TRAINFORTRADE 2000

TRADE AND ENVIRONMENT

IN THE

MULTILATERAL TRADING SYSTEM

Module 2

Table of Contents

PREFACE

1. The objectives of this module are to raise awareness and enhance the understanding of the possibilities and challenges that trade and environment issues pose for developing countries and their governments within the framework of the GATT/WTO multilateral trading system. This should assist government policy-makers and other stakeholders to:

- increase their awareness of relevant GATT/WTO provisions on trade and environment;
- enhance their understanding of specific trade and environment issues that are being discussed in the WTO;
- participate effectively in multilateral deliberations in the area of trade and environment, in particular within the WTO; and
- stimulate policy-making and coordination on trade and environment issues at the national level between the different stakeholders.

2. Target groups for this module include several stakeholders, in particular:

- Government officials with responsibility in the area of trade policy;
- Government officials with responsibility in the area of environmental policy;
- Industry associations;
- Non-governmental organizations (NGOs);
- Academic institutions.

3. Section I presents an overview of how the environment and the concept of sustainable development emerged in the GATT/WTO multilateral trading system (MTS). Section II provides background information and analysis of trade-related environmental provisions within the GATT/WTO framework. It also examines issues that are of particular relevance for developing countries. Specific trade and environment issues discussed within the WTO are highlighted in Section III. Section IV briefly examines a number of trade-related environmental cases brought before the GATT and the WTO Dispute Settlement Mechanism (DSM). Finally, section V addresses a series of questions on common themes and misunderstandings of the trade and environment debate in the WTO.

I. TRADE AND ENVIRONMENT IN THE WTO

A. Background

4. Emphasis on environmental policies within the Multilateral Trading System (MTS) is relatively recent. The WTO has no specific agreement dealing with the environment, however a number of its agreements include provisions dealing with environmental concerns. The objectives of sustainable development and environmental protection are stated in the preamble to the Agreement establishing the WTO. A number of different reasons can be said to have led to the inclusion of these concepts into the WTO.

5. In particular, in the early 1990s representatives of the environmental community feared that there could be a conflict between trade liberalization -- resulting, in particular, from the Uruguay Round negotiations and the North American Free Trade Association (NAFTA)-- and enhanced environmental protection. Furthermore, some saw the ruling of the well-known GATT "tuna-dolphin" panel as an indication that GATT rules were not sufficiently responsive to environmental concerns. In contrast, the trade community feared that environmental concerns could be used for protectionist purposes or that environmental standards could have the effect of creating unnecessary obstacles to trade.

6. In the early 1990s, GATT Members reconvened the Working Group on Environmental Measures and International Trade ("EMIT group"), established in 1971 to examine the possible effects of environmental protection policies on the operation of the GATT. At the end of the Uruguay Round of Multilateral Trade Negotiations in 1994, attention was once again drawn to trade-related environmental issues and trade ministers thought it would be useful to begin a comprehensive work programme on trade and environment in the WTO to analyze the relationship between trade liberalization and the protection of the environment. Thus, the WTO Committee on Trade and Environment (CTE) was established with the creation of the WTO in 1994.

B. The Committee on Trade and Environment (CTE)

7. The CTE was established at the first meeting of the General Council of the WTO, in accordance with the Uruguay Round Ministerial Decision on Trade and Environment. It received a broad-based mandate to identify the relationship between trade measures and environmental measures in order to promote sustainable development, and to make appropriate recommendations on whether any modifications of the provisions of the MTS are required. This brought environmental and sustainable development issues into the mainstream work of the WTO. The CTE considers 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.

8. The Committee's work is guided by two important principles:

1. The WTO is only competent to deal with trade; it is not an environmental agency. Therefore, with respect to environmental issues its only task is to study issues that arise when environmental policies have a significant impact on trade. Members of the WTO do not want the WTO intervening in national or international environmental policies or to set environmental standards.

2. If the CTE does identify problems, the solutions that stem from the discussions within the committee must support the principles of the WTO trading system. WTO Members are convinced that an open, equitable and non-discriminatory multilateral system has a key contribution to make to both national and international efforts directed towards the protection and conservation of environmental resources and promotion of sustainable development.

9. In addressing the link between trade and environment, WTO Members do not believe that the WTO itself has the answer to environmental problems. However, they are of the view that trade and environmental policies can be mutually supportive. Environmental protection aims to preserve the natural resource base on which economic growth is often premised and the liberalization of trade results in increased economic growth necessary for adequate environmental protection. Therefore, the WTO's role is limited to trade liberalization and to ensure that environmental policies do not result in obstacles to trade. Furthermore, the WTO ensures that trade rules do not interfere with adequate domestic environmental protection.

10. The work programme of the CTE focuses on 10 items (see Box 1). The agenda of the CTE is driven by the proposals presented by individual WTO Members on issues that are of importance to them. Since its establishment, the CTE has discussed all of the items contained in its work programme.

Box 1: The Work Programme of the CTE

Item 1:	The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements
Item 2	The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system
Item 3:	The relationship between the provisions of the multilateral trading system and: (a) charges and taxes for environmental purposes; and (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling
Item 4:	The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects

Item 5:	The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements
Item 6:	The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions
Item 7:	The issue of exports of domestically prohibited goods (DPGs)
Item 8:	Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the environment
Item 9:	The work programme envisaged in the Decision on Trade and Services and the Environment
Item 10:	Input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations (NGOs).

11. Following the 1996 Singapore Ministerial Conference, discussions have been grouped into two main clusters: MEAs and TRIPS (Items 1, 5, 7 and 8) and market access (Items 2, 3, 4 and 6).

II. RELEVANT GATT/WTO PROVISIONS ON TRADE AND ENVIRONMENT

12. This section is divided into three parts. The first part presents key GATT/WTO principles of the MTS. In the second part a number of articles of direct relevance to the environment are presented. Part three reviews a number of WTO Agreements that contain provisions dealing with environmental concerns. It also examines certain WTO provisions on Special and Differential Treatment (S&D) and discusses the extent to which they can assist developing countries in achieving sustainable development through trade.

A. Key GATT/WTO Principles

13. A number of basic principles run throughout all of the WTO Agreements. These fundamental principles are the foundation of the MTS. In particular, these principles ensure that:

- Trade takes place without discrimination;
- The MTS becomes freer with barriers being gradually reduced through negotiation;
- The MTS ensures a business environment that is more stable and predictable;
- The MTS promotes fair competition and is rendered more competitive by discouraging "unfair practices", such as the use of export subsidies and

dumping products at low cost to gain market share, and;

- Developing and least developed countries are granted special privileges, greater flexibility and more time to adjust their policies.[1]

B. Relevant GATT/WTO Articles

1.GATT Article I: Most Favoured Nation and GATT Article III: National Treatment

14. Non-discrimination is the cornerstone of GATT/WTO. It contributes to the most efficient allocation of resources on the basis of comparative advantage. Non-discrimination is implemented through Article I of GATT, which contains the Most Favoured Nation clause (MFN) as well as, the National Treatment clause (NT) contained in Article III of GATT. The MFN principle ensures that imports from all sources are subject to the same treatment, while the NT principle implies non-discrimination between domestic and imported goods. Non-discrimination prevents the inappropriate use of trade restrictions and protects in particular the interests of weaker trading partners.

15. With respect to trade-related environmental issues, the principle of non-discrimination ensures that national environmental protection policies are not adopted with a view to arbitrarily discriminate between foreign and domestically produced 'like products',[2] or between 'like products' imported from different trading partners. Therefore, it prevents the abuse of environmental policies, and of their use as disguised restrictions on international trade.

2. GATT Article X: Transparency

16. According to GATT Article X, laws and regulations regarding trade are to be published before they are enforced. This will ensure that Members' trade rules are as clear and transparent as possible, and accessible to other Members as well as companies engaged in international trade.

17. With respect to the environment, WTO members should provide as much information as possible about the environmental policies they have adopted or actions they may take, when these may have a significant impact on trade. This should be done by notifying the WTO, but the task should not be more of a burden than is normally required for other policies affecting trade. The WTO Secretariat is to compile from its Central Registry of Notifications all information on trade-related environmental measures that members have submitted. These are to be put in a single database that all WTO members can access.

[1] http://www.wto.org

[2] For a definition of the concept of 'like product' see section III.A.

3. GATT Article XI on General Elimination of Quantitative Restrictions

18. GATT Article XI provides that no prohibitions or restrictions other than duties, taxes or charges "shall be instituted or maintained on the importation or exportation of any product".[3] This means that quantitative restrictions for environmental purposes would normally be considered inconsistent with GATT rules.

4. GATT Article XX on General Exceptions

19. GATT Article XX on General Exceptions lays out a number of specific instances in which GATT Contracting Parties, or current WTO Members may be exempted from GATT rules. These include two exceptions for environmental purposes. GATT Article XX states that:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between countries where the same conditions prevail, or a **disguised restriction on international trade**, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

20. Paragraphs (b) and (g) of GATT Article XX are designed to allow WTO Members to adopt otherwise GATT-inconsistent policy measures if this is either "necessary" to protect human, animal or plant life or health, or if the measures "are primarily aimed at the conservation of exhaustible natural resources". For a measure to be covered by article XX (g), it will also have to be demonstrated that restrictive measures were imposed on domestic production or consumption.[4]

21. The chapeau of GATT Article XX is designed to ensure that the environmental exceptions do not result in arbitrary or unjustifiable discrimination and do not constitute disguised restriction on international trade.[5]

5. Article XIV on General Exceptions of the General Agreement on Trade in Services (GATS)

22. The chapeau of GATS Article XIV (General exceptions clause) is identical to that contained in GATT Article XX. It also allows Members to adopt measures

[3] Article XI itself allows some exceptions, covering primarily agricultural and fisheries products.

[4] The cases referred to in the Dispute Settlement Section below will provide illustrations of interpretations given to this article in a number of decisions rendered by the dispute settlement bodies of the GATT and the WTO, addressing environment-related issues.

[5] For more information see Part III.B.

otherwise inconsistent with the agreement if it is "necessary to protect human, animal or plant life or health".

6. Other Relevant Articles

23. "Part IV" of the GATT, which was added in 1964, consists of three articles, which contain special provisions on actions that could be taken by developed countries to promote trade and development of developing country Members. A Committee on Trade and Development (CTD) was established to monitor the implementation of the provisions of Part IV and to examine whether modifications or additions are needed.

24. GATT Article XXXVI, "Principles and Objectives", recognizes the need to provide developing countries with improved market access for primary products (including agricultural products) and for processed and manufactured products of export interest to them. It also recognizes the need to take measures, whenever appropriate, to "attain stable, equitable and remunerative prices" for primary products.

25. GATT Article XXXVII, "Commitments", provides that developed countries should, to the fullest extent possible, accord high priority to the reduction and elimination of tariffs and non-tariff barriers on products of potential export interest to developing countries.

26. GATT Article XXXVIII, "Joint Action", lists the forms of joint actions that the contracting parties are expected to undertake, for example in the area of commodities (for improved market access and stabilization of prices at equitable and fair levels).

C. Relevant GATT/WTO Agreements

1. The Agreement on Sanitary and Phyto-Sanitary Measures (SPS)

27. The Sanitary and Phytosanitary (SPS) Agreement negotiated under the Uruguay Round and in effect since 1 January 1995, concerns the application of food safety and animal and plant health regulations. In particular, the measures of the SPS Agreement are designed to protect the following:[6]

- human or animal life from risks arising from additives, contaminants, toxins or disease causing organisms in their food;
- human life from diseases carried by plants and animals;
- animal or plant life or health from pests, diseases, or disease causing organisms.

[6] Measures for environmental protection (other than as defined above), to protect consumer interests, or for the welfare of animals are not covered by the SPS Agreement. These concerns are addressed by other WTO agreements (i.e., the TBT Agreement or Article XX of GATT 1994).

28. The main objective of the SPS Agreement is to maintain the sovereign right of any Government to provide the level of health protection it considers appropriate and to ensure that these sovereign rights are not abused for protectionist purposes and do not result in unnecessary barriers to international trade. Article 2 of the Agreement stipulates that SPS measures shall not be applied in a manner which would constitute a disguised restriction on international trade.[7]

29. SPS measures can be used by a Member to prevent or limit potential damage that could result from the entry, establishment, or spread of pests. SPS measures include relevant laws, decrees, regulations, requirements and procedures, including end-product criteria, processing and production methods, and packaging and labeling requirements directly related to food safety.

30. The formulation of SPS measures must be based upon international standards, guidelines and recommendations developed by international organizations, such as the joint FAO/WHO Codex Alimentarius Commission for food safety; the Office International des Epizooties (OIE) for animal health; and for plant health, the FAO International Plant Protection Convention (IPPC). However, each Government has the discretion to determine its own level of acceptable risk and is explicitly permitted to impose requirements more stringent than existing international standards.

28. There are, nevertheless limitations on a country's right to do so. A Member that selects a standard exceeding international guidelines is required to justify its use under the SPS Agreement if a trade dispute occurs. In particular the Member has to demonstrate that:

- the standards set are necessary for the protection of human animal or plant life; and
- that they are based on scientific principles and not maintained without sufficient scientific evidence.

29. It follows that a government wishing to defend local or national food safety regulations more stringent than those of Codex Alimentarius Commission bears the burden of proof, and would have to convince a WTO dispute resolution panel that the regulation is both necessary and scientifically based.

30. The SPS Agreement provides additional latitude for schemes aimed at controlling disease causing organisms and pests even if the criteria includes non-product characteristics such as environmentally sustainable management.

31. SPS measures, by their very nature, may result in restrictions on trade. There is consensus amongst governments that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, SPS measures should not be applied beyond what is needed for health protection and put in place to protect their domestic producers from economic competition. The SPS Agreement stipulates that "WTO Members shall ensure that the measures adopted are not more trade-restrictive than required to achieve their appropriate level of sanitary or

[7]Article 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

phytosanitary protection, taking into account technical and economic feasibility."[8]

32. An important number of developing countries have established food safety and veterinary and plant health services, others not. For the latter, the requirements of the SPS Agreement present a challenge to improve the health situation of their people, livestock and crops which may be hard for some to meet. Due to this difficulty, the SPS Agreement delayed all requirements, other than those dealing with transparency (notification and the establishment of enquiry points), until 1997 for developing countries, and until 2000 for the least developed countries. These countries were not required to provide a scientific justification for their SPS requirements before that time. Countries that may need longer time periods, i.e., for the improvement of their veterinary services or for the implementation of specific obligations of the agreement, can request the SPS Committee to grant them further delays.

33. A large number of developing countries have already adopted international standards as the basis for their national requirements in an effort to avoid the need to duplicate work already done by international experts (including those of Codex Alimentarius, OIE and the IPPC). The SPS Agreement encourages developing countries to participate as actively as possible in these international standard-setting organizations, in order to contribute to and ensure the development of further standards that address their needs.

34. Article 9 of the SPS Agreement stipulates that Members agree to facilitate the provision of technical assistance to developing countries, either through the relevant international organizations or bilaterally. Such assistance, may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with SPS measures necessary to achieve the appropriate level of SPS protection in their own markets. FAO, OIE and WHO have considerable programmes to assist developing countries with regard to food safety, animal and plant health concerns. A number of countries also have many bilateral programmes with other WTO Members in these areas.

35. Where substantial investments are required in order for an exporting developing country Member to fulfil the SPS requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.[9]

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

36. The new Agreement on Technical Barriers to Trade (TBT) negotiated during

[8] Article 5 of the Agreement on Sanitary and Phytosanitary Measures.
[9] Article 9 of the Agreement on Sanitary and Phytosanitary Measures.

the Uruguay Round and in effect since 1 January 1995, with the entry into force of the WTO, builds upon and strengthens the Standards Code under the GATT. It is premised on an acknowledgement of the right of WTO Members to develop technical requirements, and to ensure they are complied with. However, the main objective of the TBT Agreement is to ensure that unnecessary obstacles to international trade are not created.

37. The TBT Agreement separates the technical requirements into two categories: *technical regulations* and *standards.* In the Agreement, a technical regulation is defined as a:

> "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."[10]

38. And, a standard is defined as a:

> "Document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."[11]

39. Both technical regulations and standards are considered product technical requirements. However the main difference between the two is that compliance with technical regulations is mandatory, while compliance with standards is voluntary.

40. The Agreement states that Members must ensure that neither technical regulations nor standards are "prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade." Concerning technical regulations, the Agreement stipulates that, "Members shall ensure that technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking into account of the risks non-fulfillment would create."[12]

41. Technical regulations under the TBT Agreement can only be developed for one or more of the objectives considered legitimate by the Agreement. Legitimate objectives include: "*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."[13] The Agreement does not consider these legitimate objectives as being exhaustive and therefore, other objectives may also be considered legitimate.

42. In light of the above, in order for a technical regulation not to be considered as posing unnecessary obstacles to international trade it must meet two conditions.

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[10] Annex 1 of the Agreement on Technical Barriers to Trade.
[11] *Id*.
[12] Article 2 of the of the Agreement on Technical Barriers to Trade.
[13] *Id.*

First of all, it must be designed to meet one of the legitimate objectives stated in the Agreement and second, it must be the least trade-restrictive option available to a WTO Member that achieves that legitimate objective, taking into account the risks that would be associated with its non-fulfilment.[14]

43. The TBT Agreement embraces the GATT principle of non-discrimination, and applies it to technical regulations, standards and conformity assessment procedures. It also encourages WTO Members to base their technical regulations, standards and conformity assessment procedures, on international standards, and guides and recommendations when these exist or are about to be put in place, except when they are considered to be inappropriate or ineffective for the fulfillment of the legitimate objectives pursued.[15] The objective of the call for harmonization is designed to avoid the appearance of unnecessary layers of technical requirements and assessment procedures, and to encourage the use of those that have been designed with the approval of the international community. In support of this requirement, the Agreement calls upon Members to participate in the work of international standardizing and conformity assessment bodies.

44. The Agreement notes that there may be times when Members would need to derogate from this obligation and it creates enough scope for them to do so in order to tailor domestic requirements to the specifics of their situation. In the case of technical regulations and standards Members may derogate from this obligation in the event of: fundamental climatic or geographic differences or as a result of fundamental technological problems and, for conformity assessment procedures the exceptions allowed are broader. According to the Agreement, these may be obtained for "inter alia, such reasons as: national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment, fundamental climatic or other geographic factors, fundamental technological or infrastructural problems".

45. The Agreement notes that WTO Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations. Given that international harmonization is a timely as well as very complex process, the Agreement encourages Members to accept each other's regulations as equivalent until complete international harmonization becomes possible. This has the effect of greatly reducing barriers to trade.[16]

46. Concerning conformity assessments procedures, Article 6.1 of the Agreement calls upon WTO Members to "ensure, whenever possible, that results of conformity assessments procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an

[14]Doaa Abdel Motaal, "Overview of the WTO Agreement on Technical Barriers to Trade", paper presented at the CUTS *International Workshop Negotiating Agenda for Market Access: Cases of SPS and TBT*, 24-25 April 2001, Geneva.

[15] Article 2.4 of the Agreement on Technical Barriers to Trade.

[16] Doaa Abdel Motaal, "Overview of the WTO Agreement on Technical Barriers to Trade", paper presented at the CUTS *International Workshop Negotiating Agenda for Market Access: Cases of SPS and TBT*, 24-25 April 2001, Geneva.

assurance of conformity with applicable technical regulations or standards equivalent to their own procedures".[17] The purpose of this provision is to avoid multiple product testing, both in, exporting and importing country markets, and its associated costs, financial and otherwise.[18]

47. In order for Members to achieve the equivalence, the Agreement encourages Members to enter into mutual recognition agreements (MRAs), for the acceptance of each other's assessment results. MRAs are generally negotiated bilaterally or plurilaterally to cover specific product groups.

48. Transparency is a very important feature of the TBT Agreement, it includes notification obligations to the WTO Secretariat and the establishment of national enquiry points as well as the creation of the TBT Committee. Notification obligations are comprised of the following: notifying the measures taken to implement the provisions of the TBT Agreement nationally, i.e., how its provisions have been incorporated into domestic legislation; notifying draft technical regulations, conformity assessment and standards and providing other members with sufficient time to comment on them, with the obligation of taking these comments into account; and, notifying entry into any bilateral or multilateral agreement regarding technical regulations, standards or conformity assessment procedures.[19]

49. The objective behind the notifications is that they allow for the dissemination of information, and for avoiding unnecessary obstacle to international trade at the early stage. They permit exporters to be informed of the new requirements that are developed in their export markets before their entry into force, to provide comments on these requirements, as well as, to have their comments taken into consideration and finally, to prepare themselves for compliance.

50. The TBT Agreement calls for each WTO Member to establish an enquiry point that can respond to questions on technical regulations, standards and conformity assessment procedures (whether proposed or adopted), and supply relevant documents. Enquiry points are designed to increase transparency by contributing to the flow of information. The Agreement has also established a TBT Committee in the WTO, which is a standing body that acts as a forum for consultation and negotiation on all issues pertaining to the Agreement. Participation in the Committee is open to all WTO Members.

51. Special and differential treatment of developing country Members within the TBT Agreement is provided for in Article 12. It includes the following provisions:

[17] Article 6.1 of the Agreement on Technical Barriers to Trade.

[18] Doaa Abdel Motaal, "Overview of the WTO Agreement on Technical Barriers to Trade", paper presented at the CUTS *International Workshop Negotiating Agenda for Market Access: Cases of SPS and TBT*, 24-25 April 2001, Geneva.

[19] *Id*.

- In the preparation and application of technical regulations, standards and conformity assessment procedures, the special development, financial and trade needs of developing country Members have to be considered, with a view to ensuring that they do not create unnecessary obstacles for products that are of export interest to them.
- Developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.
- International standardizing bodies and international systems for conformity assessment should be organized and operated, to the extent possible, in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members. Reasonable measures should be pursued with a view to ensuring that international standards are prepared for the products that are of special interest to developing countries.
- Upon request, developing countries, in particular LDC's may obtain specified, time-limited exceptions in whole or in part from obligations under the Agreement.

52. Furthermore, the Agreement encourages developed country Members to provide technical assistance directed towards helping developing countries, in particular LDC's to: prepare their own technical regulations; meet the technical requirements of their export markets; establish national standardizing bodies and participate in international ones; establish bodies for conformity assessment with technical regulations and standards; access the conformity assessment systems of other countries; and become Members of international bodies.

53. It is important to note that the scope of the SPS and TBT agreements is different. SPS provisions differ from those of the TBT Agreement in three important aspects:

- While the TBT Agreement requires that product regulations be applied on a MFN basis, the SPS permits Members to impose different sanitary and phytosanitary requirements on food, animal or plant products sources from different countries, provided that they "do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail". The rational for this is that there may be to differences in climate, pests or diseases and food safety conditions across countries.

- The provisions of the SPS Agreement provide governments with a greater degree of flexibility not to use international standards. The Agreement explicitly states that a country may introduce or maintain a SPS measure that would result in a "higher level of SPS protection than would be achieved by an international standard". However, should they result in a greater restriction of trade, the government may be asked to show scientific justification for the measure or to demonstrate that the international standard would not result in the level of health protection it

considers appropriate.

- The SPS Agreement introduces a precautionary approach by permitting Member countries to adopt SPS measures on a "provisional basis", in cases where "relevant scientific evidence is insufficient" by taking into account "pertinent information" that may be available to them, including from other Members or from relevant international organizations.

3. The Agreement on Agriculture

54. The Agreement on Agriculture (AoA) was adopted during the Uruguay Round, it sought to reform trade in agricultural products and provide the basis for a fair and market-oriented agricultural trading system. This would improve predictability and security for both importing and exporting countries. International trade in agriculture products had always been subject to GATT rules, nonetheless, these rules and their application were weak. As a result of this, agricultural trade became highly distorted, especially with the use of export subsidies that normally would have not been allowed for industrial products.

55. The long term objective, as stated in the Preamble to the AoA is to "provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets." The Preamble also notes that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment.

56. Under the Agreement, domestic support measures with minimal impact on trade (known as "green box" policies) are excluded from reduction commitments (contained in Annex 2 of the Agreement). These include expenditures under environmental programmes, provided they meet certain conditions.

57. The new rules and commitments apply to:

- Market access- various trade restrictions confronting imports
- Domestic support- subsidies and other programmes including those that raise or guarantee farm-gate prices and farmers incomes.
- Export subsidies and other methods used to make exports artificially more competitive

58. The Agreement allows governments to support their rural economies but preferably through policies that cause less distortion to trade. It allows some flexibility in the way commitments are implemented**.** Developing countries don't have to cut their subsidies or lower their tariffs as much as developed countries and they are given extra time to complete their obligations. Special provisions deal with the interest of countries that rely on imports for their food supplies and the LDCs. "Peace" provisions within the agreement aim to reduce the likelihood of disputes or challenges on agricultural subsidies over a period of 9 years.

59. The AoA reform programme is the first step in a longer term process whose objective, through substantial and progressive reductions in support and protection, is the establishment of a fair and market-oriented agricultural trading system, in particular for developing countries that have a comparative advantage as agricultural producers. Future agricultural trade reform, through the elimination of export subsidies for example, has the potential to yield direct economic benefits, in particular for developing countries, by creating fairer and more open trading conditions. Rural poverty could be reduced; moreover, by dismantling policies that have provided incentives for environmentally damaging behavior, such as intensive farming in ill-suited areas, environmental quality could be enhanced. Exemptions from the reduction commitments are contained in Annex 4 of the Agreement and include direct payments under environmental programmes. The provisions of Article XX on non-trade concerns (NTCs) may be relevant to certain developing countries, for example in the context of the relationship between trade liberalization and food security.

60. The continuation of the agriculture reform process is one of the most important components of the 'built-in' agenda. To date, some members have expressed dissatisfaction over the lack of progress of agricultural negotiations under Article XX. On the other hand, a number of members, perceived as those not willing to work towards an in-depth reform in agriculture, have given signals that under a wide negotiation, going beyond the limits of the 'built-in' agenda, they would be willing to consider a wider agricultural reform.

4. The Agreement on Trade Related Intellectual Property Rights (TRIPS)

61. The Agreement on Trade Related Intellectual Property Rights (TRIPS) is one of the new Uruguay Round Agreements that was adopted with the creation of the WTO. It is designed to enhance the protection of intellectual property rights. Explicit reference is made to the environment in Section 5 on Patents.

62. Article 27.2 provides Members the possibility to temporarily exclude inventions from patentability if preventing their commercial exploitation is necessary to avoid serious damage to the environment, or to protect human, animal or plant life.

63. Under Article 27.3, Members may also exclude from patentability plants and animals other than microorganisms, as well as biological processes for the production of plants or animals other than microorganisms. However, Members must also provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by a combination of the two.

64. Many developing countries have expressed concern about the potential impact of TRIPs on biodiversity, health, and rural populations. The relationship between the TRIPS Agreement and the Convention on Biological Diversity is addressed in module 5 on Multilateral Environmental Agreements.

65. The WTO Committee on Trade and Environment, in its 1996 report to

Ministers, decided to continue work on how the provisions of the TRIPs Agreement relate to:

- Facilitating the generation of environmentally sound technologies and products (EST&Ps);
- Facilitating the access to, transfer and dissemination of EST&Ps;
- Environmentally-unsound technologies and products; and
- The creation of incentives for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources including the protection of knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity."[20]

5. The Agreement on Subsidies and Countervailing Measures

66. The Agreement on Subsidies, which applies to non-agricultural products, is a Uruguay Round Agreement designed to regulate the use of subsidies. Under the Agreement, certain subsidies are referred to as "non-actionable" and are generally allowed. Under Article 8.2 (c) of the Agreement on non-actionable subsidies, direct references had been made to the environment under specific circumstances. Among the non-actionable subsidies that had been provided for under that Article, were subsidies used to promote the adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms.

D. Special and Differential Treatment

67. Special and Differential Treatment (S&D) is of key importance to many developing countries, in particular the least developed (LDC's) among them. The Uruguay Round Decision on Measures in Favour of Least-Developed Countries recognizes the need to ensure the effective participation of the LDC's in the world trading system, and to take further measures to improve their trading opportunities. Members agree to keep under review the specific needs of the LDC's and to continue to seek the adoption of positive measures which facilitates the expansion of trading opportunities in favour of these countries. S&D Treatment could also assist developing countries, in particular LDCs, in achieving sustainable development objectives.

III. SPECIFIC TRADE AND ENVIRONMENT ISSUES DISCUSSED IN THE WTO

68.| This section briefly presents a number of trade and environment issues

[20] See, WTO Singapore Report (1996) Committee on Trade and Environment.

discussed in the WTO and outlines where the debate stands. It also provides an analysis of possible implications and challenges that developing countries face on the issues concerned.

A. The concept of "like product"

69. The debate over the definition of "like product" has been at the heart of the trade and environment debate. The concept of "likeness" is important because under GATT's main obligations, such as MFN (GATT Article I) and national treatment (GATT Article III), discrimination is only prohibited between "like products". According to a common interpretation of WTO rules, products are considered as "like products" on the basis of their final characteristics[21]. Therefore products may not be distinguished on the basis of their process and production methods (PPMs), unless these have an impact on the final characteristics of the product. However, while WTO rules do not allow countries to discriminate between "like products" on the basis of their PPMs, from an environmental point of view some consider that it may be relevant to take into account the environmental externalities of a product during its production. For example, some consumers may be concerned about whether or not timber or timber products originate from sustainable managed forests, or whether tuna has been harvested without the incidental kill of dolphins, in other words in a "dolphin safe" manner. A number of developed countries in response to environmentally conscious consumers have voiced increasing concerns about the whole life cycle of a product, from cradle to grave, and have advocated that it may be desirable to distinguish between seemingly "like products" within the WTO.

70. The Shrimp/Turtle and Tuna/Dolphin cases presented in Section IV provide illustrations of disputes that deal with the controversial definition of "like products". Current discussions on whether genetically modified organisms (GMOs) can be differentiated from conventional products provide another illustration of the potential controversy arising from the lack of clarity on the definition of "like products."

Challenges for Developing Countries

71. Developing countries have argued that they do not want products to be distinguished on the basis of their process and production methods (PPMs), unless these have an impact on the final characteristics of the product. They fear that if products are distinguished on the basis of whether or not they were processed or produced in an environmentally sound manner this will result in serious obstacles to market access opportunities for their export products. Another main concern is the spillover effect that this may create in opening up the door for future considerations, including labor standards in the determination of "like-product".

[21] The determination of whether any particular imported product is "like" a domestic product is generally made on a case-by-case basis, when a dispute arises. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality; and HS (harmonized system) codes the tariff classification. In all these cases, however, the distinguishing criteria are based on the final product and its physical characteristics.

B. Trade Measures taken pursuant to Multilateral Environmental Agreements (MEAs)

72. One key issue in the trade and environment debate is the relationship between the provisions of the MTS and trade measures for environmental purposes, including those pursuant to MEAs

73. There is broad consensus that there should be a harmonious relationship between MEAs and the MTS. However there is no agreement on whether or not a modification or interpretation of WTO rules is needed to prevent conflicts between these two legal instruments.

74. A number of developed countries argue that there is a need to provide MEA negotiators with a clear indication of possible packages of measures they can design in the process of negotiating MEAs. They argue that trade measures "pursuant to" MEAs should not be challenged in the WTO, as this would undermine both the MTS as well as the international environmental agenda. Furthermore, they argue that legal clarity is particularly relevant in the context of future agreements. Others have argued that there is already sufficient flexibility and clarity under WTO rules to address environmental challenges through MEAs and that the possibility of conflict can be substantially reduced through policy coordination at the national level. Supposing a trade dispute arises because a country has taken action on trade (i.e., imposed a tax or restricted imports) under an environmental agreement outside the WTO and another country objects, if both sides to the dispute have signed that agreement, WTO members agree that they should try to use the environmental agreement to settle the dispute. However, if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute.

Challenges for Developing Countries

75. Developing countries argue that GATT Article XX already provides sufficient scope for trade measures, which are implemented in a non-discriminatory way. They have emphasized that to date, no trade measures pursuant MEAs have been challenged in the WTO, and that it is unlikely that this would happen in the near future. Developing countries further argue that the international community should focus on supportive measures to assist them in joining MEAs and complying with their obligations under these agreements.

76. Further accommodation of MEA trade measures in the multilateral trading system may have implications for developing countries. In this context, the following concerns have been raised:

- Could further accommodation of MEA trade measures affect the balance of rights and obligations under the WTO?
- Could discriminatory trade measures against non-parties to an MEA be used effectively only against economically weaker trading partners?
- Could accommodating trade measures reduce incentives to search for alternative supportive measures?

- Is there a risk that trade measures purportedly taken "pursuant to" an MEA by one or several Parties, and which are regarded arbitrary and unjustifiable by other Parties, could no longer be challenged at the WTO?

77. On the other hand, Appellate Body decisions may have widespread effects including a possible precedent setting on interpretations of Article XX as well as other Articles.[22] This could imply that even if clarification of the scope of measures covered by Article XX [sub paragraphs (b) and (g)] were desirable, there is no need to amend either the chapeau or the text of Article XX.

C. Eco-labelling

78. Well-designed eco-labelling programmes may be a useful market-based instrument tool to inform consumers about environmental characteristics of a product and to promote consumption and production of "environment-friendly" products (see also modules 3 and 4). A key point for the WTO is that labelling requirements and practices should not be discriminatory, either between trading partners, or between domestically produced goods or services and imports.

79. A number of WTO developed country Members, i.e., the E.U. propose that the WTO compatibility of eco-labelling should be considered within the context of future trade negotiations. They argue that voluntary eco-labelling schemes, including those using criteria based on non-product related processes and production methods (PPMs), should be covered by trade rules and disciplines, provided that there is strict adherence to multilaterally agreed eco-labelling guidelines.

80. Some are of the view that eco-labelling only becomes a WTO issue if it causes undue trade effects and that in such case WTO laws provide adequate coverage in terms of its criteria of least trade restrictiveness, as well as arbitrary and unjustifiable discrimination clauses. Some feel that, if necessary, it may be possible to spell out guidelines for the panels on eco-labelling that take account of additional considerations such as mutual recognition and equivalence.

81. There is broad consensus concerning the usefulness of the notification of eco-labelling schemes.

Challenges for Developing Countries

82. Developing countries in the past have voiced their concerns about the implications of accommodating eco-labelling programmes based on non-product related PPMs in the MTS. They were particularly worried about setting a precedent for accommodation of other PPM-based instruments in the WTO and about the possible spillover effects of the application of labels to other policy areas, in particular concerning social issues.

83. Recently the debate has moved forward and developing countries are focusing

[22] Article III of GATT, Asbestos Case

now more on the kinds of disciplines to which such labeling schemes should be subject. Developing countries have expressed concern about the implications for their exports of eco-labelling programmes based on non-product related PPMs, and about the need to ensure labeling programmes are subject to appropriate disciplines. A number of developing countries have recognized that in some cases, labeling schemes may be of benefit to them. For example, foreign schemes may increase market access in some specific markets, i.e., organic agriculture, and domestic schemes may protect local health and industry, i.e., GMO labels.

D. Environmental benefits of eliminating subsidies

84. "Win-win" situations arise when the removal of trade restrictions and distortions have the potential to yield benefits both for the MTS and the environment. For most Members, this issue is particularly important in that it holds the key to the complementarities that exist between sound trade policy-making and sound environmental policy-making.

85. A number of WTO Members argue that future trade negotiations should aim at pursuing win-win results, for example through:

- The establishment of disciplines to eliminate subsidies that contribute to overcapacity in fisheries and forestry sectors.
- The elimination of agricultural export subsidies and the continued reduction of domestic subsidy programmes that distort trade and contribute to the degradation of natural resources (while retaining the so-called "Green Box" for subsidies that have no or negligible impact on trade).
- The elimination of restrictions on trade in environmental goods and services.

86. Some WTO Members, however, have expressed the view that certain subsidies may be necessary and beneficial to the environment. In this context, the concept of "multifunctionality"[23] of agriculture has been mentioned in particular by some developed countries that are agricultural exporters to emphasize the need to address positive environmental externalities of agricultural production. Similarly, some countries have noted that subsidies in the fisheries sector are not the only cause contributing towards overcapacity and unsustainable fishery resource management. [24]

Challenges for Developing Countries

87. The removal of agricultural export subsidies may bring substantive benefits to a range of developing countries, particularly those that are efficient agricultural

[23] The multiple functions of agriculture include (a) its primary role of producing food and fibre; providing employment as well as (b) prevention of soil erosion, landslides and flooding; conservation of water resources; preserving bio-diversity; maintaining the landscape and providing recreational space through sustainable agricultural activities.

[24] For example, in the High Level Meeting on Trade and Environment, Japan questioned the view that fisheries subsidies are the cause of excessive catch and should, therefore be eliminated ". Japan believed that " such an opinion is quite one-sided and inappropriate, and that a more balanced view should be adopted".

producers and exporters. Other developing countries, such as the net food importing countries, could, however be adversely affected. These countries could have to cope with higher world market prices for imported food and reduced availability of food aid. Finally, some developing countries have expressed concern that food security objectives should not be compromised by further trade liberalization.

88. With regard to fisheries, substantial benefits may also be achieved. However, some developing countries may derive important economic benefits from existing arrangements in the fisheries sector. For example, fishing agreements (which may include subsidies) may provide important economic benefits. These countries need to anticipate possible short-term adverse economic effects that may arise from the elimination of certain subsidies.[25] This could be done, for example, by seeking the replacement of certain kinds of payments that could be considered as subsidies by other forms of assistance, including technical co-operation.

89. Some developing countries have expressed the view that mandated negotiations at the WTO on trade liberalization should not be linked to environment. If trade liberalization also results in environmental benefits than there is an added advantage. However, even in cases where immediate environmental benefits are not discernible, additional and effective market access for developing countries can contribute to sustainable development.

90. With regard to domestic support programmes, some developing countries, propose that, in the context of non-trade concerns of developing countries, in particular those with small and vulnerable economies, packages of measures aimed *inter alia* at preserving the environment should be exempted from the reduction commitments.[26]

E. Environmental impact assessments of trade policies and agreements

91. There is broad consensus that trade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential and contribute to the promotion of sustainable development. Some members argue that Strategic Environmental Assessments (SEAs) and integrated assessments (IAs) may be useful tools in this context.

92. Environmental impact assessments can be a useful tool if they are undertaken at the national level**.** In this case**,** they may promote policy co-ordination and help identify environmental policy measures which ensure that trade liberalization contributes to sustainable development.

93. A number of developed countries have announced that they will carry out

[25]Also, developing countries may feel a need to provide some incentives, including through subsidies, to promote domestic fishing activities, including artisanal fishing, as well as domestic processing of fish caught in their waters.

[26] WT/GC/W/163, 9 April 1999

"sustainability assessments" of forthcoming trade negotiations to provide a clearer basis for consideration of possible environment, economic and social implications.

Challenges for Developing Countries

94. Developing countries have pointed out that the potential impact of the new round of trade negotiations on the environment and sustainable development will differ among Members. Therefore, uniform guidelines and methodologies that do not factor in both country-specific and regional-specific situations for assessing environmental impacts are not realistic. Furthermore, environmental reviews would most likely not fundamentally alter the process of negotiations or greatly modify the agreements or the benefits sought from the agreements by the Members.

95. Multilateral processes (including proposals to consider EIA reports in the context of WTO Trade Policy Reviews) would have implications for developing countries. Developing countries have also expressed concern over the misuse of those assessments by developed countries as:

- The assessments of trade policies conducted by developed countries expresses certain vested interests only applicable within the borders of those countries, neglecting their obligations towards sustainable development at international political economy.
- Pressures to attach a commitment to carry out assessments on trade policies to the launching and conduct of a possible new round of multilateral trade negotiations may overburden developing countries and have chilling effects on further trade liberalization in favor of developing countries.

96. There is a need to seek clarification of proposals concerning EIAs or integrated assessments, in particular with regard to:

- Objective
- Coverage (to what extent does the assessment cover environmental, economic and social effects)
- Responsibility (whose policies being assessed?)
- Multilateral dimensions (to what extent are countries requested to compare notes, and what would be the implications?)

F. Environmental requirements and market access

97. A number of developed countries want to ensure that trade liberalization is supportive of high public health and environmental standards (see Module 3). While any country has the right to set environmental standards in accordance with national priorities, there are cases where a balance has to be sought. For example, developed countries should not shift the burden of environmental improvements (e.g. in terms of adjustment costs) to developing countries. In addition, developed countries must ensure that their environmental policies, standards and regulations do not cause

unnecessary adverse trade impacts on the exports of developing countries.

98. A number of developing countries have argued that in the cases where environmental standards are difficult to comply with, implementation of Article 11 on technical assistance (e.g. to upgrade conformity assessment procedure in developing countries in order that they gain acceptance in developed markets) should be made obligatory, rather than remain a best endeavor clause. Furthermore, the provisions for special and differential treatment contained in Article 12 of the TBT Agreement should be fully implemented, in particular with regard to the acceptance in importing countries of self-declaration, and of certification procedures adopted by developing country certification bodies, based on international standards.

99. A number of developing countries argue that trade is the main means available to them to secure the resources needed for environmental protection. As a result, trade liberalization in favor of products of export interest to them has become an essential requirement to help them achieve sustainable development. Therefore, developing countries emphasize that further work needs to be undertaken on the environmental benefits that may arise from enhancing existing market access opportunities for their products to ensure that the WTO is associated with positive efforts to promote environmental protection and contribute towards sustainable development in developing countries.

Challenges for Developing Countries

100. One of the main challenges that developing countries face has to do with ensuring their presence but most importantly their effective participation in standard setting in international bodies, and making sure these bodies comply with the Code of Good Practice. They also feel that a specific provision should be introduced in the TBT, so that if a measure in a developed country creates difficulties for developing countries, then it should be reconsidered.

101. Several developing countries' concerns regarding the WTO Agreement on Subsidies and Countervailing Measures directly or indirectly refer to the costs of compliance by either domestic or external environmental requirements. For instance, the LDCs argue that financial resources should be made available to meet their special needs, particularly with respect to the non-actionable subsidies for environmental compliance purposes (Article 8.2.c). Another challenge that developing countries face is to ensure that subsidies granted for environmental compliance and sustainable development purposes are considered non-actionable.

G. TRIPS and Biodiversity

102. The objectives of the TRIPS Agreement are contained in Article 7 which states that: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

103. The TRIPS Agreement requires that WTO Members apply intellectual property rights (IPRs) to all technologies, including those previously considered unsuitable for monopoly rights, such as plant varieties and micro organisms. Articles 27.2 and 27.3(b) allow Members to exclude certain biological resources from patentability.[27]

104. Key issues raised in trade and environment debate are (a) possible conflicts between the Members rights and obligations under the Convention on Biological Diversity (CBD) on the one hand and the TRIPS agreements on the other; and (b) the wider ethical, economic, environmental and social issues. Many developing countries have made proposals on these issues for consideration in the review of the TRIPS Agreement.

105. Review of Article 27.3(b) is currently underway.[28] In addition, Article 71 of the TRIPS Agreement specified that the Council for TRIPS would review the implementation of the entire agreement in 2000. Despite the review, most developing countries should have enacted legislation for the protection of plant varieties by 1 January 2000. Least developed countries have until 1 January 2005.

Challenges for Developing Countries

106. Several developing countries argue that complementarity between the CBD and the TRIPS Agreement should be ensured by including the principles of the CBD in the TRIPS Agreement. For example, a number of developing countries argue that:

- The TRIPS Agreement should include provisions, consistent with the Convention on Biological Diversity,[29] indicating that the State exercises sovereignty and inalienable rights over the biological resources within its national territory;[30]
- access to genetic resources can only occur on mutually agreed terms and with the "prior and informed consent" of States as stipulated in the CBD, unless States have otherwise determined.
- the equitable sharing of benefits that arise from the commercial use of communities' biological resources and local knowledge as required by Article 15.7 of the CBD should be ensured.

107. Furthermore, several developing countries are of the view that in all patent

[27] See Box 3 on the TRIPS Agreement, Section 5, Patents.

[28] There is some debate about whether Article 27.3(b) provides for the review of the implementation of the provisions therein, or for the review of the substantive provisions of the Article itself. Some, mainly developed countries, see it only as a review of the extent to which the previsions have been implemented. Others, mainly developing countries, see it as a review of the provisions themselves that could lead to revision of the text. The African Group, for example, emphasizes that the wording of the last sentence of Article 27.3(b) makes it clear that the mandate of the Council is to review the substantive provisions of this Article, and that the mandated review cannot be meant to be confined to the implementation of the subparagraph.

[29] Articles 3 and 15 of the CBD recognize the sovereign rights of States over their biological and genetic resources.

[30] WT/GC/M/39, Page 4.

applications for biotechnological innovations the country of origin of the germplasm should be indicated. It should also be indicated whether prior informed consent was obtained for the biological genetic resource or traditional knowledge so that mutual benefit-sharing arrangements can be made.

Protecting the rights of communities, farmers and indigenous people

108. The CBD requires parties to protect and promote the rights of communities, farmers and indigenous peoples *vis-à-vis* their customary use of biological resources and knowledge systems (Articles 8(j) and 10) and also that the equitable sharing of benefits that arise from the commercial use of communities' biological resources and local knowledge are ensured as required by Article 15.7. However, a number of developing countries argue that by mandating or enabling the patenting of seeds, plants and genetic and biological materials, Article 27.3(b) of the TRIPs Agreement is likely to lead to appropriation of the knowledge and resources of indigenous and local communities. Therefore, they argue in favor of harmonizing Article 27.3(b) with the CBD and the International Undertaking, *inter alia* by allowing developing countries to implement *sui generis* systems that can provide for the protection of the innovations of indigenous and local farming communities in developing countries.

109. Some developing countries would like to see the establishment on a mandatory basis within the TRIPS Agreement of a system for the protection of intellectual property, with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders.

110. A number of developing countries are of the view that, within the context of the review of the TRIPS Agreement provided for in Article 71:1, a new Article specifying the rights of indigenous peoples and local communities be included in Part I ("General provisions and basic principles") of the Agreement. [31]

111. Moral and ethical concerns arise over the extension of patents to life forms and over the way agreements are arrived at. There are also economic, environmental and social concerns. Some argue that plants, animals and essentially biological processes must not be patented.[32] However, by providing Members the option whether or not to exclude the patentability of plants and animals, Article 27.3(b) allows for life forms to be patented as long as they meet the requirements for patentability. Some developing countries, including LDCs argue that the review of Article 27.3 should clarify that plants and animals as well as micro-organisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable as they exist in nature. It is important to note that in this context a difference has to be made between a discovery and an invention.

[31] *Id.*

[32] B.L. Das, "Proposals For Improvements in the Agreement on TRIPS", SEANTINI (Southern and Eastern African Trade, Information and Negotiations Initiative) Bulletin. Volume 1 No. 8, 1998.

112. For example, some developing countries emphasized that the review of Article 27.3 (b) should not "pre-empt the outcome of deliberations in other related fora such as CBD, UPOV, FAO, the International Undertaking, and the development of an OAU model law on Community Rights and Control of Access to Biological Resources. These are important fora dealing with Article 27.3(b) issues (from a developmental perspective) which the TRIPS Council cannot afford to ignore".

113. According to one developed country, the review should consider "whether it is desirable to modify the TRIPS Agreement by eliminating the exclusion from patentability of plants and animals and incorporating key provisions of the UPOV agreement regarding plant variety protection".[33] In general this is also the position favored by pharmaceutical and agro-technology industries. Several other developed countries would also prefer UPOV 91 as the sole *sui generis* option.[34]

114. A number of developing countries, on the contrary, see the review as an opportunity to widen the options for excluding life forms from patentability and/or to increase the compatibility between the provisions of the TRIPS Agreement and the Convention on Biological Diversity (CBD). Other developing countries wish at least to have their options open and have more time to examine the issues and possibilities.

H. The Precautionary Principle

115. The precautionary concept developed within the paradigm of environmental protection. The precautionary principle embodies the logic that prevention is often better than cure, and acknowledges that scientific certainty often arrives too late to allow policy makers to formulate policy to avert serious environmental damage. In the trade context, the precautionary principle suggests greater deference by the trade rules, in certain defined circumstances, to national environmental measures. Recent interest in policy measures based on the precautionary principle or approach has also emerged in response to growing public concern about contaminated food and genetically modified organisms (GMOs).

Box 3: The Precautionary Principle

Principle 15 of the Rio Declaration reads as follows:

In order to protect the environment, the precautionary approach shall be widely applied by Member States in accordance with their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Article 5.7 of the SPS Agreement reads as follows:

[33] WT/GC/W/115**,** 19 November 1998

[34] The European Union would probably want to retain the UPOV option for plant varieties, but an EU position may be difficult to arrive at since the Dutch formally challenged the legitimacy of the EU Patent Directive that allows patents on plants and animals. Geoff Tansey, op. cit., page 14.

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the necessary information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measures accordingly, within a reasonable period of time.

116. The SPS Agreement, through Article 5.7 (see box 3), incorporates the precautionary approach. It applies science-based disciplines to the adoption and enforcement of national SPS measures to minimize their impacts on trade. National measures must be based on "sound science" and on an assessment of risks involved but it allows governments, under certain conditions, to take provisional measures where relevant scientific information is insufficient. The criteria reflected in Article 5.7 of the SPS Agreement is that these measure must be:

- exceptional;
- provisional;
- non-discriminatory;
- consistent;
- based on a cost/benefit analysis;
- assign burden of proof; and
- allow consultation of stakeholders.

117. A number of developed countries argue that there is a need for a clarification of the relationship between multilateral trade rules and core environmental principles, notably the precautionary principle. The TBT Agreement as opposed to the SPS Agreement does not explicitly include the precautionary approach in its text.

Challenges for developing countries

118. Wider use of the precautionary principle in developed countries may pose certain risks to developing countries to the extent that it may make it easier for the former to introduce overly stringent SPS measures. There is also a need to examine the possible abuse of the precautionary principle for protectionist purposes through the arbitrary application of precaution. For example, there may be a risk that the precautionary principle may be invoked not in cases where there is inadequate science, but rather to disguise other motivations for restricting trade. Developing countries could propose further analysis and eventually the development of guidelines for the appropriate use of the precautionary approach in the context of international trade.

119. Some have suggested that developing countries could consider whether the precautionary principle could be used to develop prior informed consent procedures and, where appropriate, proof by the exporter of a minimum level of safety for trade in inherently risky products (such as domestically prohibited goods, hazardous wastes and chemicals and genetically modified organisms). This may be particularly important in cases where developing countries lack capacity to control and test imports. This, however, is not the rationale for existing proposals. Others, have noted that in cases where developing countries want to invoke the precautionary principle,

e.g. to control GMOs, SPS Article 5.7 may already provide sufficient scope for doing so.

I. Domestically Prohibited Goods (DPG's)

120. The issue of domestically prohibited goods is a concern of many developing countries that are preoccupied that certain hazardous or toxic products are being exported to their markets without them being fully informed about the environmental or public health dangers the products may cause. These goods are being exported to them, when their domestic sale in the exporting countries have been either prohibited or severely restricted on health and environmental grounds. Developing countries want to be fully informed so that they can decide whether or not to import these products.

121. The issue of the export of DPGs has been examined under the GATT since 1982. At the time, it was agreed that all Parties should begin to notify the GATT of any goods produced and exported by them but banned for health reasons by their national authorities for sale in their domestic markets. Following this Decision, the notification system began to function, however Parties tended to notify DPGs whose export had also been prohibited instead of the ones which they continued to export. In the light of this, the notification system was not successful and no notifications were received after 1990, even though the 1982 Decision remains in force. Some delegations have requested that the DPG notification system be revived. However, to date the system has not yet been revived.

122. In 1989, a Working Group on the Export of DPGs was established in GATT.[35] Its mandate expired without it being able to resolve the issue. In 1994, the Ministerial Decision on Trade and Environment agreed to incorporate the issue of DPGs into the terms of reference of the CTE.

123. A number of international instruments exist that address the issue of the export of DPGs, such as, the prior informed consent (PIC) procedure of embodied in the Rotterdam Convention, the Bio-safety Protocol and the Basel Convention on the Transboundary Movement of Hazardous Wastes, which address for the most part, chemicals, pharmaceuticals, and hazardous wastes. A number of developing countries have argued that more work and better progress on this issue needs to be undertaken in the WTO. Certain delegations have argued that these instruments do not cover consumer products. Furthermore, while other instruments exist, they are voluntary in nature; therefore, parties to these instruments do not have to comply with their obligations if they decide not to.

Challenges for Developing Countries

124. One of the main challenges that developing countries face is the lack of information and infrastructure to adequately monitor, and where appropriate regulate trade in DPGs, in particular in the area of human and animal food. Developing countries also face the challenge of ensuring that technical assistance and transfer of technology related to DPGs whose trade is allowed, takes place. This would greatly

[35] The Working Group met fifteen times between 1989 and 1991.

contribute to help them deal with environmental problems at their source and avoid unnecessary additional trade restrictions on the products involved. This would also assist developing countries in strengthening their technical capacity to monitor and, where necessary, control the import of DPGs.

J. Biotechnology and Genetically Modified Organisms (GMOs)

125. The debate over biotechnology and genetically modified organisms (GMOs) is a multidimensional debate. The issue of biotechnology is a very contentious and complex issue that came up for the first time in the MTS through the TBT Committee as a result of a notification from the EC (under the TBT Agreement) of a mandatory labelling requirement for GM soya and maize. The notification was made at the end of 1997, and has been discussed throughout 1998 and 1999. The EC claimed that the objective of the labelling requirement was not the protection of human health, given that adverse effects of genetic modification on human health have not been proven, but to provide consumers with product information. Opponents of the labelling requirement argued in the Committee that the label would feed into the existing GMO scare. They stated that the products of modern biotechnology are no different than conventional agricultural products, which are also genetically modified but through different techniques. They believe that GM agricultural crops (soya and maize) are no different than conventional ones in terms of composition, nutritional value or even nutritional effect. In so far the EC's labelling requirement was distinguishing between "like products", they held that it was discriminatory and inconsistent with the TBT Agreement. This discussion is one of the first signs in the WTO of the new types of concerns that will result from modern biotechnology.

126. Some Members would like the WTO to address disciplines to ensure trade in biotechnology products is based on transparent, predictable and timely processes. In preparation for the Seattle Ministerial Conference, a number of proposals relating to biotechnology were made. These included a proposal to establish a working group in the WTO on approval procedures for products developed through new technologies, including agricultural biotechnology. These proposals reflected growing concerns with the regulatory measures being taken by Members in response to genetic modification.

127. The creation of a working group in the WTO on biotechnology was overwhelmingly opposed by developing countries on the basis that it would undermine the negotiations in other international for a. Moreover, some are of the view that it may pave the way for new WTO disciplines that hamper the ability of developing country governments, who are already burdened by limited capacity, to regulate GM products. It is important to note that developing countries have made considerable efforts to ensure a successful conclusion to the Biosafety Protocol with a view to ensuring a strong international framework for trade in GM products. In light of the above a number of developing countries argue that there is actually little need to formally discuss biotechnology in the context of the WTO, as an international framework has already been established.

Challenges for Developing Countries

128. The GMO issue, in particular, poses many challenges for both developed and developing countries. One of the main challenges that countries face is the lack of information, as well as adequate testing facilities to monitor and control potential effects of GMOs, both in the short and long term.

129. The question of the environmental impacts of biotechnology which has been inextricably connected with debates about bio-diversity and species remains to be settled in a satisfactory manner for all stakeholders involved. The results of these debates could have serious implications for developing countries that are rich in biological resources. Furthermore, the absence of capacity in some developing countries to differentiate between bio-technically engineered products and conventional products also poses serious challenge for developing countries.

IV. GATT/WTO TRADE-RELATED ENVIRONMENTAL DISPUTES

130. The first part of this section presents an overview of the WTO dispute settlement mechanism (DSM). It highlights the efficacy and the benefits of the DSM and its importance as a tool for developing countries to defend their interests when nullified or impaired by other Members, in particular developed country Members. In the second part, a brief review of the main trade-related environmental disputes in the GATT and under the WTO is presented. Finally, this section ends by highlighting some implications for developing countries of dispute settlement rulings and concerns that have resulted from the decisions.

A. Overview of the WTO Dispute Settlement Mechanism

131. A WTO Member having a reasonable grievance against another Member regarding the rights and obligations in the WTO Agreements can avail itself of the Dispute Settlement Process of the WTO. This is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU). It is administered by the Dispute Settlement Body (DSB), which consists of the Members of the WTO. The DSB has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the findings of the panels as well as the results of an appeal. It monitors the implementation of the rulings and recommendations, and in accordance with the procedures set up in Article 2.2, it has the power to authorize retaliation when a country does not comply with a ruling.

132. Dispute settlement in the WTO plays a central role in providing security and predictability to the WTO multilateral trading system, in particular for developing

countries. The Dispute Settlement system is in many ways the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy. The new WTO system is at once stronger, more automatic and more credible than its GATT predecessor. This is reflected in the increased diversity of countries using it and in the tendency to resolve cases "out of court" before they get to the final decision.

133. The efficiency and dependability of dispute resolution is key to the effective functioning of the WTO and ensures a number of benefits that are of particular importance for the weaker trading partners. It provides the WTO with a rule-oriented system that favours mutually agreed solutions and one that intends to secure withdrawal of inconsistent measures. The application of dispute settlement (DS) in the WTO rests on the following three main principles:

- multilateralism versus unilateralism;
- exclusive application of WTO rules on dispute settlement to disputes related to the WTO; and
- uniform application to all WTO Agreements.

134. The function of the DS is to preserve the rights and obligations of WTO Members. Without a means of settling disputes, the rules-based system of the WTO would not be as efficient because there would be no way of enforcing the rules and the weaker trading partners would have no way of making sure that their interests are protected.

135. The system is based on clearly defined rules, with timetables for completing a case. In addition, the countries can settle their dispute bilaterally at any stage. At all stages, the WTO Director-General is available to offer his good offices, to mediate or to help achieve a conciliation. The main stages of dispute settlement in the WTO are described below

Consultation Phase

- A Member which feels aggrieved by the action of another will propose to hold consultation with the other Party. The latter has to respond within 10 days and enter into consultation within 30 days.
- If the consultation takes place, the Members should try to reach a satisfactory solution of the issues involved
- If any other Member feels that it has a substantial trade interest in the matter in dispute, it may request to join the consultation.
- If the dispute has not been settled in 60 days the aggrieved party may ask for the formulation of a panel.
- In many instances, disputes have been resolved at the consultation stage, without further proceedings.

Panel and Appellate Body Review

- The DSB has to establish a Panel promptly.
- The DSB will prescribe the terms of reference of the panel. Usually standard terms of reference are used but in some cases, special terms of reference are used. It calls for an examination of the issue raised by the complainant and the giving of findings to assist the DSB in making recommendations or in giving the rulings provided for in the relevant agreement.
- Normally a Panel consists of three members. Usually panel members are chosen

from a list maintained for this purpose. The list consists of persons who have acquired direct experience in the field of GATT/WTO or have served as senior trade officials of Members or have taught or published on international trade law or policy. Nomination is initially proposed by the secretariat.

Adoption of the Report by the DSB

- Within 60 days of the sending of the panel report to the Members, the report must be adopted by the DSB unless one of the parties notifies its decision to go for appeal. In this case it will be considered by the Appellate Body which will give its decision normally within 60 days.
- The Appellate Body has seven members. Three members of this body serve on any one case.

Implementation

- It is expected that the Member to whom the recommendation for action has been addressed will implement the recommendation promptly. Within 30 days of the adoption of the Panel or Appellate Body report, the Member must inform the DSB about its intention in respect of the recommendations, including a time-table for implementation.

Compensation and suspension of concessions

- If the recommendations have not been implemented within the time frame set for this purpose, the complaining party may either seek compensation or seek permission to withdraw or suspend concessions to the offending party

B. Brief review of some trade-related environmental GATT/WTO disputes

136. Under the GATT six panel proceedings on cases involving environmental measures or human health-related measures under Article XX were completed. Out of the six reports, only three were adopted. Under the WTO Dispute Settlement Understanding (DSU), four trade-related environmental disputes have been completed (see Box 4).

Box 4: GATT/ WTO Trade -Related Environmental Disputes

GATT

1. **United States - Restrictions on the Imports of Tuna and Tuna Products (1982)**
2. **Canada- Measures Affecting Exports of Unprocessed Herring and Salmon (1988)**
3. **Thailand-Restrictions on the Importation of and Internal Taxes on Cigarettes (1990)**
4. **United States - Restrictions on the Imports of Tuna, (1991)**
5. **United States - Restrictions of the Imports of Tuna (1994)**
6. **United States - Taxes on Automobiles, (1994)**

WTO

1. **United States - Standards for Reformulated and Conventional Gasoline, (1996)**
2. **EC Measures Concerning Meat and Meat Products (Hormones) (1998)**
3. **United States - Import Prohibition of Certain Shrimp and Shrimp Products (1998)**
4. **EC- Measures Affecting Asbestos and Asbestos Containing Products (2000)**

137. It is important to note, that dispute settlement rulings concerning trade-related

environmental measures or human health-related measures under Article XX (b) or (g) [36] have evolved considerably from the "tuna-dolphin" panel decisions under GATT to the latest dispute settlement rulings under the WTO (see Box 5).

Box 5: Evolution of GATT/WTO Trade-related Environmental Disputes under Article XX (b) and (g)

GATT- environment/ human health related disputes	(Panel Findings) Article XX (b)		(Panel Findings) Article XX(g)		(Panel Findings) Chapeau of Article XX	
1. UNITED STATES – RESTRICTIONS ON THE IMPORTS OF TUNA AND TUNA PRODUCTS			Not justified			
2. Canada-Measures Affecting Exports of Unprocessed Herring & Salmon			Not justified			
3. Thailand-Restrictions on the Importation of and Internal Taxes on Cigarettes	Not "necessary" within the meaning of Article XX (b)					
4. US-RESTRICTIONS ON THE IMPORTS OF TUNA	Not justified		Not justified			
5. US-Restrictions of the Imports of Tuna	Not justified		Not justified			
6. US – Taxes on Automobiles			Not justified			
WTO –environment/human health related disputes	Panel Findings Article XX (b)	AB Findings Article XX(b)	Panel Findings Article XX(g)	AB Findings Article XX(g)	Panel Findings Chapeau Article XX	AB Findings Chapeau Article XX
5. US- Standards for Reformulated & Conventional Gasoline	Not justified		Not justified	Within the terms		Failed to meet the requirements
6. EC Measures Concerning Meat and Meat Products*	----	----	----	----	----	----
7.US-Import Prohibition of Certain Shrimp and Shrimp Products			Not justified	Within the terms		Failed to meet the requirements
8. EC- Measures Affecting Asbestos & Asbestos Containing Products	Justified	Justified			Does not conflict	Does not conflict

*This case considered the consistency of the import prohibition with the SPS Agreement.

138. What is important in the WTO's rules is that measures taken to protect the environment must not be unfair. In short, they must not discriminate between domestic and foreign products nor can they discriminate between different trading partners. The real challenge is to prove that measures are taken for legitimate environmental purposes and that they meet the requirements of the Chapeau of Article XX in order for them to be considered legitimate.

[36] Article XX (b) and (g) are designed to allow WTO Members to adopt GATT-inconsistent policy measures if this is either "necessary" to protect human, animal or plant life or health, which together can be taken to mean "environment", or if the measures relate to the conservation of exhaustible natural resources.

GATT trade-related environmental disputes

139. This section presents a factual overview of some of the most relevant GATT/WTO trade-related environmental disputes listed above.

The tuna/dolphin disputes (1991) (1994)

Facts

140. The U.S. Marine Mammal Protection Act (MMPA) was enacted in 1972 to limit the incidental killing of marine mammals by commercial fishermen.[37] Under the MMPA, Congress instructs the Secretary of Commerce to ensure that the marine mammal kill rates of countries exporting tuna to the United States does not exceed, by a given margin, the taking rate of the U.S. fleet. If a country does not meet the standard, the Secretary is required to implement a direct embargo on tuna imported from that country. To further ensure compliance with the MMPA's Direct Embargo Provision, Congress later included the Intermediary Nation Provision, the Pell Amendment, and the Dolphin Protection Consumer Information Act (DPCIA). The DPCIA provides that producers, importers, exporters, distributors, or sellers of tuna products can only attach a "dolphin safe" label if the tuna is harvested in a manner that was not harmful to dolphins.

United States – Restrictions on the Imports of Tuna, not adopted, circulated on 3 September 1991

141. A GATT dispute settlement panel was established to examine the MMPA and the embargo by the United States on imports of tuna from Mexico. This case achieved prominence in the media because it was the first dispute dealing directly with a trade sanction used by one country to dictate the environmental standards of another.

142. The Panel recognized that the MMPA regulations were concerned only with production methods, which did not affect the product itself, and as such could not be enforced on imports under Article III of the GATT. The Panel also determined that the U.S. embargo of Mexican tuna was an effective quantitative trade restriction and was therefore in violation of Article XI. The argument advanced by the United States that the restrictive trade measures could be justified under Article XX (b) as measures necessary to protect human, animal or plant life or health and Article XX (g) as measures relating to the conservation of exhaustible natural resources were rejected by the Panel.

143. The Panel did, however, uphold the DPCIA. It gave the consumer the freedom of choice to give preference to tuna carrying the "dolphin safe" label. The labelling provisions did not restrict the sale of tuna and tuna products or provide any advantage for products labeled "dolphin safe". Further, the "dolphin safe" label did not violate Article I of the GATT because it did not discriminate against any country.

[37] Panel report on "United States--Restrictions on Imports of Tuna", 16 June 1994, DS29/R.

United States – Restrictions on Imports of Tuna, not adopted, circulated on 16 June 1994

144. In June 1992, after Mexico refused to seek ratification by the GATT Council of the Panel decision in Tuna-Dolphin I, the European Community brought its own challenge against the US MMPA before a GATT dispute resolution panel.

145. Three years after Tuna-Dolphin I, in 1994, the new Panel came to the same conclusions relating to the secondary tuna embargo as the panel in the original case. The panel ruled that the US was in violation of the GATT prohibition on quantitative restrictions and that the use of trade measures to force other countries to adopt its own domestic environmental or other policies is inconsistent with the GATT. The MMPA required a country not only to kill fewer dolphins but also to use the same processes as the U.S. fleets.

146. The Panel on Tuna-Dolphin II applied a slightly different reasoning than the Panel in Tuna-Dolphin I. The panel in Tuna-Dolphin II noted that, on the basis of its article XX(g), countries are not prevented from using trade measures to protect the global commons or environmental resources outside their jurisdiction. However, these measures have to be designed with the aim of protecting the resource in question, in this case dolphins. Further, it ruled that it was necessary that no other measure could be taken which is more consistent with the GATT. The panel found that the MMPA was in failure on both of these counts.

United States - Taxes on Automobiles, not adopted, circulated on 11 October 1994

Facts

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

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

149. The CAFE regulation required the average fuel economy for passenger cars manufactured in the US or sold by any importer not to fall below 27.5 mpg. Companies that were both importers and domestic manufacturers had to calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically.

150. The Panel found the CAFE regulation to be inconsistent with GATT Article III:4 because the separate foreign fleet accounting system discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. Similarly, the Panel found that

the separate foreign fleet accounting was not justified under Article XX(g); it did not make a finding on the consistency of the fleet averaging method with Article XX(g). The Panel found that the CAFE regulation could not be justified under Article XX(d). This panel was the first to consider the application of article XX for a tax.

WTO trade- related environmental disputes

United States - Standards for Reformulated and Conventional Gasoline, adopted on 20 May 1996

Facts

151. Following a 1990 amendment to the Clean Air Act, the Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the US. From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

The Panel findings

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

153. The Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g).

The Appellate Body findings

154. On appeal of the Panel's findings on Article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX.

155. The Appellate Body overruled the panel report which stated that the Gasoline Rule did not relate to the conservation of clean air. The Appellate Body concluded that:

- The measures were primarily aimed at the conservation of exhaustible natural

resources;
- a restriction on the conservation of clean air by regulating domestic production was established jointly with restriction on imported gasoline.

156. However, the Appellate Body did not consider that the measures were covered by the chapeau of article XX:

- The US has not pursued the possibility of entering into cooperative arrangements with governments of Venezuela and Brazil;
- The costs of imposition of statutory baselines for foreign firms were not taken into consideration as they were for domestic firms.

EC Measures concerning meat and meat products (hormones), adopted on 13February 1998

Facts

157. A first complaint was brought by the USA and a Panel was established by the DSB in May 1996. The DSB then established on 16 October 1996 the Panel in the complaint brought by Canada. The EC and Canada agreed that the composition of the Panel should be identical in both cases.

158. The Panels dealt with complaints against the EC relating to an EC prohibition of imports of meat and meat products derived from cattle to which either certain natural hormones or synthetic hormones have been administered for growth promotion purposes. The import prohibitions were set forth in a series of Directives of the Council of Ministers.

159. The EU forbids the use of growth hormones in its member countries and has prohibited hormone beef imports since 1989.

The Panel findings

160. The US Panel Report and the Canada Panel Report reached the same conclusions in paragraph 9.2:

> "*The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in article 5.1 of the SPS Agreement;*
>
> *The EC, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirement contained in article 5.5 of the SPS Agreement.*
>
> *The EC, by maintaining sanitary measures which are not based on existing international standards without justification under article 3.3 of the SPS agreement, has acted inconsistently with the requirements of article 3.1 of that*

agreement."

161. In both Reports, the Panel recommended that:

"*the Dispute Settlement Body requests the EC to bring its measures in dispute into conformity with its obligations under the SPS agreement*."

The Appellate Body findings

162. On 24 September 1997, the EC notified the DSB of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel.

163. The Appellate Body upheld, modified and reversed certain of the findings of the Panel. It upheld the Panel's finding that the EC measures are inconsistent with the requirements of article 5.1 of the SPS agreement. It recommended that the DSB request the EC to bring the SPS measures found inconsistent with the SPS agreement into conformity with the obligations of the EC under the SPS agreement.

164. It ruled in February 1998 that the 10 year old embargo was not based on a scientific risk assessment, in conformity with articles 5.1 and 5.2 of the SPS Agreement, showing that the hormones had adverse effects on human health. The measures found to be inconsistent with the obligations of the EC under the SPS agreement were the Directives maintaining the import prohibition.

165. In response to the ruling, the EU kept the ban in place while waiting for the completion of 17 new scientific studies, expected to be available in mid-2000. In July 1999, the WTO authorized complainants (Canada and the USA) to impose trade sanctions because the EU had not implemented the AB ruling.

United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted on 6 November 1998.

Facts

166. In 1997, Malaysia, India, Pakistan and Thailand requested the establishment of a WTO panel to consider US trade restrictions on shrimp imports. Under the authority of the Endangered Species Act (ESA), the US imposed embargoes on the import of shrimp from a number of its trading partners for the purpose of protecting the sea turtle population. Under the ESA, access to US shrimp markets is conditional upon a certification that a country has adopted conservation policies that the US considers to be comparable to its own regulatory programs concerning the incidental taking of sea turtles. The US argued that this trade measure satisfied Article XX(g).

The Panel findings

167. The panel issued its final report to the parties on 6 April 1998. It rejected the U.S. argument on the basis of its interpretation of the chapeau of article XX, and article XX(g) was not considered in the particular. The panel found that the US measure constituted unjustifiable discrimination between countries where the same conditions prevail. The U.S. appealed the panel's interpretation of Article XX(g).

The Appellate Body findings

168. The Appellate Body, overruling the Panel's interpretation, considered article XX(g) and decided that although the embargo served an environmental objective that is recognized as legitimate under the Article, the measure was applied in a manner which constituted arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.

169. The Appellate Body adopted an evolutionary approach in its interpretation of "exhaustible natural resources". It considered that living species, and therefore sea turtles, could fall under the ambit of article XX(g). The means-to-an-end relationship between the trade measure and the policy of conserving an exhaustible, endangered species, was observably close and real and therefore a measure "relating to" the conservation of an exhaustible natural resource. The Appellate Body also determined that the imposition of the embargo was non-discriminatory, in that it was made effective in conjunction with restrictions on domestic harvesting of shrimp, as required by Article XX(g).

170. However, the Appellate Body went on to conclude that the U.S. embargo was applied in a manner which constituted both unjustifiable and arbitrary discrimination between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX.

171. The Appellate Body considered that the US measure did not respect the chapeau for a number of reasons, including the following:

- The US regulation requires all exporting Members to adopt the same policy as the one applied in the US;
- The US failed to take into consideration the specific local and regional conditions in other Member countries;In cases where shrimp was caught using US prescribed methods, imports were prohibited if the exporting country did not impose the use of turtle excluder devices (TEDs)
- No attempt was made by the US government to reach a multilateral solution with the complainant countries;
- The measure was applied in a discriminatory manner authorising differing phase-in periods for the use of TEDs in different countries;
- Based on article X of the GATT 1994 with respect to granting due process rights, it stated that foreign governments and traders should have the opportunity to comment on and challenge regulations before US administrative bodies or courts, like US nationals.

European Communities -Measures Affecting Asbestos and Asbestos- Containing

Products

Facts

172. On December 24, 1996, the French Government adopted a Decree[38] that provides for a ban on the manufacture, sale and import of all forms of asbestos and products containing them.[39] France defended the measure arguing that asbestos was a known carcinogen estimated to kill more than 2000 people a year in France alone.[40]

173. Canada did not contest the toxicity of asbestos, but maintained that chrysotile asbestos, was safe under properly controlled used and therefore should not be banned outright.[41] Canada was of the view that the French import ban was an attempt to protect domestic asbestos substitute producers instead of a legitimate public health measure.

174. Canada claimed that the Decree violates GATT Article III:4 and XI as well as the TBT Agreement, and also nullified or impaired benefits of the GATT under Article XXIII:1(b). Canada requested the DSB to establish a panel on October 8, 1998 to examine the French measure concerning the prohibition of asbestos and products containing asbestos. The DSB established a panel on November 25, 1998. Brazil, the US and Zimbabwe reserved their rights as third parties to the dispute, in accordance with Article 10 of the Dispute Settlement Understanding.

The Panel findings

175. The panel ruled that Canada was correct to assert that the import restriction violated GATT Article III:4, which requires equal treatment for "like products", but exempted the measure from this obligation under GATT Article XX(b), which allows such exceptions when they are necessary to protect human, animal or plant health.

176. The panel decision marked the first time that the human health exception was found to justify an otherwise GATT inconsistent measure. However, it raised serious concerns within the health and environmental communities with respect to the panel's "like product" analysis, which disregarded the fact that, unlike their substitutes, asbestos and asbestos fibres were potentially life-threatening. The final Panel report was circulated on September 28, 2000. On October 2, 2000 Canada appealed.

The Appellate Body Findings

[38] Decree No. 96-1133, which entered into force on January 1, 1997.

[39] WT/DS135/R, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel.

[40] Article 2 of the Decree provides certain limited exceptions to the ban for chrysotile asbestos (also called white asbestos fibres), it states that: "On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available that: On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices; on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use… ." *See* WT/DS135/R, European Communities-Measures Affecting Asbestos and Asbestos- Containing Products, Report of the Panel.

[41] Bridges, *"Asbestos Ruling Breaks New Ground in "Like Product" Determination*, Year 5 No.1-3, January-April 2001.

177. In its appeal Canada sought to overturn the panel's approval of the ban. The European Communities requested that it be upheld and that the Article III:4 "like product" violation finding be reversed. Canada also contested the original's panel finding that the French decree was not regulation subject to the WTO TBT Agreement, which requires, *inter alia*, that prohibitions be based on the descriptive characteristics of products rather than their performance.

178. The WTO's Appellate Body on 12 March did not confirm that France's import ban on chrysotile asbestos was inconsistent with GATT rules. It also reversed the original's panel's finding that a product's end use rather than its characteristics, including toxicity, was irrelevant in determining the "likeness" with competing products.

179. From the sustainable development point of view, the Appellate Body's most significant finding was to reverse the panel's conclusion that chrysotile asbestos and its substitutes were "like products". It agreed with the EC that health risk constituted a legitimate factor in determining whether products were "like" and therefore subject to GATT Article III:4 obligation to be treated equally.[42]

180. In its appeal, Canada disagreed with the panel's conclusion that the manipulation of chrysotile asbestos cement posed a risk to human health and therefore fell under the scope of Article XX (b), which allows Members to take measures to protect human health even if those measures are inconsistent with other GATT provisions. The Appellate Body stated that it regarded "Canada's appeal on this point as, in reality, a challenge to the panel's assessment of the credibility and weight ascribed to the scientific evidence before it." Furthermore, it noted that all four scientists that had been consulted by the panel agreed that a health risk did exist and that the carcinogenic nature of chrysotile asbestos fibres had been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization. The Appellate Body therefore found the panel "well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health", and upheld the conclusion that the import ban was a measure to protect human life or health within the meaning of Article XX(b) of the GATT 1994.[43]

181. The Appellate Body upheld the panel's conclusion that the EC had demonstrated that there was no "reasonably available alternative" to the French prohibition, and that the regulation was "necessary to protect human…life or health" within the meaning of Article XX (b) of the GATT 1994.

182. Canada was more successful in its request that the Appellate Body reverse the panel's conclusions that the TBT Agreement did not apply to the French decree. However, while the Appellate Body decided that the regulation was indeed a 'technical regulation' under the TBT Agreement, it cautioned that the finding applied only to "this particular measure" and did not mean that all internal measures under GATT Article III:4 fell under the scope of the TBT Agreement. The Appellate Body did not examine

[42] *Id.*

[43] Bridges, *"Asbestos Ruling Breaks New Ground in "Like Product" Determination,* Year 5 No.1-3, January-April 2001.

the specific TBT violations alleged by Canada, given that the original panel had determined that the contested decree was not a technical regulation and therefore there were no 'issues of law' or 'legal interpretations' to review these by the Appellate Body.

183. The Appellate Body created a special procedure for persons other than third parties to request leave to file a non-solicited report submission, but denied all requests for leave that were submitted. The reasons for the denial were not specified the beyond an all purpose "failure to comply sufficiently with all the requirements set forth in paragraph 3 of the additional Procedure." The Appellate Body did not elaborate further on this question. The Appellate Body report was circulated, March 12, 2001.

C. Implications for Developing Countries of Dispute Settlement Rulings

184. The GATT panel decisions of the well-known "tuna-dolphin" dispute stimulated the discussions on trade and environment within the multilateral trading system. Recent decisions of trade-related environmental cases brought to the dispute settlement mechanism seem to have been affected by these discussions. An important number of member delegations have stated that the Appellate Body has modified the balance of rights and obligations under the WTO agreements. Several suggestions for reform of the dispute settlement have arisen as a result of the perceived political nature of trade and environment dispute settlement resolution, in particular as a result of the conclusions of the "shrimp-turtle" panel.

185. An issue that has resulted in increased concern in developing countries is the discussion concerning non-solicited briefs. The defendants of the "shrimp-turtle" case claim that the ruling regarding the admission of the non-solicited briefs before the WTO's dispute settlement mechanism modifies the balance of the Dispute Settlement Understanding (DSU). It is feared that this ruling would help non governmental groups to participate on inter-governmental disputes through the submission of non-solicited briefs, in particular from those NGOs that deal with trade and environment issues. One main concern is the spill-over effect that this may create in opening up the door for future participation of other private interests and pressure groups, including those of agricultural, industry or services private groups, as well as labour groups.

186. According to a number of WTO Members, NGO participation in the dispute settlement process was not authorized when they agreed on the DSU in Marrakech in 1994. The relevant applicable provisions of the DSU (Article 13.2) indicate that panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. It does not appear to suggest that the Appellate Body could accept unsolicited briefs. This has led a number of Members to argue that in the context of the Dispute Settlement Review, rules should be clarified to state that Panels and the Appellate Body should not take account of unsolicited information.

187. Of greater concern, are the statements expressed by some members who consider that the Appellate Body has voluntarily taken steps to undertake duties beyond their mandated role, and "legislate" through the interpretation of principles and rules of the agreements, while the legislative process is reserved for WTO Members. These are

some of the reasons which have made some members argue that it's necessary to complete the mandated DSU review as soon as possible.

188. Despite some imperfections in the DS system, it is important to note that Members, in particular, developing country Members benefit greatly from the efficiency and dependability of dispute resolution. The DS system is a central element in providing security and predictability to the multilateral trading system, which is of crucial importance for the weaker trading partners, in particular for the developing countries. Furthermore, the DS mechanism is the only system that developing county Members can rely upon in the WTO to defend their interests when nullified or impaired by other Members.

V. COMMON THEMES AND MISUNDERSTANDINGS OF THE TRADE AND ENVIRONMENT DEBATE IN THE WTO

189. This section addresses a series of common concerns that result from the trade and environment debate. These issues are presented with a view to clarifying a number of misunderstandings that are often voiced by participants from both governments and civil society, including environmental and developmental NGOs.[44] For this purpose a number of questions have been posed for consideration.

A. Do WTO rules prevent countries from implementing sound environmental policies?

190. A popular perception is that the WTO rules, as well as, concerns about international competitiveness, that result from trade liberalization prevent countries from implementing legitimate environmental policies, in accordance with national environmental priorities. Some fear that WTO rules and competitive deregulation lead to a downward harmonization of standards or a "race-to-the-bottom" with respect to environmental standards worldwide.

191. By and large these perceptions are wrong. Many experts, particularly in the trade community, have emphasized that WTO rules do not prevent countries from adopting environmental policies. WTO rules allow complementary trade measures that are conducive to effective implementation of domestic environmental policies, but aim to prevent such measures from creating unnecessary obstacles to trade. According to a GATT/WTO report:

> "GATT rules, [therefore], place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products. Generally speaking, a country can do anything to imports that it does to domestically produced products, and it can do

[44] This section is intended to stimulate the debate and may be skipped if participants have a fairly good understanding of the WTO.

anything it considers necessary to its own production processes."

192. As pointed out in the same report, there are, however, some limitations on a country's right to choose specific measures for the protection of the domestic environment. For instance, technical regulations and standards should not be formulated or applied in such a way as to constitute unnecessary obstacles to trade.

193. The conclusions of the report of the Appellate Body in the shrimp-turtle case, clarifies this issue further. It states that:

> "In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bi-laterally, pluri-laterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do."[45]

194. According to the Appellate Body conclusions, with respect to their findings on this issue they stated that:

> "What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*."[46]

195. According to some, the existing WTO rules may be less effective in dealing with transborder, regional or global environmental problems. In particular, the question of the compatibility between some multilateral environmental agreements (MEAs) and WTO rules has been raised.

B. What are WTO's limitations to deal with environmental issues?

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[45] Paragraph 43 of the Appellate Body Report on *"United States – Import Prohibition of CertainShrimp and Shrimp Products"*.

[46] *Id.* Paragraph 44.

196. The WTO is perceived as one of the few multilateral institutions dealing with trade and environment issues that has the means to settle trade-related environmental disputes unlike, for example, UNEP, UNCTAD or the Commission on Sustainable Development. In the light of this, many perceive the WTO as the institution that will eventually deal with and resolve trade and environment issues.

197. Expectations from environmentalists may often be too high. The WTO Secretariat itself emphasizes "that the WTO is not an environmental protection agency, and that its competence for policy coordination in this area is limited to trade policies, and those trade-related aspects of environmental policies which may result in a significant effect on trade". Furthermore, the WTO Secretariat notes that "in addressing the link between trade and environment, [therefore] WTO Members do not operate on the assumption that the WTO itself has the answer to environmental problems. However, they believe that trade and environmental policies can complement each other. Environmental protection preserves the natural resource base on which economic growth is premised, and trade liberalization leads to the economic growth needed for adequate environmental protection. To address this complementary, the WTO's role is to continue to liberalize trade, as well as to ensure that environmental policies do not act as obstacles to trade, and that trade rules do not stand in the way of adequate domestic environmental protection".

C. Should trade rules be adjusted for environmental purposes?

198. Clear international trade rules provide protection, particularly for the economically weaker trading partners, against the unnecessary trade effects of environmental policies of trading partners. Without strong trade rules, protectionist measures may be applied under the guise of environmental protection policies.

199. Modifications in WTO rules that might make environment-related trade restrictions easier pose a risk to the developing countries. However there is also a danger that if international trade rules are perceived to get in the way of increased environmental protection at the national and international levels, environmental policies will be adopted without regard for trade. For developing countries the maximum safeguard is provided by a rule-based multilateral trading system which takes account of environmental concerns, rather than being exposed to the risk of unilateral trade measures.

200. There may thus be a need to carefully examine whether certain adjustments in the trade rules need to be made to better accommodate environmental policies while at the same time providing safeguards against unnecessary trade restrictions.

201. The Committee on Trade and Environment was mandated to make 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. It did not made any such recommendation in its first report to the WTO Ministerial Conference in Singapore.

202. It is worth noting that coordination between trade officials and environmental

officials at the national level is of crucial importance in ensuring that the linkages and complementarities that exist between trade and environment policies are taken into consideration and are adequately addressed.

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VII. USEFUL INFORMATION

International Organizations

FAO	**Food and Agriculture Organization** **http://www.fao.org**
ITC	**International Trade Centre (UNCTAD/WTO)** **http://www.intracen.org**
UNCTAD	**United Nations Conference on Trade and Development** **http://www.unctad.org**
UNEP	**United Nations Environment Programme** **http://www.unep.org**
WTO	**World Trade Organization** **http://www.wto.org**