Environment and Trade
A Handbook

Second Edition

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United Nations Environment Programme
Division of Technology,
Industry and Economics
Economics and Trade Branch

3.
International trade law

3.1 Introduction

The foundations of the international trade regime date back to 1947 when the General Agreement on Tariffs and Trade (GATT) was concluded. This Agreement, salvaged from an unratified larger agreement to establish an International Trade Organization, was to be one piece of the so-called Bretton-Woods system, designed in the post-World War II environment to promote and manage global economic development. (The International Monetary Fund and International Bank for Reconstruction and Development—the World Bank—were the other two main pieces.) The 48-year history of the GATT established the two basic directions for the trade regime:

- Developing requirements to lower and eliminate tariffs, and
- Creating obligations to prevent or eliminate *non-tariff barriers* to trade, i.e., other types of rules, policies or measures that could act as impediments to trade.

From 1948 to 1994, the GATT Secretariat oversaw the development of the multilateral trade regime, including eight negotiating "Rounds" that further developed the trade regime along both the above noted lines. Early rounds focused more on tariffs alone, but non-tariff barriers began coming to the fore in the so called Kennedy Round that ended in 1964.

The last of these negotiations, the "Uruguay Round," concluded in 1994. The *Marrakech Agreement Establishing the World Trade Organization* marked the end of the Round, and established the WTO as an organizational structure to administer the GATT and the other various multilateral trade agreements. Never properly established as an international regime since its awkward beginnings, the multilateral trade system now had a real "home." Among the key changes brought about at this time was the creation of a more effective dispute settlement system, complete with an appellate body.

In 2001, at the WTO's fourth Ministerial Conference, the members initiated a new work program of negotiations, analysis and work to implement existing agreements: The Doha program of work, discussed in greater detail in Section 7.1 and in various sections of Chapter 5. There is some disagreement among the members over whether the Doha work program constitutes a ninth round

of multilateral negotiations or not. This book refers to the Doha program of work, or the Doha agenda.

While the GATT was developing and the WTO being created, other areas within the trade regime were also developing. Development of the internal European trade and investment regimes both foreshadowed and underpinned the deepening continental integration. Regional trade agreements in North America, South America, Asia and elsewhere emerged, with differing degrees of trade liberalization. As well, non-tariff issues continued to grow in importance within the trade regime. By 1992–1994 (the final negotiations periods for both the North American Free Trade Agreement (NAFTA) and the WTO) they came to include intellectual property rights, investment rules, subsidies and other areas of laws and regulations that impact trade.

This vast expansion of trade rules has, not surprisingly, led to a much larger array of connections between trade law and the environment. In this section and the following one, the basic elements of the WTO and its law, as well as other sources and elements that today comprise the international trade law regime, are identified, along with their linkages to environmental management and protection. These include the most important functions, principles and agreements that provide the foundation for today's modern trade regime.

In this section and throughout the book, when we refer to the *multilateral trade regime*, we refer to the WTO body of law and institutions. When we speak of the *international trading regime*, this includes the WTO and all the other regional and bilateral agreements that cover international trade.

3.2 Structure of the World Trade Organization

The World Trade Organization came into force on January 1, 1995, fully replacing the previous GATT Secretariat as the organization responsible for administering the multilateral trade regime. The basic structure of the WTO includes the following bodies (see organizational diagram):

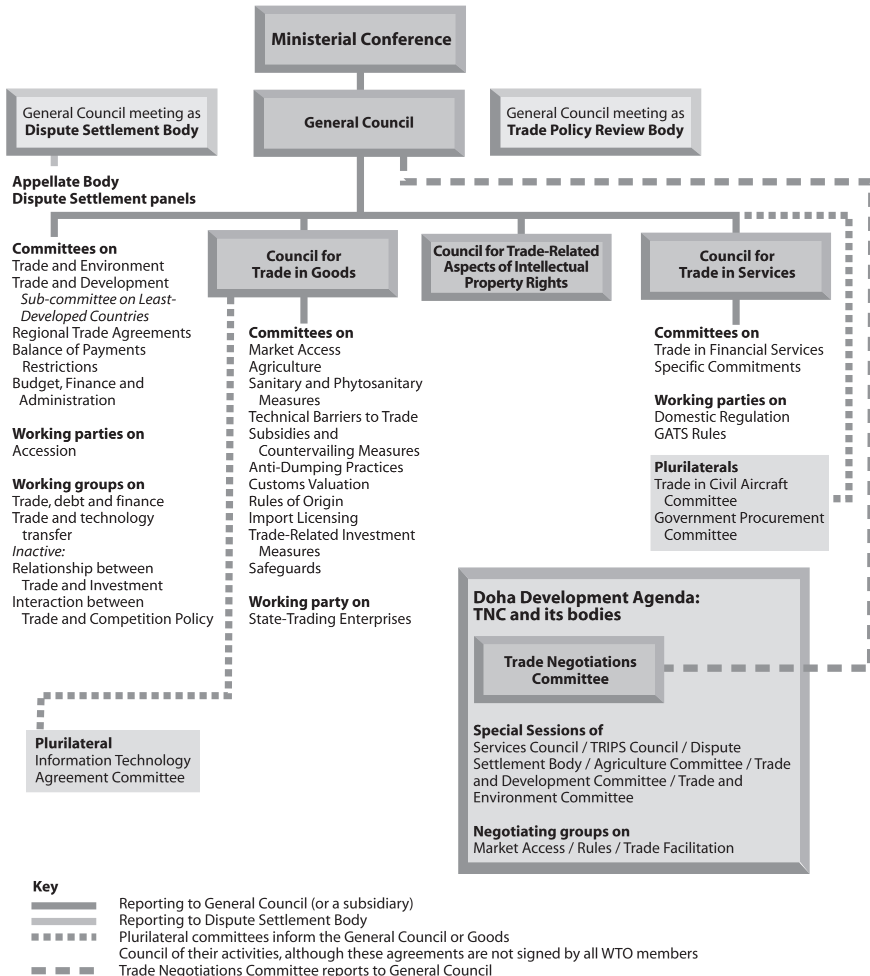
- The Ministerial Conference is composed of international trade ministers from all member countries. This is the governing body of the WTO, responsible for setting the strategic direction of the organization and making all final decisions on agreements under its wings. The Ministerial Conference meets at least once every two years. Although voting can take place, decisions are generally taken by consensus, a process that can be difficult in a body composed of 148 very different members.
- The General Council is composed of senior representatives (usually ambassador level) of all members. It is responsible for overseeing the day-to-day business and management of the WTO, and is based at

the WTO headquarters in Geneva, Switzerland. In practice, this is the key decision-making forum of the WTO for most issues. Several of the bodies described below report directly to the General Council.

- The Trade Policy Review Body is also composed of all the WTO members, and oversees the Trade Policy Review Mechanism. It periodically reviews the trade policies and practices of all member states. These reviews are intended to provide a general indication of how members are implementing their obligations, and to help them improve their adherence to their WTO obligations.
- The Dispute Settlement Body is also composed of all the WTO members. It oversees the implementation and effectiveness of the dispute resolution process for all WTO agreements, and the implementation of the decisions on WTO disputes. Disputes are heard and ruled on by dispute resolution panels chosen individually for each case, and by the permanent Appellate Body that was established in 1994. Dispute resolution is mandatory and binding on all members. A final decision of the Appellate Body can only be reversed by a full consensus of the Dispute Settlement Body.
- The Councils on Trade in Goods and Trade in Services operate under the mandate of the General Council and are composed of all members. They provide a mechanism to oversee the details of the general and specific agreements on trade in goods (such as those on textiles and agriculture) and trade in services. There is also a Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights, dealing with just that agreement and subject area.
- The Secretariat and Director-General of the WTO reside in Geneva, in the old home of GATT. The Secretariat now numbers just over 600 positions, and undertakes the administrative functions of running all aspects of the organization. The Secretariat has no legal decision-making powers but provides vital services, and often advice, to the members. The Secretariat is headed by the Director-General, who is elected by the members.
- The Committee on Trade and Development and Committee on Trade and Environment are two of the several committees continued or established under the Marrakech Agreement in 1994. They have specific mandates to focus on these relationships, which are especially relevant to how the WTO deals with sustainable development issues. The Committee on Trade and Development was established in 1965. The forerunner to the Committee on Trade and Environment (the Group on Environmental Measures and International Trade) was

established in 1971, but did not meet until 1992. Both Committees are now active as discussion grounds and venues for negotiations as part of the Doha work program. The mandate of the CTE is discussed in greater detail in Section 3.2.1.

WTO Structure



Source: World Trade Organization

3.2.1 The Committee on Trade and Environment

The terms of reference given to the CTE at its inception in Marrakech were, in part:

> "To identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
>
> To make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system…"

The Committee narrowed this broad mandate down to a 10-item agenda for work (see Box 3-1) and used this agenda as its framework for discussions until its role was fundamentally changed by the 2001 Doha Declaration. In Doha the members charged the Committee with focusing primarily on three issues:

- The relationship between the WTO and MEAs;
- Procedures for information exchange between MEA Secretariats and the WTO, and criteria for granting MEAs observer status in WTO meetings; and
- Reducing or eliminating barriers to trade in environmental goods and services.

For these issues the CTE was to serve as a negotiating forum, contributing to the Doha agenda results—a role fundamentally different than the discussion forum it had been up to that time, and for which it convenes in special negotiating sessions. The CTE was also instructed, in pursuing its work on the 10-point agenda, to give particular attention to three issues (though not in the form of negotiations):

- The effect of environmental measures on market access, and the environmental benefits of removing trade distortions;
- The relevant provisions of the TRIPS Agreement; and
- Labelling requirements for environmental purposes.

The substance of these issues is discussed in depth in Chapter 5, and the specifics of the CTE's revised agenda is taken up in greater detail in Section 7.1.

Box 3-1: The Marrakech Mandate for the Committee on Trade and Environment

The CTE was created with an agenda of 10 items for discussion:

1. The relationship between trade rules and trade measures used for environmental purposes, including those in MEAs.
2. The relationship between trade rules and environmental policies with trade impacts.
3. a) The relationship between trade rules and environmental charges and taxes.

   b) The relationship between trade rules and environmental requirements for products, including packaging, labelling and recycling standards and regulations.
4. Trade rules on the transparency (that is, full and timely disclosure) of trade measures used for environmental purposes, and of environmental policies with trade impacts.
5. The relationship between the dispute settlement mechanisms of the WTO and those of MEAs.
6. The potential for environmental measures to impede access to markets for developing country exports, and the potential environmental benefits of removing trade restrictions and distortions.
7. The issue of the export of domestically prohibited goods.
8. The relationship between the environment and the TRIPS Agreement.
9. The relationship between the environment and trade in services.
10. WTO's relations with other organizations, both non-governmental and inter-governmental.

3.3 Functions of the WTO

The main functions of the WTO can be described in very simple terms. These are:

- To oversee the implementation and administration of the WTO agreements;

- To provide a forum for negotiations; and
- To provide a dispute settlement mechanism.

The goals behind these functions are set out in the preamble to the Marrakech Agreement Establishing the WTO. These include:

- Raising standards of living;
- Ensuring full employment;
- Ensuring large and steadily growing real incomes and demand; and
- Expanding the production of and trade in goods and services.

These objectives are to be achieved while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, and while seeking to protect and preserve the environment. The preamble also specifically mentions the need to assist developing countries, especially the least developed countries, secure a growing share of international trade.

3.4 The core principles

The WTO aims to achieve its objectives by reducing existing barriers to trade and by preventing new ones from developing. It seeks to ensure fair and equal competitive conditions for market access, and predictability of access for all traded goods and services. This approach is based on two fundamental principles: the national-treatment and most-favoured nation principles. Together, they form the critical "discipline" of non-discrimination at the core of trade law.

- The principle of national treatment requires, in its simplest terms, that the goods and services of other countries be treated in the same way as those of your own country.
- The most-favoured nation principle requires that if special treatment is given to the goods and services of one country, it must be given to all WTO member countries. No one country should receive favours that distort trade.

Members follow these principles of non-discrimination among "like products"—those of a similar quality that perform similar functions in a similar way. They are, of course, free to discriminate among products that are not like—foreign oranges need not be treated the same as domestic carrots. Note, however, that products that are not physically or chemically identical can still be considered like products if, among other things, the products have the same end use, are seen by consumers as substitutes, perform to the same standards or require nothing different for handling or disposal. The "like products test," which tries to determine which products are and are not like, is thus of cen-

tral importance. These two complementary principles and the notion of “like products” are discussed further in Section 3.5.1.

Some argue that the concept of sustainable development has now emerged as a principle to guide the interpretation of the WTO Agreements. In the 1998 Appellate Body ruling in the *U.S.-Shrimp-Turtle* case (see box 3-2), it was made clear that the interpretation of WTO law should reflect the Uruguay Round’s deliberate inclusion of the language and concept of sustainable development (in the Preamble of the Marrakech Agreement establishing the WTO). This ruling may have moved the WTO toward requiring the legal provisions of its agreements to be interpreted and applied in light of the evolving principles and legal standards of sustainable development.

How the WTO will use sustainable development as a principle of interpretation in the future remains, of course, to be seen. But it is clear that elevating “sustainable development” to this role would be a major step in making trade policy and sustainable development objectives mutually supporting.

Box 3-2: The WTO, shrimp and turtles

The WTO Appellate Body (AB) rulings in the *U.S. Shrimp-Turtle* case are something of an environmental landmark. The case stemmed from a U.S. measure banning the import of shrimp from countries that did not mandate measures similar to those mandated for the U.S. fleet to protect endangered sea turtles from drowning in shrimp nets. It was thus a PPM-based measure, discriminating among shrimp imports based on the way the shrimp was harvested.

In October 1996 India, Malaysia, Pakistan and Thailand complained to the WTO that the measure violated WTO rules. The dispute panel agreed, as did the AB. But the latter went against the traditional understanding, ruling that the U.S.’ PPM-based measure could be allowed under GATT’s Article XX(g) exception, which focuses on conservation of natural resources. It also set a precedent by looking outside trade law to several MEAs in helping it to define natural resources as including *living* resources (such as turtles).

But it faulted the U.S. on process, finding unjustified or arbitrary discrimination, including:

- Specifying the use of a specific technology—the turtle excluder device (TED)—rather than specifying an environmental objective;

- Giving the complainants less lead time for compliance than given to other countries;
- Rejecting shrimp based on prevailing policy in the country of origin, even if the shrimp in question had been caught using acceptable U.S. standards;
- Failing to take into account the relative cost of TEDs in developing countries;
- Failing to explore multilateral alternatives with the complainants.

The result is not only a welcome set of precedents from a sustainable development perspective, but also a "rough principles" guide to what might make a PPM-based measure acceptable.

3.5 The key agreements, with special consideration of those related to the environment

3.5.1 GATT 1994

The GATT is the starting point for the key principles of trade law, whether multilateral, bilateral or regional. First concluded in 1948, it has stayed in largely the same form since then, forming an integral part of the Uruguay Round results as GATT 1994. It is composed of 37 articles and a number of explanatory understandings and addenda. This section reviews a few selected articles that are of key environmental importance.

The Preamble

The first of these, which in a sense underlies our understanding of the GATT 1994 and other elements of the WTO, is the preamble of the Marrakech Agreement—the agreement that concluded the Uruguay Round of negotiations, and established the WTO. Although the text of the GATT itself was not amended in the Uruguay Round, the preamble of the Marrakech Agreement is now understood to have made an important change to the original GATT's preamble by incorporating it and making key additions. The original text of the main paragraph of the GATT 1947 preamble is set out in normal script below. The additions coming from the Marrakech Agreement are in italics:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real

> income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources *in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*.

This addition has, in fact, taken root as a helpful guide in interpreting the GATT and other WTO agreements and, as a result, has had a significant impact on the decisions in the WTO's dispute settlement mechanism, especially in the Appellate Body. As a result of these decisions, GATT 1994 should be read and understood in the light of this new preamble.

In terms of its relationship to environmental management and protection, the GATT law needs to be worked through in a two-step manner: first, there are some specific disciplines, most notably on discrimination between domestic and imported products and on quantitative restrictions on imports and exports. Then there are exceptions to the rules, which establish the rights of members to deviate from those disciplines for certain reasons, including environmental protection. Both steps are considered below.

Articles I and III: Non-discrimination, like products

Articles I and III of GATT are the legal home of the core principles: most-favoured nation and national treatment. These principles were described earlier as together constituting the critical WTO discipline of non-discrimination.

Article I establishes the most-favoured nation rule. This requires parties to ensure that if special treatment is given to the goods of one country, it must be given to all WTO members. This provision originated because states had different tariff levels for different countries, and it was designed to reduce or eliminate those differences. The principle has now also been extended to other potential barriers to trade.

This rule has two major exceptions. The first applies to regional trade agreements. Where these have been adopted, preferential tariffs may be established between the parties to these agreements. The second exception is for developing countries, and especially the least developed countries. GATT allows members to apply preferential tariff rates, or zero tariff rates, to products coming from these countries while still having higher rates for like products from other countries. This exception is designed to help promote economic development where it is most needed.

Article III establishes the national-treatment rule. This requires that the products of other countries be treated "no less favorably" than "like products" manufactured in the importing country. The basic purpose of the national treatment

rule is to ensure that products made abroad have the same opportunity to compete in domestic markets. That is, domestic laws, regulations and policies should not impact on the competitive opportunities of imported products.

Two key issues arise here. First, what does "no less favorably" mean? Under trade law, it is understood that domestic measures can be different for imported and domestic products, as long as the resulting treatment of the imported product is no less favorable in terms of its opportunity to compete in a market. In addition, the law can be exactly the same on paper for both domestic and imported products but, if the effect of the law is substantially different between them and the imported product is treated worse in practice (*de facto*), this could also be a breach of the national treatment rule. The key test, then, for less favorable treatment, is how the measure actually impacts on the products in question.

The second key issue is what is meant by "like products." Article III mandates equal treatment for "like products" only, giving the definition great importance. The like products test is important from an environmental perspective. This issue will be explored further when we discuss process and production methods in Section 5.1, but for now it can be highlighted with an example. Consider two integrated circuit boards, one produced in a way that emits ozone-depleting substances, and another produced in a non-polluting way. Are these products like? If they are, then environmental regulators cannot give preference to the green product over the other when both arrive at the border. Nor can they discriminate against the polluting product if it arrives at the border to compete against domestically-produced clean versions. On these questions no clear answer is available today, and existing case law allows arguments to be made either way.

It is a different matter if the pollution in question arises not due to how a good is produced, but due to the characteristics of the good or the manner in which it is used or disposed of. That is, is an energy-efficient automobile "like" an energy-wasteful one? Traditionally, the GATT dispute panels used four criteria to determine whether products were like, all designed principally to test whether they were in direct competition for market share—whether they were "commercially substitutable":

1. Physical properties, nature and quality;
2. End uses;
3. Consumer tastes and habits; and
4. Tariff classification.

The WTO's Appellate Body has so far declined to add risks to human health or the environment as a separate criterion for determining likeness. However,

it has stated that the four tests described above are not treaty-mandated criteria, and that any final determination of likeness requires an overall assessment, based on a range of relevant criteria and related facts. In at least one case (*EC – Asbestos*), that range has included the risks a product poses to human health or the environment. That is, according to the Appellate Body, when risks arise from one product's physical characteristics, but not from another's, this is a legitimate argument against likeness.

Article XI: Quantitative restrictions and licences

Article XI of GATT imposes another type of limit on measures that a member can take to restrict trade. It prohibits the use of import or export bans or quotas, whether through simple bans or limitations or through import and export licensing schemes. This prohibition stems from the fact that such volume-based measures are more trade distorting than are price-based measures such as tariffs and taxes. Agricultural products currently benefit from an important exception to Article XI, and are generally subject to an entirely separate regime (the WTO Agreement on Agriculture).

Article XI might conceivably lead to conflicts with the trade mechanisms in some MEAs. For example, the Basel Convention and CITES impose license or permit requirements for trade in the materials they control. However, to date these types of provisions in MEAs have never been challenged under trade laws.

Article XX: The environmental exceptions

A government challenging an environmental (or other) measure must argue a breach of Article I, III or XI of the GATT, (or another agreement, as described elsewhere). However, even where a national law is found inconsistent with one of these rules, it will not violate GATT 1994 if the state invoking the measure can successfully argue that it falls under the provisions of GATT Article XX (General Exceptions), which allows for certain specific exceptions to the rules. Two types of exceptions are particularly relevant for environment-related measures, namely Article XX(b) and XX(g):

Article XX: 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;

A country wanting to use the environmental exceptions in Article XX has two hurdles to clear. It must first establish the *provisional justification* for using Article XX by showing that sub-paragraph (b) or (g) applies. It must then establish *final justification* by showing that the measure in question does not contravene the lead paragraph, or *chapeau*, quoted above.

Paragraph (b) requires the state to show that the measure is "necessary" to protect the environment. The necessity test had been applied in some GATT cases to categorically rule out environmental laws that protected the environment outside the enacting country's borders. However, the 1998 WTO Appellate Body ruling on Article XX(g) (the *U.S.-Shrimp-Turtle* case—see Box 3-2) may have changed this by requiring just a "sufficient nexus" between the law and the environment of the enacting state. This ruling will make it difficult to sustain blanket exclusion in the application of paragraph (b) of the same article. Although the ruling did not fully explore what constituted a sufficient nexus, it appears that transboundary impacts on air and water, or impacts on endangered and migratory species, for example, might qualify.

Other aspects of the GATT-period necessity test required a Member to show that there was a need to use trade-impacting measures and, if this was shown, to show that the least trade restrictive measure had been used. These requirements constitute a difficult hurdle, particularly if the disputed measure is weighed against purely hypothetical alternatives, rather than those that are actually practical for environmental regulators. However, recent WTO cases have taken a more reasoned approach, considering only "reasonably available" alternative measures, and defining "reasonable" by considering such factors as the measure's cost and the administrative capacity to implement them. In addition, the alternative measures must be equally effective in achieving the state's objectives.

A state claiming an exception under paragraph (g) must demonstrate first that its law relates to the conservation of exhaustible natural resources. *U.S.-Shrimp-Turtle* (see Box 3-2) made progress, from an environmental perspective, in defining exhaustible natural resources broadly, to include living and non-living resources (including other species) and renewable and non-renewable resources. Second, the law must have been accompanied by domestic-level restrictions on management, production or consumption of the resource to be conserved. In other words, the costs of any conservation regime must not only be reserved for foreigners. Finally, the law must be "primarily aimed at" the conservation objectives; it must show "a close relationship between means and ends." These requirements help ensure that environmental protection is not merely disguised trade discrimination.

If a law passes the tests described above it must then pass the tests in the chapeau, or opening paragraph, of Article XX, which address how the law is

applied. The three tests in the chapeau to be met are whether, in its application, the measure is arbitrarily discriminatory, unjustifiably discriminatory or constitutes a disguised restriction on trade. The clearest statement to date on these tests in an environmental context comes from the 1998 *U.S.-Shrimp-Turtle* case. Although the Appellate Body did not try to define these terms, it arguably defined a number of criteria in that case for not meeting the tests including, for example, the following:

- A state cannot require another state to adopt specific environmental technologies or measures—different technologies or measures that have the same final effect should be allowed.
- When applying a measure to other countries, regulating countries must take into account differences in the conditions prevailing in those other countries.
- Before enacting unilateral trade measures covering foreign process and production methods, countries should attempt to enter into negotiations with the exporting state(s). If exporting states do not agree to negotiate, or negotiate in bad faith, this allows greater leeway for importing states to subsequently enact unilateral measures.
- Foreign countries affected by trade measures should be allowed time to make adjustments.
- Due process, transparency, appropriate appeals procedures and other procedural safeguards must be available to foreign states or producers to review the application of the measure.

3.5.2 The Agreement on Technical Barriers to Trade

The Marrakech Agreement Establishing the WTO brought together a number of agreements negotiated in the Uruguay Round, as well as GATT 1994, to form a coherent body of WTO law covering many aspects of trade in goods and services. One of those agreements was the Agreement on Technical Barriers to Trade (preceded in the Tokyo Round by the plurilateral Standards Code), which covers standards-related measures that might be non-tariff barriers to trade. These can include technical performance standards a product must meet to be imported or exported—for example, energy efficiency standards for washing machines. They may also include environmental, health, labour or other standards a product must meet during its lifecycle—for example, forest products must come from sustainably managed forests. The TBT Agreement dictates when such barriers may be allowed and what conditions must be met (notification, transparency in developing the rules, the use of international standards when appropriate, and so on). It applies fully to all government standards, including most levels of government. Non-govern-

mental, non-mandatory standards are less strictly covered under what is called the Code of Good Practice. The differences in coverage are discussed in greater detail in the context of environmental standards and ecolabels, in Section 5.4.

Where the core thrust of the GATT is to establish a *relative* standard of treatment for trade in goods—that is, foreign goods should not receive worse treatment than that accorded to domestic goods, or to goods from third countries—the TBT is different in that it goes further to require certain *absolute* standards of treatment. For example, the TBT demands that labelling requirements not be more trade restrictive than necessary, regardless of whether foreign and domestic producers are treated alike.

3.5.3 The Agreement on the Application of Sanitary and Phytosanitary Measures

The Agreement on Sanitary and Phytosanitary Standards, like the TBT Agreement, was negotiated in the Uruguay Round. It deals with standards "necessary" to protect humans, animals and plants from certain hazards associated with the movement of plants, animals and foodstuffs in international trade. These include, for example, measures in these areas to protect the environment or human, animal and plant health against:

- The risks from pests, diseases and disease-related organisms entering the country with the traded goods; and
- The risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.

Like the TBT Agreement, the SPS Agreement provides for certain strict standards of rule making, in this case related to sanitary and phytosanitary measures. It describes what conditions they must meet (such as notification, transparency in developing the rules, the use of international standards when appropriate, and so on). It requires that standards be based on scientific evidence and that a risk assessment be undertaken. Special provision is made for temporary measures when current scientific information is insufficient to adopt permanent measures, making the SPS Agreement one of the few WTO agreements to observe the precautionary approach.

The absolute standards set by the TBT and SPS Agreements have the potential to create problems. In some cases, the bar can be set high enough that it becomes difficult for developing countries, with limited technical and administrative resources, to clear it. As well, the standards set by the SPS Agreement in particular may differ from those established in domestic and international environmental regimes. For example, the SPS Agreement, while it does have provisions for temporary measures in the absence of certainty, does not go nearly so far as the Cartagena Protocol in allowing precautionary measures.

There is some uncertainty, then, about the exact nature of countries' obligations with respect to rules of these types, and some potential for trade rules to conflict with national and international environmental policies set outside the WTO.

3.6 Other agreements

Several other WTO agreements are relevant to the longer-term relationship between the trade regime, environment and sustainable development. Some are under negotiation as part of the Doha program of work (see Section 7.1), though the environmental implications of the talks are not generally being explicitly addressed. These include:

- The Agreement on Agriculture (see Section 5.8);
- The Agreement on Subsidies and Countervailing Measures (see Section 5.7);
- The General Agreement on Trade in Services (see Section 5.10); and
- The Agreement on Government Procurement (see Section 5.12).

3.7 Regional trade agreements

Although the WTO provides the central features of the global trade regime, there is also an increasing number of regional and bilateral trade agreements in force, in large part modelled on the multilateral system. Of the 273 regional trade agreements that had been notified to the WTO as of December 2003, only 120 pre-date 1995. If agreements conclude as planned under WTO notification, the end of 2005 will see almost 300 regional trade agreements in force. There are also some 2,200 bilateral investment treaties in force.

Under GATT Article XXIV and GATS Article V such free trade areas are allowed under WTO rules, provided they meet three criteria: trade barriers with non-signatories are not raised, the free trade area should be fully established within a reasonable transition period (generally interpreted as no more than ten years), and tariffs and regulations should be eliminated for "substantially all sectors." The latter has been subject to various interpretations, and many agreements arguably fail to clear this hurdle. Nonetheless, though all regional/bilateral agreements involving members must be notified to and approved by the WTO, none has ever been rejected. It may be that members are reluctant to censure practices in which they too engage.

Regional and bilateral agreements take a wide variety of approaches to environmental issues. These are described in greater detail in Chapter 6.

3.8 Dispute settlement

The WTO's dispute settlement mechanism, with its ability to deliver binding decisions, is one of the central elements of the Uruguay Round Agreements. The Dispute Settlement Understanding (DSU) introduced a more structured dispute settlement process with more clearly defined stages than that which existed under GATT since 1947. A fundamental difference between the two is that under GATT a positive consensus was needed to adopt reports, so any one party could prevent formally adopting a decision. Under the DSU, dispute settlement reports are automatically adopted, unless consensus is to the contrary. This is known as "reverse consensus" and makes the decisions very difficult to reject. The DSU did, however, add a mechanism for appealing rulings to a standing Appellate Body.

A dispute is brought to the WTO when a member believes that a fellow member is infringing its rights under one of the agreements governed by the WTO. This usually occurs when a company brings an alleged violation to the attention of its government, and the government decides that action before the WTO is warranted. The two parties to a dispute then follow a pre-defined set of procedures (see Box 3-3).

Box 3-3: Four phases of the dispute settlement mechanism

Consultations: Parties to a dispute are obliged to see if they can settle their differences. If consultations are not successful within 60 days, the complainant can ask the Dispute Settlement Body to establish a panel. The parties may also undertake good offices, conciliation, or mediation procedures.

The Panel: The three-member panel decides the case in a quasi-judicial process. Where the dispute involves a developing country, one panellist is from a developing country. The panel report, circulated to all WTO members within nine months of panel establishment, becomes the ruling of the DSB unless it is rejected by consensus or appealed.

Appeals: The possibility of appealing a panel ruling is a new feature in the DSM as compared with GATT. Either party can appeal the ruling of the panel based on points of law. Appeals are heard by three randomly selected members of the Appellate Body and may uphold, modify or reverse the legal findings and conclusions of the panel in a report issued within 60 to 90 days.

Surveillance of implementation: The violating member is required to state its intentions on implementation within 30 days of the report being adopted by the DSB. If the party fails to implement the report within a reasonable period (usually between eight and 15 months), the two countries enter negotiations to agree on appropriate compensation. If this fails, the prevailing party may ask the DSB for permission to retaliate, by imposing, for example, trade sanctions, the level of which is subject to arbitration.

The DSM cannot force a state to change its laws, even if they are found to contravene WTO rules. States intent on keeping such laws can either negotiate compensation for the complainant (for example, increasing the access to markets in another area), or failing that, be subjected to retaliatory trade sanctions.

Suggested readings

Structure and functions of the WTO

Understanding the WTO. A WTO primer. <http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm>.

Sutherland, Peter *et al.*, 2004."The Future of the WTO: Addressing Institutional Challenges in the New Millenium." Report by the Consultative Board to the Director General Supachai Panitchpakdi. Geneva: WTO. <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf>.

The key agreements

WTO Legal Texts. <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>.

Dispute settlement

WTO Dispute Settlement. <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.