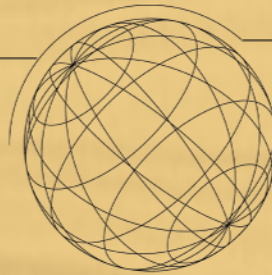


Trade and Environment at the WTO



WORLD TRADE
ORGANIZATION

The Relationship between MEAs and the WTO

Marrakesh Declaration - Item 1

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

Marrakesh Declaration - Item 5

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

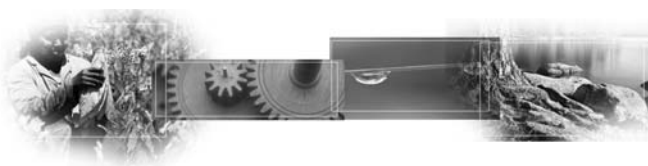
Doha Declaration - Paragraph 31(i)

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

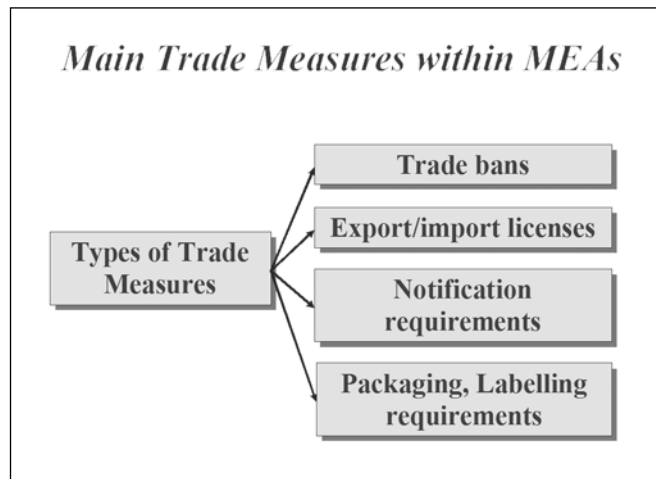
GENERAL DEBATE

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

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



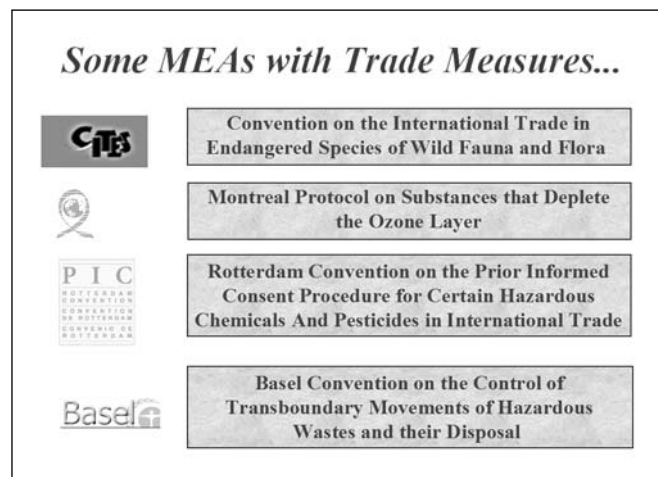
Whilst MEAs are to be encouraged, the CTE has wrestled with the issue of how to address the trade provisions which several of these agreements contain. These include trade measures agreed to amongst parties to MEAs, as well as measures adopted by parties to MEAs against non-parties.



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

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

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



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



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

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

The Chile - Swordfish Case

Facts

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

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

Proceedings at the WTO

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

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



The Chile - Swordfish Case (cont'd)

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

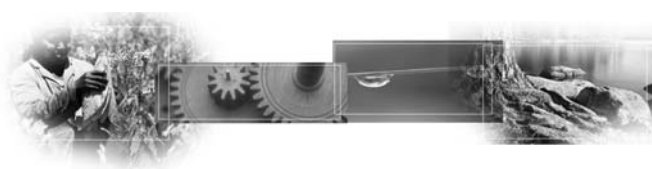
On 12 December 2000, the Dispute Settlement Body (DSB) established a panel further to the request of the European Communities. In March 2001, the European Communities and Chile agreed to suspend the process for the constitution of the panel (this agreement was further reiterated in November 2003).

Proceedings at the ITLOS

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

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

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



MEAS AND THE SINGAPORE MINISTERIAL CONFERENCE

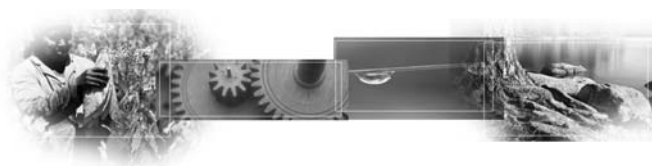
In the conclusions reached in 1996 at the Singapore Ministerial Conference, the CTE stated that it fully supported multilateral solutions to global and transboundary pollution problems, and urged Members to avoid unilateral actions in this regard. It stated that whilst trade restrictions are not the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

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

THE DOHA NEGOTIATING MANDATE ON MEAS

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

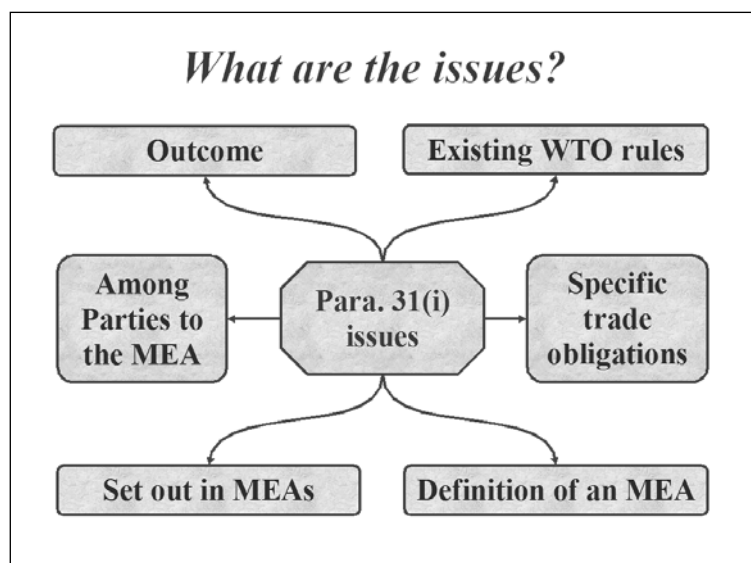
WTO Members have basically agreed to clarify the legal relationship between WTO rules and MEAs, rather than leaving the matter to the WTO's dispute settlement body to resolve in individual cases (in the event of the lodging of a formal dispute). However, they have explicitly stated that the negotiations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



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

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

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



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

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



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

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

ENVIRONMENT AND THE TRIPS AGREEMENT

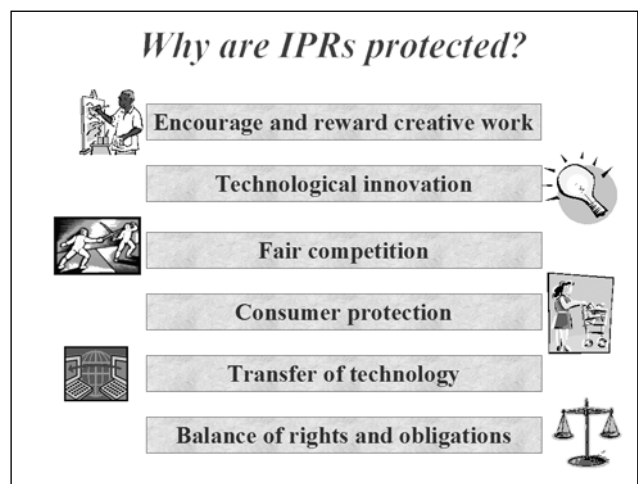
Marrakesh Declaration - Item 8

Doha Declaration - Paragraph 32(ii)

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

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

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



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

The Relationship between the CBD and the TRIPS Agreement

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

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

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

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



Transfer of Technology

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

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

