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GREEN DILEMMAS OF THE ESCWA REGION: MEAs IN THE TRADE AND ENVIRONMENT DEBATE

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GREEN DILEMMAS OF THE ESCWA REGION: MEAs IN THE TRADE AND ENVIRONMENT DEBATE

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2) dispute resolution
3) Trade related intellectual property rights and transfer of technology.
4) Charges and taxes and eco-labelling
5) DPGs

These points cover a broad range of items in the WTO work programme indicating the comprehensive nature of issues that arise in the context of MEAs. In fact, they cover more than half of the items in the CTE's work plan. See Annex 1. These issues are not exhaustive by any means but only provide an indication of the complexity of the role of MEAs in the trade and environment debate. Each of these aspects is analysed in the following sections and the recommendations for the ESCWA region have been outlined in the concluding section.

Section 1: The use of trade measures in MEAs and WTO rules

Background

This has perhaps been the most contentious issue in the trade and environment debate. Most national governments particularly because of the UNCED initiative have implemented or ratified some policies which will help protect their local environment. The question of conflict between national environmental policies arises when the economic activity of one nation conflicts with globally agreed environmental norms. In such a situation trade sanctions and other trade related instruments are chosen in preference to others, primarily because of the ease of implementation. This is evidenced by the fact that of the 127 multilateral instruments which have been negotiated so far on environment at least 17 use trade sanctions as a remedy for non-compliance.[1] Furthermore, the only international agreement which has been negotiated to date for the protection of the global commons is the Montreal Protocol on Substances that deplete the Ozone layer.[2] The important trade impacts of this protocol have been felt through the obligation to import substitutes of chemicals and products using chemicals, especially in countries which were major producers of CFCs.

One body of the literature argues that environmentally related trade restrictions may be counterproductive even for its stated objective of environmental preservation, as free trade is likely to be much more effective in tackling environmental problems. The argument for free trade is persuasive as it proposes that increased incomes generated through a process of trade liberalization will provide additional resources that can be directly applied to meet environmental objectives.[3] Economic instruments (such as taxes at source, subsidies etc)

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[1] See GATT report on Trade and Environment, March 1992.

[2] See OECD, 1992, Report on Trade and Environment

[3] See Robertson, D. (1992), "Trade and Environment: Harmonization of Technical Standards", in P. Low (ed.), *World Bank Discussion Paper*, No. 159 (Washington, DC)

instruments or even product standards affect their trading opportunities. Even if environmentally related product measures are not enforced strictly, the spectre of trade sanctions as a punishment for non-compliance with environmental measures looms large over the interests of developing countries. This is being seriously considered as a possibility in the Climate Change convention and could affect the ESCWA countries. This would be specially onerous for ESCWA region if trade sanctions for non-compliance with FCCC were applied unilaterally, without notification and without discourse.

Proposals in the WTO

Because of this inherent tension on the use of trade measures in MEAs, WTO Committee on Trade and Environment has been analysing the relationship between trade measures pursuant to MEAs and WTO rules with a view to recommending a modification of trade rules if deemed desirbale by WTO members. Three approaches have been put forward by WTO members to clarify this relationship: (a) the status-quo; (b) the Article XX approach and (c) the waiver approach. Some proposals combine these approaches. However, before analyzing these approaches it is necessary to examine the kind of trade measures which could be taken pursuant to an MEA. These could be (a) those mandated by the MEA (b) those which are non-mandated but linked to the fulfillment of the legitimate environmental objective (c) the trade sanction approach which is used to enforce compliance. Among all these approaches only those mandated by the MEA can be considered multilateral in any sense. The other two would be more in the nature of unilateral measures.

The "status quo" approach

The status-quo approach recognizes that there is a de facto coexistence of trade measures pursuant to MEAs and the WTO. Consequently, there would be no need for any amendment or interpretation of WTO rules. It is argued that trade provisions under existing MEAs have never been challenged under the GATT/WTO and that it is unlikely that Governments will challenge in one forum what they have agreed to in another. This would in particular be the case if trade and environment officials in capitals work closely together and if Governments avoid introducing WTO inconsistent measures in new MEAs from the outset. Also, where trade provisions should be seen as part of a package which also involves facilitating mechanisms, such as access to finance and technology, the negotiators of the MEA could ensure that this package takes account of the interests of all countries, so that no country is induced to stay outside the MEA for economic or commercial reasons. Finally, it can be argued that if a large consensus on trade provisions can be reached in the framework of the MEA, trade restrictions on non-parties would generally not be necessary for the achievement of the environmental objectives of the MEA. Most developing countries including those from the ESCWA region favour this approach.

The Article XX approach

This approach involves the negotiation of a collective interpretation or an amendment to the general exceptions in WTO Article XX.

would be established on the merits of each case; it could be presumed that if an MEA reflected a genuine multilateral consensus it would find broad support among WTO members and there need be little, if any, uncertainty about the chances of securing a waiver for it. Moreover, trade measures which are not based on a broad international consensus could not escape WTO scrutiny, which would provide sufficient guarantee against any protectionist abuse. This approach would avoid the need for WTO members to elaborate and agree upon general criteria to apply to the use of trade provisions in any future MEA. It would not focus on an MEA but on the trade measures included in it. Finally, the onus to demonstrate and convince others of their case would remain the responsibility of those who were seeking the waiver. Approach proposed by Singapore and the ASEAN that did not find much support among WTO members

Collective Interpretation Approach

Another approach involved the elaboration of criteria, through a collective interpretation of Article XX, but then analysing each MEA on a case-by-case basis through procedures similar to those contained in Article XXV:5. The criteria to be elaborated would be based on four concepts:

(i) the MEA would have to be multilateral from the standpoints of the minimum number of countries which, in the geographical region covered by the MEA, would have to be party to it, and it would have to be open to the participation and accession of any contracting party irrespective of its level of development, market characteristics or geographical location;

(ii) the term "environment" should cover any agreement having an environmental protection objective, even if this is not its only objective, recognizing the complexity of the concept of this term which in reality embraces various disciplines;

(iii) the trade measure taken pursuant to an MEA should be "necessary" which in WTO terms should mean "indispensable" in order to avoid disputes and leave trade measures as a last resort;

(iv) the phrase "least trade-restrictiveness" should be analyzed by the WTO using inputs of and adjusting to each particular MEA.

Guidelines for Panels on the use of trade measures

Discussions on criteria in the CTE have focused on those that relate to the interpretation of Article XX and those that would provide guidance in defining MEAs. Thes could be useful in terms of providing guidelines to dispute settlement panels.

Necessity

It is to be noted that there is considerable difference between the treatment of "necessity" by the WTO and the environmental community. At the WTO Sub-paragraph (b) of Article XX prescribes that WTO exceptions can be provided only to measures which are

manoeuvre in which the possibility could exist of using such trade action for protectionist purposes. Particularly with respect to the second situation such further measures may be justified on environmental grounds, but in some cases the use of trade measures may be counterproductive.

Chapeau to Article XX

The chapeau to Article XX furthermore states that otherwise WTO-inconsistent trade measures can be made WTO-compatible only provided " ... 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 ...". [11]; legitimate justifications not to join may constitute differences in public policy priorities and objectives which may need to be taken into account in determining the concepts of "arbitrary" or "unjustifiable" discrimination. Further, with respect to the phrase "between countries where the same conditions prevail", it has been stated that the important factor is not whether a country is a party to an MEA, but what is relevant is the actual differences in environmental protection commitments and requirements, taking into account the differing abilities, concerns and responsibilities of countries[12].

Least trade restrictiveness

The objective of the MEA should be achieved in the least trade restrictive way possible, preferably through financial or technical assistance where necessary.

Definition of an MEA

It is important to ensure that the scope of an MEA should reflect a "genuine" multilateral consensus. In this regard, the following elements have been cited as possibly assisting in making such a determination:

(a) Objective. The environmental objective of the MEA must be the preservation of the global environment;

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[11]Such reasons may include, inter alia, a view that the scientific evidence is not persuasive, is controversial or is lacking; an inability to afford joining an MEA or adhering to the required level of environmental standards of the MEA; a view that there are more pressing problems, environmental or otherwise, that deserve higher priority; or differences in absorption capacities of different environments.

[12]As the EC stated in TRE/W/5, "This GATT requirement is indeed fully recognized under CITES, Basel, and the Montreal Protocol which allow for trade with non-members to be carried cut on the same basis as with members provided non-members apply equivalent environmental guarantees". (pg. 7).

party to the MEA. This would be particularly applicable to the use of trade sanctions under the FCCC.

Section 2: [move DSU here]

Section 3: trade related intellectual property rights

MEAs addressing global environmental problems contain specific provisions on the transfer of technology by relating it to the specific environmental problem at hand, and often establish a financial mechanism to ensure that relevant technology has been transferred. However, the provisions relating to technology transfer often do not include a comprehensive notion of technology transfer as outlined above. Moreover, operationalizing provisions on technology transfer has proven to be difficult. Some examples include Article 16.4 of the Convention on Biological Diversity which states that "Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology...for the benefit of government institutions and the private sector of developing countries and in this regard shall abide by the obligations included in paragraphs 1, 2, and 3". This is to be achieved where necessary thorugh the financial mechanisms stated in the Convention. Comparable commitments are also contained in teh United Nations Framework Convention on Climate Change. Similarly the diffusion of new technology has been deemed important by the Montreal Protocol whose Articel 10 states that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under Paragraph 1 of Article 5; and the that such transfers occur under fair and most favourable terms. The provisions of this Agreement could indeed serve as a model for cooperation in promoting ESTs undere other MEAs, especially if it comes up with effective ways of addressing issues such as proprietary rights and financing schemes to accelerate the transfer of technologies and paying royalties for R&D inputs developed by private firms.

Level of obligation

The most comprehensive obligation on technology transfer can be observed in the Convention on Biological Diversity. In the case of the CBD, developed country parties are interested not only in the conservation of biodiversity, but also in utilising the biological resources in developing countries. This has given developing countries a stronger negotiating position. However the provisions on transfer of technology in the CBD differ; it has been noted that those related to technologies which assist in the conservation and sustainable use of biological diversity (Art 16, paragraphs 1 and 2) are weaker than those referring to technologies for the use of genetic resources available in developing countries (Art 16, para. 3). Other Conventions such as the Montreal Protocol and the FCCC also have varying degrees of obligation on technology transfer. MEAs which do have provisions on technology transfer tend to relate the fulfilment of this obligation to compliance with the environmental objectives. However often the linkage may be difficult to operationalize. For example, the Montreal Protocol lays down provisions for Article 5 developing countries, to notify to the Secretariat that having taken all practicable steps it is unable to implement any

the WTO, particularly in the light of the need for effective implementation of Articles 7,8,40,66.2 and 67.

An additional problem is introduced through the conflicts that may arise between the provisions of Article 27.3b and the bio-diversity Convention. While the bio-diversity Convention asserts the sovereign right of nation states over their genetic resources, Trips provides for the patenting of biologically occurring microorganisms thus transferring this sovereign right to the patentee. Also while the bio-diversity Convention provides for mutual benefit sharing in the technologies developed through the use of the genetic diversity with the owner of the resource, the TRIPS Agreement has no such provision. Therefore it is felt by some that the provisions of TRIPs may actually harm the preservation of bio-diversity.

Proposals and their responses: Most of the proposals on these issues have been put forth by developing countries. While most proposals relate to Article 27.3 (b) of the TRIPs agreement, some proposals on transfer of technologies mandated by MEAs have also been advanced. India has proposed that owners of environmentally sound technology and products should sell such technologies and products at fair and most favorable terms and conditions upon demand to any interested party which has an obligation to adopt these under national law or another country or under international law. Article 64, paragraph 2 must be modified so as to make it clear that subparagraphs (b) and (c) of Article XXIII of GATT shall not apply to the TRIPS Agreement. Articles 7 and 8 of the TRIPS Agreement to be operationalized by providing for transfer of technology on fair and mutually advantageous terms. Kenya has put in a similar position paper on behalf of the African group.

Regarding Article 27.3 (b) it is widely agreed by the developing countries that the TRIPS Agreement is incompatible with the Convention on Bio-Diversity. India has proposed that there is a need therefore to incorporate a provision that patents inconsistent with Article 15 of the CBD should not be granted. Venezuela has also submitted a similar proposal which states that principles of the CBD should be included in TRIPs especially Article 15 which prohibits the granting of patents to those inventions which use foreign genetic material and is therefore inconsistent with the sovereignty principle and the principle relating to access to genetic resources. Bangladesh on behalf of LDCs has also asserted that there should be a formal clarification that naturally occurring plants, animals or parts thereof (including genes and essentially biological processes) must not be granted patents. This proposal also suggests that patents should not be granted without consent of the country of origin in case of the above mentioned products. The Dominican Republic, Cuba, Honduras, Nicaragua and Egypt have submitted similar proposals. Kenya has also proposed that the ambiguity in the text of the protection of plant varieties by patents should be removed. Kenya has expressed the view that with Article 27.2 it can exclude from patentability plant varieties on the grounds that such an exception may be needed for meeting the obligations of CBD and for environmental protection. Such exclusion would be compatible with 27.3 (b). Kenya on behalf of the African Group has also suggested that a footnote be added to 27.3(b), which states that any sui-generis system can provide protection to the innovation of local communities in developing countries.

and bio-diversity, it is necessary to protect bio-diversity and make it a tradeable item. Alternatively, the third world countries should be able to benfit from the gains of bio-technology, particularly if it will help alleviate hunger and poverty, in exchange for their access to third world bio-diverstiy.

Another incentive to preserve bio-diversity can come from the regulations concerning bio-technology. The OECD national guidelines with respect to large-scale industrial applications and introductions of genetically modified organisms into agriculture and the environment seeks not merely to regulate the processes but contains notification requirements for the original seeds as well. This may imply that the original strains which are imported from developing countries will have to be notified to the regulatory authorities and may thus serve as a checklist of the forms of bio-diversity that are being exported. e.g the Seeds Act administered by Agriculture Canada ensures that imported, domestic and exported seed is safe, pure, efficacious and accurately represented to maintain identity and avoid fraud. Other countries also have similar legislations.

As of today, bio-technology is not subject to any form of regulatory action. It is speculated that it may have caused untold damage to the environment. For instance, it is likely that in the constituion of genetically modified organisms (GMOs) a number of new kinds of permutations of genes which can pose grave environmental threats will be released in the atmosphere. In several cases, it is speculated that GMOs can cause irreversible environmental damage. Hence the need for the international monitoring of bio-technology has arisen. This need for monitoring can also be extended to bio-diversity and indeed this monitoring process will also help identify the market and the trading price for bio-diversity.

Ironically the EEC council directive 92/43/EEC seeks to preserve the bio-diversity in EEC by cordoning off certain areas which are rich in bio-diversity and imposing regulations which will prohibit the depletion of bio-diversity. It has however no directive for preserving global bio-diversity. If the same rules were to be applied to preserve bio-diversity in developing countries then ecological imbalances would result as was evindenced in the case of trade banns on ivory tusks. Thus sustainable usage of bio-diverse resources may actually imply that they should be traded but at prices which reflect their true scarcity value.

Keeping these basic arguments in mind, the following need to be addressed:

1. A survey through NGOs or through their national governments of economic or legal instruments which can be used to regulate trade in bio-diversity. How have these instruments affected the trade, if any, in bio-diversity.

2. A list of the plants or genes which contribute to their bio-diversity which has been bought by foreign companies and at what prices in the past few years.

3. Have there been any environmental effects of the trade in bio-diversity such as local ecological imbalance or a reduction in the number of species in the past few years. Has this been a direct consequence of trade in the product.

might fall into the category of *taxes occultes* on which the 1970 Working Party did not reach a firm conclusion. Since the BTA provisions could influence a Member's choice of what environmental taxes and charges to apply, some feel that it is important to clarify them in certain aspects. Some suggested that environmental taxes and charges might need to be accorded different treatment under WTO rules than other fiscal measures, and cautioned against drawing premature conclusions on BTA disciplines which would make it more difficult to apply them. Some feel that the environmental policy decision to impose the internal tax or charge should be taken as given and should not influence consideration of the adequacy of WTO rules on BTA.

Reference has been made to the Agreement on Subsidies and Countervailing Measures (SCM), in particular its provisions on "Prohibited Subsidies" (Article 2 and Annex I) and its "Guidelines on Consumption of Inputs in the Production Process" (Annex II). Different views have been expressed on the likely treatment under the Agreement of a rebate for exported products of indirect environmental taxes on a non-product-related PPM in excess of the tax rebated on like products when sold for domestic consumption. One view is that energy taxes appear to be covered by Footnote 61 of the SCM Agreement. Another is that the principle of physical incorporation remains the basis upon which BTA is applied.

Views have been presented by some and questions were raised by others on methodologies to value environmental resources for the purposes of taxation, and the potential impact of different types of environmental taxes and charges on the trade of developing countries.

The competitiveness impacts of carbon taxes have been analysed in detail in the case study on Colombia. Several scenarios with different tax rates and their impacts on different sectors have been analyzed. The case study appears to suggest that carbon taxes would have the most disruptive effects on the markets for coal in Colombia. The policy implications suggested by the study is that such taxes could either be phased over a period of time, or incorporate some modifications to mitigate its effects.[15]

Eco-labeling based on life cycle analysis of a product using the cradle to grave approach and may therefore use criteria based on npr PPMs have been extensively discussed in the CTE. While eco-labelling discussions have related to npr PPMs, the issue by itself, several panels at the WTO have questioned i.e npr PPMs and especially its extra jurisdictional usage. Npr PPMs basically relate to PPMs which have no effect on the final product characteristics. They fall both within the scope of clarification of article XX as well as under Eco-labeling, which falls within the purview of the Technical Barriers to trade agreement. (TBT).

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[15] See Gaviria, D., R.Gomez., L. Ho., and A. Soto, 1994, Reconciliaton of Trade and Environment Policies: The Case Study of Colombia, Report prepared for UNCTAD/UNDP project INT/92/207.

If a dispute concerning a trade measure would emerge between two countries which are both parties to the MEA and WTO members, the question may arise which forum should deal with the problem. This question has been addressed explicitly in some agreements. For example, in the case of the North American Free Trade Agreement (NAFTA), member States have agreed to settle any dispute in the framework of the MEA. The Convention on the Law of the Sea, however. has transferred competence in all matters relating to subsidies and restrictive trade practices to the WTO.

There is, however, no general rule on this issue. It would generally be up to the complainant to determine whether to bring the case to the WTO or to MEA. According to some, efforts should first be made to resolve the case in the context of the MEA, which is more specific; The case should be brought to the WTO only, if possibilities to find a settlement in the context of the MEA are fully exhausted.

It has also been observed, however, that some problems may arise with this approach. First, MEA dispute settlement mechanisms may be relatively weak. Eexperience shows that (i) parties to MEAs are not obliged to submit to a process of binding judicial resolutions; (ii) there is widespread reluctance to call on procedures for formal dispute resolution even though compliance has been incomplete; and (iii) there is no central institution mandated to consider environmental disputes even though the International Court of Justice (ICJ) had established in July 1993 a special seven member Chamber for Environmental Matters to deal with disputes that might come before it.

Secondly, it would be difficult to consider whether an MEA dispute settlement mechanisms had been exhausted. For example, the party applying a trade measure, which would often be a country with the commercial capability to do so, could consider that the dispute settlement mechanisms had not been exhausted, whereas the party affected by the measure would want to refer it to the DSB as soon as possible.

If a dispute arises between two WTO members of whih only one is a party to the MEA, the country which feels that its WTO rights and obligations are adversely affectedt could only bring a complaint to the WTO. These rights would be restricted, however, through either the ex-ante or ex-post approach discussed in subsection (3) above. It has been observed that this could imply making WTO rights a function of membership or lack thereof in other treaties addressing a different policy area, falling outside the mandate and competence of WTO bodies. It is to be noted that the judgment of environmental policy objectives fall outside the WTOs competence.

The view is sometimes expressed that the settlement of trade disputes with environmental dimensions in the WTO could be more transparent and should allow for outside inputs. The WTO Understanding of Rules and Procedures Governing the Settlement of Disputes provides for each panel to have the opportunity to seek information and technical advice from any individual or body which it deems appropriate. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. This would apply to experts in the field of environment in the

developing countries have expressed the view that while no consensus has been achieved in the Committee on trade and environment on the interpretation of Article XX, Appellate bodies should not interpret rules in such an evolutionary manner that it overturns the consensus. Discussions on this could be held under Item 5 of the CTE.

Guidelines for disputes on trade measures in MEAs

Options for analysing the necessity and effectiveness of the use trade measures could include a consideration of:

(a) are trade measures the first-best solution for addressing the environmental problem?

(b) how difficult is the revision of trade provision within the MEA, e.g. in the context of interim assessments?

(c) is it possible to subject the use of trade measures to an analysis of least trade restrictiveness?

(insert from dsu paper)

Section 6: the issue of DPGs

Many developing countries are concerned about the health and environmental effects of exports to their markets of goods, where the domestic sale of such products has been prohibited or severely restricted in the exporting country (DPGs). Developing country importers need adequate information about the risk that such products could pose to public health and the environment. Apart from information problems, developing countries may also lack the infrastructure (including testing facilities) and other capabilities to monitor and control imports of DPGs. The emphasis for developing countries should be placed on:

- Technical assistance. This would assist these countries in strengthening their technical capacity to monitor and, where necessary, control the import of DPGs.

While duplication is to be avoided, existing instruments, such as the prior informed consent (PIC) procedure, are insufficient from the perspective of developing countries, in particular with regard to product coverage and procedures. For example, certain cosmetics and certain consumer goods which are of importance to developing countries may not be subject to international notification procedures.

- Membership of several of the various international agreements and instruments may be limited, and thus there is a need to resolve it in the WTO.
- While other instruments exist, a number of them are only voluntary in nature (in other words, parties to these instruments do not have to fulfill their obligations if they decide not to), and have expressed their wish to see quicker and better progress on the issue in the WTO.

subject, including, *inter alia*, the definition of product coverage, the obligation of exporting countries to notify other WTO Members of DPGs they export if these are not already being notified under another international instrument, and the need to ensure that measures taken for the purpose of the Decision are in conformity with WTO rules. The draft Decision includes provisions for technical assistance to be provided to Members in this area, for enquiry points to be established, and it encourages exporting Members to consider whether the measures they apply to DPGs domestically should also be applied to exports.

Some consider that while the WTO's role should be limited strictly in this area to supplementing the activities of other specialized international organizations, it nevertheless has within its competence an important contribution to make by helping to fill any gaps which may be left by existing mechanisms in the monitoring or control of exports of DPGs and by helping to strengthen the regimes of other international instruments whose provisions are not legally-binding or which are voluntary. Two general areas of potential gaps have been suggested: DPGs not covered by other international instruments, and DPGs exported by WTO Members which are not Parties to those other international instruments. With regard to this first area, some consider that special emphasis should be placed on exports of domestically prohibited or severely restricted consumer goods, cosmetics, foodstuffs and certain pharmaceutical products. Another view is that hazardous wastes should not be dealt with under this Item since they are already fully covered by the Basel Convention.

Some consider that much trade in DPGs is already covered by existing international instruments and that with further improvements in their operation the issue of exports of DPGs will prove to be of decreasing importance. They feel that the identification of potential gaps in coverage of DPGs, to the extent they exist, is technical work which lies outside the WTO's competence and which could be undertaken better by, or only in consultation with, other relevant international organizations such as UNEP and WHO. They have pointed to the information contained in existing notifications by Members under the TBT and SPS Agreements about technical regulations they impose on the sale or use of products on the domestic market, and they have suggested that this may provide an important source of information on DPGs and help resolve the perceived problem. They doubt there is a further contribution which the WTO could make in this area that would fall within its competence or mandate, beyond ensuring that WTO rules do not conflict with the rules of other multilateral instruments applied in this area.

Ensuring the transparency of trade in DPGs has been felt by some to be an area where the WTO could contribute, but without duplicating existing transparency and notification procedures in other relevant international instruments[18] to which priority should always be given, nor in relevant WTO Agreements such as the TBT and SPS Agreements. Some have suggested that countries exporting DPGs could be required to notify the products in question, and that they could establish enquiry points to provide, on request, information

[18] A list of other relevant international instruments was compiled by the Secretariat in WT/CTE/W/29, 14 May 1996.

about why the domestic sale or use of the products notified has been banned or severely restricted. Another suggestion is that WTO Members may limit exchange of information in this area to regulatory actions relating to DPGs. Some emphasize the importance of ensuring that one Member's notification of a DPG in the WTO would not lead to its exports being treated differently by an importing country from exports of the same product from other countries or from domestically produced goods. Some others consider that a DPG notification programme, including prohibited but also severely restricted goods, would create a serious administrative burden and the important amount of notifications resulting from such a programme would eventually impair transparency. One suggestion is to consider to what extent an environmental data base, as examined under Item 4, could address the problem, or whether a chapter dealing with DPG regulations could be included in TPR reports.

One issue examined was where the responsibility for taking a decision to restrict trade in DPGs should lie: with the exporting country, the importing country, or jointly between the two? Some feel that a reasonable degree of the responsibility for controlling trade should lie with the exporter, which should consider extending its domestic sales bans and restrictions to exports or engage in mandatory labelling of DPGs. However, some express concern that this could imply endorsement of a Member applying its own health or environmental standards extra-jurisdictionally. Another view is that the decision to restrict trade in a product should lie exclusively with the importing country, but that the exporting country could be asked to cooperate in ensuring the decision was implemented effectively.

Providing technical assistance to help Members improve their capacity to take informed decisions about whether or not to import DPGs and to monitor their imports of DPGs more effectively has been viewed as a potentially important part of the solution to problems in this area, particularly over the longer term. It has been noted that the customs authorities of developing countries often lack adequate product testing facilities and that the absence of product standards and regulations in these countries adds to the problem, for example by enabling products to be marketed beyond their expiry dates. It has been recalled that Chapter 19 of *Agenda 21* on "Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products" recommends, *inter alia*, that capacity-building for trade in DPGs be consolidated by assisting developing countries in developing and strengthening risk assessment capabilities in order to make informed decisions about their imports. One view is that the WTO could cooperate in this regard with other organizations, such as the Amended London Guidelines and the Basel Convention, which could provide the necessary technical expertise. Another is that technical assistance of this kind does not fall within the WTO's competence or mandate.

One suggestion has been made that compensation and liability should be considered, linked with a dispute settlement provision, without being necessarily related to notification and transparency provisions. The rationale for a compensation and liability provision within the framework of an instrument which would focus mainly on transparency and notification has been questioned by others.

- The definition of DPGs has to be clearly established and agreed upon. It is also necessary to discuss which of the existing DPGs should be discussed at the WTO.
- It is also necessary to examine whether the extent to which progress that has been made in other inter-governmental organizations in addressing the problems created by trade in potentially hazardous or harmful products is sufficient to deal with developing countries' concerns

The design and implementation of concrete mechanisms for enhancing transparency. For example, the DPG notification system that had been in existence between 1982 and 1990 should be revived (the Decisions taken to establish it remain in force today).

This issue covers products whose sale and use are banned or severely restricted domestically on the grounds that they present a danger to human, animal, plant life or health or the environment, but which nevertheless may be exported. It is of particular concern to many developing and least-developed countries. In 1991, a GATT Working Group on Domestically Prohibited Goods and other Hazardous Substances (DPGs) produced a "draft Decision on Trade in Banned or Severely Restricted Products and Other Hazardous Substances". Consensus to adopt the decision could not be reached.[16] Taking account of the need not to duplicate or impede work done or underway in other intergovernmental fora to improve the monitoring and control of trade in DPGs, the CTE has examined what additional contribution the WTO might make in this area.

Since the examination of this issue by the GATT Working Group on DPGs, a number of new international agreements and conventions dealing, *inter alia,* with the monitoring and control of trade in certain DPGs have entered into force and others are under negotiation. Particular mention has been made in this regard of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the preparation under the Amended London Guidelines of an internationally legally-binding instrument for the application of the Prior Informed Consent (PIC) procedures for certain hazardous chemicals in international trade, the decision to develop a draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, and the draft Protocol on Bio-Safety. Multilateral rules on exports of DPGs should continue to be developed primarily through environmental instruments such as these.

A draft Decision on Exports of Domestically Prohibited Goods has been submitted to the CTE for consideration.[17] It draws on elements of the 1991 draft GATT Decision on this

[16] See Report by the Chairman of the Working Group on Domestically Prohibited Goods and Other Hazardous Substances, L/6872, 2 July 1991.

[17] Proposal by Nigeria, WT/CTE/W/32, 30 May 1996. See also Proposal by Nigeria, WT/CTE/W/14, 27 November 1995.

event a dispute involves trade-related environmental measures. With regard to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, the panel may request an advisory report in writing from an expert review group.

Dispute settlement is another mechanism through which the carefully created balance of the CTE may be disturbed. Successive interpretations by Panels and Appellate bodies have expanded the scope of sub-paragraphs b and g in article XX, where there is no consensus to do so through the CTE. It is important to examine the impact of this evolutionary interpretation of Article XX, sub-paragraphs b and g on the debate on trade and environment. While members of the WTO are not bound by Appellate bodies and Panels, their precedent setting value is immense. Other Panels and Appellate bodies while not bound by these interpretations may find it difficult to ignore these interpretations especially because of pressure groups, which have developed around trade and environment.

Regarding the dispute settlement processes, EC, Switzerland and Norway are of the opinion that unnecessary burden on the DSU can be avoided by a clarification of the WTO rules. They seek a legal clarity on the relationship, through Article XX between WTO rules and trade measures taken pursuant to an MEA. They feel that this would increase predictability and decrease uncertainty. Acknowledging that MEAs are the best way of solving international environmental problems and that any trade measure they contain were negotiated and agreed in a multilateral context, they feel that such a clarification would be a guarantee against unilateral action and their use for protectionist purposes. They also feel that a consensus should be found for taking this into account in WTO rules. They also contend that the proliferation of environmental policies worldwide has resulted in the increased use of trade measures for environmental purposes. This is evidenced by a surge in the number of panels which have been raised in the WTO regarding Environment.

Proposals for the DSU review have pointed to the need for increased transparency of the panel and Appellate body process. US, JAPAN and Canada have contended among others that Amicus Curae briefs should be submitted and the process be made more transparent.

Most developing countries are of the view that the current provisions of GATT Article XX allow countries to take any legitimate trade measure. They are also of the view that Amicus Curae briefs and other such procedures would tilt the balance of rights and obligations in the WTO system. They also feel that NGO participation would unnecessarily distort the balance in favor of developed countries that could more easily fund the participation of NGO groups. They have also pointed out that NGOs from developing and developed countries do not concur on issues and therefore their participation does not add anything new to the debate. Any inclusion of their opinions and inputs should be done through national coordination. There is no need to internationalize essentially national conflicts.

There have been several suggestions from developing countries on the scope of the Appellate bodies functions. While no formal proposal has so far been tabled, many

Proposals and their reactions: Proposals regarding eco-labelling have mostly been put forward by developed countries. Notable among the proponents on clarification of the WTO compatibility of Eco-labeling schemes are EC, Switzerland, Norway and US. EC has sought a clarification of WTO rules and npr PPMs in particular the WTO compatibility of EC eco-labelling schemes, which use the life cycle approach. EC has asked for a clear definition of non-discriminatory process rules for the creation and administration of such schemes and even proposes procedural safeguards so that such schemes are non-discriminatory, non-protectionist instruments even if they are based on life cycle approaches. Canada and the US through their transparency proposals are also seeking to achieve the same objectives though their proposals are less explicit. Switzerland has suggested that eco-labelling be included in the new Round.

While voluntary eco-labelling is accepted as a market reality by developing countries, it is usually iterated by developing countries that npr PPMs lies outside the scope of WTO rules. Notification of eco-labelling schemes does not imply that they would be consistent with WTO rules should they have significant trade effects. A parallel can be found in the field of subsidies where all notified subsidies are not necessarily non-actionable.

One interesting aspect of this issue is the labeling of GMOs. US has extensive trade in bio-technological products, whereas consumer preference in both EC and several Asian countries points to a distinct advantage for non-GMO products. In fact India was approached recently by Thailand to provide non-GMO animal feed. US on the other hand contends that WTO agreements are aimed at reducing trade restrictions in agricultural products and ensuring that all measures are transparent and do not create unnecessary obstacles to trade. Trade liberalization should ensure that producers have fair competition in the marketplace and consumers are ensured of transparent mechanisms and protection against identified health hazards. Labeling of GMOs according to them may not meet these objectives. EU on the other hand contends that recent case law shows that non-discriminatory trade measures used to achieve the level of safety desired by the importing country is fully consistent with WTO agreements. This should be confirmed at a more general level, through the use of the precautionary principle in order to assure consumers. EU also links the provision of quality food with geographical indicators where reputation for quality is based on the geographical origin and should be thus labeled. The US view on GMOs is completely contrary to its earlier stand on npr PPMs though several people contend that GMOs may actually be using product related PPMs which would allow importers to discriminate between GMOs and other like products.

(Insert from eco-labelling paper and bridges)

Section 5: Dispute settlement mechanisms in MEAs and the WTO

A closely related issue on the agenda of the WTO Committee on Trade and Environment is "The relationship between the dispute settlement mechanism in the multilateral trading system and those found in multilateral enviornmental agreements".

4. Have the countries covered by this project used their genetic resources for the development of bio-technology particularly to promote their trade in food products.

5. Another interesting question in this context is to examine whether the use of bio-technology in the production of some products in the developed countries has indeed led to a decrease in the export of products such as cocoa or vanilla essence by making them non-competitive, and whether this has had any ecological consequences.

[Implications for ESCWA (with subsections)]

Section 4: Taxes, charges and Labelling in the context of MEAs

One issue examined is the application of GATT rules on Border Tax Adjustment (BTA) to environmental taxes and charges. The potential effects of environmental taxes on trade and problems involved in the valuation for tax purposes of tradeable environmental products have also been discussed.

Views have been presented on the potential trade effects and general economic and environmental effectiveness of levying environmental taxes and charges on imports and rebating them on exports, depending on whether they are assigned to correcting consumption or production externalities and are levied at the national or international levels.

With regard to the treatment of environmental taxes and charges under the BTA provisions, the 1970 Report of the GATT Working Party has been taken as a point of reference and several of its findings were noted.[13] These were that the BTA provisions are based on the concept of trade neutrality and they apply the destination principle. Furthermore, the Working Party concluded that certain taxes not levied directly on products are ineligible for BTA. There was a convergence of views in the Working Party that taxes levied directly on products are considered eligible for tax adjustment, and a divergence of views regarding the application of BTA for *taxes occultes* (consumption taxes on capital equipment, auxiliary materials and services used in the transportation and production of other taxable goods, for example taxes on advertising, energy, machinery and transport).[14]

Views have been presented in the CTE on the application of BTA to environmental taxes or charges applied to non-product-related PPMs. One view is that BTA applies solely to taxes levied on products or product-related PPMs, and that taxes or charges levied on non-product-related PPMs are not eligible for BTA. Another is that GATT jurisprudence remains unclear on this point, and that certain important environmental taxes and charges

[13] BISD 18S/97.

[14] The Working Party noted that it appeared adjustment was not normally made for *taxes occultes* except in countries having a cascade tax.

This would be consistent with the provisions of CBD and the FAO Undertaking on Plant Genetic Resources. Kenya. on behalf of the African group, has also suggested that the transition period for the implementation of this Agreement be extended by another five years.

While no formal responses have so far been received on these proposals as the Review of the Article is still ongoing, so far there have been 10-15 submissions of the member states on the systems that are currently being used to grant protection to plant varieties and other innovations covered by Article 27.3. Most submissions suggest that either patents or UPOV 91 has been used by member states, from which US has concluded that only these two systems provide effective protection. However, developing countries have not yet implemented the agreement and therefore such a statement appears one-sided, as it does not include the experience of developing countries. Most commentators are of the opinion that US and other developed countries may seek to narrow the scope of the sui-generis system of protection by seeking to interpret the word effective. There may also be moves to provide for a harmonized sui-generis system along the lines of UPOV 91, which does not effectively protect land races or traditional knowledge. Such moves are currently strenuously countered by developing countries with counter proposals.

Bio-diversity and Bio-Technology

Bio-diversity does not refer merely to the original bank of diverse genes, but also refers to the body of knowledge generated through the usage of (rare) plants and animals by the local communities. Bio-diversity has in the recent past become an important ingredient for bio-technology which has important implications for several forms of economic activity. The preservation of global bio-diversity is not merely required for preserving the genetic resources which have widespread industrial applications, particularly in the developed world, but it is also required to preserve the global ecological balance. Thus bio-diversity, most of which is to be found in the third world, has an economic as well as an environmental value.

The diverse uses of bio-diversity are to be found mainly in the pharmaceutical industry, in food processing, agriculture and in animal husbandry. While the bio-technologies which are developed with the genetic resources of the third world are covered by strict patent laws, bio-diversity and the knowledge associated with it are not protected by either patent laws or by other laws which will price this valuable resource in accordance with its opportunity cost. The impact of the development of bio-technology developed with the genetic resources of the third world will be particularly detrimental to several items of exports from the third world. For instance, the pharmaceutical industry in a number of third world countries is just coming of age, but the new bio-technology revolution may out-compete the cheaper chemically based pharmaceuticals exported from developing countries. Furthermore crops such as cocoa, medicinal and flavour/fragance (e.g vanilla) crops are particularly at risk from the onslaught of bio-technical substitutes. Although bio-technology is being applied in only a limited way in the multi-million dollar beverage industry, confectionary, sugar, and vegetable oils, all of these applications could make the major third world exports non-competitive. To redress this patenting imbalance between bio-technology

or all of the obligations relating to controlled substances due to the inadequate implementation of Articles 10 and 10A relating to technology transfer. However, it is not clear as to what action the secretariat is empowered to take, as well as what the legal consequences of such notification may be.

Conditions attached to technology transfer

4. Several MEAs stipulate that the transfer of technology should be at "fair and most favourable conditions". What constitutes fair and most favourable terms is however not defined and has been the subject of much debate. In the FCCC, however, there is no mention of "fair and most favourable" conditions.

Relationship with the TRIPS Agreement

5. The CBD commits Parties to ensure that IPRs are "supportive of and do not run counter to its objectives" (Art. 16.5). However, the fact that the CBD in several of its provisions (in particular paragraph 16.3) relies on the wording "mutually agreed terms" has been characterized as a "fall-back" in the interest of developed countries.
Technology is perhaps one of the most important inputs to implementing better environmental standards for developing countries. The TRIPs Agreement through its various provisions seeks to balance the interests of the innovator by providing monopoly profits with the interests of the user by making such technologies available. The balance however so far has been tilted in favor of the innovator where users of environmentally sound technologies are unable to access such technologies because of patents, copyrights, trademarks and other forms of protection afforded by the TRIPs agreement. Prospective technology seekers in developing countries face serious difficulties in their commercial dealings with technology holders in the developed countries. These difficulties are basically of three kinds: those which arise from the imperfections of the market for technology; those attributable to the relative lack of experience and skill of enterprises and institutions in developing countries in concluding adequate legal arrangements for the acquisition of technology; and those government practices, both legislative and administrative, in both developed and developing countries, which influence the implementation of national policies and procedures designed to encourage the flow of technology to, and its acquisition by, developing countries. These difficulties may have to be addressed specifically in order to fully implement TRIPS provisions relating to transfer and dissemination of technology, particularly in the light of Articles 7, 8, 40, 66.2 and 67. Some of these difficulties may be overcome by suitable safeguards in the domestic IPR laws of developing countries, particularly those arising out of the provisions of Articles 30, 31 and 40. Since developing countries have transition periods available under Article 65, these laws may still be in the formulation stage. In addition the transfer and dissemination needs of the developing countries have to be seen from the point of view of the capacity of those in need of accessing technologies, particularly where the cost of technology may be prohibitive due to economies of scale and other reasons. In such cases, in order to implement the related provisions of the TRIPS Agreement, commercially viable mechanisms need to be found. This could be studied in

(b) the universal scope of MEAs. It has been considered that MEAs should be negotiated under the aegis of the United Nations or one of its specialized agencies and that the agreement should be open for participation to all countries. Participants must include countries at all stages of development;

(c) The MEA should be supported by countries that represent all interests involved in the environmental issue addressed (producer and consumer countries, geographical regions);

(d) amendments to MEAs should be addressed separately, in terms of their scope, application, level of signatories, and trade provisions;

(e) The MEA should contain a provision establishing WTO competence for the resolution which may arise from the application of trade measures. The WTO dispute settlement mechanism should apply normally in a second stage, when consensus in the dispute settlement within the MEA is not reached

(f) The MEA containing trade provisions should be internationally notified, in accordance with Article 27 of the Rio Declaration

[Implications for the ESCWA Region - Linking Section with Dispute Resolution Issues -Conclusion]

The main disadvantage arising from this approach for ESCWA countries, is that it may involve renouncing the WTO principle of non-discrimination and it can be questioned whether that would be justified in the case of a measure which could not be considered necessary, effective or proportional and how this could be reconciled with the CTE's mandate that any recommendation for changes to the WTO must be compatible with the non-discriminatory nature of the WTO. Also this approach could upset the existing balance of WTO rights and obligations. It was also felt that although efforts to clarify Article XX were desirable, they should be distinguished from attempts to broaden its scope.

Another disadvantage is that ESCWA countries may always be at the receiving end of trade measures. Indeed, it can be argued that when a MEA already has a large number of signatories, especially those that are significant current and potential contributors to the environmental problem, then trade provisions against non-parties may be of limited relevance. Trade provisions against non-parties are more relevant, however, when the MEA is not yet well established. Put otherwise, the use of trade restrictions which would otherwise be inconsistent with the WTO rules becomes more relevant in those cases where the risk of a certain degree of unilateralism or of an unequitable distribution of costs across countries is also greater. In addition, smaller trading partners are more likely to be adversely affected than larger trading partners. Further if the rights and obligations of an MEA are such that the ESCWA countries opt for not acceding to it, the trading system should not be used, by legitimizing trade measures against non parties, to force countries to become a

"necessary" to protect human, animal or plant life or health. In the WTO it is not the MEA itself which would be put to the test, but the necessity of using WTO-inconsistent trade measures. From the environmental perspective is considerably extensive including, for example, the recognition of the precautionary principle. But it is to be noted that the precautionary approach has more to do with whether is necessary to address the environmental problem rather than whether it is necessary to use the trade or any other measure to address the problem.[10]

Proportionality

The concept of the "proportionality" of the trade restrictive effects of the measure to the need for the measure in order to ensure that the environmental objective is met has also been mentioned in relation to this term. For example, if a country using national measures is able to manage specific controlled species sustainably, then trade measures could result in unnecessary economic losses with little environmental gains.

Specificity

The chapeau to Article XX states that otherwise WTO-inconsistent trade measures can be made WTO-compatible only provided "... that such measures are not applied in a manner which would constitute ... a disguised restriction on international trade ...". This phrase may also necessitate consideration of what has been termed in discussions the "specificity" issue. This relates to how specifically an MEA defines the trade measures which would be required by the relevant provisions of the MEA and which would render effective the objectives and commitments of the MEA. In this regard, the discussions have pointed to two possible situations: (i) an MEA obliges parties to adopt trade measures in order to achieve a certain result, but does not specify exactly which trade measures; and (ii) an MEA obliges parties to take certain minimum trade action, but also allowed them to take further measures at their discretion. In both cases, there would be a significant margin of

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10 Point to be discussed: some argue that it is difficult to prove that a trade measure pursuant to a MEA is "necessary". According to this view, any understanding setting out the conditions for the use of trade measures pursuant to a MEA should exclude a necessity test in the context of the WTO. In accordance with this approach, a WTO panel would in general not examine the legitimacy or necessity of trade measures under MEA, provided that a number of (procedural) conditions are met (it would be assumed that the environmental effectiveness and necessity of the trade measures have already been examined by the negotiators of the MEA in question, who presumably are in a better position to do so). Thus, if a non-party would challenge a trade measure, the panel would examine only a limited number of questions, such as whether the trade measure is taken under a qualifying MEA and whether the trade measure offends the headlines of Article XX as mentioned above. WWF, "The Relationship between the Provisions of the Multilateral Trading System and Trade Measures for Environmental Purposes, including those pursuant to Multilateral Environmental Agreements (MEAs)". WWF Legal Briefing, 2, March 1996.

This approach could be implemented in different ways, for example:

(a) an amendment of paragraph (b) of Article XX, adding the words "environment" and "measures taken under MEAs"[8];

(b) an amendment of WTO Article XX entailing an additional paragraph which refers to an understanding setting out the conditions for the use of trade measures under MEAs;

(c) a collective interpretation of WTO Article XX (without a formal amendment);

For each of the three alternatives mentioned above, trade measure taken under a MEA are, in any case, subject to the conditions laid down in the headnotes of Article XX, which state that trade measures "should not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction to international trade". This approach has been favoured by the European Union and other developed countries, but was strongly resisted by developing countries[9].

(add from the appellate body of the shrimp turtle case) The focus on amendment of Article XX has however shifted from sub-paragraphs (b) and (g) to the headnote.

The waiver approach

This approach relies on a case-by-case granting of a waiver based on Article XXV:5. This approach is based on an understanding of this Article as a tool which is sufficiently flexible to accommodate trade provisions in MEAs.

Having recourse to a waiver would provide a measured, case-by-case response to any problems that might arise in the future. Under this approach, multilateral consensus

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[8] It is important to distinguish between trade measures "under" a MEA and trade measures "pursuant to" a MEA. The first set of trade measures comprise of multilaterally-agreed measures explicitly prescribed by the MEA. An example can be found in the ban on trade in Ozone Depleting Substances (ODSs) with non-parties to the Montreal Protocol of Substances that Deplete the Ozone Layer. The second set of trade measures also include national measures aimed at furthering the objectives of a Multilateral Agreements, which may anticipate or go beyond multilaterally-agreed measures. For example, a number of countries have designed product policies using a range of policy instruments such as product standards, taxes and charges, eco-labelling, voluntary industry agreements and government procurement guidelines.

[9] Currently, environmental protection, is not explicitly covered under Article XX. Most observers, however, consider that the environment is implicitly covered by Article XX.

which would help internalize global externalities arising from the production process will produce more economically efficient solutions and perhaps better preserve the environment. An added advantage of using economic instruments versus the use of trade instruments is that they are less prone to adverse side-effects, such as loss of competitiveness, market access and growth possibilities which trade restrictions are likely to generate. It is argued by the proponents of free-trade that trade measures may be justified only in very narrowly defined circumstances, and there is almost always a better way of meeting environmental objectives.[4]

The use of trade instruments in global environmental agreements has been justified on the grounds that it prevents free-riders from taking advantage of higher national environmental standards. A clear example of this is to be found in the provisions of the Montreal Protocol which contains no restrictions on trade, but restricts trade with non-signatories of the convention.[5] Another definition of free-riders provided in the literature pertains to environmental policies whose benefits will accrue globally, but whose costs will only be borne locally. e.g in the case of manufactured products, reduction of carbon emissions by one single country will reduce the global emissions of greenhouse gasses but may also impair at the same time the competitive position of that particular country. Similarly reduced access to forests, on account of a national/international plan to preserve forests, may decrease exports and may even increase imports which is advantageous to logging and wood-product industries outside the country but imposes costs on the country which enacts a forest convention. At the same time any contribution that forest conservation makes to slowing climate change or protection of species accrues to everyone.[6] Thus governments are unprepared to act without similar actions being taken by others.

While it has been argued that trade restrictive measures are second best instruments and the most efficient instruments are those which act directly on the environment, the perceived ease of enforceability of trade measures make it the preferred instrument of choice.[7] At the same time environmental policies and the use of trade instruments are regarded with concern by the weaker trading partners (i.e the developing countries including the ESCWA), because non-tariff barriers resulting from environmentally related trade

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[4] See Low, P. (ed.) 1992, "International Trade and Environment", *World Bank Discussion Paper*, No. 159 (Washington, DC)

[5] Ibid.

[6] Robertson, D., op.cit.

[7] A parallel to this argument can be found in Bhagwati and Srinivasan, 1983, Lectures on International Trade, Cambridge, Mass.:MIT Press. Their main argument runs along the lines that economic distortion is best corrected at source rather than through the use of trade instruments.

Introduction

Multilateral environmental agreements (MEAs) are seen as effective counterparts to the multilateral trading system. Not surprisingly their role in the trade and environment debate has been of a seminal nature. The Tuna dolphin panel which spun the whole debate on trade and environment drew a lot of wrath from the environmental community as it deemed that trade measures taken even for environmental purposes should be non-discriminatory in its application. It also questioned the validity of unilateral measures and outlined other less trade restrictive measures which could equally serve environmental interests. Following this panel, the agenda set for WTO discussions sought to limit the use of trade measures to those which were used for internationally agreed environmental problems. Hence the significance of Multilateral environmental agreements (MEAs) which are multilaterally agreed upon to address global environmental problems.

Through seven years of intensive discussion at GATT and later WTO, the role of MEAs in the trade and environment debate has acquired several other dimensions and gigantic proportions. While initially discussions were restricted to the use of trade measures in MEAs and whether they fell foul of GATT rules, discussions have expanded to whether provisions in MEAs such as the Convention on Bio-diversity are consistent with the provisions of the WTO, especially the TRIPs Agreement. Very recently the discussion of instruments in the Bio-safety Protocol was held hostage by the claim that they would be inconsistent with the WTO. It has even been questioned whether disputes relating to trade measures should be settled at the WTO or within the MEAs legal boundaries. What makes the situation piquant is that greens feel that the WTO system has much more teeth than MEAs and hence they would rather that such disputes be resolved in the WTO.

Against this background, the ESCWA region is placed in a unique position. First of all a number of them are dependent on the export of petroleum which is vulnerable to MEAs such as the Framework Convention on Climate Change. Secondly, a number of countries are net food importing countries which implies that MEAs such as the bio-safety protocol which relates to Living Modified Organisms (LMOs) would be of special interest to them. They are also signatories of other MEAs such as the Montreal Protocol, the Basel Convention, CITES, Bio-diversity Convention and would probably be affected by new MEAs such as Prior Informed Consent (PIC) and Persistent Organic Pollutants (POPs). Being a repository of a significant amount of bio-diversity and considerable wealth of traditional knowledge, how bio-diversity issues are addressed by the WTO rules would be of considerable concern to them. Lastly, being net technology importers including for technologies mandated by MEAs, the implications for technology transfer of the TRIPs Agreement would be of concern to the region.

Against this background this paper will investigate the different roles of MEAs in the trade and environment debate taking care to draw out the special implications for the ESCWA region. While this study is not comprehensive in its coverage of MEAs, the purpose is to outline the varied role of MEAs in the trade and environment debate and use specific MEAs only for illustrative purposes. Specifically the role of MEAs in the trade and environment debate relate to the following discussions:

1) the use of trade measures