

The World Trade Organization  
and Sustainable Development:

# An Independent Assessment

A Report by the  
International Institute for  
Sustainable Development



**IISD**

INTERNATIONAL INSTITUTE FOR  
SUSTAINABLE DEVELOPMENT

INSTITUT INTERNATIONAL DU  
DÉVELOPPEMENT DURABLE

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Development 1996

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Printed in Canada

Canadian Cataloguing in Publication Data

Main entry under title:

The World Trade Organization and  
sustainable development.

ISBN 1-895536-03-0

1. World Trade Organization. 2. Sustainable development.  
3. International trade - Environmental aspects.  
I. International Institute for Sustainable Development.

HF 1379.W67 1996 382 C96-920126-5

This publication is printed on recycled paper.

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The interlocking of the world's economy and ecology presents difficult but also bold choices. The relationship of trade and sustainable development is perhaps the most significant. We cannot afford the costs of trade derived through resource and environmental degradation. Nor can we ignore the unmet social and economic needs of billions of people.

IISD has focused on the WTO because this new organization is the global bell-wether for action on the linkages of trade, environment and development. It is the meeting place of nations from South and North on the key subject of wealth creation through free trade. But we know there are important differences to be bridged. The period from the Rio Earth Summit to Marrakesh introduced many of the necessary concepts. Since then what has been the action?

This is the central question in this first independent assessment of WTO performance on trade and sustainable development. We are releasing both a complete and an abridged report in the months prior to the December 1996 Singapore Ministerial Conference and in advance of the June 1997 Special Session of the UN General Assembly five years after the Earth Summit. Both are landmark events.

We consider the reports as benchmarks which can be used by decision-makers preparing for these meetings. And we expect to repeat the effort at an appropriate time in the future.

Konrad von Moltke played a central role in the research and preparation of the reports. He is a Senior Fellow of the Institute and a member of IISD's Trade and Sustainable Development Working Group. David Runnalls, IISD Program Director for Trade and Sustainable Development, coordinated the activity and contributed to the writing and editorial work. The draft material was reviewed at a special meeting of IISD's Trade and Sustainable Development Working Group held in The Hague with the financial support of The Netherlands Ministry of Housing, Planning and the Environment. Members of the Working Group were not requested to sign off on the contents, but their contribution was immense.

Aaron Cosby, Julie Wagemakers and others associated with IISD provided valuable input and assistance in editing and production.

Content of the final document is the responsibility of IISD's Trade and Sustainable Development Program. I endorse the conclusions and look forward to their acceptance by both the trade and sustainable development communities.

Arthur J. Hanson  
President and CEO

The abridged version of this publication is entitled *The World Trade Organization and Sustainable Development: An Independent Assessment Summary* and is available from the IISD.

Highlights of these reports and other IISD Trade materials can be found on the Trade Program homepage of IISDnet [Http://iisd1.iisd.ca/trade/trdhome.htm](http://iisd1.iisd.ca/trade/trdhome.htm)



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## List of Abbreviations

|        |   |
|--------|---|
| ACC    | Administrative Council for Coordination                             |
| ACP    | African, Caribbean and Pacific countries                            |
| BISD   | Basic Instruments and Selected Documents                            |
| CSD    | Commission on Sustainable Development                               |
| CTD    | Committee on Trade and Development                                  |
| CTE    | Committee on Trade and Environment                                  |
| CTSD   | Committee on Trade and Sustainable Development                      |
| DPG    | Domestically Prohibited Goods                                       |
| EC     | European Community  |
| ECOSOC | Economic and Social Council of the United Nations                   |
| EMIT   | Group on Environmental Measures in International Trade              |
| EPA    | Environmental Protection Agency                                     |
| EU     | European Union  |
| FAO    | Food and Agriculture Organization of the United Nations             |
| GATS   | General Agreement on Trade in Services                              |
| GATT   | General Agreement on Tariffs and Trade                              |
| GEF    | Global Environment Facility   |
| GSP    | Generalized System of Preferences                                   |
| IMF    | International Monetary Fund   |
| ISO    | International Organization for Standardization                      |
| PPM    | Process and Production Methods                                      |
| MEA    | Multilateral Environmental Agreements                               |
| MFN    | Most Favoured Nation  |
| NGO    | Nongovernmental Organization  |
| OECD   | Organization for Economic Cooperation and Development               |
| SC     | Subcommittee  |
| SPS    | Agreement on the Application of Sanitary and Phytosanitary Measures |
| TBT    | Agreement on Technical Barriers to Trade                            |
| TC     | Technical Committee   |
| TNC    | Trade Negotiations Committee  |
| TPRB   | Trade Policy Review Board   |
| TPRM   | Trade Policy Review Mechanism                                       |
| TRIMs  | Trade-Related Investment Measures                                   |
| TRIPs  | Trade-Related Aspects of Intellectual Property Rights               |
| UN     | United Nations  |
| UNCED  | United Nations Conference on Environment and Development            |
| UNCTAD | United Nations Conference for Trade and Development                 |
| UNDP   | United Nations Development Programme                                |
| UNEP   | United Nations Environment Programme                                |
| US     | United States   |
| WHO    | World Health Organization   |
| WIPO   | World Intellectual Property Rights Organization                     |
| WWF    | Worldwide Fund for Nature (World Wildlife Fund in North America)    |
| WG     | Working Group   |
| WTO    | World Trade Organization  |



## GENERAL OBSERVATIONS

The World Trade Organization (WTO) is barely two years old. It will convene its first meeting of the world's trade Ministers in Singapore in December 1996. That meeting will review progress of the implementation of the commitments made in the Uruguay Round. It will also consider the report of its Committee on Trade and Environment.

The idea of sustainable development is also in its youth. Spawned by the Brundtland Commission and the Earth Summit in 1992, sustainable development is included in the preamble to the Uruguay Round Agreement. The Ministerial session seems a good time to review the progress of the WTO in linking trade and sustainable development. Sustainable development touches on the work of the WTO in many ways, this report deals with the organization as a whole, rather than dwelling solely upon the work of the Committee on Trade and the Environment, the most important body for sustainability within the organization.

### Linking Trade and Sustainable Development

Making the transition to sustainable development will require substantial amounts of capital. And it is clear that little of this money will come from parsimonious Northern parliaments.

For many countries, much of the new capital will have to come from increased trade revenues. In that sense, trade liberalization may be said to be a necessary, although not sufficient, condition for the achievement of sustainable development. Greater access (and quicker access) to Northern markets than that provided under the Uruguay Round would provide substantial sums to Southern economies. But trade liberalization without adequate environmental policies can be very damaging to the environment.

Hardly any area of policy poses problems with respect to inter-institutional relations that are as complex as those relating to the agenda of sustainability.

### Committee on Trade and Environment

This Committee is the most crucial to the sustainability agenda. However, the working agenda which it has adopted is narrower than the task originally outlined: to address trade and sustainable development and to make recommendations on whether any modifications of the provisions of the multilateral trading system are required. Instead, the Committee has chosen to settle on a number of specific issues related to the trade impacts of environmental policies.

The CTE has addressed its essentially political task in a largely technical manner. Few of the issues on the agenda appear ready for action, so the most likely outcome of two years of work will be to recommend a renewed mandate for the Committee. The CTE has struggled with the conundrum that faces any environmental body: the issues it addresses are cross-cutting, affecting virtually every part of the WTO, and numerous organizations outside the WTO. Environmental issues occur explicitly or implicitly on the agenda of numerous other WTO bodies.

### Dispute Resolution Regime

It is worth noting that the first dispute under the new regime to reach the stage of a complete panel report concerned an environmental issue. Venezuela complained against the impact of aspects of the implementation of the Clean Air Act in the United States on Venezuelan refineries.

The WTO Venezuela Panel addressed technical issues of environmental policy. Yet, there is no evidence that the use of experts was considered in this instance, by the panel or by any of the parties.

The panel report also entered territory which has long posed particular difficulties for GATT panels. The US argues that its regulation treated imported gasoline similarly to gasoline for “similarly situated” domestic parties. The panel rejected this view because “any interpretation of Article XX (g) in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products” (emphasis added).

### **Making the System More Transparent**

The main emphasis in the new WTO approach to openness is on providing information by derestricting documents and making them available on-line, although with an indefensible six month delay. The Secretariat is encouraged to be somewhat more active in its direct contacts with non-governmental organizations (NGOs). However, no formal submissions of NGOs to the WTO are envisaged at any stage. No process is created to give recognition to major

A culture of closed decision-making has persisted, inefficient internal structures have carried over without reflection, and the dispute settlement process still resembles the rules committee of a club, with the single exception of the first opinion from the Appellate Body.

international NGOs with proven competence in some or all areas of the work of the WTO. No access is provided to interested non governmental parties to the dispute resolution process.

The environmental agenda will become an instrument of change in the GATT/WTO system because it responds to different incentives. It has raised the problems of transparency and participation in the WTO, as it did within the UN system, the World Bank and in bilateral

relations between countries, which are in fact issues which transcend the environmental agenda and stand at the center of important changes in contemporary international society. It is unlikely that the WTO will long be able to resist the pressure exerted by these changes.

### **The Politics of Trade and Sustainable Development**

Few governments have shown much enthusiasm for the agenda of trade and environment. It is viewed as primarily a concern of the developed countries, yet it is difficult to identify any among these, with the possible exception of the Nordic countries, which have consistently urged forceful action within the WTO to address environmental concerns.

Continuing support for liberalization and globalization depends vitally on the ability of government at all levels to ensure that the benefits are as widely distributed and that the legitimacy of the trade regime is widely accepted.

Many developing countries have sharply articulated their concern that environmental issues may be used to create new barriers to trade and thwart hard-won gains in market access. Experience with a number of prominent cases, shows that this may well be true - ranging from US measures to impose certain standards to protect dolphins on Mexican and other ships fishing for tuna in Mexican and international waters, to Austrian requirements to label

tropical timber, to U.S. measures implementing clean air standards in a manner that disadvantaged Venezuelan and Brazilian refineries.

## CONCLUSIONS

The successful conclusion of the Uruguay Round and the launching of the WTO have come to symbolize a new era in international relations. The trading system has finally begun to deal with a number of issues which were previously taboo, such as agricultural subsidies. Progress has been made on dealing with services and intellectual property rights and a new system for resolving disputes has been put in place. Most important of all, the temporary, Northern dominated GATT, has been replaced by a soon to be universal trade organization which consolidates the results of Uruguay and previous rounds in the text and under one roof. But the accolades for the WTO may well be premature.

A period of unrivaled wealth in much of the world is being accompanied by rising levels of insecurity even in affluent societies and growing inequality between those who succeed and those who do not. Continuing support for liberalization and globalization depends vitally on the ability of government at all levels to ensure that the benefits are widely distributed, and that the legitimacy of the trade regime is widely accepted.

They must also persuade an increasingly skeptical public that liberalization can contribute to environmental improvement. The WTO has failed to recognize the central message of sustainable development — that the world's economy and its environment are joined at the hip like Siamese twins. Progress in one area depends upon progress in the other. Trade liberalization without adequate environmental safeguards will lead to environmental deterioration, often on a massive scale. And trade liberalization and the increased revenues which it brings is an essential condition for the achievement of sustainable development.

Will the WTO be able to respond to these essentially political challenges? The first two years have not been encouraging. The dominant theme has been continuity from the GATT to the WTO. A culture of closed decision-making has persisted, inefficient internal structures have carried over without reflection, and the dispute settlement process still resembles the rules committee of a club. The Committee on Development has achieved nothing notable and the Committee on Trade and Environment may continue a record of futility which now dates back 24 years to the first creation of the abortive environment committee of the GATT. The Councils on Intellectual Property Rights and Trade in Services have spent most of their two years on mundane housekeeping tasks.

Sustainable development depends upon open decision-making. The WTO must shed the habits of a club and become a global forum for trade policy.

### Reform of the WTO

Sustainability must be built into the mandates of the Councils and Committees of the WTO. The Committee on Trade and Environment could play a key role in defining the relationship between the trading system and the environment if it begins to treat the issue as a vital part of the integrity of the trading system and not just as an annoyance imposed from the outside.

The TRIPS regime is critical to the shift to new, more eco-efficient technologies. Trade in services, from the more narrowly defined environmental service industries, to consulting services, finance and banking, will be critical to the achievement of sustainable development. The reform of the notification procedures under the TBT agreement will be important to help insure against protectionist capture of the environmental agenda. TBT is also at the centre of the discussion about ecolabeling.

The key to ensuring the support of many developing countries for the sustainability agenda in the WTO is a renewal of some elements of the Rio Bargain. This renewal will need to be built

on guarantees of increased market access and further progress on the reduction of market distorting subsidies in the North. The Committee on Trade and Development could take on some of these responsibilities within the WTO structure if it is given a new mandate and renamed the Committee on Trade and Sustainable Development.

Further progress must also be made on reform of the dispute resolution mechanism. The US/Venezuela Panel Report demonstrated the same kinds of eco blindness displayed by panels under the old system. But the Appellate Panel decision gives some cause for hope that the system can become more even handed.

It seems inevitable that further difficult environmental disputes will soon reach the panel process. Controversial panel reports are less likely if future panels take advantage of the new rules which allow them to hear expert environmental advice. Efforts should also be made to ensure that the panel reports are released as soon as possible and not restricted to everyone but the cognoscenti and readers of insiders' newsletters as they have been in the past. A somewhat bolder step, which would do more to reinforce the legitimacy of panel reports, would be to permit the filing of "amicus" briefs by concerned parties from civil society.

### Transparency and Participation

Sustainable development depends upon open decision-making. The WTO has a long way to go to meet basic criteria for access to information and scope for participation. The processes of globalization must also extend the rights which traditionally counterbalance the risks of abuse of public authority and the unfettered exercise of private power. The WTO must shed the habits of a club and become a global forum for trade policy. The two approaches to decision making are fundamentally incompatible.

The WTO should recognize that its performance will be judged by whether adequate transparency and participation are achieved, rather than by whether the WTO has done as much as it believes it can.

Increased transparency and scope for participation are also essential to the attainment of the basic goals of trade policy. The ratification of the Uruguay Round agreements was a close run thing in many national parliaments. The success of future agreements will at least partly hinge on the public perception that these agreements have not been arrived at by special interests operating behind veils of secrecy.

No-one is suggesting that NGOs and business groups should sit around the table while trade agreements are actually being negotiated. That is still the business of sovereign states. But the WTO is no longer simply a club of contracting bodies and there are plenty of ways of involving civil society in its work. The WTO should learn from the wide range of experience in other international organizations that pragmatic solutions can be found, that increased transparency and participation do not endanger the effectiveness of an organization and that a step by step approach is feasible. Obviously, the WTO should not simply adopt the practices of other organizations without considering whether they suit its particular needs. It should, however, recognize that its performance in this area will be judged by whether adequate transparency and participation are achieved, rather than by whether the WTO has done as much as it believes it can.

### A WTO Implementation Gap

Whatever rules emerge in the coming years to address the complex relations between trade, environment and sustainability, it is important to ensure from the outset that they are not only equitable but also equitably implemented. Experience has shown that the most important

steps towards the implementation of international agreements frequently occur long before these are signed or enter into force. Most of the necessary measures will be taken at the international level so that the need to ensure accountability for national measures is one of the most important functions of the WTO.

There is some evidence that the GATT adopted notification requirements as a no-cost alternative to more stringent international measures with little thought given to their effectiveness or to ensuring that they were forcefully implemented. The existence of more than 200 such requirements suggests that their implementation was never seriously considered. The result is a potential implementation gap as serious as in any other international regime. There is no evidence that these notification requirements have been effective in the trade regime. Notification systems between states do not function unless they are linked to strong incentives or are subject to public scrutiny.

The new WTO procedures for the circulation and derestriction of WTO documents should, in theory, provide an opportunity for public scrutiny of the notification experience within the trade regime. Experience in other regimes, however, suggests that states dislike the exposure to public criticism, and even on occasion ridicule, which such scrutiny can bring with it and may therefore seek to curtail opportunities for it. The credibility of the WTO, and possibly the future of the trade regime, depend on the willingness of all concerned to tolerate such scrutiny.

The significantly international character of the trade and environment issue comes to the forefront in the relationship between the multilateral trade regime and multilateral environmental agreements, particularly those which directly affect trade.

### **An Agreement on Trade and Environment: Addressing PPMs**

Sustainable development requires that producers move away from the old approach of react and cure to the anticipation and prevention of environmental problems before they occur. This approach places a premium on the redesign of production processes and the promotion of "eco-efficiency", in the words of the Business Council for Sustainable Development.

The ability to distinguish between sustainably and unsustainably produced goods in international trade is vital to ensuring that trade liberalization does not undermine essential environmental protection but contributes to sustainable development. This is particularly true when no other measures, such as patents, provide manufacturers with protection within the trading chain, (i.e., for commodities and commodity manufactures).

Distinguishing between like products on the basis of their contribution to sustainability could open the door to new forms of protectionism. Protectionist interests in all countries have always proven adept at using trade rules to their advantage. And they are perfectly capable of forming alliances with environmental groups to clothe their traditional concerns in more fashionable green clothing.

It requires the development of an Agreement on Trade and Environment, essentially an agreement on the use of PPMs to promote sustainable development.

The answer to this dilemma does not lie in an amendment of the existing trade rules. It will require the development of an Agreement on Trade and Environment, (essentially an agreement on the use of PPMs to promote sustainable development). This agreement would be analogous to the agreements on Trade and Services and TRIPS. It would set out principles for the necessary balancing of goals and would establish institutional procedures which can enjoy widespread support to implement them.

The WTO cannot negotiate such an agreement on its own. Indeed, it will need to reach out to those responsible for environmental management at all levels, certainly national and international but probably also subnational, in an attempt to generate the necessary consensus and acceptance of the solutions which may emerge. Therefore relations between the WTO and other organizations are of central importance to the future of sustainability in the trade regime.

### **Singapore and Sustainability**

It is critical that the Singapore Ministerial recognize the limitations of the WTO and reach out towards other appropriate organizations to seek an understanding on an approach to the issues. Just as the WTO must find ways to relate to environmental bodies, the national ministers of trade who are its masters must meet with their counterparts from the environment side.

Trade and Environment Ministers should meet in the year between WTO Ministerial meetings to ensure that there is appropriate focus of the agenda of trade and sustainability in all the international fora for which such a group of ministers bears responsibility. Such a meeting should not take the form of a general get acquainted chat. Rather, Singapore will need to set in motion a careful preparatory process, leading to the preparation of specific draft decisions for discussion.

## The WTO: A New Organization

The World Trade Organization (WTO) was created by the Uruguay Round of trade negotiations. The WTO is based in large part on the General Agreement on Tariffs and Trade (GATT) and the various Agreements which have emerged from the eight “Rounds” of which the Uruguay Round was the last. The WTO is, however, a full-fledged international organization, albeit at less than two years of age one of the youngest ones, while the GATT and its related agreements were a complex legal structure to promote an agenda of trade liberalization, closely controlled by its members, the so-called Contracting Parties, with weak organizational structure.

In most institutions, changes in organizational status lead to changes in substantive outcomes. In the trade regime, initially not much appears to have changed. Nevertheless it is reasonable to assume that its new status will lead to real changes in the priorities it sets and in the manner in which it addresses issues. No area is as likely to test this proposition as the need to ensure that trade policy promotes sustainability. The central principles of the trade regime are, however, unchanged. The principle of non-discrimination (most-favoured-nation treatment) is embodied in Article I of the GATT which states that with respect to certain measures relevant to international trade “any advantage, favour, privilege or immunity granted by one party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” The principle of national treatment is embodied in Article III which stipulates that “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

Both of these principles depend on the meaning given to “like” product. The structure of the WTO closely reflects its antecedents. Like the GATT, it is an organization dominated by the representatives of member states, at least at the present time. Most countries maintain permanent delegations in Geneva, often with several staff members, whose mission is to participate in the WTO. The number of meetings is at times so large that smaller delegations are incapable of attending all of them. Traditionally, the Secretariat is not accorded independent judgment or initiative although the drafting of documents, including the drafting of panel reports in dispute settlement proceedings, gives the Secretariat de facto influence. Ultimately, however, its role depends heavily on the personality of the Director General and the extent to which he is willing to take positions which lead rather than follow the consensus opinion of Member States.

This report views internal relations within the WTO as an important issue but considers the institutional mandate to apply to all those responsible for the operation of the organization: the Secretariat, representatives of member states serving in the General Council and its subsidiary bodies and members of the Ministerial Conference. Institutional changes should be judged primarily in terms of the ability of the organization to achieve this mandate which extends beyond the administration of multilateral rules governing trade to the political task of articulating the reasons for these rules and ensuring that they remain appropriate in a changing world. This political task is one of the important differences between the GATT and the WTO. It is widely recognized that the GATT was organizationally incapable of undertaking a political role; the WTO presumably will need to find a way to fulfill this function. From the perspective of many member states, the principal purpose in creating the WTO was to resolve problems of implementation which had become apparent following the

Tokyo Round. Moreover the extreme difficulty of amending the constitutive text of the GATT had led to several agreements with overlapping membership and differing processes of implementation. By requiring all members of the WTO to be members of the connected Agreements (with the exception of the “plurilateral” Agreements) and by permitting cross-cutting implementation, the WTO certainly represents a major step towards bringing more coherence to the preexisting structure of the GATT (see below), although the old fragmentation has been allowed to persist in four areas, the so-called Plurilateral Agreements. By strengthening the organizational character of the WTO, many signatories sought to reinforce the effectiveness of the multilateral trade regime in relation to ever-present tendencies towards unilateral action, particularly in the United States.

It is important to consider how the change in institutional character and the expanded mandate of the WTO have contributed to substantive changes in the functioning and impact of the multilateral trade regime. Both together have certainly caused the regime to take a much more central place in international society, with numerous linkages to other international regimes. Following successful conclusion of the Uruguay Round, the linked issues of liberalization and globalization have moved to the center of the international agenda, and with them expectations that the WTO will prove an effective organization. Most importantly, the WTO has the potential to be a dynamic regime, capable of evolving over time without resort to the cumbersome multilateral negotiations which characterized the GATT Rounds. Presumably these will take place only when evolutionary development based on the WTO appears inadequate.<sup>1</sup>

The WTO emerged almost simultaneously with the articulation of the broad agenda of sustainable development at the international level. While the Uruguay Round was being negotiated, a long list of major international environmental agreements was also being put in place, culminating in the United Nations Conference on Environment and Development (UNCED) and the signing of the Framework Convention on Climate Change and the Biodiversity Convention in Rio de Janeiro in June 1992. Like the WTO, the complex structure of international environmental management and sustainable development is a “work in progress,” an evolving system involving numerous international agreements and the active participation of governments and private actors.

Defined in an appropriately broad manner, the multilateral trade regime and the agenda for sustainable development have numerous areas of convergence, and some areas of potential conflict. While these issues were manifest in 1992 at the time of the Earth Summit and in 1994 at the time the Uruguay Round was concluded, they were not addressed in an exhaustive manner in either instance. Agenda 21 contains a chapter on trade; the agreement establishing the WTO refers to sustainable development in its preamble and there are manifestations of environmental concern in individual sections of the Uruguay Round agreements, in particular on TBT, SPS and subsidies, but consideration of the major issues linking trade and sustainable development was postponed both times.

Only two WTO bodies did not arise from a prior round or the text of an Agreement: the Committee on Trade and Development (CTD) which has existed since the Tokyo Round and the Committee on Trade and Environment (CTE) established by the Marrakesh Ministerial Conference which concluded the Uruguay Round. The CTE has an agenda which encompasses many of the issues relating to trade and environment, focussing on the aspects of environmental policies which may result in significant trade effects for its members. In

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<sup>1</sup> von Moltke, Konrad. “The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit,” *Environmental Law*, vol. 25 no. 2 (Winter 1993), pp. 323-344.



# Major Elements of the Uruguay Round

Marrakesh Agreement Establishing the World Trade Organization<sup>a</sup>

- Annex 1A: Multilateral Agreements on Trade in Goods  
General Agreement on Trade in Goods 1994 (GATT 1994)  
Agreement on Agriculture  
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)  
Agreement on Textiles and Clothing  
Agreement on Technical Barriers to Trade (TBT)  
Agreement on Trade-Related Investment Measures (TRIMs)  
Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping)  
Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation)  
Agreement on Preshipment Inspection  
Agreement on Rules of Origin  
Agreement on Import Licensing Procedures  
Agreement on Subsidies and Countervailing Measures  
Agreement on Safeguards
- Annex 1B: General Agreement on Trade in Services (GATS)
- Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)
- Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
- Annex 3: Trade Policy Review Mechanism (TPRM)
- Annex 4: Plurilateral Trade Agreements<sup>b</sup>  
Agreement on Government Procurement  
Ministerial Decisions and Declarations  
Ministerial Decisions and Declarations Adopted by the Trade Negotiations Committee on 15 December 1993<sup>c</sup>  
Decision on Measures in Favor of Least-Developed Countries  
Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking  
Decision on Notification Procedures  
Declaration on the Relationship of the World Trade Organization with the International Monetary Fund  
Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Countries  
Decisions Relating to the Agreement on Technical Barriers to Trade  
Decisions Relating to the General Agreement on Trade in Services - Decision on Trade in Services and the Environment  
Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes  
Ministerial Decisions Adopted by the Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994<sup>d</sup>  
Decision on Trade and Environment

a Comprises 28 Agreements and Understandings

b Total: 4

c Total: 23

d Total: 4

## Preamble to The Marrakesh Agreement Establishing the World Trade Organization (Excerpt)

The Parties to this Agreement,

“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment 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, Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the discriminatory treatment in international trade relations, ...”

principle, all issues concerning trade and environment can be raised in the CTE. In practice, it has developed a detailed agenda based on the specifics of the mandate from the Ministerial Conference and has focussed on the trade effects of environmental regimes. Consequently it represents only a segment of the agenda placing environmental management in the context of sustainable development. To capture this broader perspective, this report considers all activities of the WTO and enquires whether they have taken into account the concern for sustainability and have made a positive contribution to achieving this ambitious goal of international policy.

## The Politics of Trade and Sustainable Development

Few governments have shown much enthusiasm for the agenda of trade and environment. It is widely viewed as primarily a concern of the developed countries, and it is difficult to identify any among these, with the possible exception of the Nordic countries, which has consistently urged forceful action within the WTO to address environmental concerns. The voices of Sweden and Finland have been muted since these countries joined the European Union, although they may be contributing to changing the attitude of the EU to these issues. Portions of the agenda, in particular those dealing with domestically prohibited goods (DPG), trade-related intellectual property rights (TRIPs) and market access, are viewed as developing country concerns. The result is a highly ambiguous situation.

Representation of countries in the WTO is handled by trade ministries whose primary concern is economic policy, and which are not known for environmental fervor. The (by now 15) Member States of the European Union are represented by the Commission of the

The environmental agenda is widely viewed as a problem imposed on the WTO from the outside, rather than as a necessity to achieve the goals of trade liberalization.

European Community, sharply muting individual voices. The environmental agenda is widely viewed as a problem imposed on the WTO from the outside, rather than as a necessity to achieve the goals of trade liberalization.

Many developing countries have sharply articulated their concern that environmental issues may be used to create new barriers to trade and thwart hard-won gains in market access. Experience with a number of prominent cases,

ranging from United States measures to impose certain standards to protect dolphins on Mexican and other ships fishing for tuna in Mexican and international waters, to Austrian

requirements to label tropical timber, to United States measures implementing clean air standards in a manner that disadvantaged Venezuelan and Brazilian refineries, to European regulations concerning the use of leg-hold traps, to US measures relating to turtles in shrimp capture, a pattern appears to exist which justifies developing country concerns.

Part of the problem is that environmental protection measures are typically seen as an end in themselves, rather than as an essential component of sustainable development. Rarely is the argument made that they are essential to the economic well-being of developed and developing countries alike, and even more rarely is the complex relationship of environment and development acknowledged. All too often environment and development are viewed as antithetical and those who eloquently defend the need to recognize the environmental imperative fail to address the urgent need to generate wealth to provide for the essential needs of poor people, particularly in developing countries, and vice versa.

This report takes the “Winnipeg Principles” for Trade and Sustainable Development as its point of reference, and then asks what has occurred over the first two years of the WTO’s existence that has contributed to promoting sustainability. It assumes that ultimately the WTO will need to give specific form to its very nebulous commitment to sustainability and seeks to identify areas of the current WTO agenda where this might be expected to occur.

Sustainable development is the only long term solution to the multiple environmental

## Winnipeg Principles

- Efficiency and Cost Internalization
- Equity
- Environmental Integrity
- Subsidiarity
- International Cooperation
- Science and Precaution
- Openness

problems of the planet while accommodating the needs of a world population in excess of ten billion. Since the United Nations Conference on Environment and Development (UNCED) in 1992, evidence has continued to accumulate showing that the premises of Agenda 21 and the “Rio bargain” were correct. The report of the Intergovernmental Panel on Climate Change confirms the consensus of the scientific community on global warming. The planet continues to lose biodiversity at an alarming rate. The collapse of the North Atlantic fishery is little more than a harbinger of trouble in all major ocean fisheries. All of these examples also demonstrate once again how the environment and the economy are so closely linked that policies in one sphere which ignore the other are bound to fail. The need for action is greater, for we are five years further along the path, with little corrective action taken as a result of UNCED.



**T**he General Council stands at the center of the WTO institutional system. It exercises, sometimes literally, day to day control over the organization. To the extent that the WTO will exercise political functions it will need to do so through the General Council. While much of the continuing business of the organization is conducted by the Secretariat and through the numerous councils and committees, decisions which affect the WTO as a whole, for example concerning relations with other organizations, transparency and participation, ultimately return to the General Council.

The WTO has a nationally pyramidal structure, with all issues ultimately reported to the Ministerial Conference or the General Council. Membership of most subsidiary bodies is open to all WTO Members, and the most important will actually include all Members. This device derives from the GATT (General Agreement on Tariffs and Trade) and its related agreements. Where membership in the latter could diverge significantly from one body to another and no culminating authority existed to pull the pieces together, the WTO is composed of a series of Committees of the whole. This sometimes permits Members to revisit issues several times in differing contexts as they rise, for example, from the Committee on Technical Barriers to Trade to the Council on Goods and from there to the General Council. At the same time it reduces any benefit which might have been derived from a series of steps in the process: by virtue of the structure where each level has identical membership, passing decisions from one body to another actually creates less substantial opportunities for adaptation. Obviously, participants in the General Council are more likely to be of higher administrative rank, i.e. ambassadors, but it is unlikely that they would disavow positions taken previously by their subordinates (presumably under their responsibility). Under normal circumstances, reports from committees will pass with little or no comment through this process but controversial issues may be annotated by interested parties, creating a “negotiating history.”

The result, not surprising to students of representative institutions and organizational behavior, is that many important decisions are taken outside the formal meetings, in informal meetings, special discussions under the authority of the chair of the respective body or simply in the corridors. This diminishes transparency, effectively reinforcing the feeling of the WTO as a “club.” While insiders may find this an effective form of decision-making, it diminishes accountability and is inappropriate for major issues of public policy that can affect people worldwide. The agenda of sustainability has traditionally included the need for openness precisely because of its potential impact on people who do not participate in the formal decision-making process. Actually WTO governance resembles the practices of the United Nations more than that of the specialized agencies or the Bretton Woods institutions, most of which have a more carefully designed governance structure. The closest parallel is the manner in which reports in the United Nations pass from the Economic and Social Council (ECOSOC) to one of the massive General Assembly committees and then to the General Assembly itself, a procedure widely recognized as inefficient and counterproductive, and a comparison the WTO presumably does not welcome. In the WTO there is no governing body which oversees work delegated to the Secretariat. The members remain involved in day to day decisions to a greater degree than in other international agencies.

The precise function of the Ministerial Conference in this structure remains unclear. In principle, the General Council exercises the functions of the Ministerial Conference between meetings. This structure is common among international organizations. What is unusual about the relationship between the General Council and the Ministerial Conference is that their membership is identical. In other instances, the body which meets regularly is composed of a subgroup of all members so that the periodic meeting of the full membership is required to decide matters which require action by all members. In the WTO structure, the only decision reserved explicitly to the Ministerial Conference is the appointment of the Director-

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General and the granting of certain waivers. In practice, the appointment of the Director-General has occurred outside formal meetings of the Conference, through consultations at ministerial level and no substantive decision on waivers is likely ever to reach the Ministerial Conference. Certainly the Ministerial Conferences will serve to set deadlines to internal procedures which have a tendency to drag on without such a constraint. A meeting of ministers carries more weight and benefits from a more intensive process of prior consultation than routine meetings of ambassadors. At the same time, ministers have less knowledge of their counterparts and of the constraints they may labor under and are consequently more dependent on their advisors (in practice the ambassadors) to chart a path at a meeting which occurs only once every two years.

WTO bodies are required to prepare reports on their activities each year which are compiled in a single document and reviewed by the General Council at its December 1996 meeting.<sup>2</sup> The Singapore Ministerial will be preceded by a meeting of the General Council at which the annual review will take place. While formally the General Council acts for the Ministerial Conference, in practice the Ministerial Conference may turn out to be nothing more than a more elaborate meeting of the General Council. Certainly such an outcome would reflect a high degree of continuity with the practices of the GATT.

The structure of an organization, its decision-making procedures in particular, influences its outcomes. It is important to understand the structure of decision-making in the WTO so as to be able to assess its responses to a new set of complex issues such as those arising from a move towards more sustainable development. The structure of the WTO, as it has emerged from the GATT, remains quite tight-knit. This suggests strongly that changes in perspective and priorities must ultimately be introduced through the Ministerial Conference.

## Transparency and Participation

The Council repeatedly addresses the linked issues of transparency and “consultation and cooperation with nongovernmental organizations.” With regard to transparency, there is a manifest willingness to be more forthcoming with information concerning developments within the WTO.

Trade policy reviews are to be made publicly available after discussion in the Council ... The decision reflects the unarticulated principle that supporting documents should be available together with any final decision they relate to, providing a welcome measure of accountability.

On 18 July 1996, the General Council adopted a decision on Procedures for the Circulation and Derestriction of WTO Documents.<sup>3</sup> In principle, all WTO documents shall be circulated as unrestricted, with certain exceptions set out in an annex. These are either to be automatically derestricted at the latest six months after circulation or to be considered for derestriction at that time. In the latter instance, derestriction will occur unless a Member State objects in writing within a specified time. Dispute panel

reports “shall be circulated to all Members as restricted documents and derestricted no later than the tenth day thereafter [unless], prior to the date of circulation a party to the dispute that forms the basis of a report ... submits a request for delayed derestriction. A [panel] report circulated as a restricted document shall indicate the date upon which it will be derestricted.”

2 World Trade Organization, General Council, Annual Reports (1995) (WT/GC/W/25, 7 December 1995). World Trade Organization, General Council, Minutes of Meeting Held at the International Conference Centre, Geneva, on 13 and 15 December 1995. (WT/GC/M/9, 22 February 1996). These annual reports provide the basis for a published version not currently available on the World Wide Web.

3 World Trade Organization, “Procedures for the Circulation and Derestriction of WTO Documents.”

Trade policy reviews are to be made publicly available after discussion in the Council (currently they have been made available only to journalists prior to publication).

The decision reflects the unarticulated principle that supporting documents should be available together with any final decision they relate to, providing a welcome measure of accountability. It also includes the principle that “any document that contains only information that is publicly available or information that is required to be published under any Agreement in Annex 1, 2 or 3 of the WTO Agreement shall be circulated on an unrestricted basis.” This seemingly self-evident principle is rarely applied in international organizations since it requires the Secretariat to make communications from Member States publicly available that contain only publicly available information, and few Member States relish public review of their notification efforts.

This represents a significant step in the right direction since these documents have been made available only to acknowledged researchers and those persons who have been given the imprimatur of the Ambassador of their country of origin. Researchers have been allowed to see documents but not make copies while the others may make copies but are bound by the rules of confidentiality that apply to members of delegations. Presumably the expectation of availability will in practice promote wider circulation of documents during the initial period of six months. The availability of the World Wide Web, extensively used by the Secretariats of several multilateral environmental agreements, renders access a simple matter.

The handling of dispute panel reports represented the major item of contention. No problem exists when both parties agree to public release at the time the report is transmitted to the Council (that is after the parties have had an opportunity to review it). The requirement to request delay prior to circulation is less of a restriction than it seems because parties traditionally receive an advance copy some time before general circulation occurs (defined as “circulation by the Secretariat of documents to all Members” (emphasis added). Delay in release of these critical documents sharply curtails the possibilities of interested parties outside governments to make their views known. Even without a formalized right to file amicus briefs such parties should at least be provided some basic opportunity to know what is happening within the trade regime. As virtually every dispute concerning environmental issues has demonstrated, governments are incapable of reflecting the full range of environmental issues in the constrained circumstances of a GATT or WTO dispute proceeding. It is unfortunate that the decision does not provide guidance on the maximum permissible delay so that it is left to subsequent practice to ensure that in no instance release is delayed beyond a reasonable date to affect the appellate process.

The decision also provides that the “Secretariat will circulate periodically (e.g. every six months) a list of newly derestricted documents, as well as a list of all documents remaining restricted. At first view, it would appear that this list will itself need to be circulated unrestricted.

Whereas the new rules governing the release of documents indicate an awareness that some interested parties have found the practices of the GATT unsatisfactory, the approach to consultation and cooperation with nongovernmental organizations (NGOs), that is the scope for participation, can only be described as minimalist. The WTO Agreement states that “the General Council may make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related to those of the WTO.”<sup>4</sup> Nevertheless there is no indication that the General Council wishes to engage NGOs directly or that it envisages allowing them to be present as observers in their own right (that is outside Member delegations) at any formal meetings of WTO bodies.

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4 See below.

The main emphasis in the current approach to this issue is on providing information by derestricting rapidly and making derestricted documents available on-line (i.e., through the World Wide Web). The Secretariat is encouraged to be somewhat more active in its direct contacts with NGOs. No formal submissions of NGOs to the

WTO are envisaged at any stage, no process is created to give recognition to major international NGOs with proven competence in some or all areas of the work of the WTO. Informal submissions from NGOs can be received by the Secretariat as a means of making

The general view appears to prevail that NGOs remain in the province of national consultations and that governments are presumed to speak with a single voice for all the interests within their country, and that all relevant interests are represented by national governments, a fiction which has long ceased to be an adequate reflection of reality.

them available to “interested” delegations. In other words, delegations that are not interested are under no obligation to receive or otherwise take note of any information submitted by an NGO. The general view appears to prevail that NGOs remain in the province of national consultations and that governments are presumed to speak with a single voice for all the interests within their country, and that all relevant interests are represented by national governments, a fiction which has long ceased to be an adequate reflection of reality.<sup>5</sup>

“Transparency” is, together with dispute settlement, at the heart of the international implementation process of the WTO. Transparency in the WTO context comprises the Trade Policy Review Mechanism (TPRM) and a host of notification requirements as well as the general provision of GATT Article X.1. These provisions are designed to provide Members with information about the trade relevant actions of all other Members and some of them are designed to protect the rights of traders to timely information about measures that may affect them. The General Council has thus far been preoccupied mainly with the housekeeping tasks attendant on setting up a new international organization, even if the intention is to continue most of the practices of its predecessor, the GATT. Sooner or later, it will need to consider the effectiveness of its instruments for achieving transparency, even narrowly defined.

During 1995 and 1996, transparency was on the agenda of the General Council in various ways. The issue of access to WTO documents occupied a good deal of time. The effectiveness of the numerous notification requirements (more than 200 by one count) was the subject of a new working group established by the Council for Trade in Goods but it arose in the Committee on Trade and Environment and in fact represents a major cross-cutting issue which will ultimately be of concern to all WTO bodies.<sup>6</sup> Since sustainability affects or is affected by many areas of policy, relevant information can be expected in many of the notification schemes within the WTO. Their adequate functioning is a matter of concern from the perspective of sustainability, and there is reason to assume that they are not functioning.

## Relations with other Organizations

Now that it is formally an international organization, the WTO has struggled to find its place in international society.<sup>7</sup> Despite a clear mandate, not even the apparently simple matter of

5 This development is captured in the expression “international civil society,” see Paul Ghils, “International Civil Society: International Non-governmental Organizations in the International System,” *International Science Journal* vol.44 (Aug. 1992), pp. 417-431.

6 See below.

7 The term “international society” is here used to encompass both international civil society and the traditional structures of intergovernmental cooperation.



establishing guidelines for observer status for international intergovernmental organizations was resolved during the first year. The WTO wishes to maintain close relations with some organizations while keeping others at a distance.<sup>8</sup> The agenda of sustainability poses particular challenges in the area of inter-institutional cooperation since it overlaps the trade agenda rather than being congruent with it. Consequently, a large number of international organizations at many levels may have an interest in developing working relations with the WTO.

Procedures to handle transparency, participation and inter-institutional relations have been developed over the years by the United Nations. Even there, special arrangements have had to be made when matters relating to sustainability were on the agenda, for example at the Stockholm Conference, UNCED or in the multilateral environmental agreements (MEAs). The WTO shows no inclination to adopt any of these procedures. On account of its political mandate, it will ultimately be judged by the UN standard rather than by that of the Bretton Woods institutions with their special role and structure of membership rights related to shareholdings.

## “New” Issues on the Trade Agenda

Many parties are seeking to develop the trade policy agenda. As in any other organization, agenda-setting is a major determinant of outcomes. A number of issues are presently vying for attention.<sup>9</sup> In addition to the environment, the issue of labor standards has carried over from the Uruguay Round. Further issues that have been raised include foreign direct investment, competition policy and corruption. How the WTO decides to address these issues is liable to have significant repercussions for the agenda of sustainable development within the organization.

One of the most difficult issues in defining responses to the environment and trade agenda is the widespread linkage between environmental issues and labor standards in the trade policy debate. This linkage arises because the two issues have emerged on the negotiation agenda at about the same time (although labor standards was already an issue in the negotiations leading to the Havana Charter for the International Trade Organization<sup>10</sup>), and because many people whose primary concern is trade liberalization view both environment and labor as equally extraneous to what they consider the central issues. This attitude, based largely on trade concerns, represents a serious mistake. Environmental issues are on the trade agenda because there are objective linkages between trade policy and environmental policy at the international level. In fact, neither environmental policy nor trade policy can succeed without the other. Labor standards, however, are on the agenda because they differ widely between countries, and sometimes even within countries, reflecting differing social choices. Differences in labor standards can be morally unacceptable and international solidarity of labor is an essential tool

Agenda-setting is a major determinant of outcomes. In addition to the environment, the issue of labor standards has carried over from the Uruguay Round. Further issues that have been raised include foreign direct investment, competition policy and corruption.

Neither environmental policy nor trade policy can succeed without the other.

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8 See below.

9 See Jagdish Bhagwati and Robert Hudec, eds., *Fair Trade and Harmonization: Prerequisites for Free Trade?* Cambridge, MA: The MIT Press, 1996.

10 See John Jackson, *The World Trading System, Law and Policy of International Economic Relations*. Cambridge, MA: The MIT Press, 1991, pp. 30-38.

in balancing the unequal power of various actors in the marketplace. Yet it remains a fact that the level of protection afforded labor in different countries is a matter of social choice and not subject to the kind of objective constraints based on environmental phenomena that transcend international boundaries and drive the international environmental agenda.

Of the other “new” issues, rules governing foreign direct investment have obvious significance for sustainable development. Without strong investment, a country is unlikely to succeed in the globalized economy, and increasingly the source of investment is capital that can move globally almost without restraint. At the same time, not every investment is equal from the perspective of sustainability and countries must remain in a position to ensure that investment projects actually contribute to the long term welfare of their citizens and its environment.

The desire of some parties within the WTO to move on to the “new” issues derives both from their potential significance and from a tendency to avoid the unglamorous and unsatisfying issues arising from the need to adequately implement existing agreements, for example, to ensure that the needs of the least developed countries are really met and to avoid unnecessary conflicts between trade policy and the needs of environmental management. The WTO should resist the temptation to pursue new agreements as long as there is strong evidence that existing agreements are inadequately implemented or are not achieving their intended results.

Many of the issues emerging before the Singapore Ministerial which are important from the perspective of sustainability are not necessarily labelled “environmental” or “sustainability.” They concern the character and the operations of the WTO, whether it will prove responsive to a range of issues, or whether its judgment on matters affecting sustainability is to be trusted. In this context, the broad organizational decisions concerning transparency, accountability and participation may prove the most important aspect of the Singapore Ministerial in relation to sustainable development.

Each of the agreements which were concluded within the framework of the GATT required an independent management body because membership was not necessarily identical since countries could choose to accede to individual agreements or not. These management bodies have all carried over into the WTO where they became subsidiary bodies of the relevant Council on Trade in Goods, albeit now all with identical membership.

## Councils

### Trade in Goods

There has been a steady shift in perception concerning development. Increasingly, foreign direct investment and trade are viewed as key motors of development. Publicly funded development assistance is seen as a complement to private resource flows and is increasingly devoted to supporting capacity building to permit less developed countries to participate in trade policy and to manage trade flows, presumably in a sustainable manner. This shift, clearly expressed in the Preamble to the WTO, has heightened the importance of general trade policy for sustainable development. Within the WTO, this has resulted in the growing importance of the Council on Trade in Goods for development issues, rather than the Committee on Trade and Development (CTD).

The Council on Trade in Goods includes 13 subsidiary bodies: committees on agriculture, anti-dumping, customs valuation, import licensing, market access, rules of origin, safeguards, sanitary and phytosanitary measures, subsidies, technical barriers to trade, trade-related investment measures, textiles, state trading enterprises and a working group on notification obligations and procedures. In practice it includes the essential elements of the GATT as it existed before the Uruguay Round (see Organization Chart WTO). The Agreement on Technical Barriers to Trade contains complex rules concerning the development of standards, including rules defining the extent of a national government's responsibility for standards prepared by subnational authorities or nongovernmental bodies. The key criteria are national treatment and the avoidance of unnecessary obstacles to international trade (see below).

The Agreement has a strong prejudice in favor of international and regional systems of certification. It imposes on national governments certain obligations with regard to regulations adopted by local government bodies and by non-governmental bodies, effectively setting limits on the application of the principle of subsidiarity. Whenever a relevant international standard does not exist or a technical regulation is not in accordance with an international standard, governments are required to notify other Members through the Secretariat of the particular regulation and the products covered by national, local or non-governmental regulations. Furthermore, they are required to ensure that an enquiry point (or enquiry points) exists which is able to answer questions about technical regulations.

These extensive requirements have given rise to a patchwork of actual notifications. In 1995, Japan provided 49 notifications, the United States 41, the Netherlands 33, and Germany, a country well known for the extensiveness of its standards system, 2 (on ultra light aircraft and ships and ship safety equipment). Many of the notifications received under the TBT Agreement, in fact, concern environmental issues.

Clearly this structure is not operating as intended. Most importantly, it is not possible to determine why countries decide to notify particular measures, and the pattern of actual notifications suggests not only that interpretations of the obligations differ widely between countries but that even within countries, each decision to notify arises from particular circumstances rather than from a systematic approach to notification.

## Agreement on Technical Barriers to Trade, Article 2.2

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

Interpretation of the TBT Agreement with regard to environmental issues, ecolabelling in particular, remains a difficult item, leading the Committee on Trade and Environment to develop an extensive document on the negotiating history of the coverage of the TBT Agreement with regard to labelling requirements, voluntary standards, and process and production methods unrelated to product characteristics. In particular for the latter issue it appears that “standards based on PPMs are clearly accepted under the TBT Agreement, subject to them being applied in conformity with its substantive disciplines. The negotiating history suggests that many participants were of the view that standards based *inter alia* on PPMs unrelated to a product’s characteristics should not be considered eligible for being treated as being in conformity with the TBT Agreement.”<sup>11</sup> This difference between the actual texts and the desires of some governments, or at least of the trade policy-makers within them, may be one of the sources of continuing confusion concerning the extent to which the GATT actually accepts PPMs.<sup>12</sup>

The Agreement on Subsidies and Countervailing Measures (an agreement which distinguishes between otherwise “like” products in terms of government policies which benefit the producers or exporters of these products) prohibits export subsidies and subsidies which promote the use of domestic over imported goods. It defines actionable subsidies as those which cause “adverse effects” to the interests of another country and provides remedies against them. Certain subsidies are identified as non-actionable.

No notifications have yet been received by the Secretariat under Article 8 of the Subsidies Agreement. Footnote 35 to the Agreement outlines a procedure by which Members can invoke the remedies of the Agreement against Article 8 programs which have not been notified but stipulates that the program is to be treated as non-actionable if it is found to conform to the standards set forth in Article 8.2.

Environmental subsidy programs are known to exist; indeed their existence prompted inclusion of Article 8.2. The European Union has long had comparable provisions tolerating certain environmental subsidies which deviate from the rigid prohibition of subsidies under the EEC Treaties. Several EU Member states have numerous environmental subsidy programs at federal and state level. A recent publication listed 97 programs in Germany alone (see below). These programs range from very limited to very large and have been established at all levels of government. As a rule, these programs involve accelerated depreciation allowances, interest rate subsidies for loans, partial grants, or research and development support. Not all of them are necessarily notifiable under the Subsidies Agreement.

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11 WT/CTE/W/10.

12 “Notification Provisions in WTO, GATT 1994” (prepared for WG on Notification Obligations).

It is only possible to speculate on the reasons why such environmental subsidies have not been notified. Experience with other EC instruments suggests that Member states have provided the EC Commission with incomplete formal information concerning their subsidy programs; they are presumably loathe to provide the WTO with more than they have given the Commission. The Commission itself is unlikely to want to reveal the limits of its knowledge in a further formal notification, and is liable to find itself subject to challenge if it notifies Member state measures to the WTO. Finally footnote 35 effectively removes any penalty for non-notification since it treats notified and non-notified programs alike, provided they meet the criteria of the Agreement. Why should any Member bother to notify, which could entail further questions, rather than wait for other Members to challenge a measure? Indeed, notifications on environmental subsidies which have been received were submitted under Article 32.6 which embodies a general obligation on member states to “inform the Committee [on Subsidies and Countervailing Measures] of any (sic!) changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.” For example in 1995 Norway submitted a notification covering aid for cleaner technologies, grants for waste reduction and recycling, loan guarantees for both of the foregoing and a loan facility for the single company in the country treating hazardous wastes.

## Agreement on Subsidies and Countervailing Measures, Article 8

- 8.2 Notwithstanding the provisions of Parts III and V [of the Agreement], the following subsidies shall be non-actionable: ....
- (c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
    - (i) is a one-time non-recurring measure; and
    - (ii) is limited to 20 percent of the cost of adaptation; and
    - (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
    - (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover and manufacturing cost savings which may be achieved; and
    - (v) is available to all firms which can adopt the new equipment and/or production processes.
- 8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee [on Subsidies and Countervailing Duties] in accordance with the provisions of Part VII [of the Agreement]. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under the notified programme.

## Environmental Assistance Programs in Germany (Federal Programs)

European Recovery Program Funds: Waste Management Program  
Wastewater Treatment Program  
Energy Saving Program  
Air Pollution Control Program  
Kreditanstalt für Wiederaufbau: Environmental Program  
Third Subsidiary Program of the Deutsche Ausgleichsbank to Finance Environmental Protection  
Environmental Protection Guarantee Program  
Support for Advisory Services for Small and Medium-Sized Enterprises  
Energy Research Program  
10-Megawatt Program  
Investment Program for the Reduction of Environmental Burdens  
Environmental Research Plan (annual)  
Environmental Research and Development 1989-1994  
German Federal Environmental Foundation  
Section 4a, Investment Augmentation Law  
Section 7d, Income Tax Law: Accelerated Depreciation Allowances Section 82a, Regulation for Implementation of the Income Tax Law

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From Konrad von Moltke. 1993. *Comparison of Regulatory Trends in the West and Central and Eastern Europe — Environmental Standards and Legislation in Western and Eastern Europe: Towards Harmonization Task IIIA*. Report for the European Bank for Reconstruction and Development, p. 68.

Difficulties encountered with these and other notification obligations led to the establishment of a Working Group on Notification Obligations in 1995 in accordance with a mandate from the Uruguay Round Agreements.<sup>13</sup> According to a Secretariat report, GATT 1994 and WTO involve 215 notification procedures relating to 74 different WTO provisions.<sup>14</sup> Large numbers of these are potentially significant from an environmental perspective. The Committee on Trade and Environment has sought to address this issue, requesting a report from the Secretariat. No notification requirement (with the exception of that under the Agreement on Subsidies and Countervailing Measures) specifically concerns environmental criteria. Indeed, the tradition of GATT/WTO notifications is that these concern the nature or characteristics of the policy (i.e. its trade effects) rather than its purposes (e.g. aspects of environmental management). The effectiveness of the WTO notification procedures is also an important issue in assessing possible instruments for some of the issues currently on the trade and environment agenda, for example, domestically prohibited goods. Additional notification requirements are unlikely to be effective if existing ones cannot be proven to be so.

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13 “Decision on Notification Procedures,” World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Geneva: WTO, 1995, pp. 444-446

14 WT/CTE/W/10 (also G/TBT/W/11), 29 August 1995, p. 2.

The issue of notifications was recognized by the Uruguay Round negotiators although it was seen as a matter of bureaucratic organization rather than as a threat to the overall credibility of the trade regime. Notification and assessment of information is an important tool of environmental management at all levels. From the perspective of sustainability the inadequacies of WTO notification procedures are more than a bureaucratic inconvenience. They draw into question the ability of the WTO to act effectively in a vital area of implementation. The debate about domestically prohibited goods in the GATT, leading to a draft decision, illustrates how relatively meaningless and ineffectual notification procedures can be substituted for practical action on an important issue.

It is impossible to assess the functioning of all these notifications requirements without extensive access to WTO documents which have been restricted. Based on anecdotal evidence from the WTO and the difficulties experienced by virtually all international agencies in obtaining adequate respect for notification requirements, all of the WTO notification schemes must be considered inadequately implemented unless evidence to the contrary becomes available. The new decision on Procedures for the Circulation and Derestriction of WTO Documents would appear to make all of these notifications publicly available, providing for the possibility of broad scrutiny of the adequacy of both the actual measures adopted by Member States and their notification practices.

### **Trade-Related Aspects of Intellectual Property Rights (TRIPs)**

The significance of TRIPs to sustainable development is both indirect and direct. Absent appropriate regulatory and other incentives, market economies tend to under produce innovation just as they under produce environmental quality. Innovation policy is in large measure the search for appropriate economic incentives to encourage innovation. Similarly environmental policy includes the need to create economic incentives to ensure that environmental factors are properly taken into account. Comparable to central aspects of environmental management, TRIPs concern the methods of production rather than the product itself, since a “like” product produced while infringing intellectual property rights is, by definition, materially indistinguishable from products produced respecting those rights, or to use the more colorful language of a recent panel report, it has “objective likeness.”<sup>15</sup>

Innovation is seen as central to the process of development. Indeed, it has been argued that developing countries are less developed because they create insufficient innovation to succeed in the market. Innovation, the ultimate justification for the protection of intellectual property, is also critical to the achievement of more sustainable development as environmentally inadequate technologies need to be replaced by environmentally more desirable ones. Widespread access to these technologies under favorable conditions is essential to achieving the central goal of sustainability: equitable and environmentally sound development.

Creating economic conditions conducive to the protection of biodiversity and recognizing the value of traditional knowledge and of knowledge yet undiscovered which resides in living organisms is one of the most important challenges facing the Biodiversity Convention. All of these activities are intimately linked with the regime governing the protection of intellectual property rights.

The discussion about TRIPs has emphasized the need to provide international protection for intellectual property and the TRIPS Agreement also is restricted to this end. No consideration

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15 World Trade Organization, “United States — Standards for Reformulated and Conventional Gasoline; Appellate Body Report and Panel Report; Action by the Dispute Settlement Body,” (WT/DS2/9, 20 May 1996),” para 6.12.

## Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 27

Article 27 Patentable Subject Matter ...

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not merely because the exploitation is prohibited by their law.
3. Members may also exclude from patentability...
  - (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

is given to the obligations which attach to a grant of special protection which essentially represents a right to capture monopoly rents for a specified period of time. It is reasonable to expect those who benefit from such a grant to meet the highest standards of environmental performance, although that is not a matter the WTO needs to address; TRIPs protection certainly provides adequate resources for this purpose. Similarly obtaining monopoly rents must not impede the rapid spread of environmentally sound technologies.

During the first years of its existence, the Council for Trade-Related Aspects of Intellectual Property Rights did not reach these kinds of issues. It focussed primarily on the technical arrangements for notification requirements and on establishing institutional relations with the World Intellectual Property Organization. The Decision on Trade and Environment assigned major responsibility for consideration of the environmental aspects of TRIPS to the CTE which has received several Secretariat reports and has reviewed developments under the Biodiversity Convention.<sup>16</sup>

### Trade in Services

The inclusion of trade in services in the multilateral trade regime was one of the most important innovations of the Uruguay Round. Since trade in services does not normally entail the physical transport of goods but rather involves the movement of people providing or obtaining services, it is subject to a different regime than the trade in goods, even though the underlying economic and policy principles are the same. Indeed, much like the TRIPs Agreement and the Agreement on Subsidies, the General Agreement on Trade in Services (GATS) covers areas that are likely to become important for a subsequent Agreement on Trade and Environment with a focus on PPMs.

A Decision on Trade in Services and the Environment was adopted in Marrakesh (see below). This decision presumably arose from the continuing problem with interpreting GATT Art. XX(b) in relation to the environment. GATS incorporates Art XX(b) verbatim as Art. XIV(b). Clearly any change in this language would have required a corresponding change in Art. XX(b)

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<sup>16</sup> See Table XX (Secretariat Documents of CTE, in Section 3.2.1).



to avoid the implication that the latter specifically excludes the environment. No consensus could, however, be achieved in this regard since some argue that the current language is sufficient to address environmental concerns (dispute panel interpretations notwithstanding) while others feared that the explicit inclusion of the environment would create undesirable opportunities for broader exceptions than were intended. The Decision highlights the evolution of thinking in the negotiations between the end of the Uruguay Round and the Marrakesh Ministerial. The Trade Negotiations Committee (TNC) Decisions on Trade and Environment and on Trade in Services and the Environment established a close link between environment and sustainable development. The later decisions dropped all reference to sustainable development.

Many services have significant environmental aspects. Among the most important are so-called environmental services, transport, tourism, as well as banking and accounting. "Environmental services" under the GATS are typically pollution abatement services such as drinking water treatment, wastewater treatment or industrial cleanup services, in fact a limited group of services from the perspective of sustainable development.

The GATS is structured around General Obligations and Disciplines (Part II) such as MFN treatment and national treatment) and Specific Commitments (Part III) through which countries identify the service sectors for which they accept the full range of disciplines. The intent (set out in Part IV) is to launch a step by step process of progressive liberalization through extension of commitments, analogous in some ways to the process of tariffication under the GATT by which import constraints were first translated into a universal currency of tariffs and then reduced step by step through negotiations. In practice, some areas of services have been largely left out of the GATS, for example medical services or financial services. Most countries, however, have included environmental services on their initial list of commitments, so that the GATS will presumably contribute to a reduction in the cost of such services worldwide.

## Decision on Trade in Services and the Environment

Ministers,

Decide to recommend that the Council for Trade in Services at its first meeting adopt the decision set out below.

The Council for Trade in Services

Acknowledging that measures necessary to protect the environment may conflict with the provisions of the [General] Agreement [on Trade in Services]; and noting 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;

Decides as follows:

1. In order to determine whether any modification of Article XIV of the Agreement is required to take account of such measures, to request the Committee on Trade and Environment to examine and report, with recommendations, if any, on the relationship between services trade and the environment including the issue of sustainable development. The Committee shall also examine the relevance of inter-governmental agreements on the environment and their relationship to the Agreement.
2. The Committee shall report the results of its work to the first biennial meeting of the Ministerial Conference after entry into force of the Agreement Establishing the World Trade Organization.

Transport is central to trade. Transport requires energy, indeed in the case of air transport large amounts of energy and the production, provision and consumption of energy is of central concern in the management of many forms of pollution (acid rain, organic volatile pollutants, and certain toxic substances and heavy metals in particular) and is at the heart of the debate about global warming. Many observers are convinced that current prices for most forms of transport do not reflect the full environmental costs; this is particularly true for road and air transport.<sup>17</sup> For these reasons, transport represents the classic dynamic between trade and environment: both seek greater efficiency but trade policy focuses on cost while environmental policy focuses on material inputs and wastes, which in turn have cost implications. While clearly related, the two approaches are not identical.

Transport represents the classic dynamic between trade and environment: both seek greater efficiency but trade policy focuses on cost while environmental policy focuses on material inputs and wastes, which in turn have cost implications.

The role of the WTO in this debate is still unclear. It is hard to envisage any move towards greater sustainability that would entail a substantial shift in transport pricing or technologies, or both. In increasingly global markets it is impossible for any country to make this transition alone; even large groups of countries such as the EU or the Organization for Economic Cooperation and Development (OECD) may find this difficult. Transition costs are likely to impinge upon the patterns of international trade and countries will seek to mitigate these impacts to facilitate or to promote political consensus in support of this transition. The WTO will need to balance the desirability of this transition against the real risks of protectionist capture of such measures.

For many developing countries tourism has become a major source of foreign exchange. Like many other human activities, the environmental impacts of each individual's travel are quite modest while the collective impact of mass tourism is dramatic. The challenge is to mitigate the cumulative effects of many small impacts, rendered more difficult by the fact that much tourism is seasonal so that infrastructure, including environmental services must be amortized over a few months rather than the entire year, raising costs of mitigation even further relative to the size of individual impact. The emergence of ecotourism, essentially an attempt to promote non-consumptive uses of natural resources with high ecological but no immediate market value, creates an additional important environmental agenda.

The environmental significance of insurance, banking and auditing are slowly coming into focus. In a world in which governments have dramatically reduced their controls over international trade, the achievement of environmental goals requires utilization of all available streams of information and accountability. Insurance companies, worried about decreased predictability of certain risks and consequently the potential for large losses, even losses that may threaten the viability of the system, have become active participants in the climate negotiations, supporting more precautionary approaches than most other economic actors. The risks are so large that the European Community has provided for exceptions from competition rules to permit insurers to form universal risk pools rather than to compete for the business.<sup>18</sup> Banks are increasingly confronted by the financial implications of the environmental liabilities of their clients. The importance of accounting is underscored by the

17 MacKenzie, James J. et al., *The Going Rate: What It Really Costs to Drive*. Washington, DC: World Resources Institute, 1992.

18 Bureau of National Affairs, "EC Cites Environment in Exempting Insurance Scheme from Competition Rules," *International Environment Reporter* vol. 15 no. 2 (January 29, 1992), p. 35.

emergence of new ISO standards concerned with environmental accounting.<sup>19</sup> The Council for Trade in Services has thus far focussed mainly on housekeeping issues relating to the establishment of a new structure for implementation of the Agreement. In the CTE, the special mandate from the Marrakesh Ministerial on environment and services has not prevented the issue from becoming part of the balancing of issues and interests within the committee that threatens to render decisive action impossible. The special aspect of sustainable development and services, an integral part of the Ministerial Decision has not received special attention.

## Committees

### Committee on Trade and Environment

The Committee on Trade and Environment (CTE) was established by a Decision on Trade and Environment of the Marrakesh Ministerial Meeting. This was the one of the few substantive decisions taken at the meeting which went beyond work of the Trade Negotiations Committee (TNC) which had guided the Uruguay Round to its conclusion. It was based upon a decision on Trade and Environment of the TNC which effectively decided to defer this issue until Marrakesh while laying down some guidelines.<sup>20</sup> The final Decision on Trade and Environment used the TNC Decision as “terms of reference” but provided a detailed agenda for the CTE which effectively superseded the broader TNC Decision. It required the CTE to report to the Singapore Ministerial “when the work and terms of reference of the Committee will be reviewed.” The differences between the TNC Decision and the Ministerial Decision are notable. The TNC sets a broad task (see below) while the Ministerial Decision provides a specific agenda; the TNC Decision speaks of sustainable development and the needs of the least developed countries while the Ministerial Decision is restricted to environment.

The agenda thus defined is narrower than the task originally outlined: to address trade and sustainable development and to make recommendations “on whether any modifications of the provisions of the multilateral trading system are required.” The CTE has addressed this essentially political task in a fairly technical manner. Few of the issues which have made up the agenda appears ready for action, so the most likely outcome of two years of work will be to recommend a renewed mandate for the CTE.

The CTE has struggled with the conundrum that faces any environmental body: the issues it addresses are cross-cutting, affecting virtually every part of the WTO, and numerous organizations outside the WTO. Environmental issues occur explicitly or implicitly on the agenda of numerous other WTO bodies. Moreover, the environmental agenda is one of the driving forces behind the difficult procedural decisions concerning expanded transparency and the role of nongovernmental organizations. A balance needs to be struck between “centralizing” all environmental issues in the CTE and keeping them in the respective bodies which could promote the integration of environmental concerns into all aspects of the organization’s work. In practice these are false alternatives: environmental issues require a focal point to ensure that they are advanced continuously and they can be handled successfully only if they become an integral part of the agenda of all parts of the organization. While the CTE does not have broad responsibility for environmental issues within the WTO, formally it is

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19 Conway, Tom. “ISO 14000 Standards: Challenges and Opportunities for China,” Paper prepared for the China Council for International Cooperation on Environment and Development Working Group on Trade and Environment (April 1996).

20 BISD 40, pp. 100-101.

## Ministerial Decision of 14 April 1994

Ministers .... decide .... That, within these terms of reference, and with the aim of making international trade and environmental policies mutually supportive, the Committee [on Trade and Environment] 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;
- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- 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;
- 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;
- the relationship between dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- 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;
- the issue of domestically prohibited goods...

That the Committee on Trade and Environment will consider 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 as an integral part of its work, within the above terms of reference. ...

## TNC Decision of 15 December 1993

The Trade Negotiations Committee ..... Decides to draw up a programme of work

- (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 in particular Principle 12 of the Rio Declaration<sup>21</sup>; 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.

bound by the fairly detailed agenda set out on the Marrakesh Decision on Trade and Environment, it nevertheless will be judged not only in terms of that agenda but in relation to the perceived need to assess the linkages between trade and environment in a systematic manner. In other words, the CTE has been given a limited agenda but will be judged by many outside the trade regime in relation to broad questions concerning the relationship between trade, the environment and sustainable development and the role of the WTO in this process.

The CTE is not a free agent, it is embedded in the WTO and is limited by its traditional approach to defining issues and seeking consensus, typically avoiding larger issues outside the negotiating rounds. The CTE is the successor to a GATT committee on trade and environment, created in 1972 but never convened until the early 1990s when it was constituted as a Group on Environmental Measures and International Trade (EMIT).<sup>22</sup> Surprisingly, the Marrakesh Decision does not refer explicitly to the EMIT Group despite the fact that the Uruguay Round texts quite frequently emphasize using GATT precedent for developing the WTO. The CTE agenda is a mix of EMIT issues, elements from the TNC decision and new aspects arising from negotiations between December 1993 and April 15, 1994. The objective difficulties of any body addressing environmental issues combined with the convoluted institutional history make for an agenda which is over-ambitious and too limited at the same time. It is over-ambitious for a period when the WTO is taking its first steps and deciding, tentatively indeed, the extent to which it is actually different from the GATT, too limited when viewed against the large, complex, and still growing agenda on trade and environment, let alone trade and sustainable development. Nevertheless there is a clear trend in the work of the CTE, away from broad issues of trade policy towards technical details, away from sustainable development towards environmental management, and away from matters requiring cooperative solutions towards those issues which might be handled by the WTO alone. Ultimately every negotiation must attend to the technical details of an issue but the CTE is not strictly speaking a negotiating body; it is rather the extension of an agenda-setting exercise launched by the TNC and further developed by the Marrakesh Decision. It is not desirable for the agenda to be set too narrowly or too technically at an early stage if the outcome is to match the full dimensions of the underlying issue.

The work of the CTE is regularly reported in a specialized publication of the WTO, reflecting sensitivity to the fact that this is an issue which attracts the attention of an audience different from that which normally follows trade policy.<sup>23</sup> It also indicates an effort to provide more transparency in this area of WTO activities than is currently possible in others.

The large number of Secretariat reports on trade and environment, some of them very extensive, constitutes an extraordinary analytic resource. While the reports necessarily reflect primarily the trade policy perspective, no comparable body of analysis exists elsewhere. It is to be hoped that they will be made publicly available via the WTO

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21 The Ministerial decision modified this text to read “environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12” Principle 12 of the Rio Declaration reads: “States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction to international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”

22 “Report by the Chairman of the Group on Environmental Measures and International Trade, presented to the Contracting Parties at their Forty-ninth session,” BISD 40, pp. 75-101.

23 World Trade Organization, Trade and Environment.

## Secretariat Documents Submitted to the Committee on Trade and Environment<sup>a</sup>

- WT/CTE/W/1: Environmental benefits of removing trade restrictions and distortions (16 February 1995).
- WT/CTE/W/2: Submission by Chile on relationship between dispute settlement in WTO and in multilateral environmental agreements, with special reference to Convention on the Law of the Sea which in certain parts emphasizes the provisions of the GATT (16 February 1995).
- WT/CTE/W/3: Report submitted by the Secretariat on its own responsibility to the Secretariat of the Commission on Sustainable Development for the meeting of the Third Session of the Commission on 11-28 April 1995 (10 March 1995).
- WT/CTE/W/4: Approaches to the relationship between the provisions of the multilateral trading system and trade measures pursuant to multilateral environmental agreements (10 March 1995).
- WT/CTE/W/5: 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 (23 March 1995).
- WT/CTE/W/6: A description of international agreements and instruments dealing with trade in domestically prohibited goods and other hazardous substances (31 March 1995).
- WT/CTE/W/7: Secretariat note on the results of the third session of the Commission on Sustainable Development (18 May 1995).
- WT/CTE/W/8: Environment and TRIPs (8 June 1995).
- WT/CTE/W/9: Environment and services (8 June 1995).
- WT/CTE/W/10: Negotiating history of the coverage of the Agreement on Technical Barriers to Trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics (29 August 1995).
- WT/CTE/W/11: Communication from the delegations of Nigeria and Senegal regarding the issue of domestically prohibited goods (14 September 1995).
- WT/CTE/W/12: Trade measures for environmental purposes taken pursuant to multilateral environmental agreements: recent developments (10 October 1995).
- WT/CTE/W/13: Draft rules of procedure for the meetings of the Committee on Trade and Environment (6 November 1995).
- WT/CTE/W/14: Domestically prohibited goods. Proposal by Nigeria (27 November 1995).
- WT/CTE/W/15: Trade measures for environmental purposes taken pursuant to multilateral environmental agreements: recent developments (1 December 1995).
- WT/CTE/W/16: Negotiating history of footnote 61 of the Agreement on Subsidies and Countervailing Measures (1 December 1995).
- WT/CTE/W/17: Summary of Activities of the Committee on Trade and Environment (1995), presented by the chairman of the committee (12 December 1995).
- WT/CTE/W/18: Convention on biological diversity: Recent developments (12 January 1996).

## Secretariat Documents Submitted to the Committee on Trade and Environment<sup>a</sup>

- WT/CTE/W/19: Trade measures for environmental purposes taken pursuant to multilateral environmental agreements: Recent developments. Seventh Meeting of the Parties to the Montreal Protocol (23 January 1996).
- WT/CTE/W/20: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs). Submission by New Zealand (15 February 1996).
- WT/CTE/W/21: Communication from Canada: Elements of a possible understanding to the TBT Agreement (Agreement on Technical Barriers and Trade)(21 February 1996).
- WT/CTE/W/22: Factors affecting the transfer of environmentally-sound technology (21 February 1996).
- WT/CTE/W/23: Eco-labelling programmes (19 March 1996).
- WT/CTE/W/24: Communication from Argentina on item 6 of the Committee's work programme: The environmental benefits of removing trade restrictions and distortions, including tariff escalation, subsidies, state trading, and excessively high tariffs (20 March 1996).
- WT/CTE/W/25: The effects 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 (22 March 1996).
- WT/CTE/W/26: The effects of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them (26 March 1996).
- WT/CTE/W/27: US proposal regarding further work on transparency of ecolabelling (25 March 1996).
- WT/CTE/W/28: 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 (19 April 1996).
- WT/CTE/W/29: Domestically prohibited goods: assessment of the product coverage in specific international instruments (14 May 1996).
- WT/CTE/W/30: Results of the Fourth Session of the Commission on Sustainable Development. Note by the Secretariat (22 May 1996).
- WT/CTE/W/31: The relationship between trade measures pursuant to MEAs and the WTO Agreement. Proposal by Japan (30 May 1996).
- WT/CTE/W/32: Domestically prohibited goods: Proposal by Nigeria (30 May 1996).
- WT/CTE/W/33: Results of the stocktaking exercise. Adopted at the 28-29 May 1996 Meeting (4 June 1996).

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a These documents are normally derestricted within six months of distribution. Unless otherwise indicated, reports are notes by the Secretariat.

World Wide Web site soon.<sup>24</sup> The TNC mandate and the Marrakesh decision reflect the tensions and complexities of the issues linking trade and sustainable development. Even the adoption of a work program for the first year was not a simple task.<sup>25</sup> The level of effort involved in the CTE is remarkable. Comparisons are difficult but there are indications that the CTE has involved more effort on the part of the Secretariat and the representatives of Member States than most other WTO bodies. However, only three items appear possible for action by the time of the Singapore Ministerial: transparency must be handled by the General Council (see above); MEAs and domestically prohibited goods (DPG) have become the focus of attention in the CTE.

The relationship between trade and environment is determined by several factors, among them the simple observation that both areas of policy require cooperative international action.<sup>26</sup> The significantly international character of both policy areas comes to the forefront in the relationship between the multilateral trade regime and multilateral environmental agreements, particularly those which directly affect trade. Developing an institutionalized, predictable, widely acceptable approach to this issue is in many ways the first item on the trade and environment agenda.<sup>27</sup> At present it does not appear that such an approach will emerge from the work of the CTE. On the one hand, there is no consensus among WTO members, that is among members of the CTE, concerning the urgency of the issue, the approach to take nor the details which need definition. On the other hand, it is manifestly impossible to develop an appropriate response to this issue without the active participation of the respective environmental regimes, a need which has thus far been delayed by the inability of the WTO to define its own position within international society.<sup>28</sup>

The issue of MEAs has attracted a fair amount of attention. In many respects it represents one of the easier items on the CTE agenda because there appears to be little in the current relationship between MEAs and the trade regime that could not be accommodated by means of appropriate interpretations and understandings within the framework of the current texts.

It is also proving difficult to isolate the issues concerning MEAs in the trade regime from the wider agenda of trade and sustainability: transparency and participation, the adequacy of the dispute resolution process from an environmental perspective, relations with other international organizations, the implementation of the WTO's own notification requirements and PPMs. All of these impinge upon the MEA debate so that quick resolution is unlikely.

The agenda item on DPG might lend itself to action because the GATT had addressed this issue extensively, albeit not in the EMIT. In 1991, this process resulted in a draft decision within the GATT which failed to obtain consensus approval among the Contracting Parties because one country, the United States, did not support it. The reasons advanced by the United States had to do mainly with issues of potential liability. Closer assessment of the draft decision in light of the subsequent debate about trade and environment should, however, reveal that it is the kind of action the WTO should avoid. The draft decision sought to establish a notification scheme to supplement existing schemes managed by the United

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24 [Http://www.unicc.org/wto](http://www.unicc.org/wto)

25 Hector Torres, speaking at the Conference on "Trade and the Environment: Challenges for 1996" organized by The Global Environment and Trade Study and the New York University Law School, New York, 19 January, 1996.

26 International Institute for Sustainable Development, *Principles for Trade and Sustainable Development*. Winnipeg: IISD, 1994.

27 See Konrad von Moltke, *International Environmental Management, Trade and Sustainable Development*. Winnipeg: IISD, 1996.

28 See below.



The narrowing of the CTE agenda from sustainable development to environment is unfortunate in several ways.

- It suggests strongly to developing countries that: environment and development are unrelated, contrary to all efforts to identify the linkages and incorporate them in the “Rio bargain.”
- It implies that global environmental problems are the responsibility of developed countries. It allows developed countries to treat environmental matters apart from their obligations in relation to development.
- It favors an approach that is increasingly detailed and technical and risks losing the ultimate goal, sustainable development, from sight.
- And it permits the WTO to continue to pursue solutions on its own to issues that require cooperative approaches.

Nations and several of its organs and specialized agencies. In principle such a scheme could be useful but, given the difficulties encountered with other notification obligations within the WTO and elsewhere, the lack of evidence for the effectiveness of prior notification where it is presently required, and the complexity of managing a proactive international notification scheme, it is highly unlikely that the WTO would actually contribute significantly to the alleviation of the undeniable problems which exist. Several developing countries have identified this as an issue which is important to them and there is some risk that they may embark on a path which produces a false bargain: DPG in exchange for concessions elsewhere. Possibly action on MEAs will prove beneficial to developing countries, contrary to their own expectations, but it remains unlikely that the WTO can contribute usefully to the matter of DPG's, an issue best left to other organizations with the WTO acting to ensure that whatever solutions emerge do not create unnecessary barriers to trade.

Many of the issues on the CTE agenda can be subsumed under the heading of PPMs. The trade regime is generally equipped to handle product-based measures; it may need some fine-tuning to accommodate environmental considerations but there is no indication that the existing framework is inadequate. PPMs pose additional challenges which it has tried to avoid with respect to the environment. Ultimately environmental PPMs will need to be addressed, leading to a broadly based Agreement on the Environment which is in fact, like TRIPs and the Subsidies Agreement, an agreement on PPMs designed to help decide which products are “like” in terms of the trade regime.

### **Committee on Trade and Development**

Linking development and environment is the central idea behind sustainable development. In practice this implies opening environmental debates to the development dimension and vice versa, and seeking ways to better integrate them. Consequently the work of the Committee on Trade and Development (CTD) is an essential part of any WTO response to the challenge of sustainable development. In practice, the CTD devoted most of its time to organizational and technical issues relating to the implementation of the Uruguay Round, for example, notification and technical cooperation activities. More substantive considerations were engaged primarily in connection with a review of the participation of developing country WTO Members in the multilateral trading system. Some countries called for an analysis of the difficulties that products of export interest to developing countries were facing in different markets. The number of proposals advanced led to the creation of a Working Group to review the various proposals made with regard to the participation of developing countries in the WTO.

The CTD reflects a widespread shift in opinion towards embracing liberalization and globalization as instruments of development and consequently concentrating on technical assistance and capacity building to enable developing countries to participate more fully in the world trade regime. One area of concern of the Committee is the review of the generalized system of preferences (GSP). Significant changes are anticipated in this area, as countries begin to move away from GSP. Perhaps the most dramatic change has been the announcement by the European Community that it would review its Lomé Agreement with African Caribbean and Pacific (ACP) countries entirely, taking nothing for granted, when the current agreement expires at the end of the century. Developing countries have been disturbed by moves to introduce conditions linked to environmental performance and labor standards to the granting of GSP, particularly since the definition of the standards to be applied tend to be unilateral rather than based on bilateral or multilateral negotiation.

The preamble to the WTO clearly identifies sustainable development as one of the purposes of the organization; yet the CTD continues to take a traditional view of development. Like the CTE, the CTD could be a forum in which important cross-cutting issues are considered. In practice, however, its approach has been technical and narrow, leaving aside broader issues such as the link between development and environmental management.

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Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed Net Food-Importing Countries which is of importance to numerous developing countries, was assigned to the Committee on Agriculture rather than to the CTD.

The simple fact of the matter is that developing countries have not been convinced that including the environment in the development agenda is truly in their interests and developed countries have not been willing to make significant concessions to facilitate this process. The political dynamics of environmental management are not unlike those of trade policy; even when it can be demonstrated that environmental measures are economically advantageous they are difficult or impossible to implement because those affected negatively by them are vociferous in their opposition while the beneficiaries are frequently dispersed and inarticulate.

There is an important political agenda of sustainability to be addressed by the WTO which should originate in the CTD, which could well be renamed a Committee on Trade and Sustainable Development (CTSD).

## **Management Bodies for the Plurilateral Agreements**

The so-called Plurilateral Agreements have separate management bodies because they are not fully integrated into the WTO structure. Countries can be Members of the WTO without adhering to the plurilateral agreements. In practice, the management bodies of the plurilateral agreements are the representatives of those WTO Members who are also members of a given agreement. Relevant decisions of the General Council, for example on procedures for the circulation and derestriction of documents are “transmitted to the bodies established under the Plurilateral Agreements for their consideration and appropriate action,” in reality a formality.

Of the four plurilateral agreements, on civil aircraft, government procurement, dairy products and bovine meat, only the one on government procurement has immediately obvious

environmental implications. However, one of the striking aspects of the agenda of environment and sustainable development is its pervasiveness. Since the other agreements cover products that can be environmentally sensitive they may also become the focus of environmental attention.

For the time being, most of the members of the Plurilateral Agreement on Government Procurement are OECD countries. On February 20, 1996, the OECD approved a Council Resolution on "Improving Environmental Performance of Government."<sup>29</sup> This includes a recommendation to OECD governments to "establish and implement policies for the procurement of environmentally sound products and services for use within governments." Given the volume of government procurement, estimated to be as much as 15 percent of the aggregate GDP of all countries, the impact of such policies could far outstrip the impact of other measures in terms of segmenting markets and establishing environmental criteria for goods and services. In some instances, government procurement could serve to significantly reinforce the impact of ecolabelling schemes. Certainly all the concerns relating to the discriminatory potential of ecolabelling will also arise as OECD governments move to implement this recommendation.

Developing countries are faced with a difficult choice: they can join the Agreement on Government Procurement, in which case they will be subject to its strictures; or they can remain outside, in which case they will forgo an opportunity to influence its development while members can reasonably derive legitimation for actions which are in conformity with the Agreement, even when these can be viewed by nonparties as discriminatory in nature.

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29 Draft OECD Council Resolution on Improving Environmental Performance of Government, reprinted in: *International Environmental Reporter* vol. 19 no. 5, pp. 197-198.



The Trade Policy Review Mechanism (TPRM) was first established on a trial basis by the GATT Contracting Parties in April 1989. It became a permanent feature of the World Trade Organization under the Agreement establishing the WTO. As a rule, countries are loathe to comment critically in public on the internal policies of other countries, every government knows that sooner or later there will be something to criticize in its own conduct and prefers not to have an internationally accredited forum which could validate criticisms. Nevertheless, such structures of international accountability are becoming more numerous as an alternative to more vigorous forms of international enforcement of international agreements. Examples exist in the OECD, the World Bank and the UN Commission for Sustainable Development.

Many international agreements now require parties to report, often regularly, on domestic measures taken in pursuance of jointly agreed international goals. Some provide for public availability of this information, some authorize the relevant secretariat to analyze the information which has become available, and some even welcome public debate on the underlying issues and the state of progress in achieving international goals. This is indeed an important aspect of many environmental agreements which utilize the response of interested nongovernmental parties, scientists, industry and environmental organizations, often through the filter of the media as an important tool in their implementation process.

There are similarities between such structures of accountability in international environmental regimes and the TPRM of the WTO. The WTO process includes a report by the Secretariat, a formal response by the government of the country, discussion in the Trade Policy Review Body (TPRB, the General Council sitting as a Review Body) and rapid publication of the reports and a summary record of the discussion. The ability to undertake such a process reflects the broad consensus among members of the WTO concerning the goals of trade liberalization, recognition of the difficulties many members are liable to confront in meeting their commitments and the absence of strong means of enforcing international trade agreements, particularly as they apply to broad matters of public policy rather than to specific trade disputes. In this respect there are striking similarities with the strengths and weaknesses of international environmental regimes.

The TPRM necessarily focuses on developments in trade policy, with a tendency to emphasize widespread moves towards liberalization and little analysis of the secondary effects of such changes on social and environmental factors. Nevertheless it represents an extraordinary commitment of international resources, in many ways greater than that in any other international regime, to one specific aspect of the structure of accountability and it is appropriate to expect that it cover all national policies which are trade-relevant, including those dealing with sustainability.

The overall impression of the reviews undertaken since entry into force of the WTO Agreement is that environmental factors have neither been excluded nor systematically included. It is difficult to determine why they play a relatively strong role in the Sri Lanka review, an unbalanced role in the European Union review and are hardly considered at all in the Czech or Slovak Republic reports. Presumably this is a reflection of the interaction between the WTO Secretariat and the trade officials of the respective countries. No clear pattern emerges from these reports with regard to their treatment of issues of sustainability. Clearly they will not become reports on sustainability, those should be addressed to the United Nations Commission on Sustainable Development (CSD) if they are prepared at all. They should, however, more systematically ask questions concerning policies adopted by countries to promote sustainability which could have impacts on international trade, and seek to help answer the related question, namely whether increased international trade is promoting

## WTO Trade Policy Reviews<sup>a</sup>

|                      |   |
|----------------------|---|
| Costa Rica:          | No discussion of environmental issues   |
| Cote d'Ivoire:       | The Secretariat report contains an unusual analysis of water prices, based on World Bank data   |
| Czech Republic:      | Minimal mention of environmental issues   |
| Dominican Republic:  | The report contains a generic statement on environmental issues but the implications of rapid shifts in agricultural exports for sustainability are not discussed   |
| European Union:      | The Secretariat report hardly mentions environmental issues; the EU statement discusses the CTE process rather than EU policies. In the discussion in the TPRB, the trade impact of EU environmental policies is raised by developing countries |
| Mauritius:           | The Secretariat report devotes a full page to environmental policy while the country statement only mentions the development of organic sugar production  |
| Morocco:             | Minimal mention of environmental issues   |
| The Slovak Republic: | Minimal mention of environmental issues Sri Lanka The Sri Lanka report integrates environmental concerns more systematically than any other TPRM report   |
| Thailand:            | The brief report from the Thai government outlines recent legislative developments in environmental affairs. The sustainable development consequences of dramatic expansion of exports from shrimp ponds are not discussed                      |
| Uganda:              | Minimal mention of environmental issues   |
| Venezuela:           | Environmental issues are not mentioned directly but several sections concerning commodity production and resource rents in relation to downstream production may be relevant to sustainable development   |

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a Since establishment of the WTO

sustainability within the countries in question. The TPRM mandate is wide enough to accommodate such questions. Experience in other organizations, and in the World Bank in particular, suggests that there will be benefit in a more systematic approach in the TPRM to linking trade and sustainability.

Changes in the dispute settlement procedure represented one of the early results of the Uruguay Round, with an agreement reached by 1988.<sup>30</sup> The precise character of the dispute resolution process remains unclear, presumably intentionally so, representing a mix of jurisprudential, arbitration and political models. The Uruguay Round strengthened the “jurisprudential” character of dispute resolution without, however, entirely eliminating elements of the other models. Important innovations concerned making explicit the ability of panels to hear experts, changes in the procedure for the establishment of panels and the adoption of panel reports (eliminating the ability of parties on one side of a dispute to block either the establishment of panels or the finalization of the procedure), and the creation of an Appellate Body.

The Appellate Body, composed of six persons who were named on 29 November 1995,<sup>31</sup> has an independent Secretariat attached directly to the Office of the Director-General. All other aspects of dispute settlement are fully integrated with the regular functions of the Secretariat.

The dispute settlement process was also used by the GATT to develop the interpretation of the Agreement. Panel reports first developed interpretations which subsequently were integrated into GATT law and practice. In this manner, the dispute on salmon and herring developed the doctrine of “least trade restrictive” in relation to conservation measures, and the tuna/dolphin case developed new positions on resources in international waters and on process and production methods.

Within the GATT, dispute settlement formalized and institutionalized a long tradition of international arbitration. It remained firmly under the control of the GATT Council, the highest political body of the regime. Panel reports were subject to consensus decision-making like any other action of the GATT, effectively giving reports the force of authoritative interpretations of the Agreement. In practice, panel reports might not be adopted, because the parties were able to settle the dispute once they knew how a GATT panel ruled, because they were unwilling to accept the political consequences of an interpretation which was tacitly recognized as correct or because some parties were not in agreement with the legal interpretation. However, even unadopted reports could exert a powerful influence on further development of GATT doctrine, as evidenced by the history of the tuna/dolphin dispute and its handling of the issue of process and production methods (PPMs).

The new dispute settlement procedure has changed this dynamic. The dispute settlement process can no longer rely on the authority of the Council to engender respect and compliance. It must do so almost exclusively by virtue of the legitimacy of its process and the flawlessness of the outcome. In this sense, the jurisprudential character has been reinforced. This places a heavy burden on panels and on the new WTO Appellate Body, particularly since its rulings are adopted virtually automatically since it requires a consensus to reject them.<sup>32</sup> There is little sign that the hazards of this situation have been fully appreciated.

The WTO dispute process gets mainly “bad” cases, that is those where parties have been unable to find any solution through other means. In many instances it gets cases of blatant

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30 World Trade Organization. *The WTO Dispute Settlement Procedures. A Collection of Legal Texts*. Geneva: WTO, 1995.

31 World Trade Organization. “WTO Announces Appointments to Appellate Body,” PRESS/32 (29 November 1995) (<http://www.unicc.org/wto/Welcome.html>).

32 “An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members.” DSU Article 17.

discrimination because the party concerned feels unable to generate the domestic political consensus required to change its practices. The problem of respect for panel reports will become more acute.

The dispute settlement process remains an important source of interpretation of WTO law.<sup>33</sup> After Marrakesh but before entry into force of the WTO, some disputes were settled under the old GATT procedure. Since entry into force, a number of disputes have been brought to the WTO, including new versions of some that were first considered under GATT procedures, in particular long-standing disputes on the EC banana regime and US implementation of clean air legislation as it applies to gasoline. Only one panel report was issued by August 1996, which was appealed to the Appellate Body which has in turn issued its report. At the same time, the Secretariat emphasizes that more disputes are being brought to the WTO and that developing countries in particular are more willing to bring disputes.<sup>34</sup> The Director-General has spoken of 50 disputes since the establishment of the WTO.<sup>35</sup> Most of these have not proceeded beyond the stage of consultations so that it is impossible to judge how meaningful this development is. Comparable data about experience under the GATT is not available.

A number of other issues are known to be contentious between member states and may give rise to formal proceedings in the foreseeable future. Significant new developments have occurred with regard to disputes dating to the period before Marrakesh.

## Current Disputes

The first disputes handled under the new procedure are being watched closely to determine if any discernible changes in approach or process have occurred. It so happens that the only dispute to reach the stage of a complete panel report concerned an environmental issue, the complaint of Venezuela against the impact of aspects of the implementation of the Clean Air Act in the United States on Venezuelan refineries. A number of other disputes with environmental implications are currently in various stages of consultation. The Venezuela case provides a vivid illustration of the state of the debate on trade and sustainable development within the WTO, in many ways clearer than the deliberations in the CTE or in other bodies where no decisions have yet been reached. It also provides a first indication of possible changes in the dispute settlement process. While the panel report is indistinguishable in approach and content from GATT reports, the Appellate Body has given an important indication of greater caution in interpretation.

### Venezuela/US Refineries

As with most trade disputes, the Venezuela/US Refineries dispute had a substantial history by the time it reached the panel stage. In implementing a requirement of the Clean Air Act Amendments of 1990, the United States Environmental Protection Agency had developed transitional rules effective until 1997 which required emissions of toxic air pollutants, volatile organic compounds and nitrogen oxides from gasoline in automobiles to respect certain standards derived from a 1990 baseline. Domestic refiners are provided with a procedure to establish that baseline importers (and domestic refiners beginning operations after 1990) are assigned a statutory baseline of the average U.S. gasoline quality in 1990. This was based on

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33 World Trade Organization, *Guide to GATT Law and Practice*. Analytical Index 2 vols. Geneva: WTO, 1995.

34 World Trade Organization, *FOCUS: WTO Newsletter*, December, 1995. See The Worldwide Organic Food Marketplace, <http://www.gks.com/market.html>.

35 Speech by Mr. Renato Ruggiero, Director-General of the World Trade Organization, to the APEC Trade Ministers in Christchurch, NZ, 15.07.96. [Http://www.unicc.org/wto/Whats-new/press52.htm](http://www.unicc.org/wto/Whats-new/press52.htm).



the assumption that verifiable data would not be available. Venezuela and Brazil charged that not providing an opportunity to establish their own baseline, discriminated against importers.

The Venezuelan oil company owns a large network of gas stations in the United States. Its ability to supply these stations represents an important commercial interest beyond the desire to secure wholesale markets for its gasoline. Venezuela promptly lodged a complaint against the new rules with GATT and the consultation process yielded an agreement that the United States Environmental Protection Agency (EPA) would change the regulation if Venezuela withdrew its complaint. When EPA moved to comply, the US Congress withheld funds for this work, effectively blocking the process. Venezuela then renewed its complaint to GATT and subsequently refiled it as a WTO complaint, in which it was joined by Brazil. The WTO panel submitted its report on January 2, 1996, finding against the United States.<sup>36</sup>

The facts of the case speak against the United States: by all accounts, the measures Brazil and Venezuela complained against are discriminatory and statements by US officials exist indicating that they were aware of this. This was also a case in which the trade barriers erected by the United States provided little environmental benefit, except perhaps to ease the political difficulties inherent in applying the law.

There are, however, disturbing similarities between the WTO panel report and the first GATT report in the Mexico/US tuna/dolphin dispute. These concern not the result of the panel but the process by which it was reached and some of the arguments advanced. The tuna/dolphin panel report was never adopted because under the GATT dispute settlement procedure, a single Contracting Party, including the one complained against, could block adoption of any panel report. In the end, the United States and Mexico both agreed not to finalize the procedure but the outcome may well have been different under the new procedures which would permit Mexico to press its case unilaterally. No comparable safeguard exists under the new WTO dispute settlement procedure. Every court must be concerned about the enforcement of its decisions. In many countries, legal tradition emphasizes the legitimacy of procedure, public accountability and cautious interpretation of the law as essential elements to ensure respect for decisions of courts which generally have only blunt instruments to enforce respect: fines or imprisonment. While WTO dispute resolution is not strictly speaking a judicial proceeding, such considerations should still be paramount in a process which is central to the future of the trade regime.

The WTO Venezuela Panel addressed technical issues of environmental policy. It was composed of three trade experts with no discernible environmental expertise. The new dispute settlement procedure permits the use of experts to ensure that technical issues are adequately addressed. There is no evidence that the use of experts was considered in this instance, by the panel or by any of the parties. Nevertheless the panel states categorically that alternative policies were available to the United States. Since the record of the panel proceeding is not publicly available it is not possible to determine the basis on which such a statement was made, irrespective of whether it is accurate or not.

To be credible, panelists must be either independent or expert. In practice they are expert in trade policy and tend to share the perspective of those active in the trade regime. They are typically employed by a member government and a mix of countries is generally sought on each panel to ensure that potential sympathies are appropriately balanced (the members of the Appellate Body are not current government officials).

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36 World Trade Organization, "United States — Standards for Reformulated and Conventional Gasoline," (WT/DS2, 29 January 1996). <http://www.gets.org/gets>. See Steve Chamovitz, "The WTO Panel Decision on U.S. Clean Air Act Regulations," *International Environment Reporter: Current Reports*, vol. 19, no. 5 (March 6, 1996).

The Venezuela Panel provides an illustration of the complications which may arise: one panel member was a government official from Finland, a country apparently uninvolved in the dispute. The European Community (EC) decided to intervene on the side of Venezuela and submitted a brief. Finland is a Member State of the EC and the panelist would normally participate directly or indirectly in the development of such an EC document. If he was faced with the need to consider a submission from a body he is a member of, precisely the kind of situation one would wish to avoid, irrespective of the personal integrity of the panelist.

If there are doubts about the competence of the panel with regard to environmental policy, it is doubly important that its legal reasoning be unimpeachable. Unfortunately the Venezuela panel report continues to reflect attitudes in the trade regime that are troubling from an environmental perspective. Article XX (b) of the GATT provides exceptions to other GATT obligations for “measures necessary to protect human, animal or plant life or health.” The panel continues a tradition of interpreting “necessity” in an increasingly restrictive manner. Completely unwarranted is a move by the panel to interpret Article XX (g) which provides an exception for “measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” The panel effectively replaces “relating to” by “directly connected to” which is in some ways equivalent to a necessity test. This innovation is the focus of the United States appeals brief. The excursion into Article XX (b) and XX (g) is all the more unfortunate in that it was not necessary: the chapeau of Article XX provides that general exceptions apply only if “measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination.” The core of the case against the United States is just that.

There is little doubt that the Venezuela Panel had to find against the United States. It also had to reach a determination whether domestic and imported gasoline are “like” products. In doing so, however, it entered territory which has long posed particular difficulties for GATT panels. The United States argues that its regulation treated imported gasoline similarly to gasoline for “similarly situated” domestic parties. The panel rejected this view because “any interpretation of Article XX (g) in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products” (emphasis added). This entirely original language without basis in the texts reopens the door on the critical issue of “process and production methods” which were at the center of broad environmental resistance to the tuna/dolphin panel. By substituting “like” with “objective basis of their likeness” the panel effectively takes the most limited view possible of what constitutes a “like” product, only now these opinions are liable to become accepted WTO interpretation since consideration and debate by the General Council will no longer be required. The GATT/WTO has repeatedly addressed trade relevant process and production methods, that is distinguished like products according to their mode of production, for example with regard to trade-related intellectual property rights or to subsidies. It would be a serious mistake to elevate the argument that products may not be distinguished by the environmental impact of their production to established WTO interpretation. It is hard to conceive of successful policies to promote sustainable development without distinguishing between otherwise “like” products so as to identify those which have been produced sustainably.

The panel report was appealed by the United States.<sup>37</sup> Unfortunately the US appeals brief focussed on the extraordinary interpretation of Article XX(g). The Appellate Body reaffirmed the result of the panel report but generally showed itself sympathetic to the US arguments on

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37 “Venezuela, Brazil Open Door to New Test of Gas Rules in Appeal,” *Inside U.S. Trade*, vol. 14 no. 12 (March 22, 1996), pp. 21-22.

Article XX. The result is both encouraging and unsatisfactory. It is encouraging because it may initiate a process of reinterpretation of the provisions of Article XX in a notably more forthcoming manner. It is unsatisfactory because it leaves untouched the questionable language of the report regarding PPMs, for the simple reason that none of the participants thought it worth raising the issue. It illustrates a further change in the dispute resolution procedure: since the Appellate Body can only rule on matters that are raised on appeal, countries must be presumed to have a responsibility to the WTO to raise all relevant issues; in this instance, the United States chose not to do so, either because it did not recognize the validity of the argument or for tactical reasons, not wishing to overload the appeal. A more eloquent argument for permitting amicus briefs in the WTO dispute procedure is hard to imagine.

Clearly any number of environmental organizations would have been in a position to draw the attention of the Appellate Body to the implications of continued interpretation of the WTO along the lines of the Venezuelan panel in a manner which would have been constructive and in no way threatening to the integrity of the process. Of course there is no guarantee that the Appellate Body would follow the argument of such a brief but at least the issues would be addressed openly and directly.

The Venezuela case also tested the limits to the ability of the dispute resolution procedure to balance the interests of the weaker party against the more powerful one, a matter of concern from the perspective of sustainable development. In this instance, the United States was protecting domestic interests at the expense of Venezuelan and Brazilian ones, exacting a penalty from US consumers in the form of higher gasoline prices and from Venezuela, a country with many problems from the perspective of sustainability, in the form of foregone revenue. Even after Venezuela has prevailed in all material respects it remains unclear whether it will actually reap the economic fruits of its victory, let alone whether this will contribute to more sustainable practices in the Venezuelan oil industry.

### **Other Current Disputes**

Several current disputes concern trade in commodities, primary economic goods taken directly from the natural environment. The commodities trade remains of central importance to the development process of many countries even though there is evidence, particularly from Asia, to suggest that in the current international economy the production of commodities is not a promising path to development. Commodities are traded in standardized form but the environments in which they are grown or mined can differ greatly. Consequently, environmental costs can also differ and the internalization of environmental costs will have different impacts on commodity producers in different parts of the world. This makes commodities an important category of trade from the perspective of sustainable development: distinctions between otherwise "like" commodities are necessary to reflect whether they are sustainably produced or not and governments will seek to protect their producers from the impact of cost internalization, creating much scope for conflict.

The Philippines have brought a complaint against Brazil which has imposed a countervailing duty of 121.5% on Philippine desiccated coconut to offset subsidies granted by the government. The Philippines stated that the payments represented development assistance financed through a levy collected from those farmers. The case will help to define the extent to which government action can create incentives for commodity producers, in this case farmers, to engage in desirable practices. Clearly such structures may be of significance in any effort to develop more sustainable practices in agriculture. A panel report is expected before the summer.

The EC banana regime has long been a contentious issue within the GATT/WTO. Indeed, bananas represented an important stumbling block in achieving agreement in the Uruguay Round. Several Latin American countries have twice won favorable panel reports from the GATT, neither of which was adopted by the Council. These contributed to a modification of the EC regime which has in turn attracted the opposition of countries not favored by the new rules (Ecuador, Guatemala and Honduras) and the United States on behalf of Chiquita Brands, the largest international marketer of bananas. A further panel, now under WTO rules, has been established. To judge by the current distribution of the sizable rents<sup>38</sup> associated with the banana commodity chain, internationally traded bananas are an OECD product which happens to grow in the tropics. The new EC regulations effectively increased the price of bananas to EC consumers by as much as \$300 million.<sup>39</sup> The most recent dispute is fundamentally about the relative ability of certain OECD countries and corporations to capture these additional rents in the marketing of bananas in Europe. It has no direct environmental component. Nevertheless it has indirect environmental significance and directly affects the development prospects of banana producing countries. The structure of transport and marketing will in large measure determine if it is possible to ensure application of the polluter pays principle in the production of commodities such as bananas.

A long-standing dispute pits the United States against an EC ban on the import of meat milk and milk products from cows treated with various hormones. At stake is the balance between scientific evidence and the political assessment of its significance. The issue of bovine growth hormone has been considered several times by the Alimentarius Commission which has not come to a definitive conclusion.<sup>40</sup> The United States continues to insist that milk from cows treated with BGH is safe whereas the EC, defending the structure of its milk market and responding to strong consumer concern, takes the view that the evidence is inconclusive. The recent experience with “mad cow disease” is likely to exacerbate this dispute since European consumer confidence in scientific statements concerning food safety have been further eroded. As is frequently the case, the BGH dispute also reflects differing commercial interests in the EC and the United States. The European milk market is tightly regulated: farmers require licenses which specify how much they may produce and other participants in the milk commodity chain have learned to derive benefits from these controls. Consequently no participants in the chain, least of all the governments which have struggled for years to impose limitations on milk production, have any incentive to increase milk output per unit. In the US market, increased milk production drives down costs per unit creating opportunities for some. If the BGH dispute goes to a panel it will almost certainly be appealed by the party which loses and will establish critical interpretations concerning the use of science in the formulation of public policy, a matter of great concern to environmental management.

## Past Disputes

In many ways, the 1991 panel report in the long-standing dispute between the United States and other countries over tuna fisheries and the protection of dolphins in them represents the origin of active consideration of the trade and environment agenda in the GATT/WTO.<sup>41</sup> The dispute raised several issues which continue to be important in this debate and some of its interpretations of the GATT continue to be disputed by those concerned primarily with environmental management. Among the issues raised by the dispute and the panel report are:

38 The term “rent” is here used in its traditional meaning as the difference between the market price and the cost of supply of a commodity.

39 For an eloquent but partisan discussion of the EU banana regime, see: Brent Borrell, *Beyond EU Bananarama 1993: The Story Gets Worse*. Canberra: Centre for International Economics, 1996 (with three preceding publications).

40 See below

41 BISD 37 S/200.

- The use of national measures to protect the environment outside the jurisdiction of a country, including the environment outside the jurisdiction of any country;
- The extent to which a country is obligated to seek the development of international standards before it adopts unilateral measures based on its own standards;
- Interpretation of Article XX of the GATT which provides for certain exceptions to its general obligations;
- The use of process and production methods (PPMs) to distinguish between otherwise like products in international trade;
- Linkages between legitimate environmental concerns and traditional forces of trade protectionism.

A subsequent panel report in another phase of the same dispute attenuated the original panel's statements about national measures to protect the environment outside national jurisdictions.<sup>42</sup> The first report of the new WTO Appellate Body presumably opens the way for reconsideration of some aspects of the interpretation of Article XX.<sup>43</sup> Issues relating to the use of PPMs to distinguish otherwise like products remain unresolved.

A critical factor leading to the dispute, or at least contributing to its longevity and acerbity was the absence of agreed international standards for the protection of dolphins in tuna fisheries and the fact that the United States had not exhausted all reasonable avenues for the development of such standards before adopting unilateral trade measures. Over the past two years, progress has been made towards the development of such standards, based on an agreement between the governments of the most important countries engaged in the tuna fishery of the Eastern Tropical Pacific.<sup>44</sup> Several major US environmental organizations contributed to making this agreement possible and are supporting its ratification despite continuing opposition from some of the most vocal organizations active on this issue.<sup>45</sup> Such an agreement serves to illustrate the axiom that strong environmental regimes are the best guarantee for avoiding environmentally related trade disputes.

During the period following conclusion of the Uruguay Round, while the results were being submitted to domestic review for ratification procedures, the GATT was called upon to consider a dispute between the EC and the United States over environmental controls on automobiles. The details of the so-called CAFE standards and "gas guzzler tax" are highly technical but they resulted in a situation where two German manufacturers of luxury automobiles paid virtually all the special taxes and penalties collected from their market segment. The US legislative record again indicated protectionist intent so most observers were surprised when the GATT panel issued a report which only found partially against the United States and required no remedial action. It was widely surmised that the panel reflected political considerations, not wanting to create problems for Congressional review of the Uruguay

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42 General Agreement on Tariffs and Trade, "United States — Restrictions on Imports of Tuna. Report of the Panel." (DS29/R, June 1994).

43 World Trade Organization. "United States — Standards for Reformulated and Conventional Gasoline; Appellate Body Report and Panel Report: Action by the Dispute Settlement Body," (WT/DS2/9, 20 May 1996).

44 Declaration of Panama, US Senate S1420.

45 Sierra Club, Letter of November 7, 1995 to President Clinton: "The Sierra Club strongly urges you to withdraw your support of legislation that would enact the Declaration of Panama, an unworkable document that will result in increasing dolphin mortality and consumer fraud."

Round. This illustrates the ambiguous nature of the dispute resolution process which is part jurisprudential, part arbitrational and part political. Indeed, certain aspects of the subsequent Venezuela panel report can be interpreted as seeking to limit the scope of the interpretations created by the CAFE standards case.

## Potential Disputes

For some time, European measures to assist the conservation of certain species of wild animals by banning the use of leg-hold traps and limiting imports of their pelts and related goods has been controversial between the European Union and some of its trading partners. An EC Regulation bans the use of leg-hold traps in the EC from 1995 on and prohibits the importation of pelts of thirteen fur-bearing species listed in an Annex and products from them listed in another Annex.<sup>46</sup>

The prohibition on imports, the timing of its introduction and the interpretation of the term “humane trapping standards” have been controversial from the outset. After an attempt to set humane trapping standards in the ISO failed, the European Commission set up a working group with Canadian, Russian and US government officials to draft such standards. The EC Regulation is also controversial because some believe it has a differential effect on suppliers of pelts.

To help avoid a difficult WTO dispute, the EC Commission has sought to delay implementation of the Regulation, although its authority to do so is very doubtful. The Netherlands recently acted to meet its legal obligation to implement the Regulation, making a dispute which will once again revolve around process and production methods very likely. This dispute once again raises the issue of “like” products and PPMs, and without adequate guidance a WTO panel is likely to further develop a doctrine which is poorly supported by the texts and represents a significant risk for the organization.

Another issue that may emerge at WTO level soon concerns the use of turtle protection devices in shrimp fisheries. For some time, US shrimp fishermen have been required to utilize such devices. Existing US legislation already creates a process by which this requirement is to be extended to shrimp fisheries exporting to the United States. Pressure from both fishermen and conservation interests in the United States is growing to enforce these provisions rigorously.

Dispute resolution has always been a vital function of the trade regime. Within the GATT it served the additional purpose of advancing authoritative interpretation, an activity that was particularly important in a structure which otherwise experienced great difficulty in developing incrementally. In many ways, the dispute resolution process provides continuing, formal insight into the views and attitudes of those most directly responsible for developing and upholding the trade regime. Hardly anything could have a more detrimental impact than a process which did not attract the widest possible respect and support, not only in the trade community but also in other affected policy areas.

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46 See Nigel Haigh, *Man (R) of Environmental Policy: The EC and Britain*. Harlow: Longman (loose-leaf).

The Uruguay Round Agreement mentions international bodies which are engaged in standard-setting and whose standards are generally to be recognized as international benchmarks, in particular the International Organization for Standardization (ISO, commonly known as the International Standards Organization) and the Codex Alimentarius Commission. National standards based on the standards of these organizations benefit from a presumption of being appropriate. It does not mention other bodies which set standards such as the World Health Organization, presumably because their focus is not on product standards. In this manner the WTO seeks to solve the conundrum represented by the fact that it tends to prefer international standards where possible but does not and cannot set standards itself.

These standard-setting organizations play a key role in the issue of process and production methods (PPMs). Whenever PPMs have been defined by international consensus, the WTO can utilize them as a basis for accepting (or rejecting) specific national measures based on PPMs. There are clear indications, however, that relatively apolitical organizations, such as ISO or the Alimentarius Commission, can only identify the areas of consensus. Difficulties arise when standards are not consensual or drafted in a manner that does not address all of the potentially contentious issues. In these instances, the work of the standards organizations will not ultimately protect the WTO from disputes, and these are liable to be particularly contentious since the WTO dispute often represents but another phase of an otherwise unresolved dispute. For this reason, and to deal with PPMs that are not directly product-related, the WTO will need to move towards an Agreement on Trade and Environment.

## International Organization for Standardization (ISO)

ISO is a virtual organization. Its full members are national standard-setting bodies, in many instances so-called “voluntary” organizations, insofar as they develop standards primarily at the request of the affected parties, mostly enterprises or industry associations, and the standards are developed in close collaboration with these parties. It also has separate membership categories for organizations from countries that do not have a national standard setting body, countries with a small economy and “liaison members,” international organizations with a stake or experience in an area, such as UNEP or the Worldwide Fund for Nature (WWF). ISO is not, technically speaking, an international organization established by treaty or other instrument negotiated, signed and ratified by agencies of government. It is in fact a “nongovernmental organization.”

The work of ISO is carried out through Technical Committees (TC) which in turn establish subcommittees (SC) and working groups (WG). ISO has recently established a Technical Committee on Environmental Management (TC 207), which met for the first time in 1993.<sup>47</sup> The ISO Secretariat takes the practice of delegating and decentralizing actual standard-setting to extremes. TC 207 and its subcommittees and working groups are chaired by representatives of national standard setting organizations, in many instances by executives of large firms and transnational corporations; the chair is responsible for the work program of the respective body. The ISO Secretariat was not present at the 1995 meeting of TC 207, held in Oslo and attended by several hundred delegates (the delegation from the United States alone involved about 120 people); the Norwegian standard setting organizations effectively undertook that role.

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47 Tibor, Tom and Ira Feldman. *ISO 14000. A Guide to the New Environmental Management Standards*. Chicago: Irwin Professional Publishing, 1996.

The most important aspect of ISO's work in the environmental field has concerned the 14000 series of standards, a series of standards designed to provide guidance for private sector environmental management and its evaluation.

The most important aspect of ISO's work in the environmental field has concerned the 14000 series of standards, a series of standards designed to provide guidance for private sector environmental management and its evaluation.<sup>48</sup> The series includes issues such as defining the environmental management system, auditing this system, environmental performance evaluation, life cycle assessment

and environmental labelling. It is designed to provide guidance to managers and to facilitate communication between interested parties about the environmental performance of an enterprise, as defined by that enterprise itself. It is not designed to be an instrument of public information or public policy, although it clearly complements the latter in important ways. Elements of ISO 14000 are likely to be incorporated in the internal policies and practices of governments and multinational corporations and thus become a de facto standard for a significant portion of international trade. Many developing countries fear that it will impose additional requirements on their exports, effectively acting as a new barrier to trade.

The section of the ISO 14000 series most immediately relevant to the WTO concerns ecolabelling. A significant portion of this standard concerns self-declaration but it also seeks to establish procedures and criteria for multiple-criteria third party labelling. It does not cover labelling programs established by law but only those undertaken on a voluntary basis. Therefore it excludes the labels which are most liable to lead to trade disputes.

Discussions were also held within ISO on the issue of leg-hold traps, seeking to define "humane trapping standards." These collapsed in September 1995 and were replaced by an effort to develop international trap testing standards. This result is hardly surprising since ISO is institutionally incapable of addressing issues which are controversial among its members and subject to political attack by non-participants, in this instance animal welfare groups.

## **Codex Alimentarius Commission**

The Codex Alimentarius Commission is a subsidiary body of the FAO and WHO established to develop global standards for food additives, pesticides, chemicals, and contaminants, to protect health and the environment as well as to facilitate fair international trade. The SPS Agreement of the Uruguay Round refers to the Commission as a source of recognized international standards whose use establish a presumption of non-discrimination in trade. Although Codex lacks the authority to impose its standards, the organization fulfills an important function within the trade regime.

The WTO rules on SPS set forth a number of obligations of contracting parties with regard to SPS measures; a key provision is that SPS measures must have a scientific justification. Countries which adopt Codex standards will be judged by WTO to be in compliance with trade rules; countries which adopt standards more protective to health and the environment may be asked to prove that the tighter rules have a scientific basis. The debate now facing Codex is the need to clarify the criteria of what "sound" science is in the Codex decision-making process, in particular whether to include social science aspects in addition to traditional criteria based on the natural sciences. The 21st session of the Codex Alimentarius Commission, the Codex Committee on General Principles, and most recently the 42nd Session of the Codex Executive Committee discussed at length the role that science and other factors should play in Alimentarius decision-making procedures, yet reached no consensus. In

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48 *Ibid.*



addition, Alimentarius will need to address the issue of “equivalence.” Assuming that there is consensus concerning appropriate standards, not necessarily the case, each country still can determine how to apply these standards to achieve a desired level of protection. This can result in a wide range of national measures, all deriving from a single international standard and some determination will need to be made which represents equivalence and how to identify measures which go beyond legitimate variation to constitute a disguised restriction to trade.

In practice, there is a good deal of overlap between the Alimentarius Commission and the Uruguay Round negotiating group responsible for the SPS Agreement. In many countries, the individuals representing their governments in Alimentarius were also responsible for the technical aspects of the SPS negotiations. In contrast to WTO organs, however, the Alimentarius Commission is accessible to nongovernmental interests. Indeed, industry representation at Commission meetings, including participation in official delegations, has always been intense. The Commission has traditionally operated as a technical body without much scrutiny. Following the Uruguay Round, however, it will be subject to much more intensive analysis.

Beef Cattle Hormone Debate — the recent debate over the use of hormones to promote growth of beef cattle and to stimulate milk production in cows came before Codex last July and is effectively testing the scientific bases of Codex standard-setting. The EC’s position, assessing social as well as natural sciences, is that growth hormones pose unacceptable risks to the consumer. The US position, on the other hand, is that the risk is acceptable, carefully excluding the use of social sciences in its risk management process. These issues were put to a vote, for the third time in the history of the Commission. A Draft Maximum Residue Limit for 5 Growth Hormones was adopted by secret ballot 33 to 29 with 7 abstentions. This had been preceded by a roll call vote on adjournment of the debate which had been defeated 31 to 28 with 5 abstentions. A motion to adjourn the debate on Maximum Residue Limits for Bovine Somatotropins carried by 33 to 31 with 6 abstentions.<sup>49</sup> The roll calls show some strange shifts, including a UK vote for adjournment in the first instance and against in the second, indicating heavy lobbying throughout the process.<sup>50</sup> The resulting situation is close to absurd: the WTO, a political forum, continues to operate by consensus and to avoid divisive voting; it relies for some scientific advice on the Alimentarius Commission which decides by majority vote what constitutes “good science,” a question which should be amenable to objective determination and consensus decisions. Such a situation poses real risks to the credibility of the entire process.

The United States, based on the recent Codex vote, proposes to charge that the EC policy on growth hormones is a trade barrier, and will pursue the process in the WTO. The Commission of the European Community, in turn, threatens to pull out of Codex but is contradicted by some of its Member States. Recent events in the related but unconnected area of “mad cow disease” suggest that it is unlikely that the EC will accede to the US position on bovine growth hormone. Codex is also in the early stages of a process which should result in an international definition of “organic” food production, a matter which has already caused

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49 Codex Alimentarius Commission. Report of the Twenty-First Session. Rome, 3-8 July 1995. Rome: FAO and WHO, 1995, pp. 9-10.

50 Leonard, Rodney E. “Codex at the Crossroads: Conflict on Trade, Health,” *Nutrition Week* vol. 25 no. 26 (July 14, 1995), pp. 4-5.

some friction between the United States (where this is based in large measure on Californian standards<sup>51</sup>) and the European Union (which has recently adopted its definition of “organic”<sup>52</sup>).

In its relations with ISO and the Alimentarius Commission, the WTO appears to be delegating some complex issues to other organizations. In practice neither ISO nor Alimentarius are institutionally capable of developing solutions to highly contentious issues. In those instances, the trade regime will need to be prepared to address disputes and broader issues of policy as they arise.

## **United Nations Conference on Trade and Development (UNCTAD)**

The GATT and UNCTAD have long had a peculiar symbiotic relationship. Founded to articulate a vision of international economic policy, and of trade policy in particular, which would provide an alternative to GATT, UNCTAD has occasionally been a forum for strong criticism of the trade regime. At the same time, it has drawn off some of the pressure and may have indirectly contributed to shielding GATT from its most vehement critics. UNCTAD may yet come to serve a comparable role in the debate about sustainable development and trade.

UNCTAD IX took place in Johannesburg from April 27 to May 11, 1996. UNCTAD Conferences occur every four years. Their major business is the mandate for the UNCTAD work program for the following four years. Originally UNCTAD was conceived as a forum to articulate a trade policy and development agenda of the developing countries. In recent years, some countries including the United States had asserted that UNCTAD was no longer needed. The existence of UNCTAD was, however, no longer an issue at the time of the Conference. UNCTAD has long played a de facto complementary role to GATT, providing a forum for a range of issues which would have proven extremely divisive in the GATT context. Over the years, relations between GATT/WTO and UNCTAD have waxed and waned, but they now appear to be moving into a phase of more explicit complementarity.

The themes of the UNCTAD IX clearly were globalization and liberalization, both almost universally accepted as given at the present time. The question posed at the outset and continuously throughout concerned the role of UNCTAD in the face of the economic forces unleashed by globalization and liberalization. A good deal of attention was devoted to preparing developing countries for membership in the WTO. Increasingly UNCTAD seemed to be described as a junior partner of the WTO whose principal role was to help developing countries deal with the consequences of globalization and liberalization.

For many years, UNCTAD was concerned in a systematic manner with the problems of commodity production and trade. This aspect of its work has receded into the background. The new structure for UNCTAD provides for three Commissions: on Trade in Goods and Services, and Commodities; Investment, Technology and Related Financial Issues; Enterprise, Business Facilitation and Development. In this structure, commodities production and trade appear as an item behind a comma following trade in goods and services (the focus of the WTO).

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51 World Trade Organization, Trade Policy Review Body. “Overview of Developments in International Trade and the Trading System. Annual Report by the Director General,” <http://www.unctad.org/wto/Pressrel/ov11.html>.

52 Council Regulation No. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs.

From a sustainable development perspective, however, trade in commodities remains of critical importance. Some observers have begun to notice the strange fact that abundant natural resources and the production of commodities from these resources nowhere create the conditions for sustainability because the largest part of available rents are captured by people and institutions remote from production. On the other hand, the wealth of many industrialized countries remains dependent on the availability of inexpensive commodities, often cheap because they reflect neither social nor environmental costs of production. The dominant discourse concerning globalization and liberalization focuses on industrial production, technology, innovation and services as pathways to wealth; it tends to overlook the importance of material inputs into this process. During the preparatory process, the Trade Development Board, the body responsible for preparing a draft document for consideration by the Conference, went so far as to eliminate any linked reference to commodities and sustainability. After some hesitation, the Conference put this back in.

Many of the poorest countries remain heavily dependent on commodities exports. Extraction of commodities probably represents the human activity with the largest overall impact on the environment: since commodities are, by definition, taken directly from the natural environment, their production has inescapable environmental consequences. In the process of liberalization and globalization, the poor and the environment risk being left outside the economic system. They are at greatest risk because the temptation always exists to shift burdens of the process of globalization to external factors and because the poor and the environment are generally politically inarticulate. Much of current development policy suggests that these poorest countries can succeed in the international marketplace only if they turn to manufactures and services, a strategy that is bound to generate additional pressures on the resource base. There is, however, no prospect of sustainable development unless the commodities chains which link producers and consumers through numerous intermediaries generate adequate resources to provide for poverty alleviation and sound environmental practices in production. UNCTAD continues to have a vital role in this area. No other international organization devotes systematic attention to the problems of the sustainable development of commodity-dependent developing countries.

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In the end, the Conference embraced the concept of sustainable development as a central theme for the entire UNCTAD work program. The general goal was described as “promoting growth and sustainable development in a globalizing and liberalizing world economy and the work program was subsumed under the heading “The contribution of UNCTAD to sustainable development.” It remains to be seen whether UNCTAD can live up to this ambitious goal in the coming four years as it becomes evident that it can only be achieved with much more effective attention to the position of the poor and the role of the environment in development.

UNCTAD is sharply distinguished from the WTO in its approach to nongovernmental organizations. Its willingness to engage views from outside government was clearly expressed and represents an important factor in the overall debate about trade and sustainable development, particularly as long as the WTO proves largely incapable of addressing these issues.

Cooperation between the WTO and UNCTAD occurs in many ways. Both formal and informal contacts between the WTO Secretariat and UNCTAD are frequent and occur at all levels. The WTO and UNCTAD jointly operate the International Trade Centre in Geneva. UNCTAD has a much larger research capacity than the WTO although the latter can focus its resources on a smaller number of issues, such as trade and environment in the CTE over the past two years. Moreover UNCTAD represents a forum in which EU Member States can articulate their positions on trade policy more directly than in the WTO where they are largely represented by the Commission of the EC. All of these factors could contribute to a strong continuing relationship between the WTO and UNCTAD.

**N**ow that it is formally an international organization, the WTO has struggled to find its place in international society. Despite a clear mandate, not even the apparently simple matter of establishing guidelines for observer status for international intergovernmental organizations was resolved during the first year. Clearly the WTO wishes to establish close relations with some organizations while keeping others at a distance.

Defining the WTO's position in international society has proven much more difficult than expected. The initial approach has been to take GATT practice as the point of departure. However, GATT practice was actually quite limited. The central conundrum is that the WTO appears to be most interested in relationships with the Bretton Woods institutions and is hesitant about being associated with the United Nations and its organs. However, in terms of its own governance the WTO has more affinity with the UN system of "one country one vote" and decision by consensus, and its agenda clearly overlaps the agenda of a number of major UN organizations at least as much as that of the Bretton Woods institutions, UNCTAD, UNDP, and UNEP in particular. Moreover it is unclear whether the Bretton Woods institutions share the same vision of the WTO as part of a special grouping of international organizations responsible for "global economic policy-making."

In addition to the difficulty in relation to international organizations, the WTO appears to be nonplused by the phenomenon of nongovernmental organizations and their pressure to obtain greater rights of participation in WTO proceedings.

## Relations with Intergovernmental Organizations

The importance of establishing working relations with other intergovernmental organizations is obvious and the mandate in the WTO Agreement is clear: Article V.1 instructs the General Council to "make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO." Article V.1 was further amplified by a Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic policy-making which defines the area covered as "structural, macroeconomic, trade, financial and development aspects of economic Policy-making." It clearly recognizes "that difficulties with origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone." This definition could readily have included many aspects of sustainable development but the view of environmental management as structural economic policy-making does not appear to have been part of the approach outlined in Marrakesh. A further Declaration addressed "the Relationship of the World Trade Organization with the International Monetary Fund," essentially calling for no change from the practices of the GATT. No comparable Declaration covers other international organizations, in particular the World Bank and UNDP.<sup>53</sup>

The agenda of sustainability certainly poses particular problems because it is structurally incongruent with the trade agenda, a phenomenon that already originates at the national level. In most countries, the national government has exclusive authority over foreign affairs, including trade policy; environmental management is typically a responsibility shared with subnational jurisdictions, even in highly centralized states. This is repeated at the international level.<sup>54</sup> Moreover international society is strikingly short of mechanisms for coordination

53 See also World Trade Organization, Trade Policy Review Body. "Overview of Developments in International Trade and the Trading System. Annual Report by the Director General," <http://www.unicc.org/wto/Pressrel/ov11.html>.

54 von Moltke, Konrad. "Why UNEP Matters," *Green Globe Yearbook 1996*. Oxford: Oxford University Press, 1996 and von Moltke, Konrad. *International Environmental Management, Trade and Sustainable Development*. Winnipeg: IISD, 1996.

between international organizations. Cooperation between organizations is often invoked and seldom successfully practiced. There is a distinctive difference in attitude towards varying organizations: the WTO would like strong ties to the Bretton Woods institutions; it recognizes the need to deal with the United Nations; it would like to keep most specialized agencies at a distance; the relationship with UNEP remains a puzzle; and it is unsure what to do about the numerous small secretariats which have evolved from multilateral environmental agreements.

Negotiations with the Bretton Woods institutions have continued for many months. It appears that the International Monetary Fund will define the nature of these relationships, with the World Bank essentially accepting whatever is decided between IMF and WTO. The IMF appears to be even more reluctant to share access to meetings and documents than the WTO, and it has a special Ministerial decision to back up its reticence.

The United Nations still provides an essential frame of reference for global intergovernmental organizations. The administrative rules of the WTO need to take UN practices into account. Normally organizations such as the WTO sign an agreement with the United Nations, outlining the respective roles and the form of participation in the UN System. No such agreement appears to have been signed yet between the WTO and the UN. The Director General of the WTO has, however, attended sessions of the ACC, the highest coordinating body of the UN System. The WTO Secretariat has also attended all sessions of the Commission on Sustainable Development, reporting results to the CTE.<sup>55</sup>

The specialized agencies and other organs of the United Nations system pose a dilemma for the WTO. It clearly does not want to be seen as a part of that system. Yet its governance and the political nature of its mandate dictate a certain proximity. Much of the broadly international work relating to sustainability is carried out in practice through the specialized agencies. Some of these agencies are of greater concern to the WTO than others, for example UNCTAD, FAO (through the Alimentarius Commission and in relation to agricultural trade). Making such differentiations is proving difficult. Particularly striking from the perspective of sustainability is the lack of significant contact between the WTO and UNEP. UNEP is admitted as an observer to the Committee on Trade and Environment, and the WTO presumably hopes that UNEP will be able to speak for the secretariats of multilateral environmental agreements but no visible consultation has occurred to facilitate resolution of joint problems, despite the obvious overlap between the mandate of UNEP and the agenda of the CTE. Indeed, items on the CTE agenda requiring specific environmental input will presumably remain unresolved until a forum can be found to develop working relations between the WTO and UNEP.

The past 20 years has witnessed the emergence of a new type of the single purpose secretariat.<sup>56</sup> In a very real sense, the original GATT Secretariat was just such an organization, responsible for the implementation of a single agreement, without formal organizational structure yet with a measure of independence. The multiplication of agreements associated with the GATT ultimately led to the need for a formal organization. No area has been as fertile for the development of international Secretariats as the environment, with hundreds, if not thousands, of small or very small Secretariats responsible for some aspect of international environmental management, ranging from a trans-border waste management district to the Secretariat of the Basel Convention or from the protection of flyways of specific birds to the Framework

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55 WT/CTE/W/3; WT/CTE/W/7

56 von Moltke, Konrad *et al.*, *Background Paper for the Meeting on International Secretariats*. Pocantico, June 1995.

Convention on Climate Change. Some of these use trade measures to support their goals, are in turn affected by the manner in which trade rules are interpreted, in particular those concerning PPMs, or impact the production and distribution chain of goods in international trade in ways that may lead to trade disputes.

The WTO does not need to establish formal relations with most of these environmental secretariats but there are some which pose a particular challenge, in particular those concerned with multilateral environmental agreements which contain trade provisions or which impact trade. No formal proposals have been advanced in this regard, although an informal EU proposal dealing with MEAs contained provisions for direct and continuous relationships between the WTO Secretariat and the Secretariat of the MEAs. Presumably this represents an appropriate and pragmatic level of action for these bodies. The alternative, formalizing relations with UNEP which provides management services for most of the MEAs, can provide a solution only if UNEP's role is redefined to enable it to participate in substantive aspects of the conventions and to speak for the respective Conferences of the Parties which are the decision-making bodies within the MEAs, an option that does not appear very likely to be realized.<sup>57</sup>

Defining the appropriate relationship with these secretariats illustrates the difficult choices currently facing the WTO. On the one hand it is attempting to establish itself as a new international organization, a task that requires continued focus on its central mission. On the other hand it is incapable of addressing many of the issues currently emerging on the trade agenda without forming strong relationships with other organizations big and small.

## Relations with Nongovernmental Organizations

The WTO largely assumes a world in which states are the actors on the international stage and governments control the international actions of their citizens. The WTO draws on the traditions of the GATT, which was tied more closely to the apron strings of governments than any other international institution on account of its strange origins. In domestic society governments are typically rule makers and adjudicators; on the international stage they have been the primary actors, a heady but fraught situation. Governments, at least collectively, have been hesitant to give up this exceptional position.

In reality, important nongovernmental actors exist on the international stage. From an environmental perspective, the most important are industry and commerce, the international scientific community, environmental organizations and the media. Each of these groups has developed in response to its own set of incentives but each of them has by now learned to play the intergovernmental structure with some degree of virtuosity. They exploit opportunities created by the incoherent structure of intergovernmental cooperation or create new forms of international cooperation which increasingly obscure the traditional distinctions between public and private or domestic and international. The result is an independent sector capable of pursuing independent goals despite the continued existence of formal government control over international activities of every kind.

This independent sector is largely unstructured. Many thousands of nongovernmental organizations are engaged at the international level.<sup>58</sup> An organization such as the WTO cannot be expected to know all relevant organizations nor to seek them out in a systematic

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57 von Moltke, Konrad. "Why UNEP Matters." *Green Globe Yearbook*. Oxford: Oxford University Press, 1996.

58 A good measure is the *Encyclopedia of Associations: International Organizations*. Detroit, MI: Gale Research (annual) which does not include national organizations with international interests.

manner. The only possible response is to increase transparency and permit participation based on clearly stated criteria. It is then up to the nongovernmental organizations to exercise their rights and to make themselves known as appropriate.

The WTO has barely acknowledged these changes. Until recently, the international trading system had been of concern primarily to commerce and industry which adjusted pragmatically to the artificial constraints of the rules developed within GATT, for example that trade disputes were disputes between countries. The environmental agenda has become an instrument of change in the GATT/WTO system because it responds to different incentives. It has raised the problems of transparency and participation in the WTO, as it did within the UN system, the World Bank and in bilateral relations between countries, which are in fact issues which transcend the environmental agenda and stand at the center of important changes in contemporary international society. It is unlikely that the WTO will long be able to resist the pressure exerted by these changes. Over the years, the GATT has also demonstrated a high degree of pragmatism so that if evidence accumulates that it cannot achieve its goals without opening further to public scrutiny and participation of particular interests the WTO is likely to adjust as necessary. One sign of this pragmatism is to be found in the Agreement on Preshipment Inspection. Review procedures need to take place promptly when any disagreement occurs since perishable or otherwise time-dependent goods may be involved. The Agreement provides for independent review procedures “administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement.”<sup>59</sup> A subsequent General Council Decision designated two nongovernmental organizations, the International Federation of Inspection Agencies and the International Chamber of Commerce to operate the system.<sup>60</sup> Other international organizations have also responded pragmatically to the increasing importance of the nongovernmental sector. UN rules in this regard have been adjusted from time to time and special arrangements have traditionally been made for meetings with a strong environmental content, from the 1972 Stockholm Conference to UNCED, the Conferences of Parties of MEAs and the CSD. The World Bank struggled with this issue but has reached a working accommodation which has contributed to improving its performance and strengthening its position. The Global Environment Facility (GEF) subsequently took this process a good deal further. Thus precedents exist for a range of approaches reflecting a wide diversity of institutional circumstances. The GATT, however, has remained largely insulated from these developments, largely on account of its strange institutional character. More can be expected now that it has been transformed into the WTO.

Article V.2 empowers the General Council to “make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO”. At its July 1996 meeting, the General Council agreed, space permitting, to allow nongovernmental organizations approved by the General Council to attend the plenary sessions of the Ministerial Conference. This is an indication that the WTO will take pragmatic steps to address some of the remaining issues concerning transparency and participation.<sup>61</sup>

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59 Agreement on Preshipment Inspection. In: World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Geneva: WTO, 1995, pp. 230-240.

60 World Trade Organization. “Operation of the Independent Entity Established under Article 4 of the Agreement on Preshipment Inspection. Decision of 13 December 1995,” (WT/L/125/Rev. 1, 9 January 1996).

61 *Inside US Trade*, July 19, 1996, p. 8.



The successful conclusion of the Uruguay Round and the launching of the WTO have come to symbolize a new era in international relations. The trading system has finally begun to deal with a number of issues which were previously taboo, such as agricultural subsidies. Progress has been made on dealing with services and intellectual property rights and a new system for resolving disputes has been put in place. Most important of all, the temporary, Northern dominated GATT, has been replaced by a soon to be universal trade organization which consolidates the results of Uruguay and previous rounds in the text and under one roof. But the accolades for the WTO may well be premature.

A period of unrivaled wealth in much of the world is being accompanied by rising levels of insecurity even in affluent societies and growing inequality between those who succeed and those who do not. Continuing support for liberalization and globalization depends vitally on the ability of government at all levels to ensure that the benefits are widely distributed, and that the legitimacy of the trade regime is widely accepted.

They must also persuade an increasingly skeptical public that liberalization can contribute to environmental improvement. The WTO has failed to recognize the central message of sustainable development — that the world's economy and its environment are joined at the hip like Siamese twins. Progress in one area depends upon progress in the other. Trade liberalization without adequate environmental safeguards will lead to environmental deterioration, often on a massive scale. And trade liberalization and the increased revenues which it brings is an essential condition for the achievement of sustainable development.

Will the WTO be able to respond to these essentially political challenges? The first two years have not been encouraging. The dominant theme has been continuity from the GATT to the WTO. A culture of closed decision-making has persisted, inefficient internal structures have carried over without reflection, and the dispute settlement process still resembles the rules committee of a club, (with the promising exception of the first opinion from the Appellate Body). The Committee on Development has achieved nothing notable and the Committee on Trade and Environment may continue a record of futility which now dates back 24 years to the first creation of the abortive environment committee of the GATT. The Councils on Intellectual Property Rights and Trade in Services have spent most of their two years on mundane housekeeping tasks.

## Reform of the WTO

It is difficult to see how the new organization can meet these challenges while expanding its membership without some major reforms in its structure. At the moment, all of the WTO bodies are essentially committees of the whole. This has the effect of moving many of the most important decisions into the corridors or informal sessions, thereby limiting transparency. It also leads to a tortuous decision-making process with the same delegates from the same countries discussing the same issue at several different levels within the organization. Surely there must be a move to limit membership of the Committees and Councils.

Sustainability must be built into the mandates of the Councils and Committees of the WTO. The Committee on Trade and Environment could play a key role in defining the relationship between the trading system and the environment if it begins to treat the issue as a vital part of the integrity of the trading system and not just as an annoyance imposed from the outside.

The TRIPS regime is critical to the shift to new, more eco-efficient technologies. Trade in services, from the more narrowly defined environmental service industries, to consulting services, finance and banking, will be critical to the achievement of sustainable development. The reform of the notification procedures under the TBT agreement will be important to help

insure against protectionist capture of the environmental agenda. TBT is also at the centre of the discussion about ecolabeling.

The key to ensuring the support of many developing countries for the sustainability agenda in the WTO is a renewal of some elements of the Rio Bargain. This renewal will need to be built on guarantees of increased market access and further progress on the reduction of market distorting subsidies in the North. The Committee on Trade and Development could take on some of these responsibilities within the WTO structure if it is given a new mandate and renamed the Committee on Trade and Sustainable Development.

Further progress must also be made on reform of the dispute resolution mechanism. The US/Venezuela Panel Report demonstrated the same kinds of eco blindness displayed by panels under the old system. But the Appellate Panel decision gives some cause for hope that the system can become more even handed. It seems inevitable that further difficult environmental disputes will soon reach the panel process. Controversial panel reports are less likely if future panels take advantage of the new rules which allow them to hear expert environmental advice. Efforts should also be made to ensure that the panel reports are released as soon as possible and not restricted to everyone but the cognoscenti and readers of insiders' newsletters as they have been in the past. A somewhat bolder step, which would do more to reinforce the legitimacy of panel reports, would be to permit the filing of "amicus" briefs by concerned parties from civil society.

## **An Agreement on Trade and Environment: Addressing PPMs**

It is extraordinary, and disturbing, that the most serious and persistent conflict between environmental management and the trade regime rests on a manifest misinterpretation of General Agreement on Tariffs and Trade by the very institutions that are responsible for its implementation. The finding of the first tuna-dolphin panel on the use of process and production methods was false. Through the efforts of those most concerned with environmental management, aided and abetted by the restrictive GATT rules concerning the adoption of panel reports, these findings were never formally adopted by the GATT. They have nevertheless continued to inform opinion in the trade regime, leading to the extraordinary formulation in the Venezuela report which speaks of "the objective basis of [the] likeness" of products. The new dispute settlement procedure will allow this formulation to enter WTO lore.

The definition of "like" products is crucial in the implementation of the two central principles of the trade regime, MFN and national treatment. The tense response in the trade community to new environmental distinctions imposed on otherwise like products is comprehensible. Determining the meaning of the modest word "like" has always been a difficult matter, increasingly so in an economy dominated by a spirit of change and innovation which can lead to marginal and even spurious changes with significant economic consequences. The current interpretation with regard to process and production methods is untenable: a trade regime which actually promotes distinctions between products which are not only "like" but can even be "identical" when this involves protected intellectual property rights and brand names or outlawed subsidies yet claims distinctions reflecting material impacts on the environment in the course of processing and production are unacceptable. Some of the most important brand names provide economic advantages to products which are otherwise indistinguishable from unprotected products. Indeed, branded and unbranded products — for example pharmaceuticals — can be produced by the same enterprise in the same factory on the same machines and yet be clearly distinguished within the trade regime.

The ability to distinguish between sustainably and unsustainably produced goods in international trade is vital to ensuring that trade liberalization does not undermine essential environmental protection but contributes to sustainable development. This is particularly true when no other measures, such as patents or brand names, provide manufacturers with protection within the trading chain, that is for commodities and commodity manufactures. Without such distinctions there can be no sustainable development.

Distinguishing between otherwise like products by their contribution to sustainability certainly opens the door to new forms of protectionism. In this regard, past experience of the trade regime in addressing process and production methods provides important guidance. Although the constitutive texts of the WTO do not forbid such distinctions, they impose certain obligations to ensure that the benefits the restrictions promise are balanced against the possible benefits from unrestrained trade liberalization which may be foregone.

The answer to this dilemma is suggested by the TRIPS Agreement; not an amendment of the GATT but rather the development of an Agreement on Trade and Environment, essentially an agreement on the use of PPMs to promote sustainable development, which sets out principles for the necessary balancing of goals and establishes institutional procedures which can enjoy widespread support to implement them.

Drafting an Agreement on Trade and Environment is not an easy task, not least because of the risks of protectionist capture and because the WTO cannot accomplish it on its own. Indeed, it will need to reach out to those responsible for environmental management at all levels, certainly national and international but probably also subnational, in an attempt to generate the necessary consensus and acceptance of the solutions which may emerge. For this reason, the relations between the WTO and other organizations and the linked issues of transparency and participation are of central importance to the future of sustainability in the trade regime.

## Relations with Other Organizations

In its first two years, the WTO has not managed to establish appropriate relations with a wide range of other international bodies that can impact its agenda. After many years of relative isolation, due in large measure to the bastard origins of the GATT but then institutionalized in numerous practices, the trade regime is finding it difficult to develop constructive relationships with other organizations. The exceptions are a number of organizations with clearly shared agendas, such as UNCTAD and the World Intellectual Property Rights Organization (WIPO). A number of factors are at play.

The influence of the Member States on day to day functioning of the WTO remains exceptionally large. Many find this an advantage since it contributes to ensuring continuing commitment to the WTO on the part of its members. After all, the delegations that are maintained in Geneva have an interest in documenting their utility and consequently are liable to act not only as representatives of their country to the WTO but also to a certain extent as spokespersons for the WTO in their country. In practice, the delegations were an integral part of the GATT institutional structure and retain much of this position in the WTO. In fact the relatively small size of the Secretariat is possible only because a part of the

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workload is in fact carried by the representatives of Members. No other international organization, apart from the United Nations itself, attracts a comparable level of continuing presence from its Members. Presumably the representatives of Members are not seeking to give up part of their mandate to inter-institutional procedures.

A corollary of this situation is that the Secretariat perceives itself as relatively dependent, serving the membership rather than an international agenda that transcends the interests of individual states. It is not geared to handling inter-institutional relationships.

Problems with the derestriction of WTO documents also contribute to the difficulties in developing constructive relationships. The tendency to restrict access to documents appears inappropriate to an organization concerned with public policy in the area of economics rather than with private interests or security matters.

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Hardly any area of policy poses problems with respect to inter-institutional relations that are as complex as those relating to the agenda of sustainability; it involves cross-cutting issues it affects virtually every international organization in some way. The WTO is incapable of tackling environmental issues by itself. Yet it has not been able to figure out how to work with other organizations.

## Transparency and Participation

Sustainable development depends on open decision-making. The WTO has a long way to go until it meets basic criteria in terms of access to information and scope for participation. It is true that different standards apply to transparency and participation in different countries. Nevertheless democratic countries in particular increasingly struggle with the question whether citizens' rights end at the border. The processes of globalization must also extend the rights which traditionally counterbalance the risks of abuse of public authority and the unfettered exercise of private power. The WTO must shed the habits of a club and become a global forum for trade policy. The two approaches to decision making are fundamentally incompatible.

Ultimately increased transparency and scope for participation are also essential to the attainment of basic goals of trade policy. It is in many ways an anachronism that in an age of privatization, multilateral trade policy continues to be conducted as if trade were a matter of states. In practice not states trade but private corporations. As long as states view their primary function as one of trade management for their citizens rather than creating and implementing rules for the maintenance of essential market disciplines between private actors of all nations they will remain incapable of ensuring that trade contributes to sustainability. And as long as the WTO views its role as mediator between states rather than overseer of private activities, it will be unable to play a useful role in the rapidly changing world. One of the paradoxes of the current situation is that the processes of globalization have been strongly supported by the GATT and by the Uruguay Round in particular; at the same time they risk rendering obsolete the kind of organization that the GATT was and the WTO threatens to remain.

The WTO should not simply adopt the practices of other organizations without considering whether they suit its particular needs. It should, however, recognize that its performance in this area will be judged by an absolute criterion, whether adequate transparency and participation are achieved, rather than by a relative one, whether the WTO has done as much as it believes it can. It should also learn from the wide range of experience in other

international organizations that pragmatic solutions can be found, that increased transparency and participation do not endanger the effectiveness of an organization and that a step by step approach is feasible. A right to submit amicus briefs in the dispute resolution process which should be accorded rapidly. The WTO can require that those who exercise new rights of participation must organize themselves in such a fashion that the WTO is not confronted with multiple minority views or dissenting opinions.

## A WTO Implementation Gap

Whatever rules emerge in the coming years to address the complex relations between trade, environment and sustainability, it is important to ensure from the outset that they are not only equitable but also equitably implemented. Experience has shown that the most important steps towards the implementation of international agreements frequently occur long before these are signed or enter into force. Most of the necessary measures will not be taken at the international level so that the need to ensure accountability for national measures is one of the most important functions of the WTO.

There is some evidence that the GATT adopted notification requirements as a no-cost alternative to more stringent international measures and with little thought given to their effectiveness or to ensuring that they were forcefully implemented. The existence of more than 200 such requirements suggests that their implementation was never seriously considered. The result is a potential implementation gap as serious as in any other international regime. There is no evidence that these notification requirements have been effective in the trade regime. This corresponds to experience elsewhere, ranging from the European Community to the International Atomic Energy Agency and from the International Register of Potentially Toxic Chemicals to the Commission on Sustainable Development, that notification systems between states do not function unless they are linked to strong incentives or are subject to public scrutiny. The Uruguay Round negotiators appear to have been aware of this problem but it has not emerged in international debate as the serious issue that it represents. Solutions currently under discussion are unlikely to solve the problem because they do not use civil society as a cornerstone of the assessment process.

The new WTO procedures for the circulation and derestriction of WTO documents should, in theory, provide an opportunity for public scrutiny of the notification experience within the trade regime. Experience in other regimes, however, suggests that states dislike the exposure to public criticism, and even on occasion ridicule, which such scrutiny can bring with it and may therefore seek to curtail opportunities for it. The credibility of the WTO, and possibly the future of the trade regime, depend on the willingness of all concerned to tolerate such scrutiny.

## Singapore and Sustainability

It is by now clear that the Committee on Trade and Environment within the WTO is but a partial response to the issues surrounding trade policy and sustainability. There are indeed changes that are needed within the trade regime to accommodate the needs of sustainability. Apart from the broader issues relating to transparency, participation and relations between the WTO and other international organizations, these changes have to do with the extension and interpretation of the Agreements rather than with fundamental changes in them.

The principles of trade liberalization apply equally to environment and equity as they do to trade in services, intellectual property rights or subsidies. Nevertheless they require a carefully elaborated, comprehensive framework to ensure they are appropriately applied. In previous instances of a comparable nature, the trade regime has negotiated an additional Agreement, affirming the fundamental principles but adjusting their application to the specific

circumstances of the case. Such an agreement will sooner or later become necessary for the environment, particularly with respect to the issue of PPMs. The Singapore Ministerial represents the first opportunity to set out a path towards such an outcome.

Despite this similarity with past trade policy experience, the agenda of sustainability brings some additional challenges to the trade regime that are rooted in the structure of the linked agenda of environment and equity. Both require unprecedented levels of international cooperation and the linking of widely differing areas of public policy at widely different levels of governance, that is both are subject to the principle of subsidiarity.

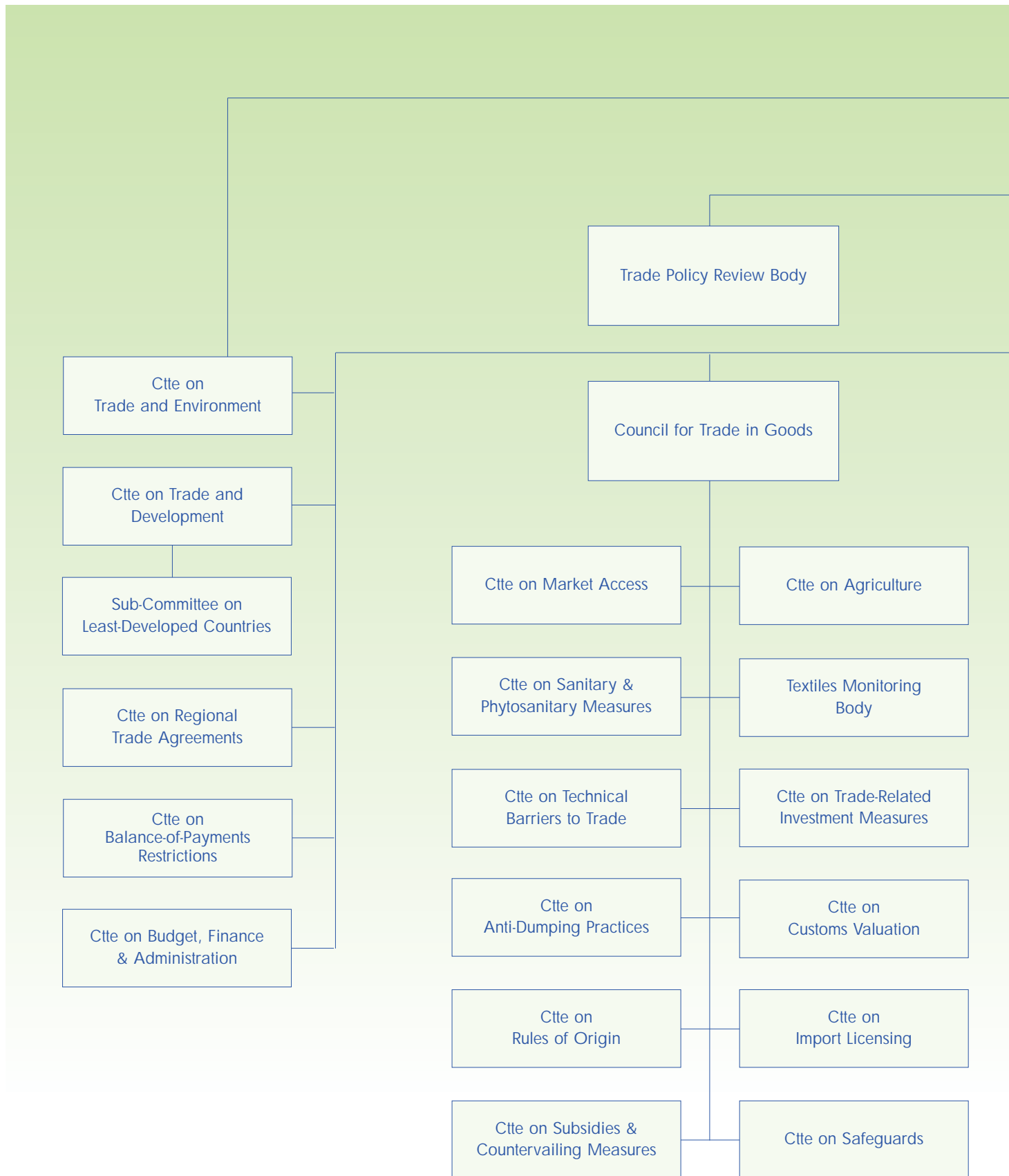
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Virtually no experience exists in achieving international cooperation across policy areas and between different levels of governance. The European Union can provide some indications for possible approaches but it is so unique a construction that lessons do not translate readily to other international organizations. Certainly the WTO alone is not in a position to tackle an issue of such complexity and fraught with so many political uncertainties. It might be useful for the Singapore Ministerial to recognize the limitations of the WTO in this respect and to reach out towards other appropriate organizations to seek an understanding on an appropriate approach to the issues.

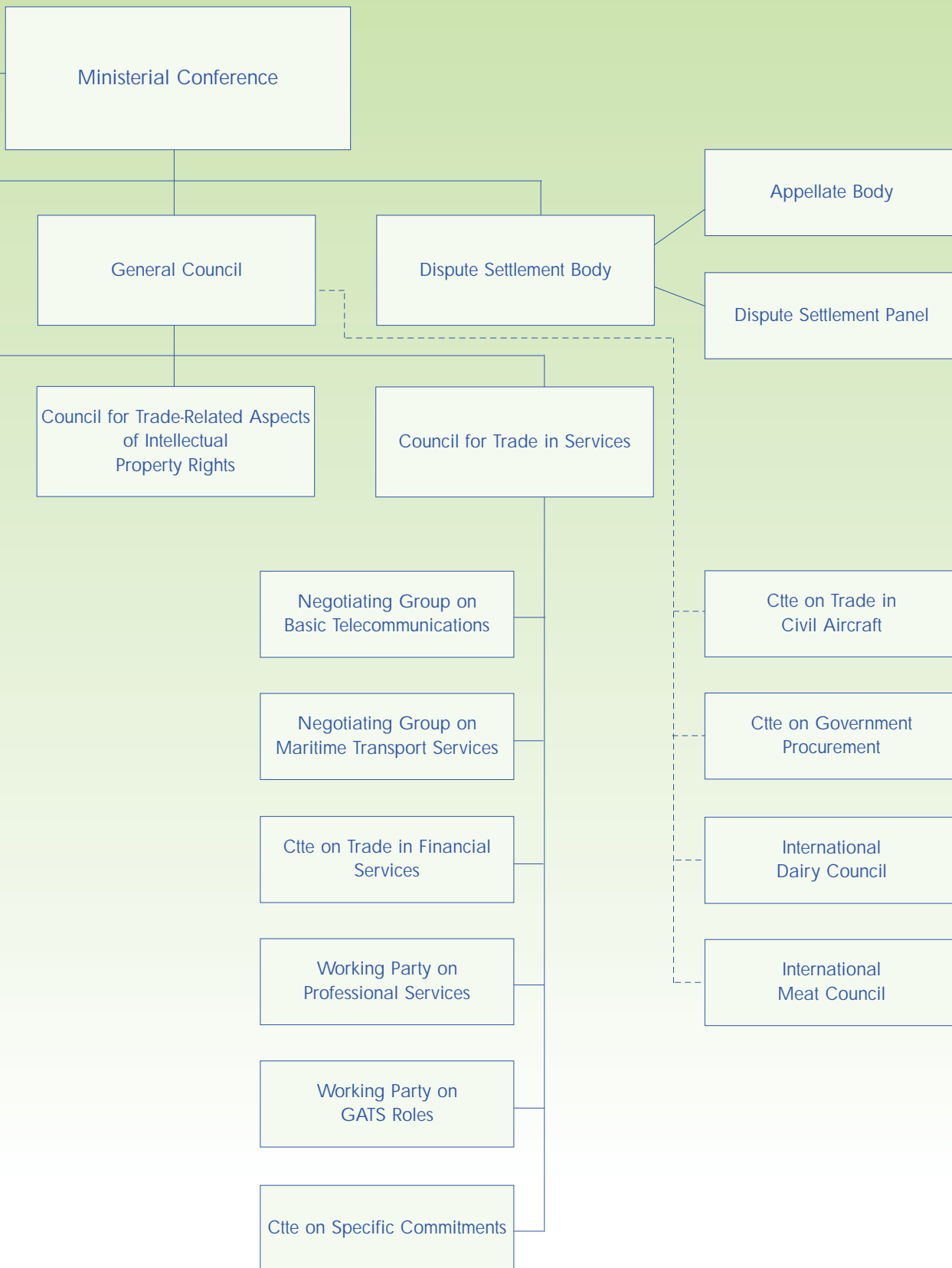
A meeting of trade and environment ministers in the year between WTO Ministerial meetings may be one way to ensure that there is appropriate focus of the agenda of trade and sustainability in all the international fora for which such a group of ministers bears responsibility. Such a meeting is, however, meaningless if it is not properly prepared, a task that requires the joint efforts of the Secretariats of several international organizations, WTO, UNCTAD and UNEP in particular well as a host willing to invest effort, resources and political capital in making it a success.

The WTO must begin to display substantial progress on the trade and sustainable development agenda soon. Failure to do so will not be without costs. The intimate linkages between the global economy and the global ecology will inevitably produce more conflicts of the type we have seen already. If some governments do not believe that the WTO can solve the problem, they will be tempted to resort to unilateral measures. And if the environmental community and consumers feel that the trade community cannot deal with the problem, the threat of green protectionist alliances will become real.

# APPENDIX A









## **IISD — Sustainable Development for Decision-Makers**

Business as usual is no longer an option — for government, private sector or individual citizen. Our soils, water, forests and minerals are not inexhaustible. Farms, industries, homes and lifestyles must become more sustainable, in every community on our planet.

To be sustainable, development must improve economic efficiency, protect and restore ecological systems, and enhance the well-being of all peoples.

IISD's mission is to promote sustainable development in decision-making internationally and within Canada. We contribute new knowledge and concepts, analyze policies, identify and disseminate information about best practices, demonstrate how to measure, and build partnerships to amplify these messages.

IISD's Winnipeg Principles are having a major impact on trade agreements around the world. The Earth Negotiations Bulletin makes UN conferences more open and understandable. IISD's homepages, IISDnet and Linkages serve users from around the world with information for sustainable development.

IISD creates networks designed to move sustainable development from concept to practice. We take action in addressing the differing views of both developing and industrialized nations. IISD bridges these concerns in its program areas and through membership on its international board. We are currently active on six continents.

IISD is an independent not-for-profit corporation, located in Manitoba, Canada. It is funded from Canadian and international sources and from the sale of products and services.

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