

**Trade and Environment at the WTO:
background document
Trade and Environment Division
World Trade Organization**

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(As of 23 April 2004)

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The WTO Secretariat has prepared this background document to assist public understanding of the Trade and Environment debate in the WTO. This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.



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ABBREVIATIONS

APEC	ASIA PACIFIC ECONOMIC COOPERATION FORUM
CAFE	CORPORATE AVERAGE FUEL ECONOMY REGULATION
CBD	CONVENTION ON BIOLOGICAL DIVERSITY
CITES	CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA
COP	CONFERENCE OF PARTIES
CPC	UNITED NATIONS PROVISIONAL CENTRAL PRODUCT CLASSIFICATION
CTE	COMMITTEE ON TRADE AND ENVIRONMENT
CTESS	COMMITTEE ON TRADE AND ENVIRONMENT SPECIAL SESSION
DPGS	DOMESTICALLY PROHIBITED GOODS
DSB	DISPUTE SETTLEMENT BODY
DSU	DISPUTE SETTLEMENT UNDERSTANDING
EIA	ENVIRONMENTAL IMPACT ASSESSMENT
EFTA	EUROPEAN FREE TRADE ASSOCIATION
EMIT	ENVIRONMENTAL MEASURES AND INTERNATIONAL TRADE
EPA	ENVIRONMENTAL PROTECTION AGENCY
ESA	ENDANGERED SPECIES ACT
ETP	EASTERN TROPICAL PACIFIC OCEAN
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
ICCAT	INTERNATIONAL COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNAS
IGOS	INTERNATIONAL GOVERNMENTAL ORGANIZATIONS
IPRS	INTELLECTUAL PROPERTY RIGHTS
ITLOS	INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
ITTO	INTERNATIONAL TROPICAL TIMBER ORGANIZATION
MEA	MULTILATERAL ENVIRONMENTAL AGREEMENT
MFN	MOST-FAVOURLED NATION
MMPA	MARINE MAMMAL PROTECTION ACT
NGO	NON-GOVERNMENTAL ORGANIZATION
OECD	ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
PPMS	PROCESSES AND PRODUCTION METHODS
SCM	SUBSIDIES AND COUNTERVAILING MEASURES
SMES	SMALL AND MEDIUM-SIZED ENTERPRISES
SPS	SANITARY AND PHYTOSANITARY MEASURES
STOS	SPECIFIC TRADE OBLIGATIONS



TBTTECHNICAL BARRIERS TO TRADE
TEDTURTLE EXCLUDING DEVICE
TNCTRADE NEGOTIATIONS COMMITTEE
TREMTRADE-RELATED ENVIRONMENTAL MEASURE
TRIPSTRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS
UNCEDUNITED NATIONS CONFERENCE ON ENVIRONMENT
AND DEVELOPMENT
UNCLOSUNITED NATIONS CONVENTION ON THE LAW OF THE SEA
UNEPUNITED NATIONS ENVIRONMENT PROGRAMME
UNFCCCUNITED NATIONS FRAMEWORK CONVENTION
ON CLIMATE CHANGE
UNFFUNITED NATIONS FORUM ON FORESTS
WSSDWORLD SUMMIT ON SUSTAINABLE DEVELOPMENT
WTOWORLD TRADE ORGANIZATION



Brief History of the Trade and Environment Debate

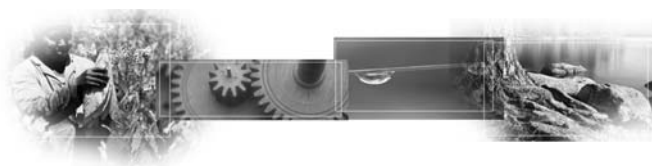
TRADE AND ENVIRONMENT DURING THE GATT

The Emergence of the Trade and Environment Debate

The trade and environment debate is not new. The link between trade and environmental protection, consisting of both the impact of environmental policies on trade, as well as the impact of trade on the environment, was recognized as early as 1970. In the early 1970s, there was growing international concern regarding the impact of economic growth on social development and the environment. This led to the *1972 Stockholm Conference on the Human Environment*.

During the preparatory phase to the Stockholm Conference, the Secretariat of the GATT was requested to make a contribution. On the Secretariat's own responsibility, a study entitled "Industrial Pollution Control and International Trade" was prepared. It focused on the implications of environmental protection policies on international trade, reflecting the concern of trade officials that such policies could become obstacles to trade, as well as constitute a new form of protectionism.

In 1971, the Director-General of the GATT presented the study to GATT Contracting Parties, urging them to examine the potential implications of environmental policies on international trade. A discussion of the issues which emerged from the study took place, and a number of Contracting Parties suggested that a mechanism be created in the GATT for their more thorough examination. A precedent in the Organisation for Economic Co-operation and Development (OECD) had already been set in this regard with the establishment of an Environment Committee which had, in addition to other matters, also taken on board trade and environment issues.



Developments in Trade and Environmental Fora (1971-1991)

At the November 1971 meeting of the GATT Council of Representatives, it was agreed that a *Group on Environmental Measures and International Trade* (also known as the "EMIT Group") be established. This group would only convene at the request of Contracting Parties, with participation being open to all. Up until 1991, no request had been put forward for its activation. Between 1971 and 1991, environmental policies began to have an increasing impact on trade, and with increasing trade flows, the effect of trade on the environment had also become more evident.

Developments within the GATT

During the Tokyo Round of trade negotiations (1973-1979), the question of the degree to which environmental measures (in the form of technical regulations and standards) could form obstacles to trade was taken up. The Tokyo Round Agreement on Technical Barriers to Trade, known as the "Standards Code", was negotiated. Amongst other things, it called for non-discrimination in the preparation, adoption and application of technical regulations and standards, and for their transparency.

In 1982, a number of developing countries expressed their concern at the fact that products prohibited in developed countries on the grounds of environmental hazards, or for health or safety reasons, continued to be exported to them. With limited information on these products, they were unable to make informed decisions regarding their import. At the 1982 Ministerial Meeting of GATT Contracting Parties, it was decided that the GATT examine the measures needed to bring under control the export of products prohibited domestically (on the grounds of harm to human, animal, plant life or health, or the environment). In 1989, this resulted in the establishment of a *Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances*.

During the Uruguay Round of negotiations (1986-1993), trade-related environmental issues were once again taken up. Modifications were made to the Standards Code, and certain environmental issues were addressed in the General Agreement on Trade in Services (GATS), the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS), Subsidies and Countervailing Measures (SCM), and Trade-Related Aspects of Intellectual Property Rights (TRIPS) (see page 56).



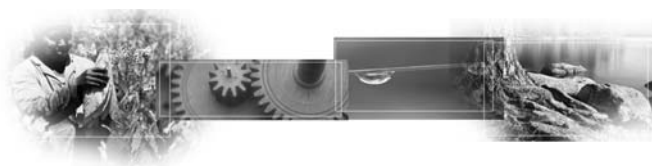
In 1991, a dispute between Mexico and the United States regarding a US embargo on the import of tuna from Mexico caught using nets which resulted in the incidental killing of dolphins, heightened attention on the linkages between environmental protection policies and trade. Mexico claimed that the embargo was inconsistent with GATT rules. The panel ruled in favour of Mexico based on a number of different arguments (see page 61 for a description of this case). Although the report of the panel was not adopted, its ruling was heavily criticised by environmental groups who felt that trade rules were an obstacle to environmental protection.

Developments in Environmental Fora

During this time period, important developments were also taking place in environmental fora. Although the relationship between economic growth, social development and environment was addressed at the Stockholm Conference, it continued to be examined throughout the 1970s and 80s.

In July 1970, an international research team at the Massachusetts Institute of Technology initiated a study of the effects and limits of continued world-wide growth. It argued that even under the most optimistic assumptions about advances in technology, the world could not support present rates of economic and population growth for more than a few decades. However, with more evidence of the contribution of technological advancement to resource savings, and of the role of prices in registering the relative scarcity of resources and consumer preferences and in allocating resources efficiently, the "limits to growth" paradigm was quickly overturned.

In 1987, the World Commission on Environment and Development produced a report entitled *Our Common Future* (also known as the Brundtland Report), in which the term "sustainable development" was created. The report identified poverty as one of the most important causes of environmental degradation, and argued that greater economic growth, fuelled in part by increased international trade, could generate the necessary resources to combat what had become known as the "pollution of poverty".



The Activation of the EMIT Group

In 1991, members of the European Free Trade Association (EFTA) (at the time, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) requested the Director-General of GATT to convene the EMIT group as soon as possible. Its activation was necessary, they stated, in order to create a forum within which trade-related environmental issues could be addressed. Reference was made to the upcoming *1992 United Nations Conference on Environment and Development (UNCED)*, and to the need for GATT to contribute in this regard.

Given the recent developments within the GATT and within environmental fora, the reactivation of the EMIT group met with a positive response. Despite the initial reluctance of developing countries to have environmental issues discussed in the GATT, they agreed to have a structured debate on the subject. In accordance with its mandate of examining the possible effects of environmental protection policies on the operation of the GATT, the EMIT group focused on the effects of environmental measures (such as eco-labelling schemes) on:

- international trade,
- the relationship between the rules of the multilateral trading system and the trade provisions contained in Multilateral Environmental Agreements (MEAs) (such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal), and
- the transparency of national environmental regulations with an impact on trade.

The activation of the EMIT group was followed by further developments in environmental fora. In 1992, the UNCED, also known as the "Earth Summit", drew attention to the role of international trade in poverty alleviation and in combating environmental degradation. Agenda 21, the programme of action adopted at the conference, addressed the importance of promoting sustainable development through, amongst other means, international trade. The concept of "sustainable development" had established a link between environmental protection and development at large.

TRADE AND ENVIRONMENT AT THE WTO

Towards the end of the Uruguay Round (after the establishment of the EMIT group), attention was once again drawn to trade-related environmental issues, and the role of the newly emerging World Trade Organization (WTO) in the field of trade and environment. In the Preamble to the Marrakesh Agreement Establishing the WTO, reference was made to the importance of working towards sustainable development. WTO Members recognized that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living ... while allowing



for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".

In April 1994, a *Ministerial Decision on Trade and Environment* was adopted, calling for the establishment of a **Committee on Trade and Environment (CTE)** (See Annex I, page 67). A broad-based mandate was agreed upon for the CTE, consisting of identifying the relationship between trade measures and environmental measures in order to promote sustainable development, and making appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required. The work programme of the CTE is contained in the Decision and covers a broader range of issues than those previously addressed by the EMIT group.

<i>The Work Programme of the Committee on Trade and Environment</i>	
→ MEAs and WTO rules	Item 1
→ Dispute settlement and MEAs	Item 5
→ Environmental policies	Item 2
→ Taxes, technical regulations, labelling	Item 3
→ Transparency	Item 4
→ Market access	Item 6
→ Domestically prohibited goods (DPGs)	Item 7
→ Intellectual Property (TRIPS)	Item 8
→ Services	Item 9
→ Arrangements with NGOs	Item 10

The CTE is composed of all WTO Members and a number of observers from inter-governmental organizations. It reports to the WTO's General Council. The CTE first convened in early 1995 to examine the different items of its mandate. In preparation for the *Singapore Ministerial Conference*, in December 1996, the CTE summarized the discussions which it held since its establishment, as well as the conclusions reached in a report presented at the Conference.¹ Since then, it has met approximately three times a year. It has held a number of information sessions with MEA secretariats to deepen Members' understanding of the relationship between MEAs and WTO rules, and organized a number of public symposia for non-governmental organizations (NGOs).

In November 2001, at the *Doha Ministerial Conference*, it was agreed to launch negotiations on certain issues related to trade and environment. These negotiations are conducted in a Committee established for this purpose, the **Committee on Trade and Environment Special Session (CTESS)**. The CTE was also requested to give particular attention to three items of its work programme. In addition, the CTE and the Committee on Trade and Development were asked to act as a forum in which the environmental and developmental aspects of the negotiations launched at Doha could be debated (see page 9 for more detail on the Doha Development Agenda and page 71 for the text of its relevant provisions).

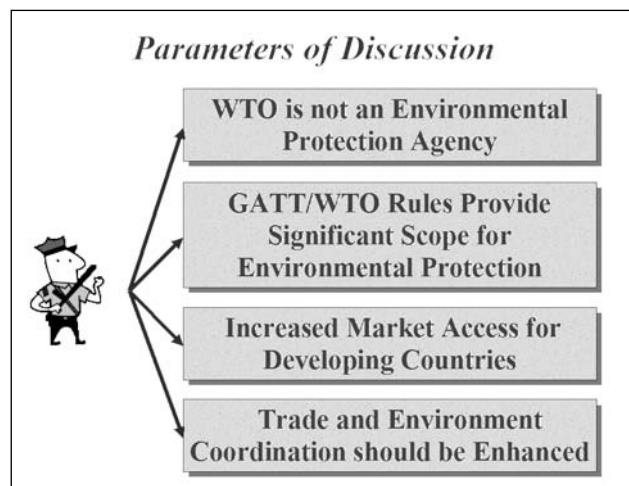
¹ See document WT/CTE/1.



PARAMETERS OF THE DISCUSSION IN THE WTO

As previously stated, environmental issues were taken up in the GATT/WTO as a result of numerous developments at the international level in trade and environmental fora. Whilst developed countries were subjected to increased pressure from environmental interest groups to reconcile what they perceived as "incompatibilities" between trade and environmental policies, developing countries feared that environmental concerns would be addressed at the expense of international trade.

In particular, they feared that a new "green" conditionality would be attached to market access opportunities. Within this context, certain parameters have guided trade and environment discussions in the WTO, including the following:



The WTO is not an Environmental Protection Agency

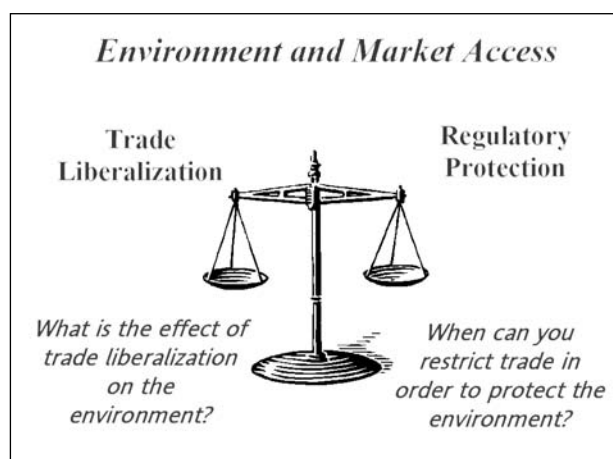
In the Preamble to the Marrakesh Agreement, WTO Members affirm the importance of working towards sustainable development. In addition, the *Ministerial Decision on Trade and Environment* states that the aim of the work of the CTE is to make "international trade and environmental policies mutually supportive". WTO Members recognize, however, that the WTO is not an environmental protection agency and that it does not aspire to become one. Its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade.

In addressing the link between trade and environment, WTO Members do not operate on the assumption that the WTO itself has the answer to environmental problems. However, they believe that trade and environmental policies can complement each other. Environmental protection preserves the natural resource base on which economic growth is premised, and trade liberalization leads to the economic growth needed for adequate environmental protection. To address this, the WTO's role is to continue to liberalize trade, as well as to ensure that environmental policies do not act as obstacles to trade, and that trade rules do not stand in the way of adequate domestic environmental protection.



GATT/WTO Rules Provide Significant Scope for Environmental Protection

WTO Members believe that GATT/WTO rules already provide significant scope for Members to adopt national environmental protection policies. GATT rules impose only one requirement in this respect, which is that of non-discrimination. WTO Members are free to adopt national environmental protection policies provided that they do not discriminate between imported and domestically-produced like products (national treatment principle), or between like products imported from different trading partners (most-favoured-nation clause). Non-discrimination is one of the main principles on which the multilateral trading system is founded. It secures predictable access to markets, protects the economically weak from the more powerful, and guarantees consumer choice.



Increased Market Access for Developing Countries

The special situation of developing countries and the need to assist them in their process of economic growth is widely recognized and accepted in the WTO. From the point of view of developing countries, where poverty is the number one policy preoccupation and the most important obstacle to environmental protection, the opening up of world markets to their exports is essential. WTO Members recognize that trade liberalization for developing country exports, along with financial and technology transfers, is necessary in helping developing countries generate the resources they need to protect the environment and work towards sustainable development. As many developing and least-developed countries are heavily dependent on the export of natural resources for foreign exchange earnings, trade liberalization is expected to improve allocation and more efficient use of their resources, as well as enhance export opportunities for their manufactured goods.



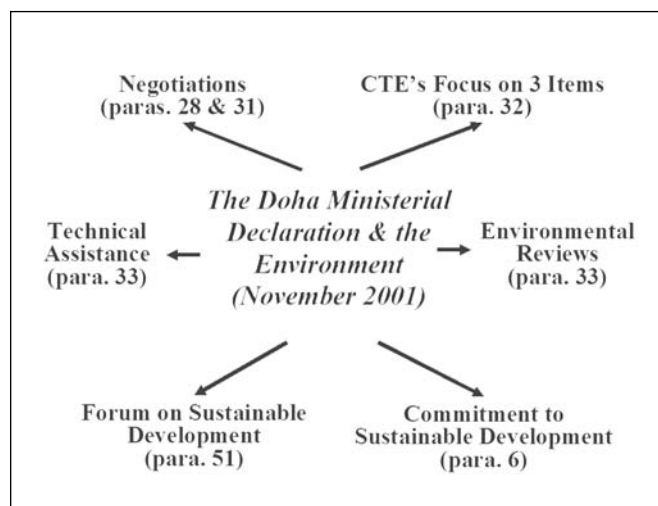
Trade and Environment Coordination Should be Enhanced

It is widely believed by WTO Members that improved coordination at the national level between trade and environmental officials can contribute to eliminating policy conflicts between trade and environment at the international level. Lack of coordination has, in the past, contributed to the negotiation of potentially conflicting agreements in trade and environmental fora. In addition, it is widely recognized that multilateral cooperation through the negotiation of MEAs constitutes the best approach for resolving transboundary (regional and global) environmental concerns. MEAs provide a safeguard against unilateral attempts to address environmental problems. Unilateral solutions are often discriminatory, and frequently involve the extraterritorial application of environmental standards. UNCED clearly endorsed consensual and cooperative multilateral environmental solutions to global environmental problems. Such solutions reduce the risks of arbitrary discrimination and disguised protectionism, and reflect the international community's common concern and responsibility for global resources.



The Doha Mandate on Trade and Environment

At the Doha Ministerial Conference, WTO Members reaffirmed their commitment to health and environmental protection and agreed to embark on a new round of trade negotiations², including negotiations on certain aspects of the linkage between trade and environment. In addition to launching new negotiations, the Doha Ministerial Declaration requested the CTE, in pursuing work on all items in its terms of reference, to focus on three of those items, and, together with the



Committee on Trade and Development, to act as a forum in which the environmental and developmental aspects of the negotiations can be debated.

The Doha mandate has placed trade and environment work at the WTO on two tracks:

- **The CTE Special Session** (CTESS) has been established to deal with the negotiations (mandate contained in paragraph 31 of the Doha Ministerial Declaration).
- **The CTE Regular** deals with the non-negotiating issues of the Doha Ministerial Declaration (paras. 32, 33 and 51) together with its original agenda contained in the 1994 Marrakesh Decision on 'Trade and Environment'³ (mandate contained in paragraphs 32, 33 and 51).

Moreover, paragraph 28 of the Doha Ministerial Declaration instructs Members "to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries". These negotiations are taking place in the Negotiating Group on Rules (for a summary of the fisheries issue see page 24).

² Relevant abstracts of the Doha Ministerial Declaration can be found in Annex II, page 71.

³ Relevant abstracts of the Marrakesh Decision on Trade and Environment can be found in Annex II, page 71.



TRADE AND ENVIRONMENT NEGOTIATIONS

Paragraph 31 of the Doha Ministerial Declaration launched negotiations, "with a view to enhancing the mutual supportiveness of trade and environment" and "without prejudging their outcome", on the following issues:

1. Paragraph 31(i) mandates Members to negotiate on the **relationship between WTO rules and specific trade obligations set out in MEAs**. Negotiations are limited in scope to the applicability of such existing WTO rules **as among parties** to the MEA in question. Moreover, the negotiations are not to prejudice the WTO rights of any Member that is not a party to the MEA in question (the discussions held on this issue are summarized on page 39).
2. Negotiations were also mandated in paragraph 31(ii) on **procedures for information exchange between MEAs and the relevant WTO committees, and on the criteria for the granting of observer status** in WTO bodies (summarized on page 44).
3. Finally, negotiations were launched in paragraph 31(iii) **on the reduction or, as appropriate, the elimination of tariff and non-tariff barriers to environmental goods and services** (summarized on page 33).

The end of **paragraph 32** is also relevant to these negotiations. It adds that:

The outcome... of the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of the Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

This qualification is designed to caution against altering through these negotiations the balance of rights and obligations of WTO Members under existing agreements.



THE WORK PROGRAMME OF THE CTE REGULAR

Three Items of Focus

In addition to launching negotiations in the areas discussed above, the Doha Ministerial Declaration provides the CTE with a special mandate. Paragraph 32 instructs the CTE, in pursuing work on all agenda items within its current terms of reference, to give particular attention to three items:

1. **The effect of environmental measures on market access and the win-win-win situations** (summarized on pages 14 and 22).
2. The **relevant provisions of the TRIPS Agreement** (for a summary of the discussions held on this issue, see page 41).
3. **Labelling requirements for environmental purposes** (summarized on page 16).

Technical Assistance and Environmental Reviews

In addition to the three items of special focus, Members are also discussing, pursuant to paragraph 33, **technical assistance, capacity building and environmental reviews** (for a summary of the discussions held on environmental reviews, see below page 27). Paragraph 33 reads:

We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

Technical assistance activities in the field of trade and environment are delivered mainly in the form of regional workshops for government representatives from trade and environment ministries, and organized in cooperation with the secretariats of UNEP, UNCTAD and MEAs.

In the discussions held on technical assistance, Members have recognized that activities, which bring together trade and environment officials, were essential to enhance coordination and policy coherence at the national level. Members have also encouraged further cooperation and coordination between the WTO, UNEP, UNCTAD and MEAs in the delivery of technical assistance.



Reporting

Paragraph 32 also requests the CTE to **report** to the Fifth Ministerial Conference in Cancún on the progress made in discussing the above-mentioned items (i.e. paragraphs 32 and 33), and to make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.

The relevant part of paragraph 32 states that:

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.

At its meeting of 7 July 2003, the CTE adopted its report to the Fifth Ministerial Conference in Cancún.⁴ This report covered the work undertaken by the regular session of the CTE between the Fourth (Doha) and the the Fifth (Cancún) Ministerial Conference of the WTO. It contains a factual summary of those issues that have been discussed and that are covered by the reporting requirement in paragraphs 32 and 33 of the Doha Ministerial Declaration.

Sustainable Development

Finally, paragraph 51 explicitly calls on the CTE, together with the Committee on Trade and Development, to act as a forum within which the environmental and developmental aspects of the negotiations can be debated, in order to help achieve the objective of **sustainable development**. The CTE has an important role to play in addressing the environmental dimension of trade liberalization as that liberalization proceeds. The CTE Regular decided to pursue a sectoral approach and received briefings by the Secretariat on relevant developments in the following negotiating areas: Agriculture⁵, Market Access for Non-Agricultural Products⁶, Rules⁷, and Services.⁸

Since the Doha Ministerial Conference, the CTE Regular has organized its work in the following manner:

⁴ The Cancun report is contained in document WT/CTE/8, 11 July 2003

⁵ See WT/CTE/GEN/8.

⁶ See WT/CTE/GEN/9.

⁷ See WT/CTE/GEN/10.

⁸ See WT/CTE/GEN/11.



(i) Paragraph 32: Issues of focus

- *Para. 32(i)*: the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development ("win-win-win situations");

- *Para. 32(ii)*: the relevant provisions of the TRIPS Agreement; and,

- *Para. 32(iii)*: labelling requirements for environmental purposes.



(ii) Paragraph 32: Other Items

- *Items 1 and 5*: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs; and the relationship between dispute settlement mechanisms in the multilateral trading system and those found in MEAs;

- *Item 2*: The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;

- *Item 3a*: The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes;

- *Item 4*: The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;

- *Item 7*: The issue of the export of domestically prohibited goods;

- *Item 9*: The Decision on Trade in Services and the Environment; and,

- *Item 10*: Appropriate arrangements for relations with inter-governmental and non-governmental organizations.

(iii) Paragraph 33

- Technical assistance and capacity building activities; and,

- Environmental reviews.

(iv) Paragraph 51: Sustainable Development Forum.



Market Access and Environmental Requirements

THE EFFECT OF ENVIRONMENTAL MEASURES ON MARKET ACCESS

Marrakesh Declaration - Item 6 - (First Part)⁹

The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them.

Doha Declaration - Paragraph 32(i) (First Part)

The effect of environmental measures on market access, especially in relation to developing countries, in particular the least developed among them.

This item is particularly important to the work of the CTE in that it holds the key to the complementarities that exist between sound trade and environmental policy-making. Improved market access for developing countries' products is key to the goal of achieving sustainable development. According to Principle 11 of the 1992 Rio Declaration on Environment and Development, environmental standards, objectives and priorities need to reflect the particular environmental and developmental context to which they apply. This means that environmental standards applied by some countries could be inappropriate and of unwarranted economic and social cost to others, particularly developing countries. Small and medium sized enterprises (SMEs) are especially vulnerable in this regard.

Members generally consider that the protection of the environment and health are legitimate policy objectives. However, it is also acknowledged that environmental requirements set to address such objectives could affect exports adversely. The answer to concerns about reduced market access is not to weaken environmental standards, but rather to enable exporters to meet them. In this context, it is

⁹ For the second part of item 6 and paragraph 32(i) see page 22.



argued that there is sufficient scope in existing WTO Agreements to ensure that environmental measures do not unduly restrict exports (e.g. the rules of the SPS and the TBT Agreements).

In striking the appropriate balance between safeguarding market access and protecting the environment, Members consider that there is a need to examine how environmental measures could be designed in a manner that (i) is consistent with WTO rules; (ii) inclusive; (iii) takes into account capabilities of developing countries; and, (iv) meets the legitimate objectives of the importing country. It is recognized that it is essential to involve developing countries in the design and development of environmental measures as a way of mitigating negative trade effects. Similarly, the facilitation of effective participation of developing countries in the early stages of the international standard-setting process is important. Once developed, flexibility in the application of environmental measures is seen as key.

In discussing ways forward on market access issues, several Members have felt that more weight has to be given to the identification of trade opportunities for sustainable growth. The CTE could look at incentives and means to assist developing countries to identify products, and develop export markets for environmentally friendly products in areas where these countries enjoy a comparative advantage. This would reinforce the message contained in the CTE's 1996 Singapore Report that trade liberalization has the potential to generate resources that could be applied to implement sound environmental policies. Moreover, the Plan of Implementation adopted at the World Summit on Sustainable Development (WSSD) in Johannesburg in 2001 has reiterated the need to support voluntary, WTO-compatible market-based initiatives for the creation and expansion of domestic and international markets for goods which are environmentally friendly.¹⁰

¹⁰ WT/CTE/W/220/Rev.1, "Report of the World Summit on Sustainable Development", Note by the Secretariat.



LABELLING REQUIREMENTS FOR ENVIRONMENTAL PURPOSES

Marrakesh Declaration - Item 3(b)

The relationship between the provisions of the multilateral trading system and requirements for environmental purposes relating to products, such as standards and technical regulations, and packaging, labelling and recycling requirements

Doha Declaration - Paragraph 32(iii)

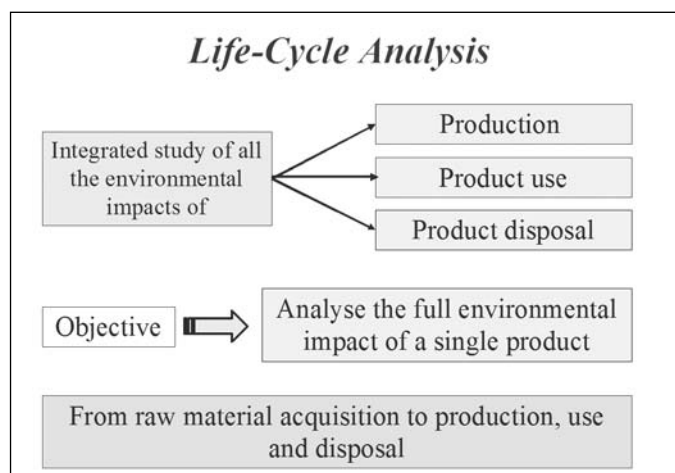
Labelling requirements for environmental purposes

Discussion of item 3(b) of the Marrakesh Work Programme has focused primarily on the issues of eco-labelling¹¹ and handling requirements¹² (such as requirements for packaging, recycling, re-use, recovery, and disposal). The issue of labelling requirements for environmental purposes has become, since the Doha Ministerial Conference, an issue of special focus in the work of the CTE Regular.

The Increasing Complexity of Eco-Labels

The use of eco-labels by governments, industry and non-governmental organizations is increasing. Moreover, the growing complexity and diversity of environmental labelling schemes raise difficulties for developing countries, and particularly SMEs in export markets. While international standards for labelling have a significant potential to facilitate trade by promoting the convergence of labelling requirements, developing countries can be at a disadvantage due to limited or ineffective participation in these processes. There is a need to better involve developing countries in the setting of environmental standards and regulations, whether at national or international level.

Moreover, eco-labelling schemes tend to be based on life-cycle analysis, i.e. the consideration of the environmental effects of a product from its production to its final disposal. In practice, life-cycle analysis is not easy to conduct, and eco-labels are frequently based on criteria that



¹¹ See document WT/CTE/W/150, 29 June 2000, "Information Relevant to the Consideration of the Market Access Effects of Eco-Labelling Schemes", Note by the Secretariat.

¹² See below page 20.



relate to only a few aspects of the process of production or of the product itself. The proliferation of eco-labelling schemes could confuse consumers (i.e. prevent them from being able to recognize or trust any particular label), and could make it difficult for exporters to meet the many different criteria on which they are based (particularly when they target the same products).

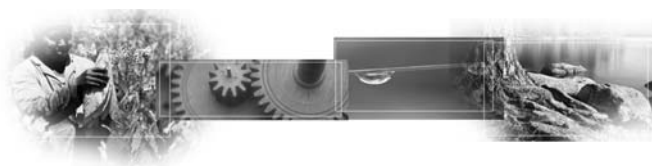
Are Eco-Labels Effective Trade Instruments?

Members generally agree that voluntary, participatory, market-based and transparent environmental labelling schemes are potentially efficient economic instruments to inform consumers about environmentally friendly products. Moreover, they tend to be less trade restrictive than other instruments. However, environmental labelling schemes could be misused for the protection of domestic markets. Hence, these schemes need to be non-discriminatory and not result in unnecessary barriers or disguised restrictions on international trade.

The assumption that labelling schemes have a positive effect on protecting the environment has been questioned by some. The criteria on which eco-labels are based are frequently determined through consultation with interested parties at the national level. A common complaint by the users of eco-labels has been that eco-labelling criteria tend to focus on local concerns and do not address the views of foreign suppliers, nor the specific environmental situation in the countries of these suppliers. For instance, an eco-label developed in a country with a serious air pollution problem may put the emphasis on air pollution control measures, whereas the main environmental problem in the foreign country could have to do with water and not air.

The PPMs Issue

A particularly thorny issue in the eco-labelling debate has been the use of criteria linked to the Processes and Production Methods (PPMs). WTO Members agree that countries are within their rights under WTO rules to set criteria for the way products are produced, if their production method leaves a trace in the final product (e.g. cotton grown using pesticides, with there being pesticide residue in the cotton itself). However, they disagree over the WTO consistency of measures based on what are known as "unincorporated PPMs" (or "non-product related PPMs") - i.e. PPMs which leave no trace in the final product (e.g. cotton grown using pesticides, with there being no trace of the pesticides in the cotton). Many developing countries argue that measures which discriminate between products based on unincorporated PPMs, such as some eco-labels, should be considered WTO inconsistent.



The issue of unincorporated PPMs has triggered a legal discussion in the WTO on the extent to which the TBT Agreement covers and allows unincorporated PPM-based measures. Currently, a major challenge to the effectiveness of the TBT Agreement is the increasing use (not only in the area of the environment) of process-based, as opposed to product-based, regulations and standards. This may require added reflection on the rules of the TBT Agreement relating to equivalence and mutual recognition, as a means of addressing the problems posed by differing environmental standards across countries. On equivalence, the TBT Agreement urges countries to recognize the equivalence of the norms set by their trading partners, even when they differ from their own, provided they achieve the same final objective. For developing countries, the recognition of the equivalency of their own certification systems is an area of particular concern. On mutual recognition, the TBT Agreement urges countries to recognize the procedures their trading partners use to assess compliance with norms, if they are convinced of the reliability and competence of their conformity assessment institutions. It has been argued that the TBT principles of equivalence and mutual recognition could have useful applications in the labelling area, where Members could come to recognize the labelling schemes of their trading partners, even where they are based on criteria that differ from their own, provided they succeed in achieving the intended objective.

The TBT Agreement

Most Members are of the view that existing WTO disciplines are adequate to deal with the issue of environmental labelling, including specific trade concerns that could arise. The issue is one of satisfactory implementation of the SPS and TBT Agreements.¹³ In their view, no compelling argument has been made in favour of a common understanding or guidance to be negotiated in respect of labelling for environmental purposes. Nor is it clear that further work on this issue needs to include the clarification of existing rules. For these Members, the TBT and SPS Agreements have created the appropriate balance of rights and obligations for both mandatory and voluntary labelling programmes.

With respect to voluntary environmental labelling schemes, the TBT Agreement's Code of Good Practice for the Preparation, Adoption and Application of Standards is important, and acceptance of this Code by the bodies developing labelling requirements is encouraged. Moreover, in 2000, the TBT Committee agreed on a set of "Principles for the Development of International Standards", which provide useful guidance.¹⁴ This decision contains the principles for the development of standards,

¹³ For more detail on the TBT and SPS Agreements, see page 54.

¹⁴ Annex 4 of G/TBT/9, 13 November 2000, "Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade"



including environmental labelling standards. These are: transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and, wherever possible, responsiveness to the needs and interests of developing countries.

What is the Appropriate Forum to Discuss this Issue?

Views diverge on the appropriate forum to discuss the issue of environmental labelling. Some Members are of the view that, considering the mandate contained in paragraph 32(iii) of the Doha Ministerial Declaration, which instructs the CTE to give particular attention to labelling requirements for environmental purposes, the CTE needs to intensify its work on environmental labelling. The discussion in the CTE could then be used as an input to the debate in the TBT Committee.

Many other Members, however, hold a different view. They argue that the TBT Committee is better suited for the task of examining WTO rules vis-à-vis labelling since it is already discussing labelling in general, including environmental labelling. They maintain that it would be unwise for the CTE either to pre-empt or to duplicate such work and that it is preferable to consider the results of the work carried out in the TBT Committee before taking a decision on the course of action for the CTE.

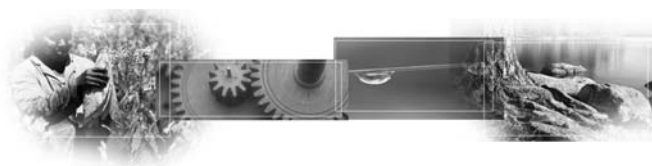
Discussions on Labelling in the TBT Committee

During the Second Triennial Review of the TBT Agreement (November 2000), the TBT Committee "reiterated the importance of any such requirements labelling requirements being consistent with the disciplines of the Agreement, and in particular stressed that they should not become disguised restrictions on trade".¹⁵ In 2001, the TBT Committee agreed to start structured discussions on labelling. TBT discussions cover all sorts of labelling schemes that have proliferated in the market-place (some mandatory, some voluntary, and some based on unincorporated PPMs).

The Committee reverted to the issue of labelling during the Third Triennial Review. As reflected under "other elements" of the report of the Review, it was agreed to continue to consider labelling concerns in its discussions in the context of the implementation and operation of the TBT Agreement.¹⁶

¹⁵ G/TBT/9, 13 November 2000, "Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade".

¹⁶ G/TBT/13, 12 November 2003, "Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade".



A workshop on labelling took place in October 2003 under the auspices of the TBT Committee. The aim of this event was to provide Members with a better understanding of the preparation, adoption and application of labelling requirements in the context of the implementation of the TBT Agreement, as well as the impact of such requirements on market access. It also provided Members with an opportunity to draw information from a wide variety of perspectives and concrete experiences (including those of consumers, industries, importers, exporters and regulators). This event was based on actual case studies, with a particular focus on developing countries' concerns. It took into account a range of labelling schemes in different sectors and with varying objectives, which could be of interest to WTO Members.¹⁷

Handling Requirements

A number of countries have set up policies on the kind of packaging that can be used in their markets and on the recovery, re-use, recycling or disposal of packaging materials once they have served their purpose. These policies can increase costs for exporters, act as potential barriers to trade, and result in discriminatory treatment, even if the same requirements are imposed on both domestic products and imports. Wood, for example, is used for packaging in many Asian countries, but is not regarded as recyclable in Europe.

On the issue of the potential trade effects of waste handling requirements, concerns were expressed by Members regarding:

- the extent to which the selection criteria governing waste handling schemes are delegated to domestic industry groups and tailored to their preferences;
- the degree to which foreign suppliers are allowed to participate in the design and preparation of these schemes;
- the extent to which packaging favoured by overseas suppliers is accepted by the schemes;
- the cost of participation in the schemes; etc.

¹⁷ For a summary of the workshop on labelling see http://www.wto.org/english/tratop_e/tbt_e/event_oct03_e/labelling_oct03_summary_e.htm.



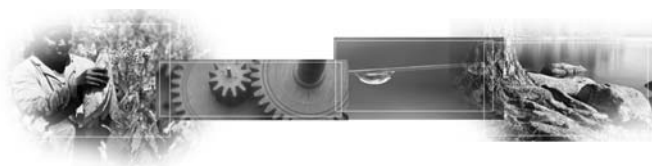
TAXES FOR ENVIRONMENTAL PURPOSES

Marrakesh Declaration - Item 3(a)

The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes.

Environmental charges and taxes are increasingly being used by WTO Member governments for the pursuit of national environmental policy objectives, with a view to "internalizing" domestic environmental costs. WTO rules discipline the way in which governments impose internal taxes and charges on traded goods, when imposed on imported products or rebated on exports. This is an issue of considerable interest and importance to trade and environment policy-makers in the context of proposals to increase taxes on environmentally sensitive inputs to production, such as energy (i.e. carbon taxes) and transportation.

Under existing GATT rules and jurisprudence, "product" taxes and charges can be adjusted at the border, but "process" taxes and charges by and large cannot. For example, a domestic tax on fuel can be applied perfectly legitimately to imported fuel, but a tax on the energy consumed in producing a ton of steel cannot be applied to imported steel. Since environmental taxes and charges are at least as much process-oriented as product-oriented, WTO rules have raised concern over the competitiveness implications of environmental process taxes and charges applied to domestic producers. The CTE has noted the importance of further work on the extent to which WTO rules need to be reviewed to accommodate environmental taxes and charges.



The Effects of Trade Liberalization on the Environment

THE ENVIRONMENTAL BENEFITS OF REMOVING TRADE DISTORTIONS: THE WIN-WIN-WIN SITUATIONS

Marrakesh Declaration - Item 6 - (Second Part)¹⁸

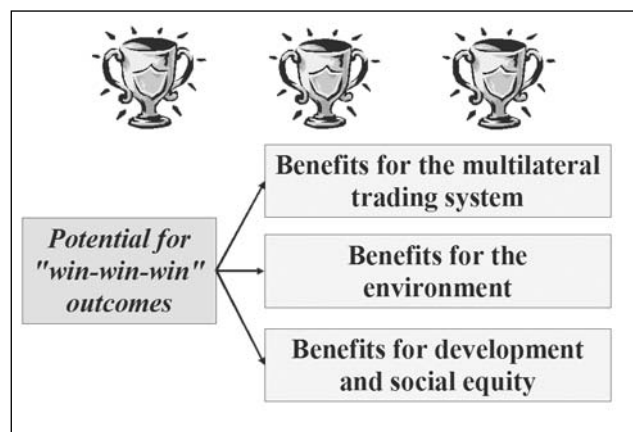
The environmental benefits of removing trade restrictions and distortions.

Doha Declaration - Paragraph 32(i) - (Second Part)

Those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development.

In the 1996 Singapore Report of the CTE, Members expressed an interest in undertaking further work to broaden the analysis of the potential environmental benefits of removing trade restrictions and distortions in specific sectors. It is considered that trade liberalization in certain sectors has the potential to yield benefits for both the multilateral trading system and the environment.

A background note prepared by the Secretariat¹⁹ observes that, to a great extent, trade liberalization is not the primary cause of environmental degradation, nor are trade instruments the first-best policy for addressing environmental problems. The environmental benefits of removing trade restrictions and



¹⁸ For the first part of item 6 and paragraph 32(i) see page 14.

¹⁹ WT/CTE/W/67, 7 November 1997, "Environmental Benefits of Removing Trade Restrictions and Distortions", Note by the Secretariat.



distortions are likely to be indirect and not readily identifiable in general terms. This is particularly the case for trade policies as they are but one of several areas of policy-making that have an effect on economic activity.

However, the study prepared by the Secretariat points towards a positive relationship between the removal of trade restrictions and distortions and improved environmental quality, through:

- (a) more efficient factor-use and consumption patterns through enhanced competition;
- (b) poverty reduction through trade expansion and encouragement of a sustainable rate of natural resource exploitation;
- (c) an increase in the availability of environment-related goods and services through market liberalization; and
- (d) better conditions for international cooperation through a continuing process of multilateral negotiations.

For developing countries, trade is an important means for securing resources needed for environmental protection. The political promises made at UNCED in 1992 of large financial and technology transfers to developing countries, to help them meet their economic development and environmental protection needs, have not been fulfilled. As a result, trade liberalization in favour of products of export interest to developing countries is fundamental to help them achieve sustainable development, and developing countries have stressed this fact in the CTE.

Agriculture

On this issue, there are two distinct arguments. One group of Members considers that agricultural trade reform offers "win-win-win" opportunities for the environment, trade and development. Trade- and production-distorting agricultural subsidies have a negative effect not only in the countries that apply such policies (incentive for intensive farming practices), but also on the environment of other countries, particularly developing countries. Such subsidies increase the instability of the international price of agricultural commodities, which reduces returns from agriculture in developing countries, thus discouraging production and investment. Lower agriculture returns are linked to poverty - a major cause of environmental degradation. Conversely, increased returns from agriculture would lead to higher incomes for developing country producers, improving their financial capacity to maintain and pursue sustainable farming practices.



Another group of Members is of the view that a certain level of domestic support is necessary to maintain various environmental benefits arising from agricultural production. These benefits include the maintenance of cultural landscapes, land conservation, management of water resources and the preservation of biodiversity.

Energy

Some Members are of the view that the energy sector presents a potential "win-win-win" situation for environment, trade and development. They argue that existing taxation and subsidy schemes in OECD countries are generally biased and discriminatory vis-à-vis petroleum products. There are negligible taxes on coal and gas, and, in addition, coal products in many OECD countries are subsidized. It is suggested by these Members that subsidies be removed and that fuel taxation be restructured to reflect carbon content - this would ensure that polluting sources (with higher carbon content) are penalized, not favoured. Other Members consider that the CTE is not the appropriate forum to discuss the impact of measures taken to mitigate climate change, as this is being dealt with adequately in the UNFCCC and the Kyoto Protocol.

Fisheries

Paragraph 28 of the Doha Ministerial Declaration instructs Members "to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries". Discussion on this issue is taking place in the context of the Agreement on Subsidies and Countervailing Measures (SCM) in the Negotiating Group on Rules. However, fisheries subsidies have been discussed at length in the CTE under item 6 of its work programme.

There is a general recognition of the importance of achieving the objective of sustainable development in the fisheries sector. A few Members maintain that poor fisheries management - taking place under open-access fisheries - coupled with increasing world demand for fishery products are at the root of declining world fisheries resources resulting from over-exploitation and illegal, unreported and unregulated fishing. In these Members' view subsidies could be an effective instrument to reduce capacity, for example through vessel buy-back programmes.



Other Members consider that over-capacity, and, consequently, a significant part of over-exploitation of fisheries, is caused by subsidies. Even when apparently sound management regimes are in place, subsidies could destabilize fisheries management and impede the objective of reducing over-capacity. In this regard, trade liberalization, in concert with sustainable resource management, could stimulate more efficient production with more long-term environmental benefits.

Forestry

The WSSD Plan of Implementation gives considerable importance to the concept of sustainable forest management. It points out that as forests provide multiple benefits, such as the mitigation of global warming and the conservation of biological diversity, the issue needs to be dealt with in a cross-sectoral manner which includes a discussion of elements relevant to trade. While Members agree on the importance of achieving the objective of sustainable development, some stress that there are different ways of achieving sustainable forest management. There is a need to look at measures which ensure conservation without reducing countries' ability to benefit economically from their forestry resources. This is particularly important for many developing countries.

Several Members share the concern that international trade of illegally harvested forest products could undermine conservation efforts in source countries, as well as other environmental, economic, and social goals. The importance of appropriate domestic regulation, and the capacity to implement, monitor and enforce such regulation, has been emphasized. In addition, more attention needs to be given to the fact that poverty is at the root of the problem because it fuels the illegal exploitation of forestry resources.

Some have emphasized that while domestic measures taken to combat illegal logging are needed, it is also important to examine possible international approaches from a trade perspective, taking into account discussions in other international fora. Others are of the view that the issue is being appropriately dealt with elsewhere and question the usefulness of debating it in the WTO.



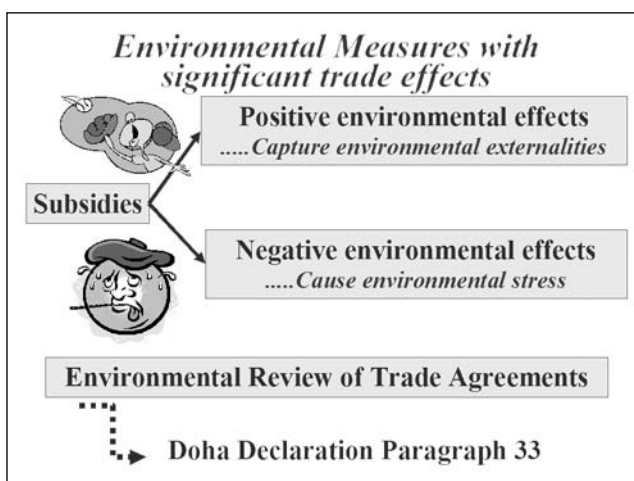
ENVIRONMENTAL POLICIES

Marrakesh Declaration - Item 2

The relationship between environmental policies relevant to trade and environmental measures with significant trade effects, and the provisions of the multilateral trading system.

The main issue examined under item 2 has been the treatment of environmental subsidies in the WTO. Other issues raised have included the environmental review of trade agreements.

Trade-Related Environmental Policies: Subsidies



Subsidies have the potential to contribute either positively or negatively to the environment. They may contribute positively when they capture positive environmental externalities. On the other hand, they may contribute negatively if they cause environmental stress (by, for instance, encouraging the overuse of certain natural resources). In the areas of agriculture and energy, subsidies are widely viewed as being trade distorting, and, in some instances, as being the cause of environmental degradation. Environmentalists have suggested that multilateral trade rules should incorporate greater flexibility for providing subsidies to encourage activities or technologies which have a beneficial impact on the environment.

During the Uruguay Round both the positive and negative contributions which subsidies may make to the environment were considered, and a number of new disciplines, as well as exemptions, were included in the Agreement on Agriculture and the SCM Agreement (although Article 8.2(c) of the SCM Agreement has expired). Under the Agreement on Agriculture, environmental subsidies may be exempt from domestic support reductions when certain conditions are met.



In the CTE, energy subsidies have also been addressed. Attention has focused on the revised rules for export subsidies provided in the SCM Agreement, whereby taxes on energy used to produce exports can be refunded without such refunds being treated as an export subsidy. Annexes 1 and 2 of the Agreement specify that exemption or remission of taxes on "inputs that are consumed in the production of the exported product" do not amount to a subsidy on exports. The exemption applies for physically incorporated inputs and "energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product."

Certain Members have argued that this provision encourages the greater use of energy intensive technologies for exports. No definitive conclusions on subsidies were reached by the CTE. It was agreed that further examination and analysis of policies of this nature would be required in future. Subsidies have also been considered under another item of the CTE's work programme (item 6, see above page 22). However, there they have been considered in relation to their specific trade distorting and environmentally damaging effect in certain sectors, such as agriculture and fisheries. The discussion of subsidies under item 2, therefore, is a more generic discussion.

The Environmental Review of Trade Agreements

In recent years, several governments have come under increasing pressure from NGOs to carry out environmental reviews of trade agreements. The United States and Canada, for instance, have prepared reviews of the North American Free Trade Agreement and of the Uruguay Round Agreements. Under item 2, the United States has recommended the use of environmental reviews of trade agreements by governments at the national level. The CTE has devoted greater attention to the issue in recent years, and the Doha Ministerial Declaration contains a paragraph relevant to this issue (Paragraph 33) which encourages Members to share their experience and expertise with others on how national environmental reviews can be performed. The importance of environmental reviews in WTO trade negotiations has also been confirmed in paragraph 6 of the Doha Declaration and, subsequently, in the WSSD Plan of Implementation. Paragraph 6 of the Doha Declaration reads: "We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis".



In the discussion held under paragraph 33, Members have emphasized the usefulness of an exchange of information on methods of environmental reviews, but also on the constraints facing developing countries in this regard. Some Members have stressed the fact that environmental reviews at the national level, besides being voluntary, need to be consistent with a country's priorities and the task of developing countries should not be made more onerous by imposing harmonized review procedures.

THE EXPORTS OF DOMESTICALLY PROHIBITED GOODS

Marrakesh Declaration - Item 7

The issue of exports of domestically prohibited goods

This issue covers products which are exported even though their sale and use are banned or severely restricted domestically on the grounds that they present a danger to the environment or to the life or health of humans, animals or plants. It is of particular concern to many developing and least-developed countries, which often lack the capacity or resources to deal with such products.

The GATT has examined the issue of the export of DPGs as early as 1982. Concern was raised by a number of developing countries, Parties to GATT, about the fact that goods were being exported to them, when their domestic sale in exporting countries had been either prohibited or severely restricted on health and environmental grounds. This raised ethical concerns which, from the point of view of these countries, needed to be addressed within the bounds of the multilateral trading system.

At the 1982 Ministerial Meeting of GATT Contracting Parties, it was agreed that the GATT examine the issue, and that all Parties notify the GATT of any goods produced and exported by them which were banned by their national authorities for sale in their domestic markets for health or environmental reasons. A notification system was set up following this Decision, but Parties tended to notify DPGs whose export had also been prohibited, rather than the ones which they continued to export. The notification system was not successful, therefore, and no notifications were received after 1990 (despite the fact that the 1982 Decision remains in force).



In 1989, a Working Group on the Export of DPGs was established in GATT. The Working Group met 15 times between 1989 and 1991, when its mandate expired, but failed to resolve the issue. At the 1994 Marrakesh Ministerial Conference, it was agreed to incorporate DPGs into the terms of reference of the CTE.

While numerous international instruments already address the export of DPGs (such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal), these instruments principally address chemicals, pharmaceuticals, and hazardous wastes and not the issue of consumer products, which has been identified as a gap by most WTO studies. Certain delegations have argued that while other instruments exist a number of them are only voluntary in nature; they have expressed their wish to see quicker and better progress on the issue in the WTO.

Collectively, the CTE has stated that while there is a need to concentrate on the role which the WTO can play on this issue, it is important neither to duplicate nor to deflect attention from the work of other specialized inter-governmental fora. It also recognized the important role that technical assistance and transfer of technology related to DPGs can play in both tackling environmental problems at their source and in helping avoid unnecessary additional trade restrictions on the products involved. It stated that WTO Members should be encouraged to provide technical assistance to other Members, especially developing and least-developed countries, either bilaterally or through inter-governmental organizations. This would assist these countries in strengthening their technical capacity to monitor and, where necessary, control the import of DPGs.

Based on a Secretariat note prepared on the information available in the WTO on the export of DPGs,²⁰ some delegations requested that the DPG notification system that had been in existence between 1982 and 1990 be revived, particularly as the Decision taken to establish it remains in force today. The system has not yet been revived. In recent years, the issue has not been raised in the CTE.

²⁰ See document WT/CTE/W/43, 22 April 1997.



SERVICES AND THE ENVIRONMENT

Marrakesh Declaration - Item 9

The work programme envisaged in the Decision on Trade in Services and the Environment.

The Decision on Trade in Services and the Environment

The work programme in the "*Decision on Trade in Services and the Environment*" notes that "since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Article XIV". In order to determine whether any modification of GATS Article XIV is required to take account of such measures, the Decision requested the CTE to examine and report, with recommendations, if any, on the relationship between services trade and the environment, including the issue of sustainable development. The Decision also asked the CTE to examine the relevance of inter-governmental agreements on the environment and their relationship to the GATS.

During the negotiation of the GATS, several delegations proposed that exceptions be provided to allow for restrictions on services trade to address problems of "the environment", "sustainable development", "the integrity of infrastructure or transportation systems", or "the conservation of exhaustible natural resources". One of the major concerns in this regard was the restrictions that Austria and Switzerland wished to maintain on transit lorry traffic, which they felt was damaging their environment. No agreement was reached before the end of the Uruguay Round to make special reference to these concerns, and the Decision on Trade and Environment reflected the insistence of certain delegations on revisiting the issue.

Discussions in the CTE

In the CTE, one Member has pressed for a broader exceptions clause in the GATS than exists at present, while many other Members feel that since the GATS is still evolving it would be premature to assess the adequacy of Article XIV(b) in dealing with environmental concerns. This issue is linked to the adequacy of Article XX of GATT 1994 in dealing with environmental concerns in the area of trade in goods.²¹

²¹ For an explanation of Article XX, see page 50.



Discussion in the CTE to date on this item has not led to the identification of any measures that Members feel may need to be applied to services trade for environmental purposes, and which would not be covered adequately by GATS provisions, in particular Article XIV(b).

Effects of Services Trade Liberalization on the Environment

In 2002, the WTO Secretariat prepared a study on the effects of services trade liberalization on the environment.²² This paper looks at three selected areas (tourism, land freight transport (inter-urban) and environmental services) and briefly considers the horizontal issue of how to assess environmental effects of services trade liberalization.

Current Context

Members have agreed, *inter alia*, that the direction of the on-going negotiations is one of progressive liberalization. These negotiations are taking place within the existing structure of the GATS and with the existing schedules as the starting point. It is recalled that the existing structure of the GATS allows countries flexibility in terms of the scheduling of commitments, as well as with respect to the conditions that governments choose to impose on foreign suppliers of services. Services trade liberalization is to take place with due respect for national policy objectives, the level of development and the size of economies of individual Members.

Regulatory Adjustment

While liberalization involves the progressive removal of barriers to services supply, this does not necessarily diminish the role of government. On the contrary, liberalization might even sharpen the need for appropriate regulation to achieve certain policy objectives. Environmental policy, for instance, might strive to mitigate negative environmental effects of services trade liberalization or enhance such positive effects, or both. In this sense, the environmental impact of liberalization in any individual sector may ultimately depend on whether or not liberalization proceeds under current regulatory conditions or with regulatory adjustments. If appropriate regulation is in place, and prices reflect the full cost of production (including environmental cost), liberalization should benefit the environment because it leads to more efficient resource use.

²² See document WT/CTE/W/218, Discussion paper on the Environmental Effects of Services Trade Liberalization, Items 6 and 9, Note by the Secretariat.



Ultimately, positive environmental impact will depend on the availability of resources a society is able to invest to protect the environment. In turn, resource availability is determined by the level of development. In other words, there is a positive link between freer trade and economic growth which can lead to reduced poverty and higher standards of living, including a better environment.

Attributing Potential Environmental Effects

It is difficult to distinguish between those environmental effects which may be attributable to services trade, and those which may arise due to other factors. Yet another step in this exercise is estimating the extent to which services trade liberalization can be attributed to liberalization under GATS. The vehicle for liberalization is perhaps not the key issue: it is the environmental effect arising from services trade liberalization, irrespective of its origin, which is of interest.

Link to Goods

While a supplied service is generally intangible, its direct environmental impact could be measured by the effect it has on the consumption of associated goods. In considering the environmental effects of services trade liberalization, effects that arise from the supply and consumption of associated goods need to be kept in mind.

What are Environmental Services?

In the Services Sectoral Classification List developed during the Uruguay Round, and largely based on the United Nations Provisional Central Product Classification (CPC), the environmental services sector includes: sewage services; refuse disposal services; sanitation and similar services; and other environmental services. Although the "other" category does not refer to any CPC item, it presumably includes the remaining elements of the CPC environmental services category, e.g. cleaning of exhaust gases, noise abatement services, nature and landscape protection services, and other environmental protection services not included elsewhere. This List has been used by many Members in their schedules of specific commitments.

As of April 2003, some 47 Members had undertaken specific commitments in at least one sub-sector of the environmental services sector. Most of them, however, have undertaken specific commitments in several, and for some Members, in all sub-sectors. The number of commitments across sub-sectors



is roughly equal. As compared to other sectors, such as tourism, financial services or telecommunications, liberalization bound under the GATS in environmental services appears rather limited. However, one should remember that Members' policies may be more liberal in practice than is reflected in their schedules.

Environmental services is a sector where most trade takes place through commercial presence (mode 3) with the accompanying presence of natural persons (mode 4). Cross-border trade (mode 1) and consumption abroad (mode 2) are of limited relevance; they may offer an avenue for some supporting services, but appear to be technically unfeasible for a number of relevant activities. These patterns are reflected in specific commitments undertaken by Members.

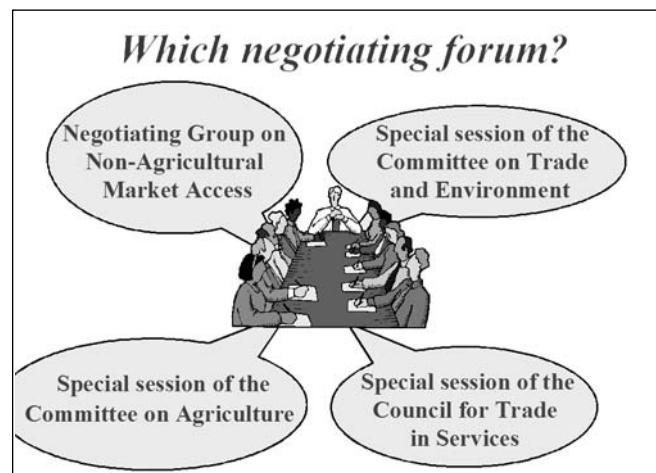
A survey of Members' schedules shows that mode 1 is often unbound, in part because some Members consider it not technically feasible. Commitments under mode 2 are rather liberal, reflecting a general trend across services sectors. Most commitments on environmental services focus on mode 3, while commitments on mode 4 are, as in other services sectors, limited to some particular categories of services providers.

ENVIRONMENTAL GOODS AND SERVICES

Doha Declaration - Paragraph 31(iii)

The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

Paragraph 31(iii) of the Doha Ministerial Declaration instructs participants to negotiate on the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services. Members agreed to conduct the negotiations on environmental goods and services in the Negotiating Group on Market Access for Non-Agricultural Products and the Council for Trade in Services in Special Session.



In addition, some Members called on the CTESS to clarify the concept of environmental goods. However, not all Members are in favour of working towards a definition of environmental goods for the purpose of the negotiations. The chairpersons of the three negotiating bodies concerned by this mandate have agreed to coordinate on the progress made in their different Committees on a regular basis.

Various criteria for the definition or identification of environmental goods were debated, and concerns were raised on the following issues:

- How products with multiple end-uses would be classified;
- whether PPMs and end-use criteria would be needed to define environmental goods;
- how the harmonized system would capture those goods; and
- how the relativity of the concept of "environmental friendliness" would be tackled (since some goods considered as environmentally friendly in some countries could be seen as unfriendly in others; also the question of incorporating, in a list of environmental goods, products that would be environmentally preferable, but nonetheless environmentally harmful).

In discussing the concept of environmental goods, several references were made to the OECD and the APEC lists of such goods. Some Members argued for the use of the APEC or OECD list as a basis for the discussions on the identification of environmental goods. However, the point has also been made that the APEC and OECD lists were biased to the interests of certain groups of WTO Members and that the interests of developing countries needed to be taken into account. Given the high technological content of such products, the situation of the real benefits going only to the more developed Members needed to be avoided. In this context, it was argued that a WTO list of environmental goods would have to be developed to include products of export interest to developing countries.



The Relationship between MEAs and the WTO

Marrakesh Declaration - Item 1

The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs).

Marrakesh Declaration - Item 5

The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs.

Doha Declaration - Paragraph 31(i)

The relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.

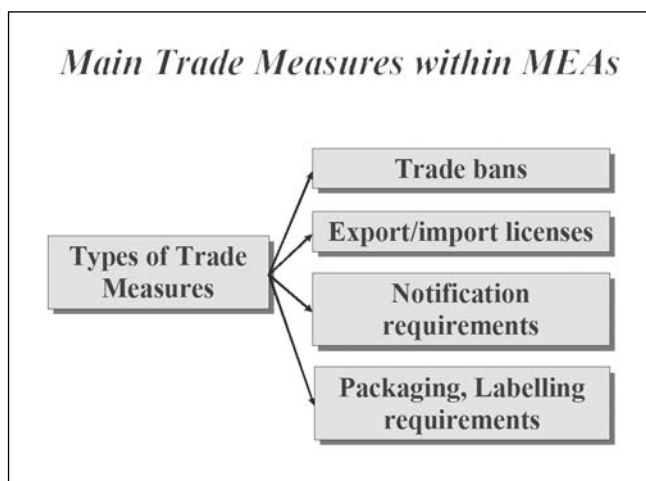
GENERAL DEBATE

It has been widely recognized by both environmental and trade policy-makers that multilateral solutions to transboundary environmental problems, whether regional or global, are preferable to unilateral solutions. Resort to unilateralism runs the risk of arbitrary discrimination and disguised protectionism which could damage the multilateral trading system. UNCED has strongly endorsed the negotiation of MEAs to address global environmental problems. Agenda 21 of the Rio Conference states that measures should be taken to "avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder or global environmental problems should, as far as possible, be based on international consensus"²³.

²³ United Nations, Agenda 21: The United Nations Programme of Action from Rio. Chapter 2.



Whilst MEAs are to be encouraged, the CTE has wrestled with the issue of how to address the trade provisions which several of these agreements contain. These include trade measures agreed to amongst parties to MEAs, as well as measures adopted by parties to MEAs against non-parties.



A possible source of conflict between the trade measures contained in MEAs and WTO rules could be the violation by MEAs of the WTO's non-discrimination principle. Such a violation could take place when an MEA authorizes trade between its parties in a specific product, but bans trade in that very same product with non-parties (hence, a violation of the WTO's MFN clause, which requires countries to grant equivalent treatment to "like" imported products (see below page 50)).

Some WTO Members have expressed the fear that MEA-related disputes could be brought to the WTO dispute settlement system. Whereas disputes between two parties to an MEA, who are both WTO Members, would most likely be settled in the MEA, disputes between an MEA party and a non-party (both of whom are WTO Members) would most probably come to the WTO since the non-party would not have access to the dispute settlement provisions of the MEA. They have argued that the WTO should not wait until it is asked to resolve an MEA-related dispute and a panel is asked to opine on the relationship between the WTO and MEAs (environment-related disputes are summarized on page 59). It is WTO Members that should themselves, through negotiations, resolve the issue.

In discussing the compatibility between the trade provisions contained in MEAs and WTO rules, the CTE has observed that of the approximately 200 MEAs currently in force, only about 20 contain trade provisions.²⁴ It has been argued, therefore, that the dimension of the problem should not be exaggerated.



²⁴ For more information on MEAs containing trade provisions see document WT/CTE/W/160/Rev.2, TN/TE/S/5, 25 April 2003, "Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements", Note by the Secretariat.



In addition, no disputes have thus far come to the WTO regarding the trade provisions contained in an MEA. Some WTO Members have argued in the CTE that the existing principles of public international law suffice in governing the relationship between WTO rules and MEAs. The 1969 Vienna Convention on the Law of Treaties as well as the principles of customary law could themselves define how WTO rules interact with MEAs.²⁵ The legal principles of "*lex specialis*" (the more specialized agreement prevails over the more general) and of "*lex posterior*" (the agreement signed later in date prevails over the earlier one) emanate from public international law, and some have argued that these principles could help the WTO in defining its relationship with MEAs. Others have argued that there is a need for greater legal clarity.

Although there has never been a formal dispute between the WTO and an MEA, the *Chile - Swordfish* case, which was suspended before the composition of the Panel, has illustrated the risk of conflicting judgments. In this case, it is likely that both adjudicating bodies would have examined whether Chile's measures were in compliance with the United Nations Convention on the Law of the Sea (UNCLOS). The WTO dispute settlement system and the International Tribunal for the Law of the Sea (ITLOS) could have reached different conclusions on factual aspects or on the interpretation of the provisions of the Convention.

The Chile - Swordfish Case

Facts

Swordfish migrate through the waters of the Pacific Ocean. Along their extensive journeys swordfish cross jurisdictional boundaries.

For ten years, the European Communities and Chile have been engaged in a controversy over swordfish fisheries in the South Pacific, resorting to different international law regimes to support their positions. However, the European Communities decided in April 2000 to bring the case before the WTO, and Chile before the ITLOS in December 2000.

Proceedings at the WTO

On 19 April 2000, the European Communities requested consultations with Chile regarding the prohibition on unloading of swordfish in Chilean ports established on the basis of the Chilean Fishery Law.

²⁵ See Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331; 8 *International Legal Materials* 679.



The Chile - Swordfish Case (cont'd)

The European Communities asserted that its fishing vessels operating in the South East Pacific were not allowed, under Chilean legislation, to unload their swordfish in Chilean ports. The European Communities considered that, as a result, Chile made transit through its ports impossible for swordfish. The European Communities claimed that the above-mentioned measures were inconsistent with GATT 1994, and in particular Articles V and XI.

On 12 December 2000, the Dispute Settlement Body (DSB) established a panel further to the request of the European Communities. In March 2001, the European Communities and Chile agreed to suspend the process for the constitution of the panel (this agreement was further reiterated in November 2003).

Proceedings at the ITLOS

Proceedings in the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* were instituted on 19 December 2000 at the ITLOS by Chile and the European Communities.

Chile requested, *inter alia*, the ITLOS to declare whether the European Communities had fulfilled its obligations under UNCLOS Articles 64 (calling for cooperation in ensuring conservation of highly migratory species), 116-119 (relating to conservation of the living resources of the high seas), 297 (concerning dispute settlement) and 300 (calling for good faith and no abuse of right). The European Communities requested, *inter alia*, the Tribunal to declare whether Chile had violated Articles 64, 116-119 and 300 of UNCLOS, mentioned above, as well as Articles 87 (on freedom of the high seas including freedom of fishing, subject to conservation obligations) and 89 (prohibiting any State from subjecting any part of the high seas to its sovereignty).

On 9 March 2001, the parties informed the ITLOS that they had reached a *provisional arrangement* concerning the dispute and requested that the proceedings before the ITLOS be suspended. This suspension was recently confirmed for a further period of two years in January 2004. Therefore, the case remains on the docket of the Tribunal.



MEAS AND THE SINGAPORE MINISTERIAL CONFERENCE

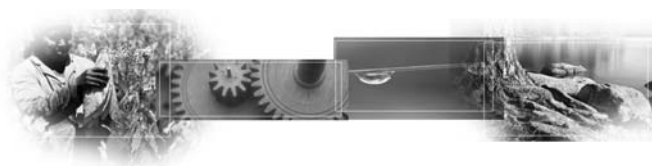
In the conclusions reached in 1996 at the Singapore Ministerial Conference, the CTE stated that it fully supported multilateral solutions to global and transboundary pollution problems, and urged Members to avoid unilateral actions in this regard. It stated that whilst trade restrictions are not the only nor necessarily the most effective policy instrument to fulfil the objectives of MEAs, in certain cases they can play an important role. The CTE agreed that WTO rules already provide broad and valuable scope for trade measures to be applied pursuant to MEAs in a WTO-consistent manner. It argued that there is no need to change WTO provisions to provide increased accommodation in this regard.

With respect to dispute settlement, the CTE agreed that better policy coordination at the national level between trade and environmental policy-makers can help prevent WTO disputes from arising over the use of trade measures contained in MEAs. It was of the view that problems are unlikely to arise in the WTO over trade measures agreed and applied amongst parties to an MEA. It urged that in the negotiation of future MEAs, particular care be taken over how trade measures may be considered for application to non-parties. In the event of a conflict in the WTO over the trade measures of an MEA (in particular against a WTO non-party to the MEA), the CTE expressed its belief that WTO dispute settlement provisions are satisfactory to tackle any such problems, including in cases where resort to environmental expertise may be needed.

THE DOHA NEGOTIATING MANDATE ON MEAS

At the Doha Ministerial Conference, however, agreement was reached to commence negotiations on certain aspects of the WTO/MEA relationship. Members have agreed to clarify the relationship between WTO rules and MEAs, with respect to those MEAs which contain "specific trade obligations" (STOs). However, the outcome of those negotiations must be limited to the applicability of WTO rules to conflicts between WTO Members who *are* parties to an MEA. In other words, Members have not agreed to negotiate a solution to conflicts opposing MEA parties and non-parties.

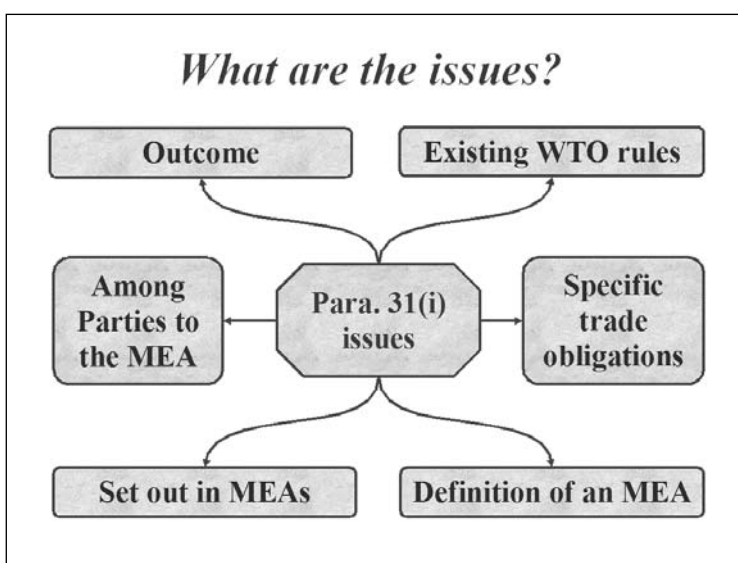
WTO Members have basically agreed to clarify the legal relationship between WTO rules and MEAs, rather than leaving the matter to the WTO's dispute settlement body to resolve in individual cases (in the event of the lodging of a formal dispute). However, they have explicitly stated that the negotiations should be limited to defining how WTO rules apply to WTO Members that are party to an MEA. In other words, they should not venture into their applicability between a party and a non-party to an MEA. The reason for this limitation is that while WTO Members were willing to let the negotiations define



the relationship between WTO rules and MEAs they have joined, they were not ready to let them alter their WTO rights and obligations *vis-à-vis* MEAs they were not part of. Moreover, paragraph 32 of the Doha Ministerial Declaration carefully circumscribed the negotiations under paragraph 31(i) and (ii):

The outcome of the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the SPS Agreement, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

Since the launching of the negotiations, delegations have actively engaged in developing a *common understanding of the mandate*. That understanding has evolved on the basis of two complementary approaches: the identification of STOs in MEAs; and a more conceptual discussion on the WTO-MEA relationship. Delegations have examined the different components of the mandate, such as the terms "existing WTO rules," "STOs," "set out in MEAs," "MEAs," and "among parties to the MEA in question". A few Members have also begun to look ahead at the possible outcomes that the mandate could deliver.



On the different components of the mandate, the bulk of the discussion has revolved around the terms "MEAs," "STOs," and the notion of measures being "set out in MEAs". On "MEAs", while some believe that there is a need to define the concept so as not to overstep the boundaries of the mandate, others do not view this as necessary. Some focus was placed on six MEAs that could contain STOs. However, Members have not agreed to limiting the discussion to any particular number of MEAs.

On "STOs," several Members believe that these must be measures that are explicitly provided for and mandatory under MEAs. However, discussion is still taking place on other kinds of trade measures



contained in MEAs and whether they can be considered STOs. Furthermore, some Members are arguing that the entire operational framework of MEAs needs to be looked at in identifying the STOs that are "set out in MEAs," suggesting that also Conference of Parties (COP) decisions must be addressed. The various forms that COP decisions can take, and their legal status, is being discussed.

Some suggestions were made on the *potential outcomes of the negotiations*, such as the need to develop certain "principles and parameters" to govern the WTO-MEA relationship, and to establish the conformity of certain kinds of trade measures in MEAs with WTO rules. However, there seems to be a general sense in the CTESS that it is premature to discuss potential results.

ENVIRONMENT AND THE TRIPS AGREEMENT

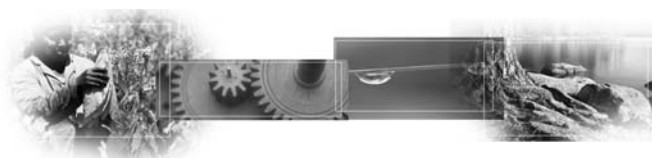
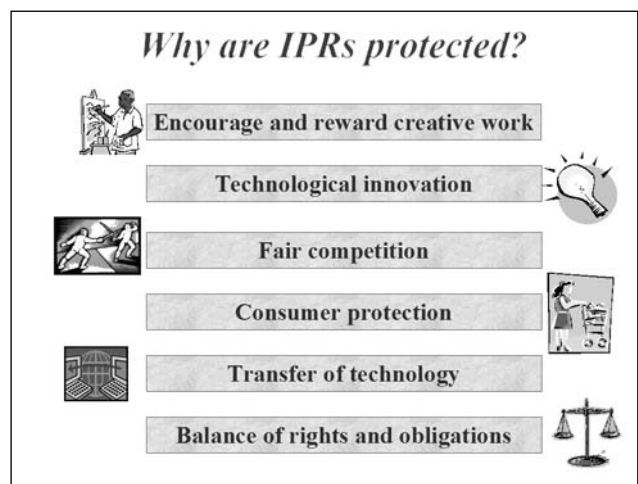
Marrakesh Declaration - Item 8

Doha Declaration - Paragraph 32(ii)

The relevant provisions of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The objective of the TRIPS Agreement is to promote effective and adequate protection of intellectual property rights (IPRs). IPRs serve various functions, such as the encouragement of innovation and the disclosure of information on inventions, including environmentally sound technology. In the context of trade and environment, the TRIPS Agreement has assumed increasing significance.

The Doha Ministerial Declaration has mandated the CTE to focus its work on the relevant provisions of the TRIPS Agreement. The Council for TRIPS has also been instructed, in pursuing its work programme including under the review of Article 27.3(b), to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, and the protection of traditional knowledge and folklore.



The links between the TRIPS Agreement and the environment are complex and many of the issues involved are contentious. CTE discussions on this matter mainly revolve around two issues: the transfer of environmentally friendly technology, and the TRIPS consistency of certain provisions of the Convention on Biological Diversity (CBD).

The Relationship between the CBD and the TRIPS Agreement

On the TRIPS consistency of certain provisions of the CBD, three main views have been expressed. For one group of Members, it is necessary to amend the TRIPS Agreement to *accommodate* some essential elements of the CBD. Such an amendment could require that an applicant for a patent relating to biological materials or to traditional knowledge (i) disclose the source and country of origin of the biological resource and/or of the traditional knowledge used in the invention; (ii) give evidence of prior informed consent through approval of authorities; and, (iii) give evidence of fair and equitable benefit sharing.

Another group of Members is of the view that there is no conflict between the CBD and the TRIPS Agreement and that the two agreements are mutually supportive. For these Members, the two agreements have different objectives and purposes and deal with different subject-matter. In addition, no specific examples of conflict have been cited.

A last group of Members considers that, although the CBD and the TRIPS Agreement are mutually supportive, their *implementation* could create conflicts. Hence, both bodies of law need to be implemented in a mutually supportive way in order not to undermine their respective objectives.

For most Members, key aspects of the debate on the relationship between the TRIPS Agreement and the CBD are being dealt with appropriately by the TRIPS Council, and the CTE should avoid duplicating such work.



Transfer of Technology

With respect to technology transfer, patents are perceived by some Members as increasing the difficulty and cost of obtaining new technologies which are required either due to changes agreed under certain MEAs (such as the Montreal Protocol) or in order to meet environmental requirements, both generally and in certain export markets. Also, there has been an increasing concern over the conservation and sustainable use of biological diversity. The rapid progress in the area of biotechnology has meant that greater importance is attached to easy access to genetic resources. Developing countries (many of which are the main suppliers of such genetic resources and biological diversity) have emphasized a *quid pro quo* in this context, involving easier transfer of technologies in return for them providing access to their genetic resources, and for undertaking policies aimed at the conservation and sustainable use of biological diversity.

This has proven to be a particularly sensitive element of the CTE's work programme, with certain Members proposing that exceptions be made in the TRIPS Agreement on environmental grounds for the transfer of technology mandated for use in an MEA and others defending IPRs as a necessary precondition for the transfer of technology.



Transparency and Relations with Other Organizations

Marrakesh Declaration - Item 4

The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes.

Marrakesh Declaration - Item 10

Input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations.

Doha Declaration - Paragraph 31(ii)

Procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status.

TRANSPARENCY OF TRADE MEASURES

Transparency is an important aspect of WTO work on trade and environment. Numerous notification systems in the WTO increase the transparency of trade-related environmental measures (TREM). GATT Article X on the Publication and Administration of Trade Regulations, the 1979 Understanding Regarding Notifications, Consultation, Dispute Settlement and Surveillance, and the transparency provisions of the TBT and SPS Agreements, create a broad basis for ensuring the transparency of TREMs at the multilateral level.



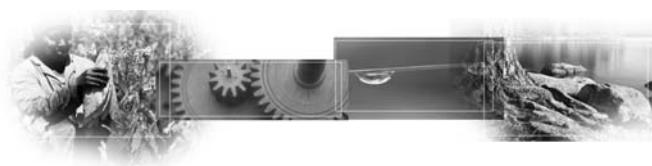
RELATIONSHIP WITH NGOS AND PUBLIC ACCESS TO WTO DOCUMENTATION

As part of the Decision of the General Council of 18 July 1996 to adopt "Guidelines for arrangements on relations with non-governmental organizations (NGOs)", WTO Members have agreed to improve public access to WTO documentation and communication with NGOs. Following this decision, the following broad conclusions emerged in the CTE:

- It would be inappropriate to allow NGOs to participate directly as observers in the proceedings of the CTE. The main consideration for many delegations was that primary responsibility for informing the public and establishing relations with NGOs lies at the national level. Another concern related to the special character of the WTO, which is both a legally binding instrument, involving rights and obligations for its Members, and a forum for negotiations.
- Nevertheless, delegations felt that the transparency of the WTO's work on trade and environment should be improved and that there was a need to respond to public interest in this area in order to avoid misunderstanding of the role of the WTO.
- Finally, the WTO Secretariat has been given a mandate to act as an intermediary between NGOs and WTO Members and to provide channels for an exchange of information and views.

In addition to its regular contact with NGO representatives, the Secretariat organized a number of NGO Symposia, which have provided opportunities for a useful exchange of information between civil society and government representatives at the WTO on issues relating to the linkages between trade and environment.

More recently, a decision by the General Council of 14 May 2002 has significantly streamlined the procedures for the circulation and derestriction of WTO documents. The basic principle of the new procedures is that most WTO documents shall be unrestricted.



INFORMATION EXCHANGE

The mandate of paragraph 31(ii) of the Doha Ministerial Declaration provides for negotiations on procedures for regular information exchange between MEA Secretariats and the relevant WTO committees.

Members agree that existing forms of cooperation and information exchange between the WTO, MEAs and UNEP have proven to be valuable and should be enhanced. Reference has been made to UNEP's efforts to organize meetings back-to-back with those of the CTESS. Such meetings have provided a valuable forum for information exchange, and have allowed numerous capital-based environment officials to attend meetings of the CTE and CTESS.

In the CTESS, some concrete suggestions have been put forward by Members with regard to cooperation and information exchange between the WTO and MEA secretariats:

- Formalizing MEA Information Sessions in the CTE, and organizing them on a regular basis;
- holding MEA Information Sessions on specific themes by grouping the MEAs that share a common interest;
- organizing meetings with MEAs in other WTO bodies, either together with the CTE or separately;
- organizing WTO parallel events at the COPs of MEAs on a more systematic basis;
- organizing joint WTO, UNEP and MEA technical assistance and capacity building projects;
- promoting the exchange of documents, while respecting confidential information;
- creating avenues for information exchange between government representatives from the trade and environment sides; and
- establishing an electronic database on trade and environment.

However, a number of delegations have highlighted that it is important to maintain flexibility with regard to information exchange, stressing the financial and human resource constraints of the WTO and MEAs, and of smaller delegations. Other delegations have argued that it was necessary to identify the WTO Committees that could benefit from widening their contacts with UNEP and MEAs.

On paragraph 31(ii), the CTESS held an MEA Information Exchange Session with six MEAs and UNEP on 12 November 2002, in which a useful exchange of ideas took place.

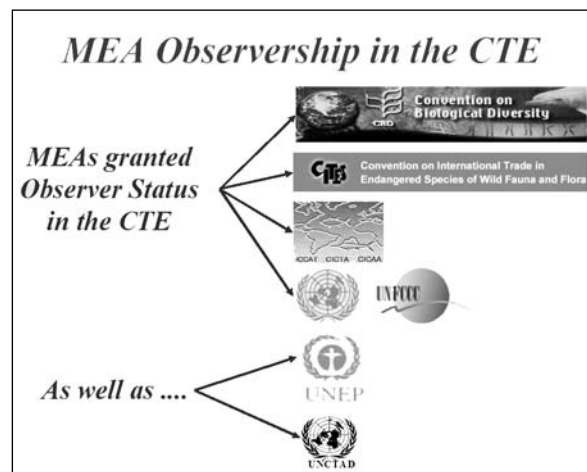


OBSERVERSHIP

Observers to the CTE Regular and CTESS

Following the Decision of the General Council of 18 July 1996 on "Guidelines for observer status for international inter-governmental organizations in the WTO", the CTE agreed to extend observer status on a permanent basis to those intergovernmental organizations which previously participated as observers on an ad hoc basis at CTE meetings and to those that had so requested. The possibility exists on the basis of the General Council's Decision to consider future requests from other relevant intergovernmental organizations.

Some 25 intergovernmental organizations were therefore granted observer status in the CTE Regular. However, since a political deadlock arose in the General Council over the issue of observer status, the CTE has not considered any new requests. For this reason, some requests for observer status from international organizations, including certain MEAs, are still pending.²⁶

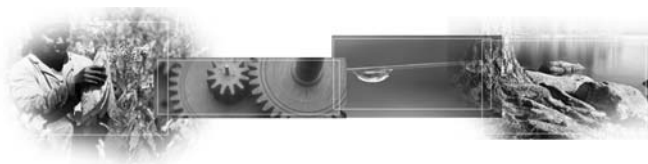


The observership situation in the General Council also had repercussions in the Trade Negotiations Committee (TNC), as well as in the various negotiating groups under its authority, including the CTESS. However, since the negotiating mandate in paragraphs 31(i) and (ii) relate to MEAs, Members in the CTESS have tried to find a solution in order to be able to benefit from the expertise of MEAs. This solution was to invite a number of MEAs to attend its meetings, on an ad hoc, meeting-by-meeting basis. This decision was taken without prejudice to a solution being found to the issue of observer status at the General Council or TNC level.

Criteria for the Granting of Observer Status

It is important to stress that the CTESS has a specific mandate of negotiation, in paragraph 31(ii) of the Doha Declaration, on criteria for the granting of observer status to MEA secretariats in relevant WTO Committees. The mandate in paragraph 31(ii) is intended to guarantee the participation of MEAs in the work of the WTO, and to strengthen the complementarities between their work and that of the WTO.

²⁶ For a list of observers in the CTE see Annex 3, page 73



It has been argued that this mandate could have positive spillover effects on the negotiations in paragraph 31(i) (see above, page 39), in terms of helping to reduce the risk of conflict in the implementation of WTO and MEA rules.

At present, four MEAs have observer status in the CTE (the CBD, the CITES, the ICCAT and the UNFCCC), but requests are still pending in the CTE, as well as in various WTO Committees.

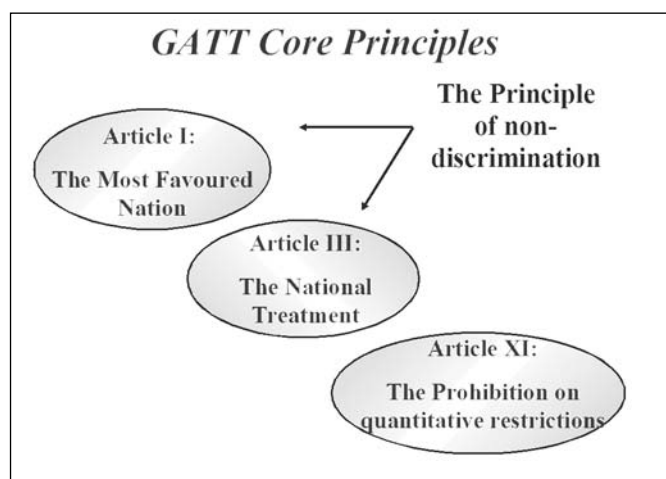


Relevant GATT/WTO Provisions

The provisions of GATT 1994 and of several WTO Agreements which are of direct relevance to the environment are presented below.

GATT 1994 - ARTICLES I AND III ON NON-DISCRIMINATION

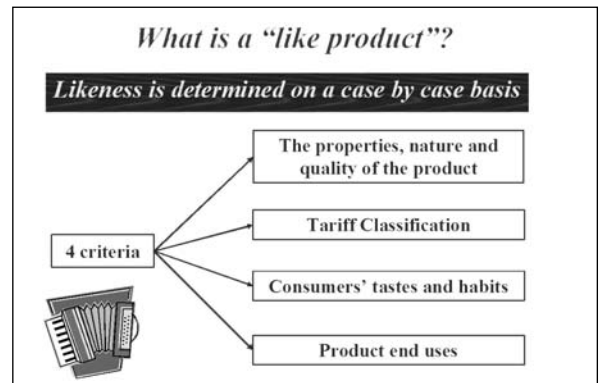
The principle of non-discrimination has two components: the Most-Favoured Nation (MFN) clause contained in GATT Article I, and the National Treatment principle contained in Article III. According to Article I, WTO Members are bound to grant to the products of other Members treatment no less favourable than that accorded to the products of any other country. Thus, no country is to give special trading advantages to another or to discriminate against it. Therefore, all Members are on an equal footing, and all share the benefits of any moves towards lower trade barriers. The MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions whenever and wherever they are negotiated. A second component of non-discrimination is National Treatment. Article III stipulates that once goods have entered a market, they must be treated no less favourably than equivalent domestically-produced goods.²⁷



²⁷ Under the GATS, Members are also required to offer MFN treatment to services and service suppliers of other Members. However, it permits listed exemptions to the MFN obligation covering specific measures for which WTO Members are unable to offer such treatment initially. The national treatment principle is only an obligation in GATS where Members explicitly undertake to accord it for particular services. Therefore, the national treatment principle is the result of negotiations among Members.



The principle of non-discrimination is the main principle on which the rules of the multilateral trading system are founded. With respect to trade-related environmental issues, the principle ensures that national environmental protection policies are not adopted with a view to arbitrarily discriminating between foreign and domestically produced like products, or between like products imported from different trading partners. It prevents the abuse of environmental policies, and of their usage as disguised restrictions on international trade.



GATT 1994 - ARTICLE XI ON GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

Article XI of the GATT 1994 addresses the elimination of quantitative restrictions introduced or maintained by countries on the importation or exportation of products. It prohibits such restrictions with the objective of encouraging countries to convert them into tariffs, a more transparent and less-trade distortive instrument. This Article has been violated in the context of a number of environmental disputes in which countries have imposed bans on the importation of certain products, and is thus relevant to trade and environment discussions.

GATT 1994 - ARTICLE XX ON GENERAL EXCEPTIONS

Negotiated as early as 1947, Article XX on General Exceptions lays out a number of specific instances in which WTO Members may be exempted from GATT rules. Two exceptions (paragraphs (b) and (g)) are relevant to environmental protection. The Article states that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."



Article XX(b) and (g) allow WTO Members to justify GATT-inconsistent policy measures if these are either "necessary" to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources. However, the chapeau of Article XX is designed to ensure that such GATT-inconsistent measures do not result in arbitrary or unjustifiable discrimination and do not constitute a disguised restriction on international trade.

The paragraphs below present the approach followed both by panels and by the Appellate Body in addressing a defence under Article XX.²⁸

As set out in the *US-Gasoline* case (summarized on page 62), the defending party must demonstrate, *first*, that the measure falls under at least one of the exceptions - paragraphs (b) and (g) - listed under Article XX, and second that it satisfies the requirements of the preamble, i.e. that it is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

Application of the Exceptions under Article XX

The first step, followed by panels and the Appellate Body, in the application of Article XX exceptions is to identify whether the policy pursued through the measure falls within the range of policies designed either to protect human, animal or plant life or health (paragraph (b)), or to conserve exhaustible natural resources (paragraph (g)). The second step consists of determining whether the specific requirements under Article XX(b) and (g) are met, such as the necessity test.

<p><i>Article XX(g)</i> <i>Measures recognized by panels as dealing with the conservation of exhaustible natural resources</i></p>	<p><i>Article XX(b)</i> <i>Measures recognized by panels as dealing with the protection of human, animal or plant life or health</i></p>
<p>the conservation of tuna stocks</p>	<p>against the consumption of cigarettes</p>
<p>the conservation of salmon and herring</p>	<p>to protect dolphin life and health</p>
<p>the conservation of dolphin stocks</p>	<p>to reduce air pollution resulting from the consumption of gasoline</p>
<p>the conservation of petroleum</p>	<p>to reduce the risk posed by asbestos fibres</p>
<p>the conservation of clean air</p>	
<p>the conservation of sea-turtles</p>	

²⁸ For more detail, see WT/CTE/W/203, "GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)", Note by the Secretariat.

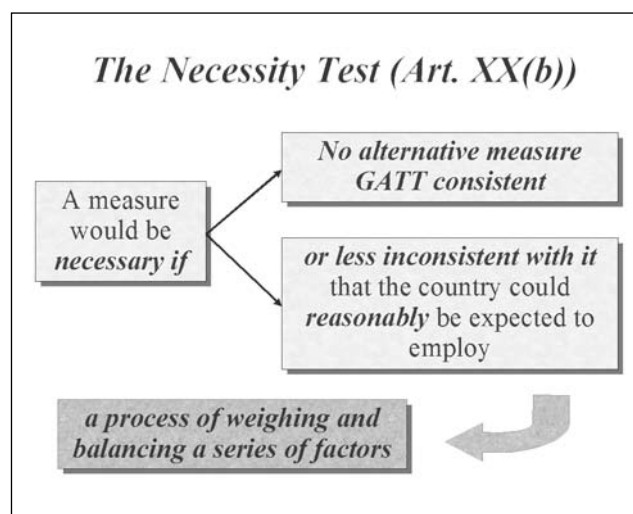


Requirements under Article XX(b): The Necessity Test

Article XX(b) requires the performance of what has been commonly referred to as a "necessity test": measures must be *necessary* "to protect human, animal or plant life or health".

In the *Thailand-Cigarettes* case (summarized on page 60), the panel applied a "least-trade restrictive" requirement and defined it as follows: "The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General

Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives".



However, in subsequent cases, there has been some evolution in the interpretation of the necessity requirement of Article XX (b). It has evolved from a *least-trade* restrictive approach to a *less-trade* restrictive one, supplemented with a proportionality test ("a process of weighing and balancing a series of factors"). The Appellate Body considered that the determination of whether a measure is necessary involves in every case a process of *weighing and balancing* a series of factors which prominently include the contribution made by the measure to the enforcement of the regulation at issue, the importance of the common interests or values protected by the regulation, and the accompanying impact of the measure on imports or exports.

In the *EC-Asbestos* case (summarized on page 40), for the first time, an "environmental" measure passed the necessity test. The Appellate Body noted that "the more vital or important the common interests or values" pursued, the easier it would be to accept, as "necessary", measures designed to achieve those ends.

Requirements under Article XX(g)

In the *US-Gasoline* case (summarized on page 62), the Appellate Body clarified the meaning of Article XX(g) by stating that a measure would qualify as "relating to the conservation of natural resources" if the measure exhibited a "substantial relationship" with, and was not merely "incidentally or inadvertently aimed at" the conservation of exhaustible natural resources.



Article XX(g) contains, as an additional requirement, that the measure at stake be "made effective in conjunction with restrictions on domestic production or consumption". This is a requirement that the measures concerned impose restrictions not just in respect of imported products, but also with respect to domestic ones.

Application of Article XX Chapeau

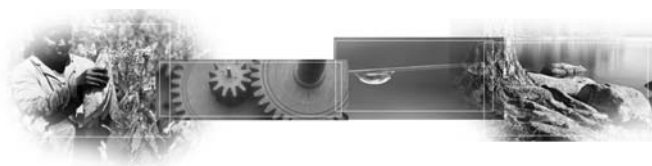
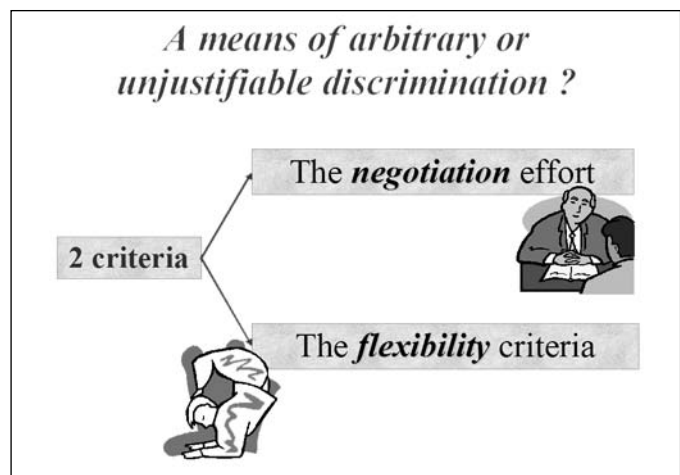
Once a measure satisfies the conditions set by one of the paragraphs of Article XX, the panel or the Appellate Body has turned to the application of the introductory clause (chapeau) of Article XX. The chapeau requires that in order to be justified under one of the paragraphs of Article XX, measures must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

A Means of Arbitrary or Unjustifiable Discrimination?

The Appellate Body noted in the *US-Gasoline* case that the chapeau, by its express terms, not so much questions the measure or its specific contents as such, but rather the manner in which that measure is applied. Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an "arbitrary" or "unjustifiable" manner.

To determine whether a measure has been applied in an *unjustifiable* manner, two requirements have been identified in the panel and Appellate Body reports in *US-Shrimp* and *US-Shrimp (Article 21.5)*: first, whether a serious effort to negotiate has been made by the Member country adopting the measure, and second, whether the measure is flexible.

Concerning the determination of whether the measure has been applied in an *arbitrary* manner, the Appellate Body considered in the *US-Shrimp* case that the "rigidity and inflexibility" in the application of a measure constitutes "arbitrary discrimination" within the meaning of the chapeau.



A Disguised Restriction on International Trade?

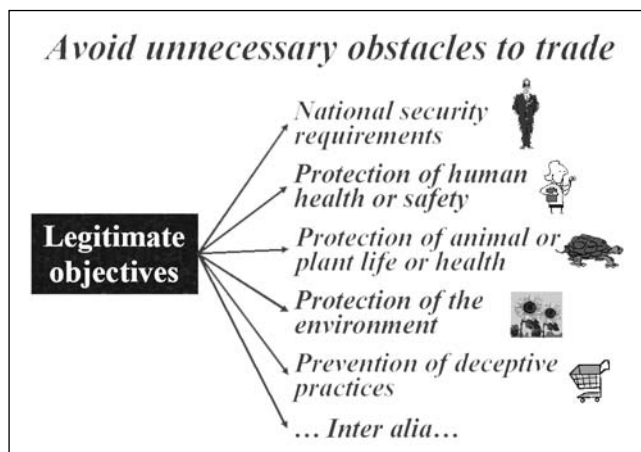
Three criteria have been progressively introduced by panels and by the Appellate Body in order to determine whether a measure is a disguised restriction on international trade: (i) the publicity test (the measure is publicly announced), (ii) the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination, and (iii) the examination of "the design, architecture and revealing structure" of the measure at issue.

THE GENERAL AGREEMENT ON TRADE IN SERVICES

Negotiated during the Uruguay Round, the GATS contains a General Exceptions clause in Article XIV, similar to that of GATT Article XX. In addressing environmental concerns, GATS Article XIV(b) allows WTO Members to maintain GATS-inconsistent policy measures if this is "necessary to protect human, animal or plant life or health" (and is identical to GATT Article XX(b)). However, this must not result in arbitrary or unjustifiable discrimination and must not constitute disguised restriction on international trade. The Article starts with a chapeau that is identical to that of GATT Article XX.

THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The TBT Agreement seeks to ensure that product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), do not create unnecessary obstacles to trade. In its Preamble, the Agreement recognizes the right of countries to adopt such measures at the level which they consider appropriate, and recognizes in Article 2.2 the protection of human, animal or plant life or health, and the protection of the environment as being legitimate objectives for countries to pursue.



The Agreement calls for non-discrimination in the preparation, adoption and application of product specifications and conformity assessment procedures. It also encourages Members to harmonize these specifications and procedures with international standards. The transparency of specifications and



assessment procedures, through their notification to the WTO Secretariat and the establishment of national enquiry points, is a central feature of the Agreement.

The first (and only) ruling of the Appellate Body decided under the TBT Agreement dealt with the marketing of "preserved sardines" in the territory of the European Communities: the *European Communities - Trade Description of Sardines*.²⁹

The EC-Sardines Case (2002)

This dispute arose when the European Communities prohibited the use of the term "Peruvian sardines" on tins containing sardine-like fish species caught off the Peruvian coast. Peru contended that the EC Regulation was inconsistent with Articles 2 and 12 of the TBT Agreement. At issue were the trade descriptions of two small fish species - *Sardina pilchardus* and *Sardinops sagax*. *Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, while *Sardinops sagax* is found mainly in the Eastern Pacific along the coasts of Peru and Chile. Both fish are used in the preparation of preserved and canned fish products.

The relevant EC Regulation provided, *inter alia*, that only products prepared from *Sardina pilchardus* (the "European Sardine") may be marketed as preserved sardines. In other words, only products of this species may have the word "sardines" as part of the name on the container.

The Panel, confirmed in September 2002 by the Appellate Body, ruled in favour of Peru. It found that a standard set by the Codex Alimentarius Commission for Sardines products constituted a "relevant international standard" under the TBT Agreement. The Codex Standard set forth specific labelling provisions for canned sardines prepared from fish from a list of 21 species, including *Sardina pilchardus* and *Sardinops sagax*. It was found that this standard had not been used as a basis for the EC Regulation and that the standard was not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the EC Regulation. Therefore, the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement.

In July 2003, Peru and the European Communities informed the DSB that they had reached a mutually agreed solution to the dispute. According to the amended EC Regulation, Peruvian sardines can now be marketed on the EC Market under a trade description consisting of the word "sardines" joined together with the scientific name of the species, i.e. "Sardines - *Sardinops sagax*".

²⁹ Appellate Body Report, *European Communities - Trade Description of Sardines* (Hereafter EC-Sardines), adopted on 23 October 2002. Before that case, the Appellate Body had already looked at the applicability of the TBT Agreement in the EC-Asbestos case. However, the Appellate Body did not examine then substantive issues involving the TBT Agreement (for a summary of this case see page 65).



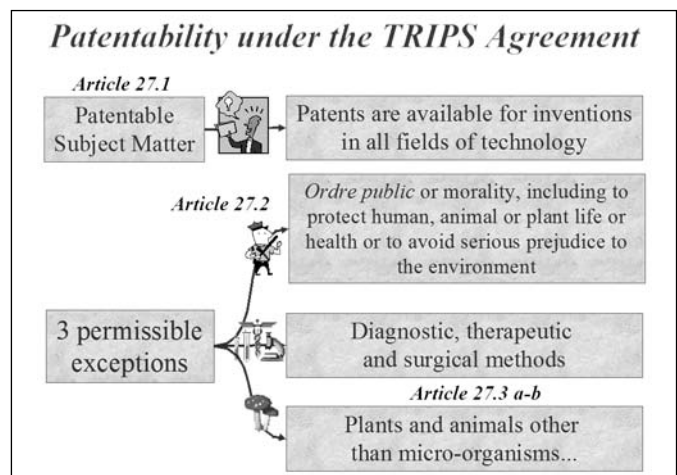
THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

The SPS Agreement is very similar to the TBT Agreement, but covers a narrower range of measures. It covers measures that are taken by countries to ensure the safety of foods, beverages and feedstuffs from additives, toxins or contaminants, or for the protection of countries from the spread of pests or diseases. It recognizes the right of Members to adopt SPS measures but stipulates that they must be based on a risk assessment, should be applied only to the extent necessary to protect human, animal or plant life or health, and should not arbitrarily or unjustifiably discriminate between countries where similar conditions prevail. Article 5.7 of the SPS Agreement allows Members to take SPS measures in cases where the scientific evidence is insufficient, provided that these measures are only provisional, and that a more objective assessment of risk is being conducted. In general, the TBT and SPS Agreements are designed to complement one another.

<i>SPS Objectives</i>	
<i>to protect:</i>	<i>from:</i>
human or animal life	risks arising from additives, contaminants, toxins or disease-causing organisms in their food, beverages, feedstuffs;
human life	plant- or animal-carried diseases (zoonoses);
animal or plant life	pests, diseases, or disease-causing organisms;
a country	damage caused by the entry, establishment or spread of pests

THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Designed to enhance the protection of intellectual property rights, the TRIPS Agreement makes explicit reference to the environment in Section 5 on Patents. Article 27 (2-3) of Section 5 states that Members may exclude from patentability inventions, the prevention of which within their territory is necessary to protect, amongst other objectives, human, animal or plant life or health or to avoid serious prejudice to the environment. Under the Agreement, Members may also exclude from patentability plants and animals other than micro-organisms, as well as essentially biological processes for the production of plants or animals. However, Members must provide for the protection of plant varieties either by patents or by an effective *sui generis* system or a combination of the two.



These provisions are designed to address the environmental concerns related to the protection of intellectual property. The Agreement allows Members to refuse the patenting of inventions which may endanger the environment (provided their commercial exploitation is prohibited as a necessary condition for the protection of the environment), as well as to exclude from patentability plants or animals (frequently undertaken on ethical concerns). Under the Agreement, Members must provide for the protection of different plant varieties, for the purposes of biodiversity, through patents or other effective means referred to in the Agreement.

THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

The Agreement on Subsidies, which applies to non-agricultural products, is designed to regulate the use of subsidies. Under the Agreement, certain subsidies referred to as "non-actionable" are generally allowed. Under Article 8 of the Agreement on non-actionable subsidies, direct reference had been made to the environment. Amongst the non-actionable subsidies that had been provided for under that Article were subsidies used to promote the adaptation of existing facilities to new environmental requirements (Article 8.2(c)).

However, this provision expired in its entirety at the end of 1999. It was intended to allow Members to capture positive environmental externalities when they arose.

THE AGREEMENT ON AGRICULTURE

Adopted during the Uruguay Round, the Agreement on Agriculture seeks to reform trade in agricultural products and provides the basis for market-oriented policies. In its Preamble, the Agreement reiterates the commitment of Members to reform agriculture in a manner which protects the environment. Under the Agreement, domestic support measures with minimal impact on trade (known as "green box" policies) are excluded from reduction commitments (contained in Annex 2 of the Agreement). These include expenditures under environmental programmes, provided they meet certain conditions. The exemption enables Members to capture positive environmental externalities.



RELEVANT DECISIONS

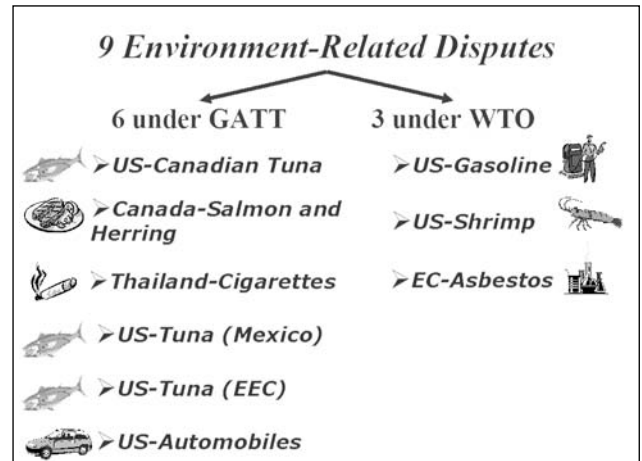
Two Decisions were adopted in 1994 which address environmental issues. As previously stated, the Marrakesh *Ministerial Decision on Trade and Environment* created the CTE with the aim of making international trade and environmental policies mutually supportive. The Decision contains the work programme of the CTE (see page 67).

A *Decision on Trade in Services and the Environment* was also adopted by Ministers in 1994 (For more details, see above page 30). The Decision instructs the CTE to examine and report on the relationship between services trade and the environment, including on the issue of sustainable development, in order to determine if any modifications of Article XIV are required. The CTE has taken up this issue as part of its work programme.



Environment-Related Disputes: An Overview

Under the GATT, six panel proceedings involving an examination of environmental measures or human health-related measures under Article XX were completed. Of the six reports, three have not been adopted by GATT Contracting Parties. Under the WTO Dispute Settlement Understanding, three such proceedings have been completed. The following provides a factual overview of these disputes.



GATT CASES

United States - Canadian Tuna

An import prohibition was introduced by the United States after Canada had seized nineteen fishing vessels and arrested US fishermen fishing for albacore tuna, without authorization from the Canadian government, in waters considered by Canada to be under its jurisdiction.³⁰ The United States did not recognize this jurisdiction and introduced an import prohibition to retaliate against Canada under the Fishery Conservation and Management Act. The Panel found that the import prohibition was contrary to GATT Article XI:1, and was justified neither under Article XI:2, nor under Article XX(g).

Canada - Salmon and Herring

Under the 1970 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon.³¹ The United States complained that these measures were inconsistent with GATT Article XI. Canada argued that these export restrictions were part of a system of fishery resource management aimed at preserving fish stocks, and therefore were

³⁰ *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982.

³¹ *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988.



justified under Article XX(g). The Panel found that the measures maintained by Canada were contrary to GATT Article XI:1 and were justified neither by Article XI:2(b), nor by Article XX(g).³²

Thailand - Cigarettes

Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, while authorizing the sale of domestic cigarettes. Moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with Article XI:1, and considered that they were justified neither by Article XI:2(c), nor by Article XX(b). It also argued that the internal taxes were inconsistent with Article III:2. Thailand argued, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. The Panel found that the import restrictions were inconsistent with Article XI:1 and not justified under Article XI:2(c). It further concluded that the import restrictions were not "necessary" within the meaning of Article XX(b). The internal taxes were found to be consistent with Article III:2.

United States - Tuna (Mexico)

The Marine Mammal Protection Act (MMPA) required a general prohibition of the "taking" and importation into the United States of marine mammals, except when explicitly authorized.³³ It governed, in particular, the taking of marine mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP), an area where dolphins are known to swim above schools of tuna. Under the MMPA, the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or serious injury of ocean mammals in excess of US standards were prohibited.

In particular, the importation of yellowfin tuna harvested with purse-seine nets in the ETP was prohibited (*primary nation embargo*), unless the competent US authorities established that (i) the government of the harvesting country had a programme regulating the taking of marine mammals, comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels. The average incidental taking rate (in terms of dolphins killed each time in the purse-seine nets)

³² *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990.

³³ *United States - Restrictions on Imports of Tuna*, circulated on 3 September 1991, not adopted.



for that country's tuna fleet were not to exceed 1.25 times the average taking rate of US vessels in the same period. Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (*intermediary nation embargo*).

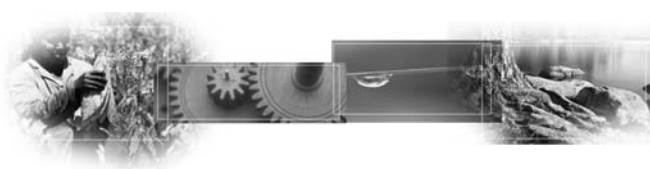
Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with Articles XI, XIII and III. The United States requested the Panel to find that the *direct embargo* was consistent with Article III and, in the alternative, was covered by Article XX(b) and (g). The United States also argued that the *intermediary nation* embargo was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g).

The Panel found that the import prohibition under the *direct* and the *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). Moreover, the *intermediary* embargo was not justified under Article XX(d).

United States - Tuna (EEC)

The EEC and the Netherlands complained that both the *primary* and the *intermediary* nation embargoes, enforced pursuant to the MMPA (see above), did not fall under Article III, were inconsistent with Article XI:1 and were not covered by any of the exceptions of Article XX.³⁴ The United States considered that the *intermediary* nation embargo was consistent with GATT since it was covered by Article XX, paragraphs (g), (b) and (d), and that the *primary* nation embargo did not nullify or impair any benefits accruing to the EEC or the Netherlands since it did not apply to these countries. The Panel found that neither the *primary* nor the *intermediary* nation embargo were covered under Article III, that both were contrary to Article XI:1 and not covered by the exceptions in Article XX (b), (g) or (d).

³⁴ *United States - Restrictions on Imports of Tuna, circulated on 16 June 1994*, not adopted.



United States - Automobiles

Three US measures on automobiles were under examination in this case: the luxury tax on automobiles ("luxury tax"), the gas guzzler tax on automobiles ("gas guzzler"), and the Corporate Average Fuel Economy regulation ("CAFE").³⁵ The European Communities complained that these measures were inconsistent with GATT Article III and could not be justified under Article XX(g) or (d). The United States considered that these measures were consistent with the General Agreement.

The Panel found that both the luxury tax -which applied to cars sold for over \$30,000 - and the gas guzzler tax - which applied to the sale of automobiles attaining less than 22.5 miles per gallon (mpg) - were consistent with Article III:2 of GATT.

The CAFE regulation required the average fuel economy for passenger cars manufactured in the United States or sold by any importer not to fall below 27.5 mpg. Companies that were both importers and domestic manufacturers had to calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically. The Panel found the CAFE regulation to be inconsistent with Article III:4 because the separate foreign fleet accounting system discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. Similarly, the Panel found that the separate foreign fleet accounting was not justified under Article XX(g); it did not make a finding on the consistency of the fleet averaging method with Article XX(g). The Panel found that the CAFE regulation could not be justified under Article XX(d).

WTO CASES

United States - Gasoline

Following the 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States.³⁶ The Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It

³⁵ *United States - Taxes on Automobiles (hereinafter US - Automobiles)*, circulated on 11 October 1994, not adopted.

³⁶ *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report and Panel Report, adopted on 20 May 1996.



required any domestic refiner which was in operation for at least six months in 1990 to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, *inter alia*, with GATT Article III, and was not covered by Article XX. The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in Article XX, paragraphs (b), (g) and (d).

The Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g). On appeal of the Panel's findings on Article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX.

United States - Shrimp: Initial Phase

To date, seven species of sea turtles have been identified world-wide.³⁷ They spend their lives at sea, where they migrate between their foraging and their nesting grounds. Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products.

The US Endangered Species Act of 1973 ("ESA") listed as endangered or threatened the five species of sea turtles that occur in US waters and prohibited their take within the United States, in its territorial sea and the high seas. Pursuant to ESA, the United States required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of Public law 101-102, enacted in 1989 by the United States, provided, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the United States, or that the

³⁷ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report and Panel Report adopted on 6 November 1998.



particular fishing environment of the harvesting nation did not pose a threat to sea turtles. In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means had to impose on their fishermen requirements comparable to those borne by US shrimpers, essentially the use of TEDs at all times, if they wanted to be certified and to export shrimp products to the United States.

The Panel considered that the ban imposed by the United States was inconsistent with Article XI and could not be justified under Article XX. The Appellate Body found that the measure at stake qualified for provisional justification under Article XX(g), but failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of GATT 1994.

United States - Shrimp: Implementation Phase (Article 21.5)

In 1997, Malaysia introduced an action pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU), arguing that the United States had not properly implemented the findings of the Appellate Body in the Shrimp/Turtle dispute.³⁸ The implementation dispute revolved around a difference of interpretation between Malaysia and the United States on the findings of the Appellate Body. In Malaysia's view, a proper implementation of the findings would be a complete lifting of the US ban on shrimps. The United States disagreed, arguing that it had not been requested to do so, but simply had to revisit its application of the ban.

In order to implement the recommendations and rulings of the Appellate Body, the United States had issued *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations* (the "Revised Guidelines"). These Guidelines replaced the ones issued in April 1996 that were part of the original measure in dispute. The Revised Guidelines set forth new criteria for certification of shrimp exporters.

Malaysia claimed that Section 609, as applied, continued to violate Article XI:1 and that the United States was not entitled to impose any prohibition in the absence of an international agreement allowing it to do so. The United States did not contest that the implementing measure was incompatible with Article XI:1, but argued that it was justified under Article XX(g). It argued that the Revised Guidelines remedied all the inconsistencies that had been identified by the Appellate Body under the chapeau of Article XX.

³⁸ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, Appellate Body Report and Panel Report, adopted on 21 November 2001



The implementation panel was called upon to examine the compatibility of the implementing measure with Article XX(g). It concluded that the protection of migratory species was best achieved through international cooperation. However, it found that whereas the Appellate Body had instructed the United States to negotiate an international agreement for the protection of sea turtles with the parties to the dispute, the obligation at issue was an obligation to negotiate, as opposed to an obligation to conclude an international agreement. It then found that the United States had indeed made serious "good faith" efforts to negotiate such an agreement. The implementation panel therefore ruled in favour of the United States.

Malaysia subsequently appealed against the findings of the implementation Panel. It argued that the panel erred in concluding that the measure no longer constituted a means of "arbitrary or unjustifiable discrimination" under Article XX. Malaysia asserted that the United States should have *negotiated* and *concluded* an international agreement on the protection and conservation of sea turtles before imposing the import prohibition. The Appellate Body upheld the implementation panel's finding and rejected Malaysia's contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX required the *conclusion* of an international agreement. Malaysia also argued that the measure at issue resulted in "arbitrary or unjustifiable discrimination" because of its lack of flexibility. However, the Appellate Body upheld the panel's finding and rejected this claim.

European Communities - Asbestos

Chrysotile asbestos is generally considered to be a highly toxic material, exposure to which poses significant threats to human health (such as asbestosis, lung cancer and mesothelioma).³⁹ However, due to certain qualities (such as resistance to very high temperature), chrysotile asbestos has been widely used in various industrial sectors. To control the health risks associated with asbestos, the French Government, which had previously been an importer of large quantities of chrysotile asbestos, imposed a ban on the substance as well as on products that contained it.

The European Communities justified its prohibition on the grounds of human health protection, arguing that asbestos was hazardous not only to the health of construction workers subject to prolonged exposure, but also to population subject to occasional exposure. Being the second largest producer of asbestos world-wide, Canada contested the prohibition in the WTO. While it did not challenge the hazards associated with asbestos, it argued that a distinction should be made between chrysotile fibres and chrysotile encapsulated in a cement matrix. The latter, it argued, prevented release of fibres and did

³⁹ *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001



not endanger human health. It also argued that the substances which France was using as substitutes for asbestos had not been sufficiently studied and could themselves be harmful to human health.

Canada claimed that the Decree violated GATT Articles III:4 and XI, and Articles 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement, and also nullified or impaired benefits under GATT Article XXIII:1(b). The EC argued that the Decree was not covered by the TBT Agreement. With regard to GATT 1994, it requested the panel to confirm that the Decree was either compatible with Article III:4 or necessary to protect human health within the meaning of Article XX(b).

Despite finding a violation of Article III, the Panel ruled in favour of the European Communities. Under Article III (which requires countries to grant equivalent treatment to like products) the Panel found that the EC ban constituted a violation since asbestos and asbestos substitutes had to be considered "like products" within the meaning of that Article. The panel argued that health risks associated with asbestos were not a relevant factor in the consideration of product likeness. However, the Panel found that the French ban could be justified under Article XX(b). In other words, the measure could be regarded as one which was "necessary to protect animal, human, plant life or health." It also met the conditions of the chapeau of Article XX. It therefore ruled in favour of the European Communities.

On appeal, the WTO Appellate Body upheld the panel's ruling in favour of the EC, while modifying its reasoning on a number of issues. For instance, it reversed the Panel's finding that it was not appropriate to take into consideration the health risks associated with chrysotile asbestos fibres in examining the "likeness" of products under GATT Article III:4. The Appellate Body also argued that the case should have been looked at under the TBT Agreement rather than under GATT rules, but did not itself pursue the analysis under TBT since the Appellate Body only has a mandate to examine issues of "law" in dispute settlement (and cannot itself embark on new analyses).



Annexes

ANNEX I

MARRAKESH MINISTERIAL DECISION ON TRADE AND ENVIRONMENT (14 APRIL 1994)

Ministers, meeting on the occasion of signing the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh on 15 April 1994,

Recalling the preamble of the Agreement establishing the World Trade Organization (WTO), which states that members' "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,"

Noting:

- the Rio Declaration on Environment and Development, Agenda 21, and its follow-up in GATT, as reflected in the statement of the Chairman of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in December 1992, as well as the work of the Group on Environmental Measures and International Trade, the Committee on Trade and Development, and the Council of Representatives;
- the work programme envisaged in the Decision on Trade in Services and the Environment; and
- the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights,



Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other,

Desiring to coordinate the policies in the field of trade and environment, and this without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members,

Decide:

- to direct the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment open to all members of the WTO to report to the first biennial meeting of the Ministerial Conference after the entry into force of the WTO when the work and terms of reference of the Committee will be reviewed, in the light of recommendations of the Committee,

- that the TNC Decision of 15 December 1993 which reads, in part, as follows:
 - "(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;

 - (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
 - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and

 - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and



- surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures;"

constitutes, along with the preambular language above, the terms of reference of the Committee on Trade and Environment,

- that, within these terms of reference, and with the aim of making international trade and environmental policies mutually supportive, the Committee will initially address the following matters, in relation to which any relevant issue may be raised:

- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements; [Item 1]

- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system; [Item 2]

- the relationship between the provisions of the multilateral trading system and:

(a) Charges and taxes for environmental purposes;

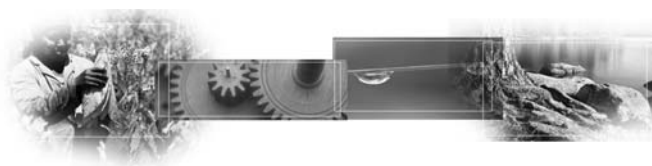
(b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling; [Item 3]

- the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects; [Item 4]

- the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements; [Item 5]



- the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions; [Item 6]
- the issue of exports of domestically prohibited goods; [Item 7]
- that the Committee on Trade and Environment will consider the work programme envisaged in the Decision on Trade in Services and the Environment [Item 9] and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights [Item 8] as an integral part of its work, within the above terms of reference;
- that, pending the first meeting of the General Council of the WTO, the work of the Committee on Trade and Environment should be carried out by a Sub-Committee of the Preparatory Committee of the World Trade Organization (PCWTO), open to all members of the PCWTO;
- to invite the Sub-Committee of the Preparatory Committee, and the Committee on Trade and Environment when it is established, to provide input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO. [Item 10]



ANNEX II : ABSTRACTS OF THE DOHA MINISTERIAL DECLARATION⁴⁰ (14 NOVEMBER 2001)

Paragraph 6 (Preamble)

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

Paragraph 31

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) The relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

⁴⁰ See document WT/MIN(01)/DEC/1.



Paragraph 32

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

Paragraph 33

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

Paragraph 51

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.



ANNEX III

OBSERVER STATUS IN THE COMMITTEE ON TRADE AND ENVIRONMENT REGULAR⁴¹

International Intergovernmental Organizations granted observer status

African, Caribbean and Pacific Group of States (ACP Group)
Convention on Biological Diversity (CBD)
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
European Free Trade Association (EFTA)
Food and Agriculture Organization (FAO)
International Commission for the Conservation of Atlantic Tunas (ICCAT)
International Monetary Fund (IMF)
International Organization for Standardization (ISO)
International Plant Genetic Resources Institute (IPGRI)
International Trade Centre (ITC)
Islamic Development Bank (IDB)⁴¹
Latin American Economic System (SELA)
Organization for Economic Co-operation and Development (OECD)
South Pacific Forum (SPF)
Southeast Asian Fisheries Development Center (SEAFDEC)⁴²
United Nations (UN)
United Nations Commission for Sustainable Development (CSD)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Development Programme (UNDP)
United Nations Environment Programme (UNEP)
United Nations Framework Convention on Climate Change (UNFCCC)
United Nations Industrial Development Organization (UNIDO)
World Bank
World Customs Organization (WCO)
World Intellectual Property Organization (WIPO)

⁴¹ See document WT/CTE/INF/6.

⁴² Ad hoc observer status.



International Intergovernmental Organizations whose requests for observer status are pending

Cooperation Council for the Arab States of the Gulf (GCC)

Gulf Organization for Industrial Consulting (GOIC)

International Tropical Timber Organization (ITTO)

League of Arab States

Organization of the Islamic Conference (OIC)

Organization of the Petroleum Exporting Countries (OPEC)

Ozone Secretariat of the Montreal Protocol on Substances that Deplete the Ozone Layer

World Health Organization (WHO)



ANNEX IV: SELECTED LIST OF WTO DOCUMENTS

CTE Documents ⁴³

Symbol	Date Issued	Topic
WT/CTE/INF/5/Rev.2	8 September 2003	List of Documents - <i>Note by the Secretariat</i>
WT/CTE/8	11 July 2003	Report to the 5th Session of the Ministerial Conference in Cancún - Paragraphs 32 and 33 of the Doha Ministerial Declaration
WT/CTE/W/160/Rev.2 TN/TE/S/5	25 April 2003	Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements - <i>Note by the Secretariat</i>
WT/CTE/GEN/11	16 April 2003	Environmental Issues Raised in the Services Negotiations - Paragraph 51 <i>Statement by Mr. A. Hamid Mamdoub</i>
WT/CTE/GEN/10	4 April 2003	Environment-related Issues in the Negotiations on WTO Rules - Paragraph 51 <i>Statement by Mr. Jan Woźnowski</i>
WT/CTE/GEN/ 9-TN/MA/7	21 February 2003	Environmental Aspects of the Negotiations on Market Access - Paragraph 51 - <i>Statement by Mrs. Carmen Luz Guarda</i>
WT/CTE/GEN/8	18 February 2003	Environmental Issues Raised in the Agriculture Negotiations - Paragraph 51 <i>Statement by Mr. Frank Wolter</i>
WT/CTE/W/218	3 October 2002	Discussion Paper on the Environmental Effects of Services Trade Liberalization <i>Note by the WTO Secretariat</i>
WT/CTE/W/203	8 March 2002	GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g) <i>Note by the WTO Secretariat</i>
WT/CTE/W/150	29 June 2000	Information Relevant to the Consideration of the Market Access Effects of Eco- Labelling Schemes <i>Note by the WTO Secretariat</i>
WT/CTE/W/67	7 November 1997	Environmental Benefits of Removing Trade Restrictions and Distortions <i>Note by the Secretariat</i>
WT/CTE/1	12 November 1996	1996 CTE Report "Singapore Report"

⁴³ A complete list of documents circulated in the CTE is available in document WT/CTE/INF/5/Rev.3.



CTESS Documents ⁴⁴

Symbol	Date Issued	Topic
TN/TE/INF/4/Rev.1	21 July 2003	List of CTESS Documents <i>Note by the Secretariat</i>
TN/TE/7 + Suppl.1	10 July 2003	Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee - Trade and Environment Negotiations: State of Play
TN/TE/S/3/Rev.1	24 April 2003	Compilation of Submissions under Paragraph 31(i) of the Doha Declaration - Revision - <i>Note by the Secretariat</i>
TN/TE/S/4	31 January 2003	Observer Status <i>Note by the WTO Secretariat</i>
TN/TE/S/2	10 June 2002	Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO - Paragraph 31 (ii) <i>Note by the WTO Secretariat</i>
TN/TE/S/1	23 May 2002	MEAs and WTO Rules - Proposals Made in the CTE from 1995-2002 <i>Note by the WTO Secretariat</i>

⁴⁴ A complete list of documents circulated in the CTE is available in document TN/TE/INF/4/Rev.1.

