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# IX. INTERNATIONAL ECONOMY AND THE ENVIRONMENT

## 1. INTERNATIONAL TRADE RULES, WORLD MARKET CONDITIONS, AND ENVIRONMENTAL EFFECTS

(1) *The World Trade Organization (WTO)*

(a) *The Committee on Trade and Environment (CTE) and the Singapore Ministerial Declaration*

The CTE of the WTO met seven times in 1996. This activity culminated in the preparation and adoption of a Report of the WTO Committee on Trade and Environment (CTE Report) to the WTO Ministerial Conference, held in Singapore in December. The work program of the CTE was established by the Marrakesh Ministerial Declaration on Trade and Environment (*see 5 YbIEL 283 (1994)*), which instructed the CTE to present a report to the first biennial Ministerial Conference. The CTE Report and related documents can be found at the WTO website (<http://www.wto.org>).

The CTE Report starts with a background discussion and an analysis of proposals regarding 10 principal items, followed by the conclusions and recommendations on the CTE. On the whole, the discussion and analysis of the relationship between trading rules and environmental effects in the CTE Report reflects a divergence in the perspectives of industrialized and developing WTO members that applies across a wide range of international economic issues. Industrialized members express concern with maintaining flexibility to apply environmental protection measures in accordance with their perceptions of national and regional interest. Developing countries express concern that this flexibility will result in the adoption of measures that will disproportionately restrict their opportunities to achieve effective market access for their exports. Both the industrialized and developing members are able to identify language in documents from the UN Conference on Environment and Development that support their differing perspectives on these questions.

One of the major items that the CTE considered is the relationship between the WTO agreements and multilateral environmental agreements (MEAs), including their respective dispute settlement mechanisms. The CTE stressed that there has never been a dispute involving an allegation of conflict between the provisions of the General Agreement on Tariffs and Trade (GATT)/WTO agreements and an MEA. Nevertheless, a number of members tabled proposals for clarifying the relationship between the WTO agreements and MEAs. Similar proposals from the European Union and Switzerland sug-

gested mechanisms by which the rules of MEAs might be deemed to satisfy the criterion of "necessity" under GATT Art. XX in the context of WTO dispute settlement, leaving the Dispute Settlement Body with the task of deciding whether measures taken under such "necessary" MEAs were applied in a justified manner. There were, however, concerns expressed regarding these proposals on a number of grounds, including concern whether members could agree on which MEAs qualified for a favorable presumption.

In their conclusions and recommendations, CTE members were able to reach consensus on the unremarkable proposition that "multilateral solutions based on international cooperation and consensus [are] the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" (CTE Report, para. 171). The CTE also concluded that:

[t]rade measures based on specifically agreed-upon provisions can . . . be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem. They have played an important role in some MEAs in the past, and they may be needed to play a similar important role in certain cases in the future.

(para. 173). Since the framers of the GATT certainly contemplated that trade measures would be used to protect the environment (*e.g.*, human life and health), it is not surprising that the CTE should conclude that MEAs may need to incorporate trade measures.

With respect to dispute settlement, the CTE took the step of saying that "if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA" (para. 178).

With respect to eco-labeling issues, the CTE urged increased transparency in the adoption and application of rules, and suggested using the Code of Good Practice for standardizing bodies contained in Annex 3 of the Technical Barriers to Trade Agreement as a reference point for further work on transparency issues (para. 184). The CTE in general stressed the importance of transparency with respect to trade-related environmental measures, and recommended that the WTO Secretariat compile a database of environment-related measures that have been notified to it (para. 192).

The CTE noted that market access issues remain a very high priority for developing members, and that open markets will assist those members in improving living standards, and thereby the capacity to address environmental concerns (para. 197).

Regarding the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights and the environment, the CTE focused on the importance of making environmentally sound technology and

products, and production capacity, available to developing members, as well as creating incentives for the protection of biodiversity (para. 208).

The CTE finally noted the importance of the transparency of its own activities, so that the public does not perceive the WTO as a secretive and unresponsive institution. The CTE referred to three decisions of the WTO General Council, taken in 1996, relating to the circulation and derestriction of documents, relations with nongovernmental organizations (NGOs) and observer status for intergovernmental organizations. The decision on relations with NGOs directed the WTO Secretariat to play a role in maintaining contacts with, furnishing information to, and arranging meetings with NGOs. This limited arrangement disappointed many NGO representatives, who want access to WTO member meetings and expressed their disappointment at a first informal meeting with the Secretariat in September. Although the Council decision on derestriction of information is a substantial step forward in transparency for the WTO, NGO representatives also expressed dissatisfaction with this decision, believing it leaves too many documents restricted for up to six months after being issued.

The Singapore Ministerial Declaration, adopted on December 13, refers with approval to the ongoing work of the CTE, but does not add to its work program or include any new decisions or recommendations. It concludes that “[t]he breadth and complexity of the issues covered by the Committee’s Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report.”

*(b) The Appellate Body*

The relationship between trade rules and rules to protect the environment was the subject of the first report of a WTO dispute settlement panel (United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 1996 GATTPD LEXIS 3, Jan. 29, 1996). The US appealed certain conclusions of the panel report to the newly established WTO Appellate Body, and in May 1996 the Appellate Body rendered its first decision (35 *ILM* 603 (1996)).

The Reformulated Gasoline case involved a complaint by the governments of Brazil and Venezuela against the United States with respect to the manner in which the US Clean Air Act treats imports of gasoline from foreign country refiners. Under the Clean Air Act, a refiner, blender, or importer’s compliance with pollutant emissions standards across the United States (including both areas where reformulated gasoline must be sold and other areas) is measured against a baseline of emissions from conventional gasoline sold by them in 1990. Domestic US refiners are entitled to establish individual baselines using their historical data that indicates the quality of gasoline produced by them in 1990, and in default of data are required to use a statutory 1990 baseline. However, foreign refiners are not entitled to establish indi-

vidual baselines for the quality of gasoline they produced in 1990, but must instead make use of statutory baselines. These statutory baselines place them at an environmental compliance cost disadvantage compared to US refiners.

A GATT/WTO panel decided that imported and domestic gasoline are "like products" for purposes of evaluation under GATT Art. III, and that imported gasoline was subject to less favorable treatment under US law than domestically produced gasoline, thus violating the GATT Art. III:4 rule of non-discrimination. The panel went on to find that the discriminatory provisions of the Clean Air Act were not "necessary to protect human, animal or plant life or health" under GATT Art. XX(b). The panel also found that while clean air is an "exhaustible natural resource" in the context of GATT Art. XX(g), the discriminatory aspects of the Clean Air Act were not measures "relating to" the conservation of a natural resource, and that it was unnecessary to determine whether such measures were "made effective in conjunction with restrictions on domestic production or consumption" under Art. XX(g).

The United States did not appeal the panel's finding that its treatment of foreign gasoline was discriminatory under Art. III:4, or the finding that such treatment was not necessary to protect life or health under Art. XX(b). The thrust of the US appeal was that the panel had misinterpreted the chapeau of Art. XX, and Art. XX(g), in its decision that the US measures were not related to the conservation of natural resources, and that they therefore did not qualify for exceptional treatment.

The Appellate Body upheld the result of the panel report, but found considerable fault with the panel's legal reasoning. According to the Appellate Body, the panel erred in its application of Art. XX(g) by equating a finding that the Clean Air Act was discriminatory under Art. III:4 with the provisions of the Clean Air Act itself. The panel should not have asked whether discrimination was related to the conservation of natural resources, but rather whether the relevant baseline measures were related to the conservation of natural resources. The Appellate Body said that the Clean Air Act baseline rules were clearly related to the conservation of exhaustible natural resources, and they were certainly made effective in conjunction with restrictions on domestic production in the context of Art. XX(g). However, according to the Appellate Body, this was only the beginning of a complete inquiry.

Even if measures meet the criteria of Art. XX(g), they must also satisfy the chapeau of Art. XX and not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." The Appellate Body placed the burden of proving compliance with the chapeau on the party invoking the exception (here the United States). The Appellate Body observed that the test for compliance with the terms of the chapeau must be different than the test for compliance with the terms of GATT Art. III:4. Otherwise, any measure

found to be inconsistent with Art. III:4 also would be prohibited under Art. XX. Thus the Appellate Body sought to clarify the meaning of the terms "arbitrary discrimination," "unjustifiable discrimination," and "disguised discrimination" used in the chapeau. The Appellate Body noted that these terms were not without some ambiguity. It decided that the "fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Art. XX."

Using this standard, the Appellate Body rejected the US rationale for discriminatory treatment, which was essentially one of administrative inconvenience: that it would be difficult to verify historical foreign production data and adequately track the origin of foreign gasoline shipments to the United States. The Appellate Body observed that the United States routinely uses foreign data in its antidumping proceedings, and has developed means for verifying such data. Moreover, the Appellate Body observed that assuring the origin of goods is a typical function of customs authorities, and did not appear to be an insurmountable obstacle in the subject situation. The United States had made no effort to negotiate cooperative arrangements on data verification or shipment tracking with the Brazilian and Venezuelan governments, even though comparable arrangements are routinely made in number of transnational regulatory fields. Finally, the United States failed to adequately take into account the costs that would be imposed on foreign refiners in complying with statutory baselines. The Appellate Body concluded that these defects went "well beyond" what was necessary for a finding of Art. III:4 discrimination. This discrimination "must have been foreseen, and was not merely inadvertent or unavoidable." This was "unjustifiable discrimination" and a "disguised restriction on international trade" and not "entitled to the justifying protections afforded by Art. XX as a whole."

(2) *The North American Free Trade Agreement (NAFTA) and the North American Agreement on Environmental Cooperation (NAAEC)*

The potential accession of Chile to NAFTA remained stalled in 1996 by the refusal of the US Congress to grant authority to the Clinton administration to negotiate accession under the fast-track approval mechanism. This refusal was substantially based on the insistence by the Republican congressional majority that accession to NAAEC not be included within fast-track authorization, and a corresponding insistence by the Clinton administration that authority for such accession be included.

The North American Commission for Environmental Cooperation (CEC) has become a model for transparency through the operation of its website (<http://www.cec.org>). The activities of the CEC are regularly reported in its ECO Region newsletter, which is available at the CEC website. Individuals can register on-line to receive various news releases from the CEC. As mentioned in an earlier edition of this report (*see* 6 *YbIEL* 352 (1995)), the CEC

website includes an up-to-date database of submissions to the CEC regarding the preparation by the Secretariat of factual records under Arts. 14 and 15 of the NAAEC.

In its 1996 work program, the CEC established among its priorities: (1) the improvement of species and habitat protection through cooperation in the conservation of species of birds, plant diversity, and marine and coastal area ecosystems; (2) reducing risk from persistent chemicals through programs for identification, sound management, air monitoring and modeling, and trans-boundary environmental impact assessment; (3) cooperation in promoting forest conservation and increasing investments in green technology; and (4) creating a CEC database and an integrated system for North American environmental management, among other priorities. Through the newly created North American Fund for Environmental Cooperation, the CEC sponsors and participates in symposia and workshops intended to promote environmental awareness and provides funding for research studies and community activities. The CEC has specifically identified several chemicals (DDT, chlordane, mercury, and PCBs), as chemical pollutants targeted for regional phaseout or reduction. The agreement by the three NAFTA governments to develop sound management programs for persistent pollutants reflects the type of cooperative activity that proponents of the NAFTA and NAAEC saw as potentially the most positive aspect of the agreements.

In January 1996, several Mexican environmental groups made a submission to the CEC Secretariat requesting the preparation of a factual record, pursuant to NAAEC Art. 14. The submission alleges a failure in the enforcement of Mexican environmental law involving a number of irregularities in the approval of the construction of a port terminal and related works in Cozumel. Among the irregularities alleged was the failure of the Mexican authorities to require the preparation of an environmental impact assessment. The NGOs assert that construction of the port facility will have an adverse impact on the Paradise coral reef in the Caribbean waters of Quintana Roo. The Mexican government responded to the submission by claiming, *inter alia*, that the actions complained of occurred before the entry into force of NAAEC (January 1, 1994), and that the Agreement was not intended to be retroactive. The Secretariat observed in a reply that the acts alleged occurred both before and after entry into force of NAAEC, and that

in light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention [on the Law of Treaties], a situation that has *not* ceased to exist, the Secretariat does not view the further study of this matter as constituting retroactive application of the NAAEC, nor would such study contravene the language of Art. 14 of the NAAEC.

(*see* Secretariat Recommendation to Council of June 7, 1996.) On August 2, the Council directed the Secretariat to prepare a factual record in this matter,

and a request for a substantive submission from the government of Mexico is pending.

*(3) The Organisation for Economic Cooperation and Development (OECD)*

In 1996, the OECD Environmental Policy Committee met at the ministerial level for the first time since 1991. In respect to the linkage between trade and environmental issues, the ministers

urged the OECD to continue its integrated work on trade and environmental issues, including that undertaken in cooperation with the WTO, UNEP, the UN Conference on Trade and Development (UNCTAD) and other relevant international bodies. They urged UNEP to take a greater role in ensuring that environmental aspects were fully taken into account in the trade and environment debate.

The ministers also observed that

[s]tudies by the OECD and other institutions confirm that environmental policies have not led to significant impacts, to date, on industrial competitiveness or trade, or to the movement by industry to countries with lower environmental standards. As globalisation increases competitive pressures, these interrelationships will require continuing close surveillance, and a readiness to respond with flexible policies.

*(4) The Asia-Pacific Economic Cooperation (APEC) Forum*

APEC held its first Meeting of Ministers on Sustainable Development in 1996. An Action Program for sustainable development in APEC was adopted, focusing on sustainability of the marine environment, clean technology and cleaner production, sustainable cities, and innovative approaches to sustainable development. Ministers instructed their senior officials "to undertake an annual review of sustainable development work in APEC to advance the vision shared by the Leaders in Seattle and Bogor which made sustainable development a central APEC objective."

Frederick M. Abbott

## 2. MULTILATERAL LENDING ACTIVITIES

In 1996, international financial institutions faced continued pressure to reshape their operational procedures in order to increase transparency and embrace the goals of sustainable development. Important developments included the active engagement of the World Bank Inspection Panel and the implementation of similar investigatory procedures at other multilateral development banks.