

## Trade and Environment Discussions

### Enhancing Synergies of MEAs and WTO

The United Nations Environment Programme (UNEP) hosted a Meeting on Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements (MEAs) and the World Trade Organisation (WTO), which took place on 23 October 2000 in Geneva, in collaboration with a number of other organisations.

It was attended by representatives of several States and international organisations, including UNEP, the WTO, and the UN Conference on Trade and Development, as well as officials from secretariats of several MEAs. The aim of the Meeting was to examine how national officials, MEAs and the WTO can cooperate to maximise synergies and reduce potential tensions between trade and environment policies, rules and institutions. The Meeting, said Chairperson Hussein Abaza from UNEP, was not intended to reach conclusions. Areas targeted for potential synergies between the multilateral trading system and MEAs were: Capacity building, technical assistance, integrated assessment, technology transfer, and application of the Rio Principles (that is, common but differentiated responsibilities, polluter-pays-principle, cost internalisation and the precautionary principle).

WTO Director General Michael Moore and UNEP Executive Director Klaus Töpfer emphasised the need to focus more closely on policy coherence in order to miti-

gate potential trade-environment conflicts. Together with UNCTAD (United Nations Conference on Trade and Development) Secretary-General Rubens Ricupero, they also stressed the vital importance of using their institutions to help combat poverty.

The Meeting included an examination of cooperation among trade and environment policymakers at both the national and international levels. Presentations were made by the Secretariats of the Basel Convention (on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal), the Multilateral Fund to the Montreal Protocol and the WTO on areas of potential synergy. There was also discussion on practical ways to reduce tensions in the areas of trade-related measures in environmental conventions and dispute settlement.

Several participants underlined the need for greater elaboration between the trade and environment communities in order to make their respective regimes mutually supportive. While noting the focus on potential tensions, Klaus Töpfer said the debate needed to be broadened to explore “win-win opportunities” and develop a practical approach on issues such as capacity-building, technical assistance and other shared concerns reflected in both MEAs and WTO rules, as the basis for constructive engagement between the two communities.

Delegates stated their positions on issues such as the negotiation of a "code of conduct" governing MEA and trade negotiations as a preventative measure to avoid trade-environment conflicts.

In a paper circulated to WTO members, the European Union joined Switzerland in calling on WTO members to reach consensus on resolving possible conflicts between WTO rules and global environmental agreements. The EU said members should consider reversing the "burden of proof" in defending trade-related environment measures before WTO dispute panels and establish a "code of good conduct" for the use of trade measures in global environmental agreements. This paper followed on from a 1999 Swiss initiative that urged WTO members to adopt a decision clarifying the relationship between trade and environmental agreements.

The EU paper noted that the relationship between WTO rules and MEAs is still ambiguous, as illustrated during the negotiations for the Biosafety Protocol in 1999 in Cartagena (see *Environmental Policy and Law*, vol. 30 (2000) no. 1-2, at page 46).

The EU representative said that one particular problem in the trade and environment debate is the issue of non-parties to MEAs. "So far, no trade measure taken pursuant to an MEA has been challenged in the WTO by a non-party ... It is unsure whether this would happen in the future, but the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs."

To resolve the dilemma on non-parties, "some form of accommodation mechanism is in our view necessary to preserve trade measures taken pursuant to MEAs from undue challenge," the representative added. One possibility would be to reverse the burden of proof in WTO dispute cases involving Article XX of GATT (the General Agreement on Tariffs and Trade). Under current rules, the burden falls on a government defending an environmental measure to prove that it meets the requirements under Article XX to qualify for an exemption from WTO rules.

The EU contended that the reversal of burden of proof would "turn that around so that the country challenging the measure would, just like under some provisions of the TBT (the WTO's Agreement on Technical Barriers to Trade) and the SPS (Agreement on the Application of Sanitary and Phytosanitary Measures), have to prove (that) the measures imposed by the other party do not meet the conditions of Article XX. ... This would, however, not affect the right of any WTO member to resort to dispute settlement nor alter in any way the substantive requirements" of GATT Article XX.

The European Union also proposed the development of a "code of good conduct" on the use of trade measures in MEAs, stating that such a code may "help (to) develop a mutually supportive relationship between MEAs and WTO agreements and to prevent possible conflict."

In a separate paper circulated to delegates, Switzerland, supported by the EU, announced that it favoured further clarification on the relationship between MEAs and the

WTO. However, many developing countries and the United States remain opposed to this concept.

Switzerland said that the most recent debate on the issue within the WTO's Trade and Environment Committee in July showed a clear disagreement between those delegations which thought clarification was needed and others which believed the issue was already resolved by the Appellate Body. Some other delegations argued that no conflict existed between trade and environmental agreements.

The Swiss delegate replied that "while it is true at this stage, that only a limited number of existing MEAs raise questions about possible conflicts with WTO rules and principles, these include very important MEAs such as CITES (the Convention on International Trade in Endangered Species), the Basel Convention, the Montreal Protocol (on Substances that Deplete the Ozone Layer), the PIC Convention (on Prior Informed Consent for Hazardous Chemicals and Pesticides – see also page 269), and the Biodiversity Convention." The delegate added that the Secretariats of these Conventions had already highlighted the need for clarification.

The Swiss paper rejected the claim that the Appellate Body in its "shrimp-turtle" ruling\* has already resolved the trade and environment issue. While the decision clarified the sequence of steps in analysing a claim under Article XX and established that "exhaustible natural resources" covered living natural resources, it "did not, however, deal with measures or rules established by an MEA and, therefore, did not clarify the relationship between the WTO and MEAs."

Switzerland stated that while some may argue that dispute settlement is the best and easiest way to resolve the trade and environment dispute, such important decisions "should be taken by WTO members and not through litigation." WTO panels "should determine merely the legal situation of a specific case; it is not their task to set general abstract rules," the representative said. "More importantly, the relationship between the WTO and MEAs is not merely a legal question but a politically sensitive issue which has to be addressed in negotiations rather than in the dispute settlement mechanism."

India reminded participants that since the WTO-MEA debate began eight years ago, not a single dispute over an MEA-related trade measure has occurred. "Due to meetings such as this one that increase understanding in this area, such a dispute is far less likely today than it was eight years ago," the delegate said. "Additionally, the WTO dispute settlement system itself has evolved and has integrated environmental principles more fully than in the past, and it would now be unlikely to rule against an MEA."

Although no concrete results were foreseen from the session, the close interaction between the WTO, UNEP, the MEA Secretariats and Member delegations served to solidify the UNEP-WTO relationship into what Klaus Töpfer hoped could serve as an "early warning system" for potential MEA-related WTO disputes.

The UNEP Executive Director noted that he wanted to "harmonise and strengthen" dispute settlement and li-

ability mechanisms within specific MEAs, and intimated that such measures could be a goal for the forthcoming Rio+10 Conference in 2002.

### Committee on Trade and the Environment

Convening after the above Meeting, the WTO Committee on Trade and Environment (CTE) met from 24-25 October. Agenda items included *services and the environment; linkages between the WTO and multilateral environmental agreements; relations with intergovernmental organisations (IGOs) and non-governmental organisations (NGOs); and trade liberalisation in fisheries and environmental services.*

The Committee also engaged in an information exchange session with representatives of four MEAs. Participants welcomed the Meeting on Enhancing Synergies and Mutual Supportiveness of MEAs (see above). There was also discussion on WTO disputes that are relevant or related to MEAs and submissions from several countries on MEA-WTO relations.

With regard to fisheries, delegates discussed subsidies and a WTO Secretariat paper on the environmental benefits of removing trade restrictions. (MJ)



### Note

\* Under Section 609 of Public Law 101-162, the United States bans shrimp imports from countries that are not certified as having comparable conservation policies for sea turtles or that are not certified as coming from shrimp boats equipped with so-called turtle excluder devices. The 1998 ruling rejected US claims that the shrimp ban was justified under Article XX of the 1994 General Agreement on Tariffs and Trade (GATT). This allows for exclusions to WTO rules for measures considered necessary for the protection of human, animal or plant life or to safeguard exhaustible natural resources.

In October 1998, the WTO's Appellate Body overturned this finding, concluding that the ban was justified on the grounds that sea turtles constituted an exhaustible natural resource. The Appellate Body, however, blamed Washington for imposing the ban without first seeking less trade-restrictive alternative measures and for failing to ensure that the ban did not discriminate among WTO members. Both the United States and Malaysia have reserved their right to appeal against the compliance panel's findings.

On 23 October, the WTO acceded to Malaysia's request for the compliance panel to rule on whether the US has complied with the 1998 ruling. We shall report on the outcome.