustainable development, and are also consistent with WTO rules.

The Convention on Biological Diversity. The Conference of the Parties (COP) of the Biodiversity Convention has agreed upon a set of preliminary guidelines for the implementation of the Convention with respect to coastal and marine biodiversity, termed the “Jakarta Mandate.” The Jakarta Mandate includes a number of recommendations for the sustainable use of marine and coastal living resources. These could serve as the basis for guidelines for production methods for products such as wild caught or cultured marine organisms. Also important is the Convention’s requirement under Article 11 that each Party create incentives for the conservation and sustainable use of components of biodiversity, as far as possible and as appropriate.

The Jakarta Mandate is one of the Biodiversity Convention’s most significant accomplishment to date because it contains a number of practical recommendations for developing a comprehensive, ecosystem-based approach to marine conservation and sustainable use. For example, it calls on each Party to provide for environmental impact assessment of mariculture projects that includes the participation and considers the needs of local and indigenous communities (COP II/10, SBSTTA I/8, ¶ 15 I(b)).

Nevertheless, the Mandate’s flaws must also be acknowledged. The Mandate is poorly organized and fails to cover some issues adequately (e.g. land based sources of marine pollution). It is also excessively qualified with respect to certain environmentally critical but politically

sensitive issues (e.g. fisheries subsidies). Some of these flaws may be remedied, as the Parties move forward with the process for elaborating the Jakarta Mandate. While this process started slowly, the first experts groups meeting was held in Jakarta in March 1997, and the September 1997 meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) recommended a work program that included some potentially useful activities.

Through this initiative on marine biodiversity issues, the Biodiversity Convention could play a helpful role in implementing principles for sustainable fisheries. Through the Biodiversity Convention regime, Parties could work to foster a better North-South dialogue; develop standards and associated incentives -- such as ecolabeling -- for sustainable use of biological resources that would benefit both developing and developed countries; and address the use of labeling, including labels that incorporate PPM criteria, in an environmental regime and within a specific sectoral or ecosystem context.

Like the FAO, the Biodiversity Convention has features which could enable it to provide a counterweight to institutions such as the WTO and ISO that are dominated by Northern business and uninterested in environmental goals. Developing countries have a stronger voice in the Biodiversity Convention than in the ISO. Furthermore, the Biodiversity Convention combines the objectives of conservation, sustainable use and benefit sharing in an effort to achieve sustainable development. In addition, the Biodiversity Convention has access to interdisciplinary expertise through the SBSTTA.

Questions remain, however, about the extent to which the Biodiversity Convention can fulfill its potential. The Convention, which entered into force in 1993, has struggled to build up political credibility, substantive focus, and the institutional capacity to assemble technical and scientific expertise. Conservationists will need to consider the pros and cons of the institution when deciding where to put their resources.

To sum up, environmentalists should adopt a basic strategy of encouraging and supporting international, transparent proceedings for developing standards and systems for certification and ecolabeling consistent with principles for ecologically responsible fisheries. They should also help shift the terms of the debate. Rather than thinking of ecolabels as barriers to market access, governments and industries need to think of them as measures to increase access to green consumer markets, to encourage the long term availability of resources, and to maintain truly sustainable fisheries.

Environmentalists should also press the WTO to establish criteria for the recognition of particular bodies as international standard-setting bodies for purposes of setting international environmental standards. These criteria should reflect the discussion above, identifying appropriate bodies other than or in addition to the ISO. Although ISO is presently thought of as the international standard-setting body for all standards, in fact, it is not an appropriate body for setting environmental standards. Environmental groups will also need to assess strategically the value of supporting the various forums relevant to ecolabeling, or if appropriate (keeping in mind the risks) help launch a new initiative to set standards for ecolabeling.

C. Eliminating Destructive Subsidies

Government subsidies to the fishing industry are widely recognized as one of the greatest underlying causes of the overexploitation of fisheries (see, e.g., UNEP 1997). Subsidies undermine the adoption of ecologically sound fishing practices because they promote overcapacity (more fishing vessels which are more powerful and able to make larger catches). They attract more participants into the industry by raising profits; they encourage fish producers to remain in the industry by compensating them for idle time when moratoria on fishing certain stocks are declared; and they induce more producers to adopt improved technologies by reducing the costs and risks of investing (Porter 1997b, p.14). The net effect of the resulting overcapacity is overfishing.

Subsidies also promote inefficient fishing. Since the cost of subsidized fishing is less than its real cost, subsidies reduce the incentive to investigate and employ more efficient uses of resources, particularly energy used in the processing industry. A larger world supply of fishing products drives world prices down, depressing returns on fish exports, with particularly serious consequences for countries heavily dependent upon fish exports, most of which are in the developing world (WTO 1997a, ¶ 15; WTO 1997b, ¶ 11). The availability of cheap fish and fish products promotes overconsumption, which also drives overfishing.

In light of these facts, urgent government action is needed to eliminate subsidies that underwrite expansion of fisheries capacity or migration of fleets to distant waters. Fishing subsidies are ripe for global reform.

Several recent studies on various aspects of fishing subsidies offer a solid analytical base for further work (see eg. Milazzo 1997, Porter 1997a, Porter 1997b, Stone 1997). However, one of their main findings is that there are many different types of fisheries subsidies, and their environmental and economic impacts are difficult to quantify. More analysis and research is needed in this area.⁴³

Nevertheless, these studies conclude that WTO rules could be an avenue for reducing fisheries subsidies that encourage unsustainable exploitation of fish. It is impossible to say with certainty whether a WTO panel would find a particular type of subsidy in violation of the Subsidies Agreement. The Agreement's provisions are new, complex and as yet untested. In principle, however, the disciplines of the Subsidies Agreement would appear likely to prohibit many of the practices that WTO Members currently use to subsidize their fishing fleets.⁴⁴ Practices that might be challenged include, for example, tax breaks, payments to vessels for idling when fish moratoria are declared, fuel subsidies specifically for fishing vessels, funds for modernization of vessels, and loan guarantees (*cf.* Porter 1997b, pp.35-39).

WTO Members seem increasingly willing to address subsidies through multilateral discussions. Challenges to other Members' fishing subsidies might, however, help build the political pressure for broader reform. Already, subsidies for fishing have been raised in the WTO's CTE, as part of its review of the environmental benefits of removing trade restrictions and distortions (see e.g. WTO 1997a, WTO 1997b).

In addition, observers of the WTO expect that the WTO ministerial meeting in May of 1998 will launch an informal set of “mini-rounds” of pre-negotiation discussions that could prepare the WTO Members for a “millennial round” (another big round of trade negotiations, following up on the Uruguay Round). Subsidies are expected to be on the table, and fishery subsidies are of particular interest to many countries, such as New Zealand and Canada. The principal resistance will probably come from major subsidy-providers -- in particular, Member countries of the EU, such as Spain. (The EU may not be a solid bloc on this; the European Commission, for instance, as an institution, has endorsed measures to reduce overcapacity.)

In spite of opposition, it is to be hoped that the CTE will recommend at the up-coming WTO ministerial meeting that WTO Members begin multilateral discussions on an agreement to discipline fishing subsidies.

One major question is, which forum should host such negotiations? The attractions of the WTO are that: (1) it has the political clout to enforce policy reforms against the will of vested interests; (2) an agreement negotiated in the trade context is more likely to contain effective sanctions in the form of trade measures; and (3) there appears to be some political will to address the issue in the near future.

On the other hand, the WTO has little if any expertise on fisheries conservation, and almost no institutional commitment to sustainable development or conservation. As long as the WTO has these limitations, it is probably not advisable to start a practice of negotiating agreements on mixed conservation/trade issues purely within the WTO.

Moreover, while environmentalists would like to see the power of the WTO harnessed to eliminate environmentally harmful subsidies, they will probably wish to reserve to countries the right to apply at least some environmentally progressive subsidies. Examples include support for conversion to environmentally friendly fishing gear, vessel buyback programs, and retraining of fishers. However, this is not a simple issue: even pro-environmental subsidies may distort prices in a global market to the point where poor countries will be unable to employ the same environmental practices and still compete with the subsidized products. Consequently, subsidies may have unwanted negative social and environmental effects unless they are implemented across the board at the inter-national level. The negotiations’ terms of reference (TORs) should include a clear, unqualified commitment to the objective of conservation of fisheries. The TORs should also provide for identification of permissible pro-conservation subsidies, combined with a commitment to provide financial and technical support for such measure in developing countries.

The negotiation process should also provide for some kind of liaison, and perhaps a partnership, with other institutions. The FAO, for instance, has a great deal of expertise and experience relating to fisheries conservation, management and policy, and a well-developed institutional structure linked to national fisheries agencies. Some kind of a joint sponsorship might lessen the concern over placing responsibility for an environmental and natural resource initiative in the hands of an institution without adequate environmental or natural resource expertise.

Another relevant international instrument to which such negotiations should be linked in some fashion is the Convention on Biological Diversity. The Convention's provisions are relevant to the conservation of fisheries, given the close linkages between biodiversity and fisheries health and the Convention's requirement that Parties create economic incentives for conservation. The Convention has set up a panel of experts that is developing recommendations for implementation of the "Jakarta Mandate" on marine and coastal biodiversity; these recommendations could feed into the subsidies discussions, or the experts might provide input on specified biodiversity questions.

Fees for Access to Fisheries. A number of commentators have argued that governments confer a subsidy when they "permit private businesses to remove a natural resource from the public domain at little or no cost to the producer" (Porter 1997b, p. 6; see also Milazzo 1997). Environmental groups should insist that this issue be on the table, if and when governments begin negotiations on fishing subsidies. There are powerful arguments that such underpricing indeed operates as a subsidy to encourage overexploitation of a resource. While trade impacts are extremely difficult to quantify, there are strong arguments that such underpricing creates pressure on trading partners, whose producers seek lower access fees in order to compete with the low prices of products produced using the underpriced resource.

Fees for Foreign Access to Fisheries Within an Exclusive Economic Zone (EEZ). One particularly troubling issue involves agreements providing for developed country vessels to gain access to fisheries in the EEZs of developing countries. In negotiating these agreements, developing countries may hesitate to raise the price of access, fearing they will lose the contract to another country. Often the countries negotiating such agreements are under enormous pressure to exploit their natural resources to service a crushing national debt.

A recent study of EU fisheries agreements with African countries details gross underpricing of access, as well as inadequate monitoring, probable underreporting of catches, and other abuses (see Porter 1997a). The EU negotiates these agreements on behalf of its fishing industry. The agreements provide for the EU to pay the African access; private vessels from the EU also pay license fees.

The difference between the value of the resource that EU vessels are taking and the price of the vessel license fees makes the arrangements unconscionable. For example, one author estimates that the license fees paid by EU fishing enterprises for tuna fishing under EU agreements with Guinea, Guinea-Bissau, Senegal, Mauritania and Morocco amounted to approximately 0.18% to 0.73% of the value of the estimated catches (Porter 1997a, p. 10).

Environmentalists should use the WTO rules to invalidate these agreements. Underpriced access should quantify as an actionable subsidy under the rules of international trade, although this argument has yet to be raised in a specific challenge. Moreover, the EU generally pays a large proportion of the total cost of gaining access, on behalf of private vessels. These payments for access under the agreements on behalf of its industry very likely constitute actionable subsidies as defined under the Subsidies Agreement.

The extremely low cost of access for these fishing vessels creates an enormous economic incentive to exploit the resources. In fact, EU fishing in African waters under these agreements has contributed to steep declines in fish stocks (Porter 1997a, pp. 14-17). The social repercussions are likely to be serious since the populations of several countries depend heavily on fish for nutrition (Ibid, p. 17). The African countries also forego income that could contribute to their economies as they deplete their national resources. Yet proposals to increase fees raise very sensitive issues. Many argue that the rights of local communities to use public resources should not be contingent on their ability to pay. Fees for access must be developed and applied in a way that provide for the essential needs of communities traditionally dependent on local fisheries for their livelihoods (see Annex I, para. 34). In addition, all measures taken to protect fisheries should respect the cultural practices and economic needs of communities that have been dependent historically on local fisheries (see Annex I, para. 36). Each country should safeguard the traditional access rights of coastal communities.

Under current trade rules, it is possible to protect local and traditional communities and the environment. Access fees could be assessed at a rate corresponding to the sustainability of the fishing activity, as well as its basis in traditional resource rights or the extent to which it directly satisfies basic nutritional needs. Subsistence fishing, for example, could be completely exempt from paying fees. To the extent that a multilateral agreement includes provisions on access agreements, these provisions should ensure that countries fully protect the rights of traditional artisanal fishers. In addition, there should be clear limits on the proportion of the total catch made available to foreign vessels, and the zones within which foreign vessels can fish. These limits should be defined to protect traditional fishing areas and the nutritional needs and traditional livelihoods of coastal communities. It is important, however, to note that some or all of these measures might be undercut by proposed investment liberalization rules (see Part IV.E).

In sum, environmentalists should support multilateral agreement among WTO Members to set limits on fisheries enforced by trade sanctions. The negotiation should involve the following elements:

The negotiation should probably be co-sponsored by the FAO and the WTO, should be transparent to all, including NGOs, and should provide for comment at some stage by the COP and/or Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) of the Biodiversity Convention;

the terms of reference for the negotiations should emphasize the need to achieve sustainable fisheries, and the agreement or other outcome should reflect principles for ecologically responsible fisheries;

the outcome should provide for the progressive phasing out of subsidies to the fishing industry that distort trade and discourage conservation;

the outcome should establish minimum standards for the process of negotiating agreements on access to coastal States' exclusive economic zones (EEZs) and territorial waters, possibly including regional or sub-regional collective bargaining;

the outcome should include minimum criteria for access fees for foreign vessels in national waters;

the outcome should forbid governments or other authorities from paying EEZ access fees on behalf of their vessels;

the outcome should obligate countries to protect the traditional rights and needs of coastal communities to fisheries.

Trade Rules and Subsidies: Focus on the EU Common Fisheries Policy

Under the Common Fisheries Policy, the EU provides various types of subsidies to participants in the fishing industry. The budget for the 1994-1999 period is nearly US\$2 billion. The Policy provides capacity-promoting structural support, including \$748 million for fleet renewal and modernization, and just over \$300 million for the market support scheme which guarantees minimum fish prices (Milazzo 1997, p. 23). The Policy also subsidizes the exploitation of fish resources because the EU pays most of the access fees required under fishing agreements signed with African countries. In 1994-96, EU tuna vessels paid less than 15% of the total cost of access to tuna fishing grounds, while the EU paid more than 85%, under seven of the eight agreements. Similarly, EU shrimp trawlers paid only 24-32% of the total cost under five agreements, while the EU paid the remainder (Porter 1997b, p. 29).

Most of the fisheries subsidies provided to producers seem vulnerable to challenge under the Subsidies Agreement. As discussed in Part II.F, a subsidy is a financial contribution provided by a government or a price or income support scheme which provides a benefit to the recipient. This definition would appear to apply to the direct money transfers made by the EU and Member States to participants in the Community fisheries industry. Because, however, the provisions of the Subsidies Agreement are new, complex and untested, commentators have called for further analysis of the precise extent to which the EU's subsidies are inconsistent with the Agreement (*cf.* Porter 1997b, p. 37).

In contrast to these harmful subsidies, it appears that the capacity-reducing subsidies provided under the EU structural support program may promote rather than hinder ecologically responsible fisheries. The vessel and fishing permit buyback programs are a key component of efforts to reduce overcapitalization of fishing fleets. Because fishing boats have little or no alternative use, such economic incentives encourage a shift of capital out of the sector. In practice, however, the structural support program has had little success. Although the EU restructuring plan has been in operation since 1987, progress in reducing the capacity of the EU fishing fleet has been disappointing and the fleets of certain member countries have actually increased (Milazzo 1997, p.23, 78).

D. Enhancing Positive Incentives

One urgent government action for promoting sustainable fisheries is the creation of incentives to encourage the reduction of excess fishing capacity. Such incentives include compensation plans to help workers who are displaced by fishing capacity reductions, or who are affected by transitional programs (see Annex I, para. 42).

The trade-related problem is that some arguably environmentally friendly incentives may at first glance appear “actionable” — that is, subject to challenge under the Subsidies Agreement. One example is compensation to vessel owners for not using their ships, or to fishers for not fishing. However, the Agreement only forbids subsidies that have adverse effects upon other WTO Members. Subsidies that do not affect international trade generally should not be subject to sanction under the Agreement. Retraining programs should not be at risk. Still, because some of these measures arguably benefit the fishing industry as a whole, by making it more competitive and, potentially, by reducing the losses producers must absorb, they might conceivably be challengeable.

The Subsidies Agreement contains an environmental exception which might protect subsidies granted to promote environmentally sound adaptation of vessels and other fishing facilities. However, the exception is narrowly tailored, so the permitted subsidy may not make the adaptation economically viable for the subsidized entity. Also, it is not clear whether this provision would apply to non-stationary facilities.

Environmental groups will need to analyze these types of incentives carefully and develop a typology of positive incentives -- incentives that truly encourage reduction of capacity or conversion of gear and methods to less destructive alternatives -- that should be permitted under current and future trade disciplines on subsidies for fishing as well as other types of natural resource extraction. In so doing, groups should bear in mind the potential impact that even pro-environmental subsidies might have on the environmentally sound practices of poorer nations. Even green subsidies, if implemented on a national scale within the context of a global marketplace, risk distorting prices to the point of making the same environmental practices in poor countries uncompetitive. As a rule of thumb, it is better to advocate an international framework for subsidies.

In sum, environmentalists should define the types of incentives needed to support a transition to sustainable fisheries (e.g. employment retraining, financing of conversion to less wasteful gear, etc.). They should ensure that appropriate pro-conservation subsidies are permitted under any agreement disciplining fishing subsidies, taking into account impacts on developing countries. In particular, they should evaluate the social impacts of unilateral subsidies on developing countries, and explore an international framework to define and support positive incentives -- including financial and technical assistance to developing as well as developed countries, or other methods for minimizing market distortions that could discourage adoption of environmentally sound practices in developing countries. All such measures should facilitate a long-term transition to ecologically responsible and socially just systems of fisheries

management in which subsidies, even for environmentally beneficial purposes, are no longer necessary.

E. Addressing Conservation Issues Relating to Investment Liberalization

Foreign direct investment (FDI) -- a form of international trade in capital -- has significant environmental impacts, including impacts on biodiversity. These impacts are difficult to measure in part because they are indirect. They result not from the transfer of capital itself, but from the activities supported by the investment, such as the construction of a dam or the expansion of a plant. Impacts can be either positive or negative, depending on the nature of the technology or operation supported by the investment. It is difficult to isolate FDI flows in the fisheries sector from other FDI and from fisheries activities supported by domestic investment. However, there is some evidence that FDI plays a significant role in the fisheries sector in at least some countries, and further investigation appears warranted.

Currently, OECD countries are negotiating a multilateral agreement on investment (MAI), and WTO Members are likely to begin informal talks on investment liberalization in the summer of 1998. Any agreements coming out of these talks should impose minimum standards on multinational corporations -- including those in the fisheries sector -- that invest in countries unaccustomed to the increased scale of economic activity and the introduction of new technologies that typically accompany an influx of foreign capital. These agreements should not serve as shields for corporations to avoid legitimate environmental regulations.

Unfortunately, even these minimal goals remain outside the current terms of intergovernmental debate. Rather, talks focus exclusively on expanding the rights of investors, with no consideration of investor responsibilities. Unless environmentalists move quickly to change the terms of the debate, the world will have lost an opportunity to address the environmental impacts of private investment.

Current proposals for obligations to be included in the MAI would cause serious problems for fisheries conservation. As discussed in Part III.G above, these fall into three categories:

Requirements that countries treat investors according to the national treatment and most-favoured-nation principles, which would reduce countries' power to limit access to fisheries;

Measures requiring compensation for expropriation of investment, where "ex-

propriation" is

A prohibition on "performance requirements" which require foreign investors to take steps to confer local benefits.

National Treatment The national treatment obligation in the MAI would require a country to treat foreign investors as well as domestic ones in all respects.⁴⁵ A similar "national treatment" requirement under EC rules was held to forbid the UK from limiting access to its fisheries to UK nationals or corporations majority-controlled by UK nationals (see box on the UK/Spain Cod Fishing Dispute, page 46). It is very likely that such a clause in an MAI would block Parties from giving preferential access to nationals, and would block provincial or state

authorities from giving preferential access to residents of the province or state. While the relationship between this sort of access restriction and conservation is complex, arguably, citizens of a country, state or province living in close proximity to a natural resource are more likely than those living far away to maintain the resource for the long term, because they and their descendants are more likely to suffer the consequences of resource depletion. Moreover, equity dictates granting priority to the historic access enjoyed by nationals that have a traditional dependence on certain natural resources. Examples of existing laws limiting access that might be challenged include:

In Mexico, only companies that are majority owned by nationals may fish in Mexican waters (NAFTA 1992);

In the state of Maryland in the United States, only state residents may lease sub-merged lands (oyster beds) to cultivate oysters, and they may not transfer leases to non-residents. (WGA 1997, p. 11);

In the state of Massachusetts in the United States, only state residents may receive permits for commercial lobster fishing. (WGA 1997, p. 11).

Worse yet, it is possible that restrictions that do not even mention nationality might be challengeable under certain interpretations of an MAI, if they were to have the *effect* of discriminating against foreign nationals. For example, a government might be forbidden from closing a fishery to new entrants, if the majority of existing fishers were domestic, and foreign fishers were to seek access. It is not inconceivable that a dispute settlement body hearing a complaint of a violation of an MAI would view a new entrant limitation in such a situation as a violation of the national treatment obligation. As all investors would receive the same treatment irrespective of national origin, it is not certain that such a measure would run afoul of these obligations, but such an interpretation would be consistent with the current practice (for example, at the WTO) of interpreting trade agreements very broadly and in disregard of environmental consequences. Examples of existing conservation regulations that might violate such a rule include:

The state of California in the United States “has imposed a moratorium on commercial salmon fishing licenses until the fleet size falls below 2,500 vessels” (WGA 1997, p. 11).

The state of Washington in the United States limits the number of fishers who can make landings of ocean pink shrimp to those who have “historically and continuously” harvested the shrimp. (WGA 1997, p. 11).

Expropriation The provision on expropriation that has been proposed for the MAI would provide for compensation when a company is deprived of its investment by a measure “tantamount to expropriation.” This provision could raise serious problems for environmental regulation (Ibid.). For example, under a similar provision in the NAFTA, the Ethyl Corporation recently filed a US \$251 million claim against the Canadian government, after Canada imposed an import ban on the toxic gasoline additive MMT, of which Ethyl was the leading supplier. The company has argued that the regulation is equivalent to an expropriation of its investment.

Such a rule could interfere with a government’s effort to modify the conditions (such as

catch or gear limits) placed on the granting of a fishing permit according to changes in ecological conditions. If the government were to need to reduce the quotas available under a permit, a foreign investor holding the permit might argue that the value of its property had been diminished and compensation was due. Individual transferable quotas (ITQs), in particular, could raise such problems, because they have more of the characteristics of private property than do conventional permits, since they can be bought and sold.

Prohibition on “performance requirements” Part III of the draft OECD MAI, *Treatment of Investors and Investments*, bans a number of “performance requirements” which have traditionally been used by developing country governments to ensure that foreign investment complements their development objectives. These include performance requirements for the transfer of “technology, a production process or other proprietary knowledge.” In addition, the draft MAI bans requirements to: achieve a given level of employment; invest in R&D in its territory; hire local personnel; establish a joint venture; achieve a minimum level of local equity participation; achieve a given level of domestic content; or accord preference to domestic goods and services. Some of these restrictions would apply retroactively to “advantages” which have already been granted to investors. These provisions in the MAI could severely limit developing countries’ ability to use investment policy as a tool to promote sustainable social, economic or environmental objectives.

Unquestionably, the most serious of these performance requirements from an environmental perspective relates to the ban on conditioning investment on the transfer of “technology, a production process or other proprietary knowledge.” In addition to preventing governments from conditioning investment on the transfer of technology, the draft MAI would prevent governments from *imposing, enforcing or maintaining* “any commitments” by investors to transfer technology.

Thus, the proposed MAI appears to curtail governments’ ability to negotiate for enforceable technology transfer agreements with investors as a condition of natural resource extraction concessions (except perhaps respecting government procurement contracts).⁴⁶ Hindering the transfer of environmentally sound technologies on commercial terms (in exchange for access to natural resources) would fundamentally undermine the sustainable development agreements achieved in the United Nations Environment and Development Conference of 1992.⁴⁷

Technology transfer is critical to achieving objectives of the Climate Change Convention, the Biodiversity Convention, the Vienna Convention for the Protection of the Ozone Layer, and its Montreal Protocol, all of which require governments to promote technology transfer to build capacity in developing countries to address global environmental problems.

The MAI also prevents governments from requiring technology transfer by investors from both Contracting Parties, and non-Contracting Parties. Therefore, a country which enters into the MAI is precluded from requiring technology transfer from *any* foreign investor, regardless of whether their home country is a party to the MAI. The MAI negotiations at the OECD are but the first step in an effort by the OECD countries to promote international investment rules. Investment policy is almost certain to be taken up in the WTOs millennial round of negotiations.

Environmental groups should identify fisheries conservation measures that could be threatened by the rules of the MAI, analyze potential problems and publicize them so as to build public awareness and stimulate public discussion of international investment rules. It would also be useful to research “double-standard” cases and compare the environmental impacts of the investments of a multinational corporation in a developing country and in the corporation’s home country.

In addition, environmental groups should monitor investment liberalization negotiations and propose measures to ensure that any resulting agreements protect the rights and interests of coastal and traditional communities to receive preferential treatment, including preferential access to marine resources. Furthermore, environmentalists should define provisions that should be included in investment agreements, so that the agreements promote to sustainable development. For example, an MAI could:

- require home countries to modify their legal systems to hold their corporations accountable for injuries to human health and the environment that the corporation’s subsidiaries or branch offices cause in less developed countries;

- require host countries to provide their citizens with rights of action against foreign corporations that have failed to meet the environmental standards of their home country; and

- Require home countries to impose minimum environmental standards on their corporations’ foreign investments in accordance with their environmental legislation.

Environmentalists should advocate these provisions in the relevant forums of the OECD, the WTO and in national capitals of countries especially interested in protecting fisheries.

Effects of Investment Liberalization: The UK/Spain Cod Fishing Dispute

The European Union defines the total allowable catch for each Member State as part of an effort to conserve fish stocks. With the admission of Spain and Portugal, the EU developed a Common Fisheries Policy, which includes a recalculation of these quotas.

In 1988, the UK amended its Merchant Shipping Act to provide that at least 75% of the ownership of ships and fishing companies operating in U.K. waters had to be British. The amendments to the Act were intended to prevent other countries, in particular Spain, from “quota hopping” by registering under the British flag and using the UK’s fishing quotas. Quota hopping is a practice wherein “flag of convenience” boats register in a foreign country for the sole purpose of catching fish there, thus diminishing the proportion of that country’s fish quota actually available for that country’s citizens to use, and increasing the economic pressure to exploit the fishery. Flag of convenience boats account for millions of pounds of fishing quotas without providing any benefit to the local economy. The fish do not even have to be landed in the “home” country.

Spain challenged the UK law in European Court of Justice, contending that the Merchant Shipping Act was a protectionist barrier. One of Spain’s arguments was that the UK had violated Article 221 of the European Community Treaty (as modified by the Treaty of Maastricht), which provides that “... Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms” In a series of four cases decided in the 1990s, the European Court of Justice ruled that the Merchant Shipping Act did violate Article 221’s requirement of investment liberalization, and ordered the UK to pay damages.

— *Adapted from comments by Ana Toni and research by Vincenzo Franco.*

F. Biosafety: Regulation of the Impacts of Genetically Modified

Organisms

One of the principal impacts of trade on marine biodiversity is the unintended introduction of alien species. This represents a massive externalized cost of trade imposed on the marine environment, and has caused severe damage to fisheries in some regions. Historically, the main problem has been the introduction of alien marine organisms through the discharge of ballast water from long distance shipping vessels. More recently, there is growing concern about the deliberate introduction of alien species or varieties of species in mariculture or captive breeding of fish stocks. Because, however, most of the problem to date has involved shipping rather than fishing, these issues are not covered in this study.

In contrast, the deliberate introduction of alien species and genetically manipulated organisms (GMOs), is a practice of concern in wild fisheries. Commercial research is well underway on the development and introduction of GMOs into the marine environment that will alter fisheries. Biosafety - the management of the environmental impacts of GMOs introduced into the environment - is the subject of current international negotiations on a protocol to the Convention on Biological Diversity. With a focus on transboundary movement, including deliberate transfer through trade, the protocol negotiations are inherently trade-related. Issues concerning the relationship between the protocol and WTO rules will almost certainly arise.

Consistent with the precautionary approach, sustainable fisheries principles advanced by some environmental groups, including Greenpeace, oppose the manipulation of the gene pools of wild fisheries (Annex I, para. 28). Environmentalists should ensure that the environmental risks of marine GMOs are adequately considered in the international negotiations on a biosafety protocol to the Convention on Biological Diversity.

A particularly significant trade-related issue is the future relationship between the biosafety protocol and the SPS Agreement. The biosafety protocol is likely to contain provisions on measures that countries can impose to protect against environmental risks associated with imports of GMOs. These provisions are almost certain to reflect the precautionary approach. Such import control measures are also the subject of the SPS Agreement. Unfortunately, the SPS Agreement may be interpreted in a way inconsistent with the precautionary approach. Already there are disturbing indications. For instance, the WTO appellate body hearing the US challenge to the EU ban on products containing bovine growth hormones, interpreted the SPS Agreement to impose on the EU the burden of scientifically justifying their measure regulating hormones in beef by demonstrating that the regulated substances (hormones) pose an identifiable risk to human, animal, or plant life or health. This ruling contrasts with the traditional method of food-safety regulation, which uses a more precautionary approach. Governments have traditionally required that substances be *proven safe* for human consumption *before* they may be added to food. This shift away from the precautionary approach in the area of food safety does not bode well for its application to environmental measures.

Equally troubling, some governments have advocated the inclusion of a “WTO savings provision” in the biosafety protocol. This provision would establish a presumption that the protocol does not alter rights or obligations under existing international agreements unless they

pose a serious threat to biodiversity. The inclusion of this language would threaten to make international trade law superior to international environmental law created in the protocol. Since the SPS Agreement is unlikely to incorporate the precautionary approach in the foreseeable future, this outcome threatens to undermine the environmental goals of the negotiations on the protocol.

This language would also set a bad precedent for future environmental agreements. Environmental groups should strongly oppose the inclusion of such a savings provision.

Controlling Access to Marine Genetic Resources: Developing An Incentive for Conservation and Sustainable Use

Sharing of the benefits of marine genetic resources is not usually thought of as a fisheries issue. It is mentioned here because it is in fact a highly specialized variety of commercial harvesting of living marine resources, and in that sense related to commercial fishing. The MAI's prohibition on performance requirements could interfere with countries' efforts to gain benefits from the use of genetic resources.

There is expanding commercial interest in genetic resources — the source of all biodiversity — and associated chemicals found in diverse species in the sea. Genetic resources can be sources of new medicines, pesticides, biotechnological processes and other products. Typically, exploration for marine genetic resources is an international undertaking, in which companies and government institutions in industrialized countries such as Japan and the United States prospect in the marine waters of other countries, especially tropical countries, which contain biodiversity-rich marine ecosystems such as coral reefs.

The Convention on Biological Diversity establishes principles for the equitable sharing of benefits from the use of genetic resources with the providers of those resources, including developing countries and local and indigenous communities. Article 8(j) requires Parties, as far as possible and appropriate, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity. Parties must obtain the communities' consent for wider use of such knowledge and innovations, and must encourage equitable sharing of the benefits from such use. In addition, Article 15 of the Convention provides that Parties shall control access by other Parties to their genetic resources through national legislation, and that access shall be by prior informed consent and on mutual agreed terms. Articles 15, 16 and 19 provide that the users of genetic resources shall share the benefits, including derived technologies, with the providers of those resources.

Implementation of these principles raises complex and difficult political, legal and technical issues. As a result, developing countries and communities have been slow to implement them, and are almost certainly not gaining as many benefits as they could from the "bioprospecting" that foreign companies are conducting in their jurisdictions, whether terrestrial or marine. Some developing countries have begun implementing Article 15 in part by requiring that foreign entities seeking access to genetic resources comply with requirements for transfer of technology, cooperative research, and other measures to share benefits. Some of these requirements would likely run afoul of the ban on performance requirements proposed for the Multilateral Agreement on Investment being negotiated in the OECD.

Another issue raised by the implementation of the Convention involves the relationship of its principles to the TRIPs Agreement. Many developing country governments and both Southern and Northern NGOs argue that IPR systems should be altered or supplemented so that they confer greater benefits upon indigenous and local communities whose cultures have developed and maintained genetic resources and traditional knowledge about the uses of these resources over generations. The TRIPs Agreement does not forbid the development of such "sui generis" systems, but neither would it compel the recognition of rights held by indigenous groups or individuals under such a system, if one existed. Some Northern governments, in particular the United States, would like to reduce the discretion that countries currently have under the TRIPs Agreement to alter or modify IPR systems.

Environmentalists should ensure that the value of the rich genetic diversity within biodiversity found in the marine realm such as that found in coral reefs receives adequate attention, and is not overshadowed entirely by interest in terrestrial ecosystems such as tropical rainforests. Developing countries and communities, in particular, should be aware of the potential value of their marine and coastal biodiversity as a precious genetic resource. They should ensure that this biodiversity is included in national legislation implementing the Biodiversity Convention by establishing community and national rights to control access

and share in benefits. In addition, environmental groups should research and critique the bioprospecting initiatives in the marine realm in which developed country firms are prospecting for valuable marine organisms, often without paying significant compensation and without consulting with local people.

ENDNOTES

¹ Much of the discussion in this section is based upon CIEL 1997b, p. 6-12.

² (WTO 1994.) This raises an important question. How do the environmental exceptions in Article XX apply to the listed Uruguay Round Agreements? That is, can a party that violates one of the Uruguay Round Agreements claim its breach is justified by one of the Article XX exceptions found in the GATT. Apparently, the Uruguay Round negotiators never formally addressed this question, and the text of the Final Act leaves room for doubt as to how this issue should be resolved. (Pers. comm., Richard Eglin, Director Technical Barriers to Trade and Trade and Environment Division, GATT, Oct. 10, 1994). If the GATT/WTO is considered as a package of independent agreements, one being the original GATT, Article XX's exceptions would seem to apply only to obligations arising out of the four corners of the original GATT. If, however, the GATT/WTO is regarded as one unitary agreement, then when Article XX provides an exception to the obligations of "this agreement," it may refer to the entire GATT/WTO.

³ Tariff bindings refer to schedules specifying progressively lower ceilings that each country can impose on various categories of imports.

⁴ (Jackson 1994, pp. 8-21). A recent GATT panel report concerning certain US taxes on autos may provide guidance as to what constitutes a "like product" for the purposes of the application of MFN. See *United States - Taxes on Automobiles*, GATT Doc. DS 31/R, at 3-4 (Oct. 11, 1994) (unadopted) [hereinafter Auto Taxes Panel]. Although this report involved only like products under Article III, and not under Article I, prior panels have expressed that the term "like products" under these two articles is functionally indistinguishable. See, e.g., *EEC Measures on Animal Feed Proteins*, GATT Doc. L/4599, BISD (25th Supp.) 49, at 63 (adopted Mar. 14, 1978) (applying same analysis to like products under Articles I and III).

⁵ The text of the WTO Agreements does not define what a "like" product is under Article III. See *Report of the Panel. Japan - Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, GATT Doc. L/6216, BISD (34th Supp.) 83, at pp. 113, 115-16 (adopted Nov. 10, 1987) [hereinafter Wines and Alcoholic Beverages Panel]. The determination of what constitutes a "like product" is made on a case-by-case basis by panels. *Id.*

⁶ Where products are different, then parties may discriminate between them using different internal measures such as taxes, or laws regulating the sale or use of products.

⁷ See Auto Taxes Panel, at para. 5.10; see also *Report of the Panel. United States - Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175, BISD (34th Supp.) 136 (adopted June 17, 1987); *Report of the Panel. United States - Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R, BISD (39th Supp.) 206 (adopted June 19, 1992) [hereinafter Alcoholic and Malt Beverages Panel].

⁸ *Id.* at 3; see also Alcoholic and Malt Beverages Panel.

⁹ See Auto Taxes Panel, at para. 5.54.

¹⁰ See *Lobsters from Canada*, 1990 W.L. 299945 (U.S. Can. F.T.A. Binat. Panel) (unpublished) [hereinafter Lobsters Panel]; *United States Section 337 of the Tariff Act of 1930*, BISD (36th Supp.) 345, at para. 5.10 (adopted Nov. 1989); *Canada Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD (39th Supp.) 27, at para. 5.28 (adopted Oct. 16, 1991); see also Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299 (1994) (discussing CITES). ("... recent dispute panels have taken the position that import measures will be reviewed under Article III or Article XI, but not both"). But see Lobsters Panel, (dissenting opinion) (arguing that acceptable regulation can still be quantitative restriction).

¹¹ The Tuna/Dolphin II Panel enunciated a three-part test for the environmental exceptions, which was subsequently utilized by the Auto Taxes Panel, implying that this new line of inquiry is now the test for these sections of Article XX. See Auto Taxes Panel at para. 5.29. To determine whether Article XX(b) and (g) would apply in a given situation: first, the *policy* upon which the measure is based must fall within the range of policies covered by the relevant Article XX provisions; second, the *measure* must be either "necessary" to protect human, animal or plant life or health under XX(b), or "related to" the conservation of exhaustible natural resources, and made effective "in conjunction" with restrictions on domestic production or consumption under XX(g); third, the measure must be applied in a manner consistent with the requirements of Article XX's preamble; specifically, the measure cannot be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner that would constitute a disguised restriction on international trade. *Report of the Panel. United States Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June

16, 1994) (unadopted), [hereinafter Tuna/Dolphin II Panel] at para. 5.12.

¹² See Tuna/Dolphin II Panel, at para. 5.35.

¹³ See *Report of the Panel. Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*. GATT Doc. DS 10/R-37S/200. (Oct. 5, 1990); *Report of the Panel. United States Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991) (unadopted) [hereinafter Tuna/Dolphin I Panel], at para. 5.28; Tuna/Dolphin II Panel at para. 5.35.

¹⁴ Tuna/Dolphin I Panel at para. 5.28.

¹⁵ This argument is reasonable but not conclusive. The panel made its comment on international cooperation only after reasoning against the application of Article XX on jurisdictional grounds. While that jurisdictional argument was rejected by a later panel in Tuna/Dolphin II, the third-party provisions of many multilateral agreements (provisions that impose trade measures on non-parties) would seem to raise similar jurisdictional issues that might prevent a panel from ever reaching the least GATT inconsistent issue.

¹⁶ *Report of the Appellate Body. US Standard for Reformulated and Conventional Gasoline*. WTO Doc. AB. 1996.1 (April 29, 1996) [hereinafter Reformulated Gas Appellate] at pp. 20-21.

¹⁷ *Id.*

¹⁸ See Reformulated Gas Appellate at p. 20.

¹⁹ See Tuna/Dolphin II Panel at pp. 56, 64.

²⁰ These obligations are substantially the same as those in the GATT, although the wording is slightly different.

²¹ Agreement of the Application of Sanitary and Phytosanitary Measures, Annex IA of the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, Multilateral Trade Negotiations Doc. MTN/FA, 33 I.L.M.1 (1994) [hereinafter SPS Agreement] Article 2.2. These obligations are phrased differently from their counterparts in the GATT 1994, but appear to embody substantially the same standard.

²² “For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.”

²³ Under the Agreement, serious prejudice is deemed to exist upon a showing of certain facts about the subsidy, including where the subsidy covers an industry’s operating losses, provides for direct forgiveness of debt, or displaces imports of another Member’s like products into the subsidizing Member’s market or a third country’s market.

²⁴ In addition, a Member can challenge a subsidy that is specific and is also “prohibited.” As defined under Article 3, a subsidy is prohibited if it is contingent upon export performance or upon the use of domestic over imported goods. Subsidies for fishing typically do not fit in this category.

²⁵ While MEAs promise to be useful in such a role, it is possible that the world’s societies can forge understandings on standard-setting through other processes independent of intergovernmental agreements or organizations. This has happened, to some degree, with organic farm label standards and may be happening with sustainable forest management standards, as well.

²⁶ See CITES Secretariat, CITES Press Kit, COP10, June 1997. At COP 10, the Parties added 18 species of sturgeons to Appendix II (Prop. 10.65 by Germany). In other action, the COP rejected a Cuban proposal (Prop. 10.60) to transfer the Cuban population of hawksbill sea turtles from Appendix I to II and allow trade with a single importing country, as well as a US proposal (Prop. 10.59) to control by-catch of map turtles by inclusion of the species in Appendix I.

²⁷ The proposal to establish the Timber Working Group was accepted by the Parties as an efficient method of sorting through the numerous proposals on listing of commercial timber species that had been tabled at that conference. Mandated to determine whether CITES had the mechanisms to regulate significantly traded species of timber, the working group found that, with a few adjustments to the procedural requirements, the Convention was capable of regulating timber trade. All of the working group’s recommendations were endorsed by the Parties at COP 10 in Harare.

²⁸ CITES Doc. 10.60.1. Japan argued that no commercially harvested species of fish meets the criteria for listing. Some potentially supportive Parties were alienated by the intransigence of the sponsor on other issues specifically the proposals to downlist populations of the African elephant.

²⁹ This paragraph is adapted from Downes 1996.

³⁰ Until 2002, however, the Policy allows Member States to restrict access to waters under their sovereignty and jurisdiction within a 12-mile limit for the use of local fishermen.

³¹ See Council Regulation No. 3094/86. Three measures apply to EU vessels regardless of where they are fishing. These measures restrict the length and use of driftnets, ban the use of purse seines in tuna fishing, and ban the keeping or marketing of sea salmon and trout caught outside the territorial waters of Member States.

³² Violators may be sanctioned through seizure of prohibited fishing gear and catches. See Council Regulation No. 2847/93, Article 31.

³³ Telephone interview with Mr. Georgio Gallizioli, DG-XIV, Legal Division, July 22, 1997.

³⁴ The financial support consists of carry-over aid for fresh or chilled products, private storage aid for frozen products, all of which are replaced on the market after a few months, and flat-rate aid for products completely withdrawn from the market. Additionally, when the market price drops, tuna producers receive direct aid for products supplied to the EU processing industry.

³⁵ The seriousness is assessed in terms of the economic consequences and must be justified in both legal terms (compliance with regulations and international commitments) and political terms (vis-à-vis partners' reactions). To date, the EU has not implemented emergency measures under this provision, (interview with Mr. Gallizioli, July 22, 1997), and it is highly unlikely the EU would resort to using these measures.

³⁶ Article XX and past interpretations of its provisions are discussed further in Part II.C.4.

³⁷ In addition, it is unclear how broad a category of measures could be protected in this manner. The strongest case can be made for trade related measures explicitly provided for under an MEA, such as the ban on commercial trade which a CITES Party must impose on specimens of an Appendix I listed species. More controversial would be measures taken "in furtherance of" or "consistent with" an MEA, but not explicitly called for in its text.

³⁸ US National Oceanic and Atmospheric Administration, Office of Legislative Affairs, *NOAA Legislative Informer*, January 1997, Issue #21, p. 1.

³⁹ While there is some ambiguity in the language of the TBT Agreement, the most reasonable interpretation is that it covers PPM-related labels applied to a product.

⁴⁰ For a detailed discussion of these issues, see Cook, et al. 1997.

⁴¹ While the Code does not state how States should proceed in this regard, in the analogous area of sanitary measures for fishery products, the Code states that States "should cooperate to achieve harmonization, or mutual recognition, or both, of national sanitary measures and certification programmes as appropriate and explore possibilities for the establishment of mutually recognized control and certification agencies" (Article 11.1.4).

⁴² Compare the less deferential treatment of CITES, another important international legal agreement relating to wildlife trade. Without mentioning CITES by name, the Code provides that "States should cooperate in complying with relevant international agreements regulating trade in endangered species" (Article 11.2.9). Worse yet, when the Code calls on States to develop "internationally acceptable rules or standards for trade in fish and fishery products," it provides explicitly that such rules should comply with WTO rules (Article 11.2.13), but does not mention CITES.

⁴³ Another study that may be useful in this area is being undertaken by the FAO at the request of its Committee on Fisheries. The study is to cover the impact of fishing subsidies on trade and competition, especially regarding impacts on developing country fish exports (Porter 1997b, p. 35).

⁴⁴ See Stone 1997, p. 523 The Subsidies Agreement, rather than the Agreement on Agriculture, would apply to fisheries subsidies, because fisheries were deliberately excluded from the definition of agriculture under the latter agreement (Stone 1997, p.520).

⁴⁵ For example, a description of proposed provisions of the MAI would require countries to give foreign investors "no less favourable treatment [than] it accords to its own investors and investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other dispositions of investments" (OECD 1996, ¶36).

⁴⁶ Such an effort by governments could also run afoul of the national treatment provisions of an MAI if it were shown that a local investor was not similarly required to transfer technology in order to qualify for a concession right (even though the local investor might have no new technology to transfer).

⁴⁷ See e.g., Rio Declaration on Environment and Development, principle 9, U.N.Doc. A/CONF.151/26 (vol.1) (1992), 33 I.L.M. 874 (1992).

ANNEX I

FISHING FOR SOLUTIONS: GREENPEACE PRINCIPLES FOR ECOLOGICALLY RESPONSIBLE FISHERIES

PRELIMINARY DOCUMENT -FEBRUARY 1996

I. Introduction -Oceans, Fish, and Fisheries Threatened

1. Humanity depends for its survival on the healthy functioning of the planet's ecosystems. The oceans are the origin of life on earth and are home to much of the earth's rich evolutionary heritage of life forms and species.
2. Oceans provide many essential services such as regulating climate and cycling nutrients. They are vital sources of food, medicines and livelihood, and of cultural and spiritual values which give meaning to human societies.
3. The oceans sustain us, but we are not sustaining them. The diversity of life in the world's oceans is being dramatically altered by the excessive exploitation of fish, and other marine species. Most commercially targeted fish populations and many associated marine species are in decline. In addition, marine and coastal ecosystems, as well as habitats vitally important for fish breeding and rearing, are being rapidly degraded.
4. Not only is marine biodiversity at risk, but also the millions of people who depend on the sea for food and livelihoods. Industrial societies need to redefine their relationship with the oceans. A swift and fundamental transition to ecologically responsible, low impact fishing is urgently needed. Adjustments in consumption patterns also are required.
5. Greenpeace supports ecologically responsible fishing. Indeed, Greenpeace believes that the principles expressed here are achievable and, that if they are applied, there will be enormous benefits, both for the environment and fishing communities. But to achieve this, sweeping institutional, social and economic reforms are required. Ecologically safe fishing levels must be set in a precautionary way that takes into account our incomplete understanding about the workings of complex ecosystems.
6. Governments have the responsibility to act swiftly and decisively on the design and implementation of programs for the effective control and management of their fisheries. The fishing, fish processing, and trading industries share in this responsibility, and must demonstrate to the public that they can act responsibly to protect marine biodiversity. Processes established to achieve ecologically responsible fisheries must, above all, be genuinely transparent to the public and enable the full participation of public interest groups that have a genuine interest in protecting the health and integrity of marine ecosystems.
7. The complexity and scale of today's crisis in fisheries mean there is no simple panacea. Each fishery has unique characteristics related to the social, economic and political context, the

species fished, the nature of the exploited environment, and the type of technology employed.

8. Thus, the Greenpeace Principles elaborate only the most significant, general areas of reform, while more specific measures must be tailored to meet each set of unique local, national or regional conditions.

II. PRINCIPLES FOR ECOLOGICALLY RESPONSIBLE, LOW IMPACT FISHERIES

9. To minimise the risk of irreversible damage the intensity of fishing should not substantially or permanently distort the character of the ecosystem. To achieve this, target stocks should be maintained at a high proportion of the biomass that would occur in the absence of fishing.

10. As a rule, a fishery must not jeopardise the ability of any species to withstand natural or human induced fluctuations in the environment.

11. A fishery must not endanger any species or population, nor inhibit the recovery of any that are depleted, threatened or endangered.

12. The catch of non-target species or undersized fish (bycatch) in fishing operations must be reduced to levels approaching zero. Any remaining bycatch should not be discarded, but instead brought to shore, unless it can be returned to the sea alive and in a healthy condition.

13. The destructive impacts of a fishing activity on habitats must be eliminated (e.g., damage to coral reefs, seagrass beds, bottom substrate).

14. Wasteful forms of fish production, and fishing for wasteful purposes, such as those which involve only a lethal harvest of roe, must be eliminated.

15. Industrial reduction fisheries must be treated with particular caution because of the potential for serious food web impacts caused by removal of such large amounts of the marine biomass at critical trophic levels.

16. Toxic, persistent, or bioaccumulative substances must not be part of the production process. Compounds which are not hazardous, should be either recycled, reused or reprocessed.

17. Total energy consumption of the product cycle, including fisheries operations, transport, processing and distribution, must be minimised.

18. CFCs, HCFCs, HFCs and other ozone depleting substances and refrigerants, as well as substances that contribute to global warming must be eliminated from the production cycle, wherever alternatives exist.

19. Packaging must be minimised in the first instance, and should be reusable or recyclable.

III. The Precautionary Approach

20. To compensate for humanity's enormous lack of understanding of marine ecological processes, fishing must be based on the Precautionary Approach. The overriding objective of the Precautionary Approach is to conduct fisheries activities in a manner that ensures a high level of probability that marine species or ecosystems will not be seriously or irreversibly harmed. This approach, among other things, shifts the burden of proof onto those that seek to exploit marine ecosystems, and onto those institutions responsible for fisheries management, to demonstrate that there will be minimal risk of serious or irreversible harm.

21. Our poor understanding of the marine environment demands that the emphasis be on prevention of damage, rather than attempts to repair mistakes through mitigation or restoration measures. The precautionary approach, therefore, should apply at all times, even when stocks are abundant. To apply the precautionary approach only when fish stocks are low is a reactive response and the very opposite of precaution.

22. No fishery shall be established or expanded until a verifiable, scientifically based, dynamic management procedure with clear objectives has been established. The performance of such management procedures should be demonstrated, by simulation or otherwise, to be capable of ensuring a high probability of achievement of the objectives under a wide range of alternative assumptions and scenarios about the dynamics of the system.

23. No fishery shall be established or expanded in the absence of reliable estimates of the minimum size of the target species biomass. Where scientific data or other reliable forms of information are inadequate to determine the likely impact of fishing on the populations and the ecosystem of which they are a part, fishing effort should be restricted to an extremely low percentage of the lowest estimate of the unfished biomass, pending proper analysis.

24. Before introducing any new fishing methods or gear types into a fishery a scientifically based environmental impact assessment must demonstrate that such methods or gear will have no damaging impact on the target fish populations, other associated species, or their habitats. Existing gear and methods should also be subject to such assessments and damaging gears or methods should be phased out. Where a new gear or method is intended to replace an existing one as an interim measure, it must be shown to have a less damaging effect.

25. In fisheries where overexploitation has severely reduced the spawning stock biomass or substantially altered the ecosystem, moratoria on fishing should be imposed to assist recovery.

26. Development of management procedures and supporting national legislation that meet the above requirements must begin immediately (1996) for all fisheries, with phased implementation over a decade-long period, by which time they should be fully operational worldwide. Some flexibility is envisaged for small scale, traditionally managed fisheries which have been stable for 20 years or more.

27. The protection of the marine environment is integral to effective fisheries conservation.

Fisheries management should be part of an integrated planning system for the regulation of all human activities that impact the coastal zone or watershed (e.g., for the protection of anadromous species such as salmon). All human activities which have the potential for significant adverse impact on the conservation of fish stocks and marine biodiversity should be subject to environmental impact assessments and any adverse impacts must be minimised and eliminated.

28. Fisheries management concerns the management of fishers and their activities, not the management of ecosystems. As such, attempts to augment fisheries production must not include: the culling of predator species; fisheries enhancement and sea ranching (except in extreme cases ie. when a population is no longer extant); the manipulation of the gene pool of wild species and other forms of genetic 'engineering'.

29. In addition, Greenpeace has serious concerns about the development of intensive aquaculture, particularly its promotion as a means of meeting world food needs. A separate set of Greenpeace principles have been drafted that are specific to aquaculture.

IV. Social and Economic Reforms for Ecologically Responsible Fisheries

30. Greenpeace seeks a substantial transformation from fisheries production dominated by large-scale, intensive methods to smaller-scale, community-based, fisheries using ecologically safe, selective fishing technology and environmentally sound practices. Greenpeace believes this transformation will result in lower impact, more ecologically responsible fisheries that are also socially, economically and culturally beneficial.

31. There should be a renewed emphasis on meeting essential nutritional needs from fish production through reliance on regional and local fisheries and the progressive conversion of industrial reduction fisheries to provide substantially greater quantities of fish protein for human consumption.

32. Every effort should be made to amalgamate scientifically acquired forms of knowledge with traditional, locally acquired knowledge systems. This approach will enable the development of locally appropriate fisheries management regimes, fishing technology and practices designed to meet the objectives of a reformed, low impact fishing industry while, at the same time, safeguarding the rights of traditionally dependent fishing communities to basic food and livelihoods -- all within environmental limits.

33. The optimum yield from any fishery should be defined as the yield that maintains the long-term ecological viability of fished systems and this must take precedence over short-term financial considerations.

34. Within ecologically sound limits, fisheries must provide for the essential needs of communities that have traditionally depended on local fisheries for essential food and livelihoods.

35. A nation's export of its fisheries production should not be at the expense of the environment,

or domestic consumption needs, nor should it cause any significant adverse social or cultural impacts for its coastal communities.

36. Access rights to fisheries must be consistent with the cultural practices and economic needs of communities that have historically depended on local fisheries and that have consistently demonstrated the capacity to fish in a manner which maintains the integrity of the ecosystem.

37. No new fishery should be started or an existing one expanded until an environmental and social impact assessment proves it to be socially acceptable to affected communities.

V. Urgent Government Action on Reforms

Greenpeace advocates the following governmental actions:

38. As virtually all major commercial fisheries today are being fished at or beyond the limits of sustainability, fishing capacity and overall effort must be drastically reduced.

39. Governments should adopt and implement the Precautionary Approach to fisheries and related criteria for ecologically responsible fisheries in national, regional and international management regimes. They should also ensure sufficient funds for research on marine environments, on fisheries impacts, and on fishing gear selectivity.

40. Effective mechanisms must be established to regulate the activities of both domestic and international fishing vessels, their captains and observers, as well as to ensure that states enter into and comply with international fisheries conservation agreements and laws.

41. Particular emphasis must be placed on ensuring that in Government efforts to address the problem of excess fishing capacity, large scale industrial fishing fleets are not allowed to move to areas of the world where their activities will be detrimental to fish stocks, marine biodiversity and coastal communities.

42. Governments must eliminate subsidies that underwrite the expansion of fishing capacity, or the migration of their fishing fleets to distant waters, and subsidies that are detrimental to the long-term economic viability and social well-being of fishworkers and community-based fisheries. Governments should establish and fund compensation plans to help fishers and fishworkers who become displaced by fishing capacity reductions or who are affected by transitional programmes.

43. National government funding and inter-governmental lending and assistance made available for fisheries development must be redirected only to promote the development or maintenance of ecologically responsible fisheries.

44. Taxation levels in the fishing industry should be adjusted to reflect the level of environmental impacts resulting from ecologically unsound practises.

45. Economic incentives aimed at protecting biological diversity through the adoption of

non-destructive, selective gear types and the reduction of fishing capacity should be established to complement precautionary management regimes.

46. In order to protect society's common natural heritage, access to fishing and control of ocean areas should not be privatised. In addition, fishing operations should be subject to liability regimes requiring payment of compensation in respect of any damages.

VI. Urgent Market Action on Reforms

Greenpeace advocates the following market-based actions:

47. The fish buying, processing and retailing industry should use these principles as benchmarks when reviewing their purchasing policies related to the production and marketing of seafood products.

48. All levels of industry that profit from fisheries should invest some part of their revenues into monitoring, enforcement, smooth transition and conversion to environmentally sound fishing technologies and practices, including compensation for fishermen impacted by such recovery measures.

49. As consumers can only exercise their choice on the basis of adequate information regarding the impact of their consumption, the fish buying, processing and retailing industry must provide the public with direct access to information. This can be done, for example, through detailed product labelling or, where appropriate, point-of-purchase and other forms of information directly accessible by consumers.

ANNEX II

General Principles for Managing Trade and Environment Issues

In 1997, CIEL developed the following suggestions for environmental organizations involved in trade and environment issues.

1. Avoid unnecessary trade conflicts by educating advocacy staff on basic trade issues, and connecting them with experts to whom they can turn when confronted with a trade and environment problem.

2. Overcome the chilling effect that unwarranted trade concerns impose on development of sound environmental policies. Trade officials often argue that WTO rules prohibit certain environmental policies when in fact they are only proposing an interpretation that is not definitive. Environmental organizations must be ready with counter arguments to prevent such representations from "chilling" the development of environmental policy.

3. Advocate environmental exceptions to those trade rules that impede strong,

effective environmental policies.

4. Use trade rules proactively to promote environmental protection, where synergies exist with environmental goals.

5. Target the right audiences for trade and environment messages, including the public, environmental officials and trade officials. The most important target audiences today are government officials and NGOs in national capitals — not officials at WTO headquarters.

6. Environmental organizations in developed countries should work with partners and affiliates in developing countries to educate developing country officials and NGOs on how international environmental law systems, combined with rules based multilateral trading systems, can give developing countries a stronger voice on these issues.

7. Develop an analytical base to address trade issues in key environmental areas affected by trade rules, including forests, fisheries, chemicals, biodiversity and biotechnology.

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LIST OF ACRONYMS

CBD Convention on Biological Diversity
CITES Convention on International Trade in Endangered Species
COP Conference of the Parties
CSCM Committee on Subsidies and Countervailing Measures
CTE Committee on Trade and the Environment
EEZ Exclusive Economic Zone
EU European Union
FAO Food and Agriculture Organization
FDI Foreign Direct Investment
GATT General Agreement on Tariffs and Trade
GMO Genetically Modified Organisms
ICCAT International Commission for the Conservation of Atlantic Tunas
ICRW International Convention on the Regulation of Whaling
IFC International Finance Corporation
IFOAM International Federation of Organic Agriculture Movements
IPRs Intellectual Property Rights
ISO International Organization on Standardization
IWC International Whaling Commission

MAIMultilateral Agreement on Investment
MEAMultilateral Environmental Agreement
MFNMost Favoured Nation
MSCMarine Stewardship Council
NPRNon-Product Related
NTNational Treatment
OECDOrganisation for Economic Co-operation and Development
PPMProduction or Processing Methods
RFMORegional Fisheries Management Organization or Arrangement
SBSTTASubsidary Body on Scientific, Technical and Technological Advice
SPSSanitary and Phytosanitary Measures
TBTTechnical Barriers to Trade
TRIM Trade Related Investment Measures
TRIPsTrade Related Aspects of Intellectual Property Rights
TWGTimber Working Group
UNCLOSUnited Nations Convention on the Law of the Sea
UNEPUnited Nations Environment Programme
WTOWorld Trade Organization