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# APPROACHES TO THE RELATIONSHIP BETWEEN THE PROVISIONS OF THE MULTILATERAL TRADING SYSTEM AND TRADE MEASURES PURSUANT TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

Note by the Secretariat

1. At the meeting of the Sub-Committee on Trade and Environment on 27 October 1994, it was agreed that the Secretariat would prepare a paper which would present the state of the discussion under the first item of the work programme, namely, "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements." This note highlights the different approaches which have been presented with respect to the second aspect of this item, trade measures pursuant to MEAs, and attempts to identify specific issues that would merit further analysis in the Committee. It builds on the significant work already carried out in the Group on Environmental Measures and International Trade (EMIT Group) on this subject, summarized in L/7402 and TRE/W/19. Other relevant documentation includes TRE/W/1/Rev.1, TRE/W/5, TRE/W/8, TRE/W/16/Rev.1, TRE/W/17/Rev.1, TRE/W/18, TRE/W/21 and L/6896, prepared for the EMIT Group, and PC/SCTE/W/3 and PC/SCTE/W/4, prepared for the Sub-Committee.

2. The relationship between the provisions of the multilateral trading system and the use of trade measures pursuant to multilateral environmental agreements (MEAs) received considerable attention in the EMIT Group. Discussions built on the results of the United Nations Conference on Environment and Development (UNCED) which endorsed efforts to foster international cooperation as the most useful and effective manner through which to address global and transboundary environmental problems. It was generally recognized that the multilateral trading system should positively consider MEAs which result from cooperative, multilateral solutions, including trade measures contained therein. Of the approximately 180 multilateral environmental agreements (MEAs) which have been negotiated at present, it has been pointed out that only 18 contain trade provisions. Therefore, there may be only a limited number of MEAs and a limited range of trade measures to consider in the context of the rules of the multilateral trading system. However, in light of the growing perception that trade measures can facilitate achievement of environmental objectives in MEAs and in order to give guidance to future negotiators of these MEAs, it was felt that clear rules in this area were needed to ensure that the rules of the international trading system coexist constructively with multilateral environmental objectives and commitments.

3. Any conflicts that might arise between GATT provisions and trade measures taken pursuant to an MEA would likely fall within one or both of two situations. The first is where trade measures are used to help protect environmental resources that do not fall within the national jurisidiction of any one or more WTO members, nor necessarily affect solely or directly their own environment. The second is when trade provisions of MEAs apply separately to non-parties (countries who have decided not to join an MEA).

4. From the discussions held in the EMIT Group, two options for reconciling any conflicting obligations between GATT provisions and trade measures taken pursuant to MEAs emerged. A first approach, which was referred to as the *ex-ante* approach, involves the negotiation of a collective interpretation or an amendment to the general exceptions in Article XX. Criteria would be established which trade measures taken pursuant to an MEA would have to satisfy in order to be granted an exception under Article XX from the obligations imposed by other GATT provisions.

5. A second approach, referred to as the *ex-post* approach, relies on a case-by-case granting of a waiver based on Article XXV:5. This approach is based on an understanding of Article XXV:5 as a tool through which is evidenced the sufficient flexibility which proponents of this approach consider that GATT already has. These two basic approaches are not mutually exclusive and do not exclude the possibility of other proposals emerging during the course of the work in the Committee on Trade and Environment.

6. Discussions in the EMIT Group as well as in the Sub-Committee on Trade and Environment have identified a number of advantages and disadvantages to these two approaches. It has been noted that the *ex-ante* approach would provide predictability and security to negotiators of MEAs on the type of trade provisions which would be considered consistent with the rules and principles of the WTO. Also, this approach would avoid the need to tackle explicitly the interpretation of the General Agreement, particularly Article XX, with respect to the issue of extra-jurisdictional action, yet in the view of some delegations it would allow it to be made clear that the current provisions of the General Agreement, and notably Article XX, do not permit unilateral action to address extra-jurisdictional environmental problems.

7. Doubts about this approach have also been expressed. One is the question of whether there is any need at all to go beyond existing WTO provisions, including its exceptions, to accommodate trade provisions taken in the context of MEAs. Also this approach could upset the existing balance of GATT rights and obligations. WTO members, non-parties to an MEA, may wish to use their WTO rights if they believe they are suffering from arbitrary, unjustified, or unnecessary discrimination; the provisions of an MEA, or the judgement of parties to an MEA, should not be allowed to override those rights, especially without there being an obligation to explain the case for trade discrimination if there were to be a challenge under the GATT. Another doubt is whether it would be possible to find a single formula for implementing this approach that would be general enough to encompass all legitimate requirements, present and future, for the use of trade measures in the context of MEAs and, on the other, would neither overstretch the basic concept of an exception clause which underlies this approach nor open the door to protectionist abuse.

8. Advantages of an *ex-post* approach have also been put forward. For one, it has been said that having recourse to a waiver would provide a measured, case-by-case response to any problems that might arise in the future. Under this approach, multilateral consensus would be established on the merits of each case; it could be presumed that if an MEA reflected a genuine multilateral consensus it would find broad support among GATT contracting parties and there need be little, if any, uncertainty about the chances of securing a waiver for it. This approach would avoid the need for GATT contracting parties to elaborate and agree upon general criteria to apply to the use of trade provisions in any future MEA. It would not focus on an MEA but on the trade measures included in it. Finally, the onus to demonstrate and convince others of their case would remain the responsibility of those who were seeking the waiver.

9. Doubts about this approach include that it is a case-by-case approach, which might fail to provide negotiators of MEAs with the necessary degree of predictability or security that there would not be a challenge if they felt the need to include trade provisions in an MEA. It may be desirable to provide clear guidelines to negotiators of MEAs so that they could know in advance what tools they have at their disposal, and that obtaining a waiver could be time-consuming and possibly cumbersome. Waivers are also time-limited whereas environmental problems are increasingly recognized as requiring long-term and global solutions. Also, in the absence of a clear hierarchy among different, self-standing international agreements, a formal denial of a waiver could create an untenable conflict of international obligations for contracting party governments. It has been noted that Article XXV is meant to address exceptional circumstances and it is not clear that GATT would wish to treat MEAs as exceptions. In addition, this approach could be taken to imply that the WTO took precedence over MEAs. Also, if a waiver was granted, any WTO member could invoke Article XXIII of GATT 1994 if it felt that benefits accruing to it were being nullified or impaired, even if that was the result of measures applied fully consistently with the terms and conditions of the waiver.

An *ex-ante* approach

10. An approach based on a collective interpretation of Article XX in order to clarify the relationship between GATT provisions and trade measures taken pursuant to the provisions of an MEA was proposed by the EC in the EMIT Group (TRE/W/5). The interpretation would be comprised of substantive criteria based on the interpretation of GATT Article XX and formal criteria related to the concept of an MEA. This proposed approach was premised on three considerations:

(i) the target of the collective interpretation is the application of trade measures to WTO members who are non-parties to an MEA, not those who are parties to an MEA whose actions in pursuance of the MEA should be governed by general principles of public international law;

(ii) WTO has no competence on environmental matters *per se*, and should limit itself to clarifying the scope for using trade measures within the framework of an MEA rather than defining the type of problem which may require the use of trade measures;

(iii) the justification for trade measures must be clearly related to the environmental objectives of an MEA and insofar as they are used to address actions by non-parties that would undermine or nullify the environmental commitments of parties, they should not go beyond what is necessary to achieve the environmental goals of the MEA.[1]

11. As an *ex-ante* approach would be based on specific criteria that would determine whether the trade measures taken pursuant to an MEA are WTO consistent, further work on this approach would need to deepen the examination and understanding of the various concepts and principles that would underlie such criteria. A number of these concepts and principles have been raised in the discussions in the EMIT Group and in the Sub-Committee and others may emerge from further discussions in the Committee. Based on the EC proposal, they can be divided into

[1]TRE/W/5, pp. 4-5.

two categories: those that relate to the interpretation of Article XX and those that would provide guidance in distinguishing those MEAs relevant to the Committee's work.

12. Under the first category of concepts and principles, those that relate to the interpretation of Article XX, although not definitive and without prejudicing future work under this item of the work programme, the following list of the concepts and principles which have been identified in the discussions as in need of deeper examination and clarification can be composed. It should also be pointed out that such a list format does not imply that each should be examined in isolation. On the contrary it should be kept in mind that there would likely be a considerable degree of overlap in the analysis of these concepts and principles.

(i) The language in the headnote to Article XX. This includes the following phrases:

(a) " … that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail …". It may be necessary to examine the GATT history and jurisprudence with respect to this phrase, the importance of which arises from its association with trade measures applied to non-parties to an MEA. It has been noted that there are many reasons why a country may decide not to join an MEA[2]; legitimate justifications not to join may constitute differences in public policy priorities and objectives which may need to be taken into account in determining the concepts of "arbitrary" or "unjustifiable" discrimination. Further, with respect to the phrase "between countries where the same conditions prevail", it has been stated that the important factor is not whether a country is a party to an MEA, but what is relevant is the actual differences in environmental protection commitments and requirements, taking into account the differing abilities, concerns and responsibilities of countries[3]. In this regard, mention has been made of the reference in Principle 7 of the Rio Declaration to "common but differentiated responsibility" of states in resolving environmental problems of a global nature.

(b) " … that such measures are not applied in a manner which would constitute … a disguised restriction on international trade …". Although there is little guidance in GATT history or jurisprudence on how this requirement should be interpreted, it seems clear that it is designed to safeguard against protectionist abuse of trade measures, which in this context, would be taken in pursuance of an MEA.[4] This phrase may also

[2]Such reasons may include, *inter alia*, a view that the scientific evidence is not persuasive, is controversial or is lacking; an inability to afford joining an MEA or adhering to the required level of environmental standards of the MEA; a view that there are more pressing problems, environmental or otherwise, that deserve higher priority; or differences in absorption capacities of different environments.

[3]As the EC stated in TRE/W/5, "This GATT requirement is indeed fully recognized under CITES, Basel, and the Montreal Protocol which allow for trade with non-members to be carried out on the same basis as with members provided non-members apply equivalent environmental guarantees". (pg. 7).

[4]The report of the Panel on *United States - Prohibition of imports of tuna and tuna products from Canada* suggests that if a measure was publicly announced, it should not be considered as a "disguised restriction on international trade". (See BISD 35S/108). However this interpretation may not be satisfactory. An earlier panel report, on *United States - Imports of certain automotive spring*

necessitate consideration of what has been termed in discussions the "specificity" issue. This relates to how specifically an MEA defines the trade measures which would be required by the relevant provisions of the MEA and which would render effective the objectives and commitments of the MEA. In this regard, the discussions have pointed to two possible situations: (i) an MEA obliges parties to adopt trade measures in order to achieve a certain result, but does not specify exactly which trade measures; and (ii) an MEA obliges parties to take certain minimum trade action, but also allowed them to take further measures at their discretion. In both cases, there would be a significant margin of manoeuvre in which the possibility could exist of using such trade action for protectionist purposes. Particularly with respect to the second situation such further measures may be justified on environmental grounds, but in some cases the use of trade measures may be counterproductive.

(ii) Sub-paragraph (b) of Article XX: "necessary to protect human, animal or plant life or health"

(a) Discussion of this sub-paragraph has centred on the term "necessary". There has been a significant amount of jurisprudence related to this term both in the context of sub-paragraph (b) and also sub-paragraph (d) of Article XX. This jurisprudence was addressed in Secretariat document TRE/W/16/Rev.1 in the context of the analysis of the related term "least trade-restrictive". It may be necessary to further examine the history and jurisprudence of the term "necessary" keeping in mind that, consistent with the legal interpretations of this term, it is not the MEA itself nor each WTO member's human, animal or plant life or health standards which would be put to the test, but the necessity of using WTO-inconsistent trade measures. The Secretariat has been requested to prepare an analytical study of the necessity and effectiveness of such trade measures to assist in the Committee's work on this principle. The concept of the "proportionality" of the trade restrictive effects of the measure to the need for the measure in order to ensure that the environmental objective is met has also been mentioned in relation to this term.

In the examination of this term, it may also be important to consider the rationale for including trade provisions in MEAs. It has been pointed out in the discussions that trade measures, particularly those against non-parties to the MEA, have been used: (i) to promote universal participation in the MEA; (ii) to prevent environmentally harmful products or practices being transferred to non-parties to the MEA; (iii) to impede non-parties to the MEA from gaining advantages or "free-riding" from the MEA; (iv) to avoid circumvention of the measures applied by the parties; (v) to ensure that all importers and exporters are subject to the same environmental standards that apply to the parties; and (vi) to address concerns about the impact that uncontrolled production or consumption would have on the effectiveness of the controls agreed by the

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*assemblies*, while also noting the public announcement of the measure, seems to suggest that if the application of the measure is done in a manner which does not afford protection to domestic producers and which is consistent with the policy aim of the measure, the measure would not be considered in violation of this requirement. (See BISD 30S/125).

parties. It should also be noted that these rationale are different from the notion of using trade measures as sanctions or to punish "free-riders" which most agree should not be condoned under the WTO rules. Many consider that positive incentives, such as technology transfer, financial and technical assistance, should be used to encourage participation, rather than negative pressure from trade restrictions and unilateral measures.

Another question which was raised in the EC proposal (pg. 8) and has arisen in the discussions of this term is the principle reflected in Article 2.5 of the Agreement on Technical Barriers to Trade and Article 3.2 of the Agreement on Sanitary and Phytosanitary Measures. Specifically the former Article states that "technical regulations prepared, adopted or applied…in accordance with relevant international standards … shall be presumed not to create an unnecessary obstacle to international trade"; and the latter Article states that "sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994". If this principle were extended to commitments and requirements contained in MEAs which reflect international consensus, insofar as they were considered to be "international standards", they might also be considered as "not creating unnecessary obstacles to international trade" or "necessary" in the sense of Article XX. However, again this raises the question of how specifically the measures would be defined in the MEA and whether the measure chosen within a range of measures that would satisfy the trade provision was the least trade-restrictive. Nevertheless, this is an important principle which, it has been noted, is also reflected in Article XX(h) dealing with intergovernmental commodity agreements, and which would need further reflection and study. The Secretariat prepared a paper detailing the negotiating history of Article XX(h) which is contained in TRE/W/17.

Another issue which has arisen in the discussions is the necessity of using trade measures to address process and production method (PPM) concerns pursuant to an MEA. Presumably the MEA would be addressing global or transboundary environmental problems, the resolution of which, according to international consensus, would require trade measures on products processed or produced in a manner inconsistent with the objectives or commitments of the MEA. It has been noted in the discussions that the effectiveness of measures aimed at addressing production externalities where the environmental effects were transboundary or global would depend on all, or almost all, of the countries concerned applying the same requirements relating to the production externality. This may warrant multilateral action and it might be examined whether the international trade rules should accommodate such trade measures.[5]

(b) Another conceptual consideration related to the interpretation of this sub-paragraph is whether the term "environment" should be added to it or

[5]See also TRE/W/5, pg.8.

whether the phrase "human, animal or plant life or health" sufficiently covers all existing and potential environmental situations.

(iii) Sub-paragraph (g) of Article XX: "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Although less focused upon than sub-paragraph (b), this sub-paragraph may have important implications in an *ex-ante* approach for criteria to address natural resource depletion, biodiversity issues and endangered species.

(a) The phrase "relating to" embodies another concept which may require further examination and clarification in the Committee. It has been the subject of a significant body of jurisprudence in GATT which, along with the history of this sub-paragraph, may have to be reviewed.[6]

(b) The phrase "in conjunction with restrictions on domestic production or consumption" may also require further examination in the context of trade measures taken for environmental protection objectives. The Committee may also have to review the history and jurisprudence of this phrase.[7]

13. Under the second category of concepts and principles, those that would provide guidance in distinguishing those MEAs relevant to the Committee's work, again although not definitive and without prejudicing future work under this item of the work programme, a list can be composed of those concepts and principles which have been identified in the discussions and which would need further examination and clarification in order to possibly form the basis for the elaboration of criteria under an *ex-ante* approach.

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[6]The report of the Panel on *Canada - Measures affecting exports of unprocessed herring and salmon* states that a measure "relating to" means that the measure has to be "primarily aimed at" the conservation of exhaustible natural resources. (BISD 35S/114). The reports of the Panel on *United States - Restrictions on Imports of Tuna* and *United States - Taxes on Automobiles* (DS29/R) (both unadopted) suggests that the text of Article XX(g) requires a three-step analysis of determination:

- whether the *policy* in respect of which these provisions were invoked falls within the range of policies to conserve exhaustible natural resources;
- whether the *measure* for which the exception was being invoked- that is the particular trade measures inconsistent with the obligations under the General Agreement- is "related to" the conservation of exhaustible natural resources, and whether it was made effective "in conjunction" with restrictions on domestic production or consumption;
- whether the measure is applied in conformity with the requirements set out in the introductory clause to Article XX;

Of particular interest, the latter Panel found that "the requirement under Article XX(g), unlike those related to the protection of public morals or human, animal or plant life and health (Article XX(a) and (b)), or those relating to compliance with laws or regulations not inconsistent with the General Agreement (Article XX(d)), did not require that the measure be necessary. Subject to the requirements of the introductory clause of Article XX, the fact that other less trade restrictive measures, … could be used equally and more effectively to encourage fuel efficiency did not imply that the measure could not be justified under Article XX(g)." (DS31/R, pg. 116).

[7]Of particular interest regarding this phrase, in contradicting the report of the first Panel on *United States - Restrictions on imports of tuna*, the report of the second Panel on *United States - Restrictions on imports of tuna* (both unadopted) saw no valid reason why the provisions of Article XX(g) applied only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. (DS29/R, pg. 52). Also of interest, this Panel found that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g)." (pg. 54).

(i) The first principle which has been suggested is that the scope of an MEA should reflect a "genuine" multilateral consensus. In this regard, the following elements have been cited as possibly assisting in making such a determination: (i) the openness of the negotiating process; (ii) whether the MEA is administered by the United Nations; (iii) the geographical distribution of participants; (iv) the stages of development of participants and (v) if the major producers and consumers of the products covered by an MEA were participating, or ensuring that the bulk of international trade was represented by the participants. The importance of this principle is to ensure that if trade provisions are included in an MEA, that this is the result of a genuine multilateral process. In this respect, it has been considered that MEAs should be negotiated under the aegis of the United Nations or one of its specialized agencies and that the agreement should be open for participation to all GATT members. Some delegations consider that a source of inspiration in this respect may be found in the rules applying to intergovernmental commodity agreements, specifically the formula used by the drafters of the GATT in paragraphs (a) and (e) of Article 60 of the Havana Charter Chapter on Intergovernmental Commodity Agreements. These require that full publicity should be given to any proposed intergovernmental commodity agreement, and that such agreements should be open to participation, by any member on terms no less favourable than those accorded to any other country.

(ii) Another conceptual issue that has been raised is whether the MEA addresses a domestic versus a global or regional impact of an environmental problem. It may be necessary to define what is meant by a global environmental problem in this context as few environmental agreements refer to the global commons. It has been pointed out that whereas environmental standards could properly be set at the national level for impacts confined to national boundaries, the same does not apply when the impact is global. Other agreements may refer to problems which could be of international interest but whose effects have local impacts. In cases where there are regional or national problems and MEAs were designed to address these, costs arising from trade impacts would be borne globally whereas the benefits would accrue locally or regionally. It would have to be examined whether trade measures taken under such agreements would be necessary and effective and whether the criteria under an *ex-ante* approach should address this issue.

14. Finally, an important principle which does not clearly fall in either of the two categories above is transparency of trade measures taken in pursuance of MEAs. The general view is that such trade measures should not escape the traditional transparency provisions of the WTO. Although it seems that contracting parties bear an individual rather than a collective responsibility to meet obligations on transparency and such obligations would not be altered by the context in which such measures are taken, it may be useful to examine whether this principle should not also form the basis for a criterion in an *ex-ante* approach. Further examination might also take into account the possibility that measures which fall within the meaning of "international standards" in the Agreement on Technical Barriers to Trade might not have to be notified.

An *ex-post* approach

15. A second approach, referred to as the *ex-post* approach, envisages the granting of a waiver under Article XXV:5 for MEAs on a case-by-case basis. This approach builds on the view that the GATT already provides considerable scope for using trade measures for environmental purposes, and reflects doubts that trade measures which would exceed the limitations of existing

provisions are likely to prove efficient or effective policy tools for use in MEAs as well as concerns about disturbing the balance of rights and obligations conferred by the GATT on its contracting parties. Where doubts exist about the probable compatibility of trade measures in MEAs with the provisions of the GATT, or where it has proven necessary to move deliberately outside those limits, recourse could be taken to the waiver provisions of Article XXV. A detailed explanation of this approach is contained in Secretariat document TRE/W/18.

16. Article XXV:5 provides that, in exceptional circumstances, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party upon a vote of two-thirds majority of the votes cast provided that this majority constitutes more than half of the contracting parties. Such a vote may also:

(i) define certain categories of exceptional circumstances to which other voting requirements for the waiver of obligations shall apply; and

(ii) prescribe such criteria as may be necessary for the application of a waiver.

17. The WTO Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 further specifies the procedures involved. In particular, a request for a waiver or for an extension of an existing waiver "shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994".

18. Further work on this approach would involve assessing, from environmental, political and economic perspectives, the advantages and disadvantages of this approach vis-à-vis the *ex-ante* approach and other combined approaches.

Other approaches

19. Some delegations have revealed a preference for other approaches that would combine some or all of the elements of the two approaches mentioned above. Issues to consider in this regard would include some or all of those listed above. Austria suggested an approach which would involve the elaboration by WTO members of an "understanding" concerning the application of trade measures that would oblige members to use the measure which did not create unnecessary barriers to trade and to apply such a measure in the least trade-distortive manner. Another approach suggested by Austria would involve incorporating a clause, similar to one contained in the NAFTA, which would allow provisions of certain existing, unchallenged MEAs to take precedence over WTO provisions. Trade measures pursuant to these MEAs would be presumed not to create unnecessary barriers to trade and to be least trade-restrictive and least inconsistent with GATT rules. Further, to prevent disputes, WTO members could, through the General Council, ask for a non-binding legal opinion of the WTO or the Appellate Body on whether the trade measures envisaged in an MEA could be regarded as compatible with WTO rules. If parties to an MEA decide not to accept this opinion, WTO members should be encouraged to demonstrate to the Council why the envisaged trade measures had to be included in the future MEA in order to fulfil its environmental objective or to apply for a special *ex-ante* environmental waiver. These ideas are explained in document TRE/W/19, circulated by Austria in the EMIT Group.

20. Argentina suggested an approach involving the elaboration of criteria, similar to the *ex-ante* approach, through a collective interpretation of Article XX, but then analysing each MEA

on a case-by-case basis through procedures similar to those contained in Article XXV:5. The criteria to be elaborated would be based on four concepts:

(i) the MEA would have to be multilateral from the standpoints of the minimum number of countries which, in the geographical region covered by the MEA, would have to be party to it, and it would have to be open to the participation and accession of any contracting party irrespective of its level of development, market characteristics or geographical location;

(ii) the term "environment" should cover any agreement having an environmental protection objective, even if this is not its only objective, recognizing the complexity of the concept of this term which in reality embraces various disciplines;

(iii) the trade measure taken pursuant to an MEA should be "necessary" which in WTO terms should mean "indispensable" in order to avoid disputes and leave trade measures as a last resort;

(iv) the phrase "least trade-restrictiveness" should be analyzed by the WTO using inputs of and adjusting to each particular MEA.

21. The general idea of combining the *ex-ante* and *ex-post* approaches is to allow for the predictability of an *ex-ante* approach and respect for the decisions taken by environmental negotiators while ensuring a flexible case-by-case analysis which would examine the specific trade measures in each MEA by an *ex-post* approach.