RESTRICTED

WT/CTE/W/2

16 February 1995

(95-0331)

WORLD TRADE ORGANIZATION

Committee on Trade and the Environment

Original: Spanish

COMMUNICATION FROM CHILE

The Chilean delegation would like to call the attention of the Trade and Environment Committee to the vital future role of panel reports in cases where the rules of the General Agreement, its codes and the new provisions of the Uruguay Round Agreements that amend it overlap with the considerable body of international environmental laws that have come into being in recent years.

Although there has been considerable concern for the future institutional arrangements that will regulate the relations between the multilateral trading system and the world of environmental agreements and policies, the Sub-Committee on Institutional, Procedural and Legal Matters of the Preparatory Committee of the WTO having decided that the General Council of the Organization is the appropriate body to rule on the kind of cooperation ties to be established with the United Nations system, the problem of reconciling the two extensive bodies of law that regulate trade and the environment respectively, through the jurisprudence arising from the dispute settlement procedures, has not been sufficiently studied.

Regarding the substantive aspects of the above-mentioned relationship, the Austrian delegation produced an excellent document (TRW/W/19) to which delegations made further contributions during the debate.

Nevertheless, this approach could be developed to include the effects on the development of the trade and environment issue of trends in the jurisprudence stemming from the dispute settlement procedures.

The credibility of the agreements forming the structure of the new World Trade Organization rests on a dispute settlement system capable of verifying and guaranteeing compliance with the principles, norms, rules and disciplines which uphold the multilateral trading system. In the Understanding on Rules and Procedures Governing the Settlement of Disputes, we have an automatic mechanism, having greater transparency in considering abuse, deadlines and effective application, which can only be limited by a negative consensus.

Behind many of the criticisms of the GATT panel system is a lack of awareness of the balance on which the Understanding is based. Recourse to a panel is neither taken for granted nor encouraged until all other means of consultation to try to reach a mutually acceptable solution have been exhausted.

The rights of developing countries to invoke the April 1966 Decision of the CONTRACTING PARTIES are specially protected.

Not only are the rights of the parties involved guaranteed but also those of all the members of the WTO, through the possibility of appeal, which tends to guarantee a consistent interpretation of the agreements, and through the functions provided for the Chairman of the Dispute Settlement Body in case of conflict between the rules of the various agreements that make up the structure of the WTO.

Lastly, the level of retaliation is regulated and subject to multilateral scrutiny. Moreover, recourse to arbitration is provided for if differences arise regarding the proportionality between the measures taken and the injury sustained as a result of the violations committed.

Most of the international environmental agreements include dispute settlement provisions; but most of them stress the importance of conciliation, consultation and cooperation.

In practice in this field there have been few cases where compulsory dispute settlement procedures have been invoked, and fewer still in the field of the application of trade measures under the aforementioned agreements. There are many reasons why States parties to these agreements continue to prefer collective negotiation to individual arbitration.

Looking ahead, we can imagine a future in which international environmental law will proliferate more and more, with a predominance of rule-making activity together with a small body of legal precedents derived from the jurisdictional bodies which parties will try not to resort to.

On the other hand, the development of trade will continue to make recourse to the bodies and mechanisms of the Understanding necessary. The combined effect of greater rule-making activity in the field of environment protection and the casuistical approach prevailing in GATT practice, as well as in the future WTO, has led some experts to believe that bigger conflicts and contradictions are possible in the future.

However, we take a different view. As far as principles are concerned, the Rio Declaration and the Agenda 21 of the United Nations Conference on the Environment and Development consolidated the foundations on which the conduct of States should be based, demonstrating the basic harmony between the multilateral trading system and the actions that members of the international community can or must undertake to protect the environment and promote sustainable development.

The Secretary-General of the United Nations has emphasized the historical importance of the entry into force of the Convention on the Law of the Sea. In this context, it is extremely important to point out that the Convention explicitly recognizes the authority of the General Agreement.

In Section 6 of the Agreement relating to the Implementation of Part XI, entitled Production Policy:

- "The provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area (International Seabed Area)".

- "There shall be no subsidization of activities in the Area except as may be permitted under the agreements referred to in subparagraph (b) (GATT, codes and successor agreements). Subsidization for the purpose of these principles shall be defined in terms of the agreements referred to in subparagraph (b)."

- "There shall be no discrimination between minerals derived from the Area and from other sources."

- "Where the States Parties concerned are parties to such agreements, (GATT and WTO), they shall have recourse to the dispute settlement procedures of those agreements".

- "Where one or more of the States Parties concerned are not parties to such agreements, they shall have recourse to the dispute settlement procedures set out in the Convention".

In the last case, regarding the application of the procedures established in Part XV of the Convention on the Law of the Sea, and taking into consideration that the GATT and WTO rules apply broadly to production activities in the International Seabed Area, it is evident that the arbitrator or court chosen by the parties to the dispute will have to apply the rules of the GATT/WTO as the substantive law.

In our opinion, this is an important precedent that shows a useful way of reconciling the interests of environmental protection with those of the multilateral trading system.

The changes introduced in Part XI of the Convention on the Law of the Sea seek to ensure that seabed producers have no artificial competitive advantages over land-based producers, thereby protecting the marine environment from the consequences of subsidized and uncontrolled production. To this end, the International Seabed Authority will establish the corresponding rules, but it is significant that the GATT/WTO and the dispute settlement mechanisms in the Understanding have been given the main regulatory function for all these activities through adjudication of any dispute on the subject in conformity with the rules of the GATT/WTO.

It seems to us that the approach taken in the Convention on the Law of the Sea has several advantages, including the following:

1. Although the GATT/WTO is not accorded competence in environmental aspects of the Convention on the Law of the Sea, for which there are specific dispute settlement provisions, it does have competence in trade aspects even for countries that are not members of the General Agreement;

2. This could be a mechanism that would ensure the convergence of, and relationship between, the various environmental agreements and the World Trade Organization;

3. For these purposes it singles out the situation arising where parties to a dispute are not all members of the respective agreements; and

4. It safeguards the spheres of competence of the agreements, overcoming the problems arising from the overlapping or coexistence of jurisdictions.

This point could be included in the documentation the Secretariat is to prepare for our work in 1995. The Chilean delegation proposes setting up an agenda for future work on this subject. Some of the relevant queries and questions that should be analysed are as follows:

1. Consideration of the parallels between environmental and trade dispute settlement systems. In principle, it would seem that concepts such as notification of measures, prior consultation, conciliation, investigation, mediation and recourse to arbitration are common elements in both fields. Nevertheless, the mechanisms of the Understanding will probably have a wider application than the environmental dispute settlement systems.

2. In this context, should all trade disputes arising under rules contained in environmental agreements be subject to the dispute settlement procedures in the Understanding, or only disputes where a State has gone beyond the rules of the agreement, by imposing stricter environmental standards that affect trade flows?

3. In either case, could the parties tot he dispute, when establishing the terms of reference of the respective panels, include the relevant trade rules of the environmental agreement?

4. If so, would the panels be establishing some kind of legal precedents or interpretation of the environmental agreements concerned?

5. If not, by virtue of the ad hoc and casuistical nature of panel rulings, would the same be true of the Appellate Body?

6. Would it be desirable to exclude or limit the Appellate Body in combined environmental-trade disputes in order to preclude the body of one instrument from ruling on the application of rules contained in another international instrument?

7. If so, if the Appellate Body were restrained, would this not weaken its global function of safeguarding the unity and coherence of the rules of the WTO and its components?

8. To avoid this kind of problem, and taking into account the tendency of international law to safeguard the autonomy of the purpose, would the best solution be arbitration as provided for in the Understanding, since the parties have a great deal of flexibility to determine the procedure that suits them best?

9. How can forum shopping and the coexistence of parallel disputes in the WTO and in the respective environmental agreement be avoided?

These questions only serve as an illustration and are not intended to delimit all the possibilities, which are expanding as disputes increase in number, variety and complexity. Greater specialization of panellists; the functions of the Secretariat; access to documentation and databases; the more organic and defined structure of the dispute settlement provisions; recourse to the technical opinion of experts, alternative dispute settlement solutions and a system of appeals, together embody the potential of the Understanding to face new challenges.

However, we are crossing the threshold from a more or less self-contained system of the GATT/WTO rules to a system that progressively includes the step-by-step progress made in environmental law and the reconciliation of this law with the principles of the multilateral trading system. In this process, the important precedent of the Convention on the Law of the Sea, which transfers to the GATT/WTO competence in all matters relating to subsidies and restrictive trade practices, is an interesting starting point from which all possibilities should be examined.