

# WORLD TRADE ORGANIZATION

RESTRICTED

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## Committee on Trade and Environment

### REPORT OF THE MEETINGS HELD ON 30 OCTOBER AND 6-8 NOVEMBER 1996

#### Note by the Secretariat

1. The Committee on Trade and Environment met on 30 October and 6-8 November 1996 under the chairmanship of Ambassador Juan Carlos Sánchez Arnau of Argentina. The agendas contained respectively in WTO/AIR/476 and WTO/AIR/485 were adopted.
2. The CTE adopted its Report to the Singapore Ministerial Conference (the "Report") contained in WTO/CTE/W/40.
3. The Chairman made a statement that the document the CTE had adopted was the Report of a Committee established by a Ministerial Decision and, as such, did not modify the rights and obligations of any WTO Member under the WTO Agreements.
4. The Chairman said that one of the salient aspects of the Report was that it provided continuity for the WTO's work on trade and environment. With respect to future CTE work, reference had been made in the Report to the need to continue work on several Items, particularly in the area of exports of domestically prohibited goods (DPGs) which, for some delegations, was an issue that would need to be given special emphasis.
5. Many delegations expressed their appreciation to the Chairman and the Secretariat for their contribution to the preparation of the Report.
6. The representative of Nigeria said the CTE's work had been complex and difficult, which had been reflected in drafting the Report. For Nigeria and several of the few countries, relative to the full WTO membership, which had participated actively in the debate on trade and environment, this was uncharted territory. Consistently, Nigeria had expressed the view that the debate had not been sufficiently broadened to include more countries to ensure diversity of perspectives and analysis. Several of the Items, issues, and proposals were new. As the CTE's work had progressed, Nigeria had emphasized that its policy on Items of the work programme was at a preliminary stage and was subject to finalization. Nigeria's policy development had been guided by: (i) the global objective to protect the environment; (ii) the goal of trade liberalization; (iii) the need to make trade and environmental policies mutually supportive; and (iv) the necessity of establishing a constructive relationship with other CTE Members on the basis of cooperation and consensus and on the understanding that the Report did not create new legal obligations and commitments, but represented the initial stages of the development of an international consensus on complex issues for which the goals of multilateral action were accepted while the methods would be subject to negotiation. Against this background, Nigeria was part of the consensus, which was not unanimity, to adopt the Report.
7. Nigeria had substantive and procedural concerns and reservations on paragraphs 14, 40, 41, 171, 173, 174, 176-179, 197, and particularly with respect to Section III of Item 7 on DPGs, specifically paragraphs 202, 203 and 204. Nigeria had been concerned throughout the CTE's discussion and in drafting the Report that the WTO in general and some countries in particular laboured under the charge

of environmental insensitivity. Item 7 on DPGs remained of particular importance to Nigeria. Nigeria had presented a proposal on DPGs based on: (i) increased transparency; (ii) technical assistance; and (iii) the concept of "joint responsibility of exporters and importers of DPGs". This concept had been proposed to ensure that exporters and importers shared responsibility and to ensure particularly for the latter, *inter alia*, the avoidance of the extra-territoriality of exporter action. In the final analysis, all countries must retain a degree of responsibility for what they decided to import. Nigeria regretted the opposition to the inclusion of this concept by three CTE Members and also regretted that other key CTE Members had not shown environmental sensitivity equal to that expressed on other Items. In the absence of consensus, the concept of "joint responsibility" had not been included in the Report. Nonetheless, Nigeria would continue to seek consensus on this element in the context of the CTE's future work programme. Nigeria had joined in the consensus to adopt the Report on the understanding that the CTE would continue to further work on DPGs.

8. The representative of Korea said the Report was a good basis for further work in the CTE. The CTE had made significant progress in identifying the relationship between trade and environment in the framework of WTO rules. The Report was a package deal which represented a fair balance from all points of views and was a fair reflection of CTE work to date. Even though there were many areas which fell below Korea's expectations, Korea had joined the consensus to adopt it as it was. Korea felt the text on Item 1 struck a balance between liberal thinking and conservative approaches, which sent the message that the WTO had been tackling the complex issues related to trade and environment in pursuit of sustainable development. However, it was unfortunate that the analytical methodology referred to as the "differentiated approach" had not been retained in Section III, although several delegations supported this methodology as useful for further work. Korea hoped further work would be guided by this methodology. Paragraph 197 represented a concession for Korea. The text on Item 6, which was of importance to Korea, had been drafted in a balanced manner; this balance was fragile and should be preserved. Further work under this Item should be based on analytical work and empirical evidence, taking into account country-specific conditions and without prejudice to specific sectors or specific distortive measures. Korea also attached significance to Item 8 and felt the agreement which had been reached could serve as a basis for further work. Korea hoped the Report would constitute the basis for the CTE to broaden and deepen its analysis on all Items and took note of the Chairman's statement on the character of the Report.

9. The representative of Norway said the Report was a package deal which Norway had accepted, although without enthusiasm. Although Norway would have preferred the deletion of paragraph 185, it had joined the consensus on the understanding that the content of this paragraph did not have any legal implications and did not prejudice discussions in the TBT Committee.

10. The representative of Mexico said that the discussion on trade and environment which was reflected in the Report would enable Ministers at the Ministerial Conference to gain insight into the various issues for which common, but also diverging views existed among Members. The Report was not a document which had been negotiated with a view to contractual undertakings; it had no legal implications concerning the substantial or procedural rights and obligations of WTO Members, either collectively or individually under the WTO Agreement and it did not prejudice Members' positions with respect to future CTE work. Consequently, no element in the Report could be used as a basis for action under the Dispute Settlement Understanding (DSU). As such, Mexico would have preferred not to have included paragraph 178. The DSU as well as other WTO Agreements provided for rights to invoke the DSU which could not be changed in any fora other than the WTO. Matters which were WTO-related should be dealt with in the WTO; those which were not within the WTO's competence should be dealt with outside the WTO. In cases where there was a possibility to resort to one or another fora, there shall be freedom of choice; there was no relationship in terms of *lex specialis* or *lex posterior* concerning which fora prevailed.

11. The representative of Singapore, on behalf of ASEAN, said the CTE had made substantial progress in clarifying trade and environment issues, which was reflected in the Report. ASEAN considered that the Report would serve as a basis for further work and was not a legal document. It was a political message directed not only at the environmental constituency but also, more importantly, to the

trade constituency considering that this debate had taken place in a trade organization. As stated by the Chairman upon the Report's adoption, the conclusions and recommendations contained therein should not in any way infringe on the rights and obligations undertaken in the WTO, nor prejudice Members' positions on Items on the CTE work programme. ASEAN had several concerns, particularly on Items 1 and 5, and 3(b). In order to be constructive and not to block consensus, ASEAN had made significant accommodations on these Items, for example concerning paragraphs 173(ii), 178 and 183. Furthermore, there had been no agreed definition of an MEA and views related to MEAs would be subject to such a definition. The CTE had a role to play in clarifying the complexities inherent in the trade and environment interface after the Singapore Ministerial Conference, such as ensuring environmental concerns were not used for protectionist purposes. The outcome of the CTE process should ensure multilateral cooperation to address transboundary environmental problems and guard against the use of extra-jurisdictional application of environmental laws. In analysing the Report, ASEAN saw a lack of reference to the development dimension, which it would continue to emphasize in future work as this aspect was one which needed to be taken into account in any discussion on trade and environment. In endorsing the Report, particularly paragraph 219, ASEAN emphasized the importance of the Report being sent to the Ministerial Conference through the General Council.

12. The representative of the European Communities welcomed the fact that the Report had been adopted and would be submitted to the General Council. The EC had always considered the work in the CTE to be a priority for Singapore and had demonstrated its commitment to a positive result and its high level of ambition and expectations not only in the run up to the Ministerial Conference, but throughout the CTE's work. Since the outset, the EC had taken the position that the CTE represented the appropriate forum to achieve a better understanding of the relationship between trade and environment, to promote a positive interaction between the two and to accommodate legitimate environmental concerns in the WTO. In particular, the EC had attached importance to the issue of the relationship between the WTO and MEAs. With a view to establishing a framework for this relationship, the EC had tabled a proposal whereby trade measures taken pursuant to MEAs would benefit from special treatment under WTO provisions. The proposal had been guided by the assumption that the WTO should be supportive of action at the multilateral level for environmental protection. Some had described the EC's approach as creating an "environmental window" in the WTO, a definition which the EC liked. However, it had proved impossible, so far, to find consensus on such ideas as well as on other delicate issues on the CTE's agenda and, thus, the EC found the Report fell short of its high ambitions.

13. Despite its disappointment, the EC was ready to go along with the Report's adoption, without which two years of work in the CTE would have gone unreported and the complexity of the matters being addressed would not have been presented in such a comprehensive form to the public. The Report contained elements of value which demonstrated that the WTO was not closed to further exploration of how to enhance the relationship between trade and environment. The Report constituted a clear basis for further work and was certainly not the end of the story. In this respect, the EC was able to endorse the Report because it considered that, although it fell below the level of the EC's expectations, it did not prejudice the EC's positions for the next round of negotiations. The EC understood the sensitivity of many elements of the Report for many delegations because the same critical elements were also sensitive for the EC. However, controversial issues could be addressed further in future work. The Report represented a delicate balance; so delicate that the EC had had to evaluate carefully whether to accept the package. In this respect, many Members of the EC had been reluctant to accept it. However, to have reopened the Report would have meant almost certainly that this delicate balance would have vanished and all possibility of agreement would have disappeared for the foreseeable future.

14. The representative of Japan welcomed the adoption of the Report, particularly Section III which contained important, positive messages to send to Ministers in Singapore concerning WTO work on trade and environment, including the recognition of the need for mutual respect between the WTO and MEAs, the importance of promoting a dialogue between them, and continuing work on eco-labelling. Like other delegations, although Japan had not been satisfied with some elements of the Report and would come back with its views and discuss the issues, not only on Item 6 but on Item 1 for example, it

had joined the consensus to adopt the Report so as to be in a position to build on the Report and deal with the unresolved issues after Singapore. The CTE should address its work programme after Singapore with a sharpened focus. Japan gave a high priority to reducing the potential for conflict between the WTO and MEAs and enhancing the positive interface between them, for which further work was needed.

15. The representative of the United States said his delegation had decided, after careful and sometimes difficult internal deliberations, not to stand in the way of the consensus to adopt the Report. All delegations, including representatives in capitals, had laboured long and hard over these issues, and the US appreciated the effort that had gone into this product. While the Report made some valuable contributions, the US expressed its disappointment that the CTE had not advanced significantly the understanding of environmental concerns. The US did not concur with certain of the Report's conclusions. With respect to paragraph 169, the US noted its understanding that the reference to governments' ability "to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities" was of course not intended to be a restatement or reinterpretation of Principles 2 and/or 11 of the Rio Declaration and Principle 21 of the Stockholm Declaration. In particular, the US would be concerned if this language were to be read as expressing the view that governments did not have the corresponding responsibility, as stated in Rio Principle 2, to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction. Any such reading, would be a serious backtracking, not only from the commitments of Rio but also from Stockholm and one with which it could not concur.

16. The US did not agree with the assessment contained in Paragraph 174(i) that "there is no clear indication for the time being of when or how they [trade measures in MEAs] may be needed or used in the future". This contradicted recent negotiations of both the Biosafety Protocol to the Biodiversity Convention and the Convention on Prior Informed Consent for Toxic Chemicals and Pesticides where trade measures to achieve the environmental objectives of these MEAs were under consideration. With respect to Paragraph 174(iii), the US' view was that "mutual respect" for "technical and policy" expertise included the important concept of respect for the environmental expertise of MEA negotiators in determining when trade measures may be needed in MEAs. Particularly important to the US was that, as noted in paragraph 178, while WTO Members had the right to bring disputes to the WTO dispute settlement mechanism, they could agree to bring such disputes elsewhere or not to bring them at all. For example, the US saw no legal reason why WTO Members, who were also Parties of an MEA, could not agree, for disputes involving MEA provisions, to forego recourse to WTO dispute settlement in favour of settling the dispute within an MEA's provisions. The US would take strong issue with an argument to the contrary. With respect to the discussion of further work under Item 6 in paragraph 199, while the CTE had expressed the need to examine how the implementation of environmental measures may result in disguised restrictions on trade, the US had not intended that further work become a wide ranging investigation into all manner of environmental measures. Like others, the US found some parts of the Report to its liking and others not. For example, the US regretted that the CTE had not yet been prepared to state that "WTO rules should not hamper the ability of MEAs to achieve their environmental objectives." Nonetheless, the US appreciated the work that this document represented and looked forward to continued collective efforts to build a constructive policy relationship between trade, environment and sustainable development.

17. The representative of Morocco said that the Report was not ideal but his delegation was satisfied. The Report was a sound basis for future CTE work to resolve several sensitive issues, such as the export of DPGs. Morocco accepted the Chairman's statement that the Report did not infringe on WTO Members' rights and obligations under the WTO Agreements.

18. The representative of India said the Report was a delicately balanced text which contained elements of interest to different Members. As was natural in any negotiations, there was some disappointment amongst all delegations about not getting all their ideas incorporated, to the desired extent, in the Report. Nevertheless, like all other delegations and in the spirit of cooperation, India had gone along with the consensus in adopting this Report. He clarified India's understanding that the term "Multilateral Environmental Agreement" had not been defined anywhere. India had consistently stated

that, in this context, the term should cover only those MEAs which had the following elements: (i) it should have been negotiated under the aegis of the United Nations or its specialized agencies; (ii) its procedures should stipulate that participation in the negotiation was open to all countries; (iii) there must have been effective participation in the negotiations by countries belonging to different geographical regions and by countries at different stages of economic and social development; and (iv) the MEA's procedures should provide for accession of countries which were not original members, on terms that were equitable to those of its original members. These elements were contained in India's non-paper on Item 1. India read the Report based on this understanding of an "MEA".

19. India had consistently taken the stand that no provision in the WTO Agreement needed to be changed or interpreted in any manner other than that which was already available in the jurisprudence in order to accommodate genuine environmental concerns; paragraph 174(ii) confirmed this point. India was concerned that there should not be any hierarchy established between the dispute settlement mechanism under the WTO and those under MEAs. India's understanding was that paragraph 178 was a statement of "best endeavour," which encouraged WTO Members to consider trying to resolve their differences through available MEA dispute settlement mechanisms provided they were perceived to be efficacious enough for this purpose, without in any manner questioning or diluting WTO Members' rights with regard to dispute settlement. The Report provided scope for all WTO Members to pursue Items of particular interest to them in a future work programme within the CTE's original mandate and terms of reference as set out in the Ministerial Decision of April 1994. India was proceeding on the basis that the Report to the Ministerial Conference through the General Council was a Report by the Committee as mandated by a Marrakesh Ministerial Decision and that it was not a legal agreement creating new rights or obligations. India's understanding also was that the Report could not be used in part or its entirety in any dispute settlement process or any other legal instruments that might be developed subsequently.

20. The representative of Hong Kong supported the adoption of the Report, which represented a balanced outcome. The Report would not modify WTO Members' rights and obligations. Delegations' ability to reach a consensus on such a complex subject area where views were evidently divergent had reconfirmed the WTO's role as an effective negotiating forum. Hong Kong hoped this same spirit of cooperation would be reflected in other areas of WTO work, especially areas where conclusions and recommendations for the Ministerial Conference had yet to be determined. Hong Kong felt CTE discussions had contributed to enhancing the available information on the nature of environmental issues, especially on the nature and relationship of WTO rules to trade-related environmental measures. Transparency in WTO had no limitations and was a means and not an end to solving problems related to trade-related environmental measures. In future, the CTE would have the opportunity to examine a database on trade-related environmental measures which the Secretariat would establish according to paragraph 192 of the Report and the CTE could reexamine the issue of compliance gaps which had been identified.

21. The representative of Canada said the process had been difficult as the CTE had been dealing with complex issues and much of the process had been educative. Speaking on behalf of the Point de Jour Group, he said that in the end it was the willingness of all delegations which had resulted in a reasonable compromise which would serve as a basis for future CTE work.

22. The representative of Argentina said his delegation found the Report to be somewhat unsatisfactory and that this might be the greatest merit of the Report as all delegations seemed to be equally unsatisfied.

23. The representative of Australia said that as the Report represented two years of examination of complex issues, it was understandable that it reflected the difficulty of achieving the sort of consensus which some delegations had wanted. Although the Report fell below Australia's expectations, it was balanced and provided a basis for further WTO work in this area.

24. The representative of New Zealand said the CTE had made some progress towards clarifying the relationship between the provisions of the multilateral trading system and trade measures for

environmental purposes, including those pursuant to MEAs. However, New Zealand was disappointed that more substantive results had not been achieved. Nevertheless, the Report contained some important messages, one of which was to highlight to the public the complexity of the issues discussed. New Zealand looked forward to substantive conclusions emerging from future CTE discussions.

25. The representative of Cuba said that although his delegation would have liked some of the issues in the Report to have been expressed differently, Cuba had joined the consensus for its adoption because it represented an acceptable outcome. As stated by the Chairman, Cuba's understanding was that the Report would not infringe on WTO Members' rights and obligations.

26. The representative of Egypt said the Report represented a balanced result. Egypt considered that Section III was a political statement issued largely to address the environmental community, and, as had been asserted by several delegations and the Chairman, the text neither in part nor in its entirety would be considered by panels or by any other legal instruments that were developed subsequently. This applied particularly to paragraph 174(ii).

27. The representative of Switzerland joined the consensus with little enthusiasm. Nevertheless, the Report was a sound basis for future work. Switzerland had participated actively in CTE discussions and would continue to do so in the future.

28. The representative of Colombia, on behalf of Colombia and Venezuela, welcomed the Chairman's statement on the legal status of the Report and shared the comments made by Mexico on the consistency and scope of the DSU regarding WTO Members' rights and obligations.