The World Trade Organisation Committee on Trade and Environment: Exploring the Challenges of the Greening of Free Trade

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Summary: The World Trade Organisation General Council established the WTO Committee on Trade and Environment on 31 January 1995. The predecessors of this Committee are the GATT group on Environmental Measures and International Trade and the Sub-Committee on Trade and Environment of the Preparatory Committee of the World Trade Organisation. The WTO Committee has already discussed a wide range of issues involved in the "greening" of free trade. Its work reflects the definition of environmental protection as constituting an element of global free trade.

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1. Introduction

The World Trade Organisation (WTO) Committee on Trade and Environment, established by the WTO General Council (31 January 1995), held its first meeting on 16 February 1995.

The Committee was created to formalise a process which has been taking place for some time within the forum of the General Agreement on Tariffs and Trade (GATT), namely the reconciliation of the legitimate concerns for environmental protection with the establishment of a global free trade regime.

This article seeks:
1. to define the origin of the Committee;
2. to examine briefly the issues dealt with so far by the Committee; and
3. to consider what role this Committee may play in the debate on the "greening" of free trade.

2. From EMIT to the Trade and Environment Decision of 14 April 1994

2.1 The GATT group on Environmental Measures and International Trade

The GATT group on Environmental Measures and International Trade (EMIT) was established in November 1971 by decision of the General Council. It was given the task of examining, upon request, any specific matters relevant to the trade policy aspects of measures to control pollution and protect the human environment.1 It was to report back to the Council.

EMIT did not become active until October 1991. This gap between the establishment of the EMIT group and its eventual realisation illustrates the importance attached to the issue in the 1990s. Three items were dealt with (TE 001, 01.04.1993, p.6):
1. trade provisions in existing multilateral agreements (MEAs) vis-à-vis GATT principles and provisions;
2. the transparency of trade-related environmental measures;
3. the possible trade effects of packaging and labelling requirements.

The chairman of EMIT concluded that the group proved useful as a forum for the exchange of information. In his view, the group had reached two important conclusions:
1. The delegations seemed convinced that the GATT agreement offered room for environmental considerations, either within the GATT rules or as an exception to those rules. This statement answered the concerns of some environmentalists that the GATT, by its nature (being an agreement promoting free trade and fair competition), cannot offer a sufficient framework to meet environmental concerns.
2. Delegations stressed that GATT does not seek to impose its free trade goals over environmental protection, nor to boycott international initiatives in protecting the global environment. This statement reflects a commitment to multilateralism in responding to the environmental challenges of international trade.

2.2 The Trade and Environment Decision of 14 April 1994

In adopting the Uruguay Round Final Act in Marrakech on 15 April 1994, Ministers agreed to insert a decision on trade and environment.

This decision called for the establishment of a WTO Committee on Trade and Environment. It also included the Committee’s terms of reference, which give it a broad assignment. Within the framework of the terms of reference, any relevant issue may be raised.

However broad the agenda, there is a limit, due to the nature of the WTO. Ministers stated a wish for the Committee to co-ordinate policies in the field of trade and environment, without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for members.2

The Ministerial decision calls on the Committee to ensure the input of inter-governmental and non-governmental organisations referred to in Article V of the WTO.

1. Interim report by the Chairman of EMIT, 3 December 1992, TE 001, 01.04.1993, p.6. The WTO (previously GATT) secretariat regularly issues documents on the trade and the environment aspects of the GATT. These documents will be cited in this article as “TE (No), (date)”.  
2. See the text of the ministerial decision as published in TE 002, 08.05.1995, p.7 onwards.
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The Committee was to submit its report to the WTO Environmental Conference, to be held in Singapore in mid-December 1996.

2.3 The Sub-Committee on Trade and Environment

Given the relative success of the EMIT group, ministers were convinced that, prior to the first General Council of the WTO, a forum had to be created in which the consultations on trade-related environmental issues could be pursued. Therefore, it was decided to set up a Sub-Committee of the Preparatory Committee of the World Trade Organisation.

This sub-committee held five meetings pending the establishment of the WTO Committee. These meetings dealt with the following matters (TE 002, 08.05.1995, p.3 et seq):

1. organisational matters. These included inviting the secretariats of the UN, UNEP, FAO, ITC, UNDP, OECD, EFTA, The Commission on Sustainable Development, IMF, UNCTAD and the World Bank to observe its work. These inter-governmental bodies have also been granted observer status within the Committee on Trade and Environment (infra);

2. the relationship between the provisions of the multilateral trading system and –
   (a) charges and taxes for environmental purposes, and
   (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;

3. the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;

4. the effect of environmental measures on market access, especially in relation to the least developed among them, and environmental benefits of removing trade restrictions and distortions.

3. The WTO Committee on Trade and Environment

3.1 Structure

The first General Council of the WTO established the Committee on Trade and Environment on 31 January 1995.

The Committee is open to all members of the WTO; other signatories of the Final Act of the Uruguay Round that are Contracting Parties to the GATT 1947 and eligible to become original members of the WTO; and other governments with observer status.

The eleven inter-governmental institutions that obtained observer status under the Sub-Committee on Trade and Environment keep this status in the Committee. So far, no arrangements have been made to meet the requirement of the Ministerial Decision to allow observer status to non-governmental organisations.

The latter issue has proved complex. As became apparent in the Sub-Committee on Trade and Environment (TE 010, 11.10.1994, p. 9 et seq), there is agreement on the principle that NGOs should participate. However, no consensus has emerged on the extent or manner of such involvement.

The task for the Committee is to promote transparency and use the expertise and information of the NGOs, at the same time avoiding delays and maintaining principles of democracy. All that has been achieved towards transparency is that it has been agreed to provide NGOs and other interested persons with reports of the meetings and the preparatory work of the Committee.

No consensus has been reached so far on a number of other issues. Should NGOs be allowed to observe – or to participate in – the actual sessions of the Committee, or does this endanger the specific needs and characteristics of a negotiation process? Should the issue of transparency be resolved at a national level or at the level of the WTO itself, as with other international organisations, such as the World Bank or the OECD?

Thus, the participation of NGOs remains to be resolved. Consultations on this subject are currently taking place in the WTO General Council.

3.2 The Committee’s Agenda

The Committee adopted the following agenda items (TE 002, 08.05.1995, Appendix 2. These items form part of the terms of reference provided by the Ministerial Decision on trade and environment):

1. the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;

2. the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;

3. the relationship between the provisions of the multilateral trading system and –
   (a) charges and taxes for environmental purposes, and
   (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;

4. the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;

This principle has also been recognized in other international fora. Article 71 of the 1945 Charter of the United Nations recognises the legitimacy of involving NGOs in international activities. Chapter 27 of Agenda 21 seeks to reinforce the role of NGOs, defining them as partners in achieving sustainable development and urging the signatories to invite NGOs to take part in the formulation of policies and implementation of development programs. Chapter 38 of Agenda 21 similarly calls on international organisations to involve NGOs in their work.

India suggests (TE 010, 11.10.1994, p.10) that the input of NGOs should be achieved by giving them the means to try and influence the point of view of their government. Transparency by way of public participation of NGOs in the WTO policy-making process at the level of the WTO itself, in the view of India, risks politicizing the WTO, which is not just a forum for interchanging ideas, but an international organisation with far reaching decision-making power and advanced dispute settlement procedures.
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5. the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral agreements;
6. the effect of environmental measures on market access, especially in relation to developing countries, in particular the least developed among them, and environmental benefits of removing trade restrictions and distortions;
7. exports of domestically prohibited goods;
8. Trade-Related Intellectual Property Rights (TRIPs);
9. services;
10. appropriate arrangements for relations with non-governmental organisations referred to in Article V of the WTO and transparency of documentation.

This agenda recycles some of the issues that have been addressed already in the EMIT group.

3.3 Issues That Have Already Been Discussed

3.3.1 Exports of Domestically Prohibited Goods

The issue of domestically prohibited goods (DPGs) concerns the treatment of goods whose sale and use is restricted in the domestic market because they present a danger to human, animal or plant life or health or the environment, but which nevertheless may be exported to other countries (TE 001, 22.03.1995, p.1).

Sri Lanka and Nigeria brought this issue up in 1982. Subsequently, a GATT working group was set up, which produced a report on the matter in 1991 (Draft Decision on Trade in Banned or Severely Restricted Products and Other Hazardous Substances). This report did not find sufficient support for it to be adopted.

The Committee observed that matters had evolved since that report had been published, notably there had been some initiatives in international environmental agreements and instruments:

1. The Second Meeting of the Basel Convention’s Conference of the parties had decided to ban exports of hazardous wastes from OECD to non-OECD countries (for final disposal, immediately; and for recycling and recovery, as of January 1998).
2. Resolution 3 of the 1989 Basel Conference called on the Executive Director of UNEP to establish an ad hoc working group of experts to develop elements that might be included in a protocol on liability and compensation for damage resulting from the transboundary movement of (hazardous) wastes and their disposal. This group was succeeded by a similar group set up by decision of the first Conference of the Parties to the Basel Convention (prolonged by the second conference).
3. Finally, the Committee draw attention to the negotiations under the London Guidelines on Banned or Severely Restricted Chemicals to make the Prior Informed Consent (PIC) procedures legally binding. Given these initiatives, the question of the role of the WTO in tackling the problem of DPGs was raised. It was recalled that the WTO does not have the mandate to review national environmental priorities, to set environmental standards or to develop global policies on the environment. The WTO Committee was not set up to undermine or duplicate work done in international environmental fora.

Most members of the Committee expressed the opinion that what the WTO can accomplish in this area is greater transparency of those national environmental policies banning goods internally while at the same time allowing them to be exported. Here again it was underlined that, notwithstanding future initiatives, there already exists a wide range of measures within the WTO to secure transparency of trade measures.

However, it seems that the European Union wishes to assign a larger mandate to the WTO in this area. The representation of the European Union said consideration might be given to taking complementary action in the WTO, as a safety net, if reinforcement of rules in other fora was felt to be necessary (TE 001 22.03.1995, p.4). If this means that the WTO trade rules would be used as a safety net for failing or non-existing rules, then this idea is not revolutionary, but would be a mere application of the rules of international public law. However, if the European Union is considering a specific set of environmental standards within the WTO, then this line of thinking represents a substantial change in the character of the WTO rules.

Concerning the question of compatibility of DPGs with the existing GATT rules, several delegations noted the possibility, offered by Article XX of the GATT, of restricting imports where it was felt necessary to protect human, animal or plant life or health. Yet there would be a problem if decisions on restricting trade were taken by exporting countries alone. This would raise the issue of extra-jurisdictional action.

Discussions on this topic were concluded by the suggestion that establishing a working group might prove useful.

3.3.2 The Relationship Between the Multilateral Trading System and Environmental Measures

The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs), has already been on the Committee’s agenda. It has not been discussed thoroughly, although it attracted wide attention both in the EMIT group and in the Uruguay Round Preparatory Committee on Trade and Environment (TE 011, 06.01.1994, p. 4 et seq)

This item goes to the heart of the trade and the environment question, embracing the discussions on Trade Related Environmental Measures (TREMs) pursued through international agreements, and TREMs taken unilaterally.

5. See Demaret, P., “TREMs, Multilateralism and the GATT” in Cameron, J., Demaret, P. and Geradin, D. (eds.), Trade and The Environment: The Search for Balance, London, Cameron May, 1994, Vol.I, (p.52) p.54. The Prior Informed Consent system was jointly set up by the UNEP and the FAO in the context of the shipment of dangerous chemicals that are either banned or strictly controlled on the domestic market of exporting countries.
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3.3.2.1 TREMs in International Agreements

The international community supports multilateral action rather than unilateral initiatives. Both the Rio Declaration and the Rio Convention on Climate Change say explicitly that international co-operation needs to be promoted to tackle transboundary environmental problems. The belief in multilateral co-operation as the most effective way to solve global and transboundary environmental problems has been expressed in the meetings of the Committee and its predecessors. Not only does a common approach promise to be more successful, it also discourages unilateral measures.

A number of international environmental agreements include TREMs. The most important are the 1973 Washington Convention on International Trade in Endangered Species (CITES); the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous wastes and their Disposal.

There are relatively few TREMs in international environmental agreements and few complaints from countries which have been made subject to them. This may lead some to believe that it would be better to let sleeping dogs lie. However, it could prove more rewarding to examine such agreements now, rather than when conflicts actually arise.

Countries Party to Both the WTO and the MEA

The international legal order does not have any problem with the compatibility of TREMs in MEAs and the GATT principles vis-à-vis parties to both treaties. Indeed, according to the Vienna Treaty on the law of treaties, contracting parties to the GATT may agree that certain provisions of the GATT will not apply in their mutual relationship. In the EMIT-group, participants acknowledged that a later and more specific agreement takes precedence over an earlier agreement, provided that the agreements address the same subject matters (TE 01, 01.04.1993, p.8).

Not all MEAs meet the conditions for the lex specialis derogat legi generalis rule, or the lex posterior derogat legi priori rule to apply. If a treaty orders the parties to take measures towards the environmental goal that has been set, without defining the specific measures to be taken, then it seems justified to let the normal set of GATT checks and balances do their work to exclude protectionist measures.

Looking at the GATT in isolation, the compatibility of the trade measures of MEAs with GATT articles was not guaranteed.

Import restrictions as with the Basel Convention are compatible with Article III of the GATT (the national treatment principle) only in so far as they coincide with internal domestic restrictions. This means that as far as the GATT is concerned, TREMs taken pursuant to MEAs to protect environmental goals situated outside the state’s jurisdiction, are deemed to be incompatible with Article III.

Under the same circumstances, export restrictions are incompatible with Article XI (prohibition of quantitative restrictions).

The exceptions provided for in Article XX (b) and (g) of the GATT could not be invoked until very recently. The second Tuna/Dolphin Panel, however, seems to have left aside the restrictive interpretation of Article XX (b) and (g).

Thus, at the moment, the GATT does not seem to challenge any longer the legality of TREMs enacting MEAs, vis-à-vis parties to the treaty concerned.

Countries Party to the WTO but not to the MEA

Trade measures against non-parties to the MEA concerned generally are adopted to avoid “free-riders” and to encourage countries to adhere to the MEA.

It is said, however, that there are more effective means to try and meet the environmental objective set in the MEA, such as technological and financial assistance. This consideration is important in case the exception(s) in Article XX of the GATT are triggered. Indeed, as has been underlined in several GATT Panel Reports, one of the conditions to be met by trade measures to qualify as an exception under Article XX is that there are no less restrictive measures that are equally effective in attaining the policy goal.

A number of countries drew attention to the fact that there might be good reasons for a state not to accede to an MEA. A state may consider that the environmental problem has a low priority, or that the scientific evidence of the
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problem is not adequate, or that the associated costs are not affordable. Developing countries might find support in Principle 6 of the Rio Declaration if they consider that a particular MEA has not taken their specific (financial and/or economic) problems into account. National sovereignty is another argument against the use of trade measures as a means to force countries to join the treaty.

At first sight there seem to be overwhelming arguments that trade restrictive measures vis-à-vis non-parties are incompatible with the GATT agreement.

If the parties to the MEA are obliged to apply the same restrictive trade regime towards non-parties as they do towards parties, then this amounts to the inversion of the most-favoured nation clause (Article I GATT). If they have to apply an even more restrictive regime, then the discrimination is loud and clear (violation of Article I GATT).

The obvious problem that the GATT has with MEAs discredits the GATT, according to some environmentalists. They claim that, since the GATT was established to promote and to protect fair trade, it will never be able to deal with trade measures aimed at solving global environmental concerns. Therefore, in their view, the GATT should be re-written. "Modern" interpretations of GATT principles and exceptions are not enough, according to these critics.

Despite such incompatibility with basic GATT principles, a number of countries have invoked various reasons to justify the application of trade measures to non-parties: 1. Reference is made to the global character of the environmental interests at stake. The importance of the challenge would thus justify stringent measures, including overt discrimination, in seeking maximum support for the MEAs concerned.

2. The GATT code on public procurement entails, as with the MEAs concerned, the non-application of the most favoured nation principle vis-à-vis states that do not wish to accede to these sectoral agreements. If this practice is considered to be justified in the name of free trade, then this should also be possible to preserve the global environment.

3. Trade measures vis-à-vis third states should be justified because and as far as the parties to the treaty protect their own environment.

If the contracting parties to the WTO were to on the necessity for trade measures even though they would be incompatible with GATT principles, a way has to be found to reconcile those measures with the GATT agreement. The Committee saw two possible ways of achieving this (TE 002, 08.05.1995, p.5 and TE 011, 06.01.1995, p. 4 et seq):

1. The waiver provisions of the WTO. Thus, on a case-by-case basis, trade measures would be exempted from having to comply with GATT articles. The North American Free Trade Association (NAFTA) might serve as an example of this approach. NAFTA cites, in Article 104, three international environmental agreement (CITES, the Montreal Protocol and the Basel Convention) which are expressly stated to take precedence over the NAFTA agreement. This precedence is however made subject to the condition that the state wishing to invoke the MEA as the justification for not complying with the NAFTA agreement must choose, from the means at its disposal, the means which are the least inconsistent with NAFTA, in a reasonable way and with the same efficiency in reaching the environmental goal. In respect of existing MEAs, it should not be too difficult for the WTO Contracting Parties to reach a consensus on a list of "exempted MEAs". But what of MEAs that will be concluded in the future? Should the granting of a waiver be subject to complying with a list of general criteria, to be drafted by the Contracting Parties? Would it be better to work on a case-by-case basis?

Overall, the disadvantage of the waiver approach would be that parties negotiating an MEA could not be certain that a waiver would eventually be granted, since, by definition, the waiver would take place ex post.

2. Another possible approach could be a collective interpretation of the GATT Articles that apply in the context of trade and the environment, such as Article XX (b) and (g). This, however, might not prove easy to reach. Additionally, a collective interpretation does not leave any room for aspects of the trade and the environment issue that might turn up in the future (unless, of course, the parties were to agree a "new" collective interpretation in the future). If this approach were to be adopted, then the conditions for the Article XX exceptions to apply, as defined in the headnote to the article, would of course be withheld. This means, among other matters, that in any event, the use of trade measures vis-à-vis non-parties to the MEA may not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. It would not be possible in casu to use trade measures against non-parties if those countries meet the level of environmental protection dictated by the MEA.

Argentina launched an interesting proposal, suggesting a two-stage approach (TE 011, 06.01.1995, p.6). According to this proposal, the pros and cons of both approaches could be combined as follows:

1. In a collective interpretation of Article XX, criteria would be defined which, if they were met by an MEA, would prima facie make the trade measures included compatible with the GATT rules. This would offer the obvious advantage to parties negotiating an MEA that the (in)compatibility with GATT rules becomes reasonably predictable.

14. Principle 6 of the Rio de Janeiro Declaration on Environment and Development: "The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries".


17. Argentina proposed four basic criteria: the term "multilateral" should be considered in terms of the minimum number of countries in the geographical region covered by an MEA that would have to be party to it, and the need for MEAs to be open to participation by any WTO member. The term "environmental" should cover any agreement having an environmental protection objective, even if it was not its only objective. Trade measures included in an MEA should be shown to be indispensable to meeting its environmental objectives. Trade measures should be the least trade restrictive in each particular case.
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2. The second stage would entail a procedure similar to the waiver procedure of the GATT, in which each MEA would be examined to see if it indeed meets the criteria. A last aspect of the issue of MEAs and their (in)compatibility with international trade law is the problem of defining an MEA. The concern is that the international community can be favourable towards multilateral initiatives only if they are truly multinational, rather than reflecting the individual wishes of (developed) countries, disguised as an international treaty.

The European Community has suggested that only international agreements negotiated under the aegis of the United Nations, or those in respect of which the negotiations are open to all Contracting Parties to the WTO, could qualify as multilateral agreements. The European Community considered such agreements should, in any event, be open to all WTO Contracting Parties, under the same conditions as the original parties.

But can the WTO require that an international agreement have a minimum number of participants to qualify for an exemption from GATT rules? This is a delicate question. On the one hand, it is not up to an international organisation protecting fair trade to determine how many participants are needed for an agreement to be useful in seeking to solve global environmental problems. On the other hand, countries that are directly involved in the environmental issue concerned should not be prevented from participating in initiatives to deal with the problem.

Here, the European Community suggested granting exceptions to the GATT rules only to those MEAs in which a representative number of producers of the source of the environmental problem are involved.

3.3.2.2 TREM s Taken Unilaterally

Although Item 1 of the Agenda extends to unilateral trade measures, most discussions so far have concerned MEAs.

The international community, as already outlined, is more favourable towards multilateral initiatives than towards unilateral action. However, not all unilateral actions are necessarily arbitrary and disguised protectionism.

Unilateral action might play an important role as a catalyst for global environmental action, for instance, bearing in mind the precautionary principle, where there is no agreement on the evaluation of the scientific evidence available. Likewise, unilateral action might prove necessary in the event of unsuccessful negotiations on a multilateral agreement (this point was also made by the United States' representative, TE 011, 06.01.1995, p.3).

It is not always clear whether a specific measure is a unilateral one. For instance, there is confusion about the nature of treaties that give the parties the possibility of going beyond what has been explicitly agreed in the treaty.

Paul Demaret suggests the following criteria of demarcation. Those measures that are taken to protect an environmental goal that has been properly defined in the treaty are to be seen as the result of multilateralism. For instance, using the example of CITES, measures to protect non-threatened animals are not multilateral.

Unilateral TREM s taken to protect the environment within the territory of the state concerned in general are compatible with GATT Articles III and XI.

To be compatible with Article III (national treatment clause), the TREM s need to parallel similar measures vis-à-vis domestic products. If this is not the case, then the state may try and justify the measures using the exceptions provided for in Article XX (b) and (g). In this balancing act, principles such as the proximity principle and the "polluter pays" principle may play an important role.

Export restrictions that are incompatible with GATT Article XI might also qualify under the exceptions in Article XX (b) and (g).

A specific concern within the WTO framework, is de facto discrimination, by way of differing product norms within various countries. So far, the GATT has not been able to provide an answer to this.

Currently, the GATT is more concerned with the use of trade measures to protect the environment outside a state's territory. Participants in the WTO Committee have warned against this form of eco-imperialism, without however discussing this issue in extenso.

"Extra-territoriality" is a term often used in this context, although it does not always seem to be justified. A state regulating imports into, or exports from, its territory, to protect the environment, does not exercise extra-territorial jurisdiction. The mere fact that the import concerned goes to its territory, and the export leaves from it, gives that state enough territorial affiliation with the matter to be competent from the public international law point of view.

On the other hand, if a state were to require firms established on its territory, and their foreign branches, to abide by certain "green" rules when investing abroad, then one could speak of extra-territoriality.

In the context of extra-territoriality and the WTO, the two GATT Panels reports on the so-called Tuna/Dolphin cases are significant. Both Reports said that a Contracting Party to the GATT cannot adopt trade measures to protect environmental interests outside its territory if those measures (economically) force another Contracting Party to change its domestic policy. This is consistent with Principle 12 of the Rio Declaration.

18. A Compilation of some Working Documents of the Commission Services on Trade and Environment, 29 November 1994, p.5 et seq. See also TE 011, 06.01.1995, p.5.
19. See principle 15 of the Rio de Janeiro Declaration on Environment and Development: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".
21. Waste should be disposed of as close as possible to the place where it is produced in order to keep the transport of waste to the minimum practicable: Court of Justice of the European Communities, Case C-2/90, Commission v Belgium (Waste Imports) [1993] CMLR 365, at 34, in fine.
22. Demaret, P., op.cit., p.60 et seq.
23. In EC law, this problem has been dealt with in (in extenso) articles 30-36 EEC and the jurisprudence of the Court of Justice. The European Community seeks not only to establish free trade, like the GATT, but also to seek an internal market, in which there are no frontiers, either physical or de facto.
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However, this does not resolve all the problems that have emerged in the trade and environment context. One of the important matters is the question of compatibility with the GATT of measures taken vis-à-vis products which do not themselves have a negative impact on the environment, but the processes for producing them are damaging. Thus, it is not clear what attitude a WTO panel would adopt towards trade measures taken against production processes damaging the common heritage of humankind.\(^\text{25}\)

3.3.2.3 Conclusion as to Agenda Item 1
This item is the most ambitious one of the WTO Committee on Trade and the Environment. Both in the WTO Committee and in its predecessors, many issues surrounding Item 1 have been mentioned. Much of the work done has been to try and define the difficulties, rather than suggest solutions.

It is most likely that the report of the Committee to the General Council of the WTO Contracting Parties will propose setting up a working group on this item alone.

3.3.3 Transparency
The EMIT group has done much of the work on the provisions of the multilateral trading system on the transparency of trade measures used for environmental purposes and environmental measures and requirements that have significant trade effects. The idea behind transparency is clear. By enabling states to keep themselves informed about each other’s trade policy, both public and private actors are given time to abide by the policy of the state concerned and/or to try and persuade the latter to change its policy (TE 003, 22.03.1995, p.3).

Committee members acknowledged that within GATT and the WTO side agreements, as well as in international agreements, much work has already been done on the matter of transparency.

GATT Article X contains a general requirement for the publication of trade provisions. The Uruguay Round brought about the extension of transparency requirements to certain environmental measures such as the new agreements on Technical Barriers to Trade (TBT),\(^\text{26}\) Sanitary and Phytosanitary Measures (SPS)\(^\text{27}\) and the Agreement on Subsidies and Countervailing Measures.\(^\text{28}\)

All impose certain mandatory requirements.

However, notwithstanding the degree of transparency already existing in international trade, two questions remained to be answered: first, whether any of the policy measures under consideration falls outside the existing transparency provisions; and, second, whether measures that are covered are subject to a sufficient mix and degree of transparency.

As to the first matter, it was recalled that the EMIT group had drafted a list of gaps in the existing transparency provisions regarding the trade and the environment issue (TE 003, 22.05.1995, p.9). Some of these gaps have been filled by the Uruguay Round negotiations. Other issues, however, still seem to fall outside the transparency provisions of the GATT and/or of the sectoral agreements. These include labelling, packaging and waste handling, as well as voluntary measures.

It was rightly pointed out that some of the trade and environment issues might not fall within the scope of the trade agreements. This is the case, for instance, with voluntary agreements.

The second question involves a balancing act between, on the one hand, trying to achieve maximum openness in states’ trade measures, and, on the other hand, keeping the system manageable. In this respect, the suggestion of installing national enquiry points, as under the TBT and SPS agreements, was welcomed with some caution, since a multiplicity of enquiry points, depending on the subject matter concerned, might make consultation difficult.

The delegations agreed that the best way of making notification and transparency useful, is by making an ex ante requirement, which enables manufacturers to adapt their products and/or production processes in time. It also makes it possible for interested parties to try and influence the final decision.

One of the suggestions made to keep the system manageable is to oblige states to report only those measures that will have a significant effect on trade. This might, though, prove difficult to realise. Indeed, not only does it require consensus on the concept of “significant trade effect”,\(^\text{29}\) but it also raises the question of who would be the judge of the (non)significance of an envisaged trade measure.

3.3.4 Dispute Settlement Mechanisms
Much of what has been discussed in the Committee on the relationship between the dispute settlement mechanisms in the multilateral trading system and those in multilateral environmental agreements, raises the question of the extent to which the WTO can and should be a primary source of international law. The GATT and its sectoral agreements have been set up to promote and protect fair trade. Does this prevent it from having a preponderant voice in international environmental law, or rather, given the WTO’s position (joined by a large number of states), should it have a dominant say in areas touching on international trade law?

The WTO dispute settlement mechanism, as it has been set up in the Dispute Settlement Understanding (DSU), established a unified dispute settlement mechanism that applies to all WTO Agreements.\(^\text{30}\) The DSU introduces

25. For instance, measures taken against computers the chips of which, in some countries, are cleaned with CFKs, thus damaging the ozone layer. Obviously, caution must be the guideline when discussing the (in)compatibility of this kind of trade measure with GATT/WTO rules, first at the level of proving the link between the Processes and Production Methods (PPMs) concerned and the environmental damage detected.

26. Article 10 of the Uruguay Round Agreement on Technical Barriers to Trade.


29. As has been pointed out by India (TE 003, 22.05.1995, p.4), what is “significant” for one state might not be significant for another.

strict time limits in cases where formal dispute settlement is requested. Panel findings are adopted automatically by WTO members unless they decide by consensus otherwise. Appeal is possible to the WTO appellate body.

Most of the MEAs contain provisions for dispute settlement. These provisions are generally less stringent than those of the WTO. The Committee distinguished three types of dispute involving a TREM:

1. A dispute between two MEA parties concerning compliance with MEA requirements and trade measures in which one party is said to be in breach of the requirements.

Here the question is that of the relationship between the settlement procedures of the MEA on the one hand, and the WTO on the other. For instance, should recourse be had to the WTO dispute settlement procedures if the procedure of the MEA does not fulfil the wishes of the parties concerned, because the procedure is not clear enough, or because the parties consider the bodies dealing with the dispute under the MEA are not competent enough to deal with the dispute?

Some delegations considered that WTO members should maintain their right of submitting to the WTO dispute settlement mechanism any conflict that might arise as a result of an environmental measure having trade effects (see the delegation of Colombia, TE 003, 22.05.1995, p.7). Some participants added that this possibility should, however, be limited, for instance by requiring that the parties should first exhaust the settlement procedure provided in the MEA. This would help prevent the WTO procedure from becoming overburdened.

The contrary opinion was also expressed. Indeed, some delegations expressed the view that a WTO panel should be limited to considering WTO provisions only, and that any resolution of a dispute under the MEA could be based only on a clear breach of rights and duties under the WTO Agreements. 31

2. A dispute between an MEA party and an MEA non-party that is a WTO member.

This situation, from an international public law point of view, is clear. The WTO is the only competent forum to settle the dispute. Some delegations proposed cooperation agreements between the MEA and the WTO competent bodies, to ensure that the MEA’s environmental objective is taken into consideration in the settlement procedure (TE 003, 22.05.1995, p.7). However, due account is to be taken of the consent of the non-MEA party to such a co-operation arrangement. A non-MEA party by definition has not joined the agreement, and therefore cannot be forced to abide by it “sideways” through the WTO.

3. A dispute on trade and the environment, but the environmental problem is not covered by an MEA or no party to the dispute is a member of an existing MEA covering the problem.

This has been qualified as being not directly linked to the relationship between MEA dispute settlement and the WTO. Rather it involves the question of environmental expertise within the DSB (Dispute Settlement Body, set up by the WTO Dispute Settlement Understanding). In this respect, establishing technical expert groups to assist dispute panels, like in the TBT and SPS Agreements, might prove useful.

3.4 Outstanding Matters

Out of the Agenda of the WTO Committee on Trade and Environment, items 2, 3, 6, 8 and 9 still need to be addressed. 32

Stocktaking has been scheduled to be completed by the end of 1995. It is to be expected that, at least for some items of the Agenda, specific working groups will be established.

4. Conclusion

The results of the WTO Committee on Trade and Environment have not been revolutionary so far. Most of the meetings were in fact useful fora for the exchange of information and ideas.

However, in all probability, several working groups will be established in which specific issues will be analysed and discussed. These groups might define possible solutions in those areas where the tension between the protection of the global free trade regime and the conservation of the environment becomes apparent.

The setting up and the activation of the WTO Committee on Trade and Environment reflects the current mood in which the discussion on the “greening” of free trade evolves; environmental protection is being defined as an integrated element of global free trade, rather than as an objective of a different set of international cooperation. This may seem an important nuance. In our view, however, it is a qualitative difference.

31. It should be added that a dispute between two parties, especially in international public law, often has a relevance not just for the two parties concerned. A ruling (whether by way of a decision of a panel or by an international court) on the treaty concerned often stretches beyond the facts of the case concerned, by way of the (implicit or explicit) precedent rule.

32. See supra, 2.2. Agenda of the Committee. Meanwhile, the Committee examined the relationships between environmental policies and WTO services and intellectual property agreements (TE 004, 14.08.1995).