

**Committee on Trade and Environment
Special Session**

**MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS) AND WTO RULES;
PROPOSALS MADE IN THE COMMITTEE ON TRADE
AND ENVIRONMENT (CTE) FROM 1995-2002**

Note by the Secretariat

I. INTRODUCTION

This Note responds to a request made by participants at the first meeting of the Committee on Trade and Environment (CTE) Special Session on 22 March 2002, for a Secretariat Note on the proposals made by Members under Items 1&5 of the CTE work programme from January 1995 to today.¹ The Note summarizes the main tenets of the non-papers and working documents submitted by Members to the CTE.²

It is organized as follows:

- Section II presents the main approaches proposed by Members under Items 1&5.
- Section III outlines the main elements of the consensus reached on Items 1&5 in the CTE report to the Singapore Ministerial Conference.
- Table 1 summarizes all Member non-papers on Items 1&5.
- Table 2 summarizes all Member working documents on Items 1&5.³
- The Annex lists all the documents summarized in this Note.

This Note has been prepared on the understanding that positions taken by Members in the context of the regular CTE, need not necessarily reflect their position today. The proposals were made prior to the Doha Ministerial Conference, and to the formulation of the paragraph 31 (i) and (ii) negotiating mandate.

¹ Items 1&5 are on: "The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs; and the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs." It should also be noted that much discussion on the relationship between the Convention on Biological Diversity (CBD) and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) took place under Item 8 of the CTE work programme (on the "relevant provisions of the TRIPS Agreement").

² Many of the proposals tabled in the CTE did not specify whether they were intended to cover party/party or party/non-party conflicts. As a result, they have been summarized in their entirety. Statements made by delegations in CTE meetings are not summarized since a dividing line could not be established between interventions for brainstorming, and those intended to express specific positions.

³ Canada's contribution to WTO High Level Symposium on Trade and Environment, held in March 1999, is also summarized. It was presented to the CTE in detail in July 1996 (WT/CTE/M/10) and in several other meetings.

II. THE MAIN APPROACHES PROPOSED

Several approaches were proposed by Members on how to address Items 1&5 of the CTE work programme. A common theme running through many of them has been the call for greater coordination and cooperation between trade and environment officials at the national level, as well as between the WTO, MEAs, and United Nations Environment Programme (UNEP).⁴

The following were the main approaches proposed:⁵

- 1. Maintaining the Status Quo:** The view that WTO rules do not need to be changed to accommodate the trade measures in MEAs. Current rules provide sufficient scope for trade measures to be applied pursuant to MEAs in a WTO-consistent fashion, and the WTO's dispute settlement mechanism (DSM) would be more than capable of handling MEA-related disputes if they were to arise in future.
- 2. Amending GATT Article XX:** The amendment of GATT Article XX to accommodate trade measures taken pursuant to MEAs. The proposal elaborates two options. The first is to include measures taken pursuant to specific provisions of MEAs in GATT Article XX, while the second is to introduce a reference not only to these measures, but also to measures necessary to protect the "environment" more generally. Both options suggest the development of an Understanding under the provisions of GATT Article XX which would provide that, subject to certain procedural criteria being met, panels would examine measures that are challenged in WTO based on their conformity with the headnote of Article XX, and would not consider their necessity.
- 3. Granting Multi-Year Waivers and Developing Non-Binding Guidelines:** The recognition of specific trade measures in MEAs, on a case-by-case basis, as exceptional circumstances qualifying for a multi-year waiver. A set of non-binding guidelines could then determine the criteria that requests for waivers would be tested against. The waivers would be time-bound, and would have to be renewed periodically. A trade measure applied pursuant to a waiver could still be challenged in WTO.⁶
- 4. Setting "Differentiated WTO Disciplines" for Trade Measures Pursuant to MEAs:** The setting of differentiated WTO disciplines for trade measures applied pursuant to MEAs based on whether trade measures are specifically mandated by an MEA, and whether they are applied amongst parties or against non-parties. Trade measures taken amongst Parties would be eligible for qualified codification on a lapse of time basis, subject to them meeting appropriate conditions, which would be less strict for measures specifically mandated by an MEA, than for those that are simply authorized. Accommodation of specific measures against non-parties is considered premature.
- 5. Designing a Coherence Clause:** The introduction of a "Coherence Clause" that would provide that in case of WTO dispute over a trade measure mandated in an MEA, panels would only examine whether the measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or

⁴ At the time of the Singapore Ministerial Conference, proposals had been classified into four broad categories: those that called for maintaining the status quo, arguing that WTO rules did not need to be changed to accommodate multilateral environmental agreements (MEAs); those that called for "*ex ante*" predictability to address potential conflicts between WTO rules and MEAs before they arose (were broadly referred to as the "environmental window" approach); those that called for "*ex post*" scrutiny to address such conflicts if/when they emerged; and those that combined elements of both the *ex ante* and *ex post* approaches.

⁵ Some Members have tabled more than one proposal as discussion of the issue progressed and their position evolved.

⁶ Two similar versions of this proposal have been made, with the main difference between them lying in the criteria to be included in the Guidelines.

with a view to achieving a trade advantage, but it would not examine the legitimacy of the environmental objective nor the measure's necessity. A list of MEAs benefitting from the clause would be established.

- 6. Developing a Principles and Criteria Approach:** The development of principles that would assist WTO panels in assessing trade measures in MEAs, and criteria to help MEA negotiators in contemplating the use of trade measures in an MEA. WTO panels would test MEAs and their trade measures against certain principles, including whether MEA negotiators have explicitly considered the "criteria" prior to contemplating trade measures.
- 7. Reversing the Burden of Proof under GATT Article XX & Developing a Code of Good Conduct:** The reversal of the burden of proof under GATT Article XX to accommodate specifically mandated trade measures taken pursuant to MEAs. While the onus, at present, lies on Members invoking Article XX to defend their need for an exception, this would be reversed. A Code of Good Conduct for the use of trade measures in MEAs, which could be jointly developed by the WTO, MEAs and UNEP, could contribute to a mutually supportive relationship between MEAs and WTO and avert potential conflicts.
- 8. Developing Non-Binding Interpretative Guidelines:** The development of guidelines by the WTO to be used as a reference in the negotiation of future MEAs, and to help assess the compatibility of MEA trade measures with WTO rules. Procedural and substantive criteria would be included in the Guidelines, which MEAs, and the trade measures which they contain, would have to meet to be considered WTO compatible. Decisions made by MEAs on their environmental objectives and their trade measures would be taken into account, if the agreements and the application of its trade measures meet certain criteria.
- 9. Developing an Understanding:** The development of an Understanding to apply across the entire WTO Agreement, on differentiated treatment for trade measures applied pursuant to MEAs, depending on whether they apply between parties or against non-parties and whether they are specifically mandated by an MEA. Procedural criteria would ensure that measures to be accommodated are taken in the context of cooperative international agreements. Substantive criteria would ensure that trade measures taken for environmental purposes are not unnecessarily disruptive to trade.
- 10. Creating a Voluntary Consultative Mechanism (VCM):** The establishment of a consultative process with countries to which trade measures are to be applied. The process should assist in identifying first-best policy options, targeted at the source of the environmental problem. The mechanism would minimize conflict between parties on trade and environment policies, while avoiding inefficient environmental and economic outcomes. WTO Members should consider including VCMs in new MEAs, and using VCMs prior to applying trade measures under existing ones.
- 11. Promoting Mutual Supportiveness and Deference:** The adoption of an interpretative decision to clarify that both environmental and trade regimes should focus on their primary areas of competence, while showing deference to each other. A trade measure provided for by an MEA should benefit from a presumption of WTO conformity (eg. should be determined to be "necessary" to protect the environment), but the implementation of such a measure should remain subject to WTO requirements (to not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade). The MEAs towards which deference should be paid could be identified on the basis of certain criteria.

III. THE MAIN ELEMENTS OF THE "SINGAPORE CONSENSUS"

In the *Report (1996) of the Committee on Trade Environment* to the Singapore Ministerial Conference (WT/CTE/1), the CTE summarized the discussions it held on the various Items of its work programme, and forwarded certain conclusions and recommendations to the Conference. The following summarizes the main elements of the "Singapore consensus" on Items 1&5:⁷

1. The WTO supports multilateral solutions to global and transboundary environmental problems. Unilateral actions should be avoided (paragraph 171);

"The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both."

2. Trade restrictions are not the only nor necessarily the most effective policy instrument to use in MEAs, but in certain cases they can play an important role (paragraph 173);

"Adequate international cooperation provisions, including among them financial and technological transfers and capacity building, as part of a policy package in MEAs are important and can be indispensable elements to facilitate the ability of governments, particularly of developing countries, to become Parties to an MEA and provide resources and assistance to help them tackle the environmental problems which the MEA is seeking to resolve and thus to implement the provisions of the MEA effectively, in keeping with the principle of common but differentiated responsibility. Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem. They have played an important role in some MEAs in the past, and they may be needed to play a similarly important role in certain cases in the future."

3. The WTO provides broad and valuable scope for trade measures to be applied pursuant to MEAs in a WTO-consistent manner. There is no agreement for the time being that there is any need to change WTO provisions to provide increased coordination in this area (paragraphs 174(ii) and 176);

"A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. That includes the defined scope provided by the relevant criteria of the "General Exceptions" provisions of GATT Article XX. This accommodation is valuable and it is important that it be preserved by all," and "Views differed on whether any modifications to the provisions of the multilateral trading system are required under this Item This matter should be kept under review."

4. To date, few MEAs contain trade provisions and no problem has arisen in the WTO over the use of trade measures applied pursuant to MEAs (paragraph 174(i));

⁷ The paragraphs of *Report (1996)* from which the various elements are derived are bracketed, and relevant sections of them quoted.

"Trade measures have been included in a relatively small number of MEAs. There is no clear indication for the time being of when or how they may be needed or used in the future. Up to now, there has been no GATT or WTO dispute concerning trade measures applied pursuant to an MEA."

5. Better policy coordination can help prevent WTO disputes arising over the use of trade measures applied pursuant to MEAs (paragraphs 174(iii), (vi), and 175);

If specific trade measures are considered for inclusion in MEAs, "mutual respect should be paid to technical and policy expertise in both the trade and environment areas," and "Policy coordination between trade and environment policy officials at the national level plays an important role in ensuring that WTO Members are able to respect the commitments they have made in the separate fora of the WTO and MEAs and in reducing the possibility of legal inconsistencies arising," and "Cooperation between the WTO and relevant MEAs institutions is valuable and should be encouraged....the WTO Secretariat [should] continue to play a constructive role" in this regard.

6. Problems are unlikely to arise in the WTO over trade measures agreed and applied amongst Parties to an MEA (paragraph 174(iv));

"In cases where there is a consensus among Parties to an MEA to apply among themselves specifically mandated trade measures, disputes between them over the use of such measures are unlikely to occur in the WTO."

7. "In the negotiation of a future MEA, particular care should be taken over how trade measures may be considered for application to non-parties" (paragraph 174(v));

8. WTO Members are confident that the WTO dispute settlement provisions are satisfactory to tackle any problems which arise in this area, including in cases where resort to environmental expertise is needed (paragraphs 178 and 179).

"WTO Members have not resorted to WTO dispute settlement with a view to undermining the obligations they accepted by becoming Parties to an MEA, and the CTE considers that this will remain the case. While WTO Members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA. Improved compliance mechanisms and dispute settlement mechanisms available in MEAs would encourage resolution of any such disputes within the MEA, " and "The CTE recognizes the benefit of having all relevant expertise available to WTO panels in cases involving trade-related environmental measures, including trade measures taken pursuant to MEAs. Article 13 and Appendix 4 of the DSU provide the means for a panel to seek information and technical advice from any individual or body which it deems appropriate and to consult experts, including by establishing expert review groups."

TABLE 1: NON-PAPERS

NON-PAPER	PROPOSAL
<p>EGYPT [NON-PAPER, 18 JUNE 1996]</p>	<ul style="list-style-type: none"> • The definition of an MEA should: (1) emphasize the "universality" criterion, and distinguish between international agreements negotiated under the United Nations and regional or plurilateral agreements; (2) decide on how amendments to MEAs with trade implications will be treated; and (3) consider domestic versus the international impacts of trade provisions introduced for environmental purposes in MEAs. • Measures taken "pursuant to MEAs" must be distinguished from measures which are "explicitly and specifically mentioned in an MEA." • Article XX sufficiently covers trade measures contained in MEAs. The status quo, coupled with the <i>ex post</i> "waiver approach", would be the optimal outcome.
<p>EUROPEAN COMMUNITIES [NON-PAPER, 19 FEBRUARY 1996]</p>	<p><u>Amendment to Article XX:</u></p> <p>Two Options (combine <i>ex ante</i> predictability and <i>ex post</i> scrutiny):</p> <p>1. An amendment to GATT Article XX consisting of adding a new paragraph (k), which would refer to an "Understanding on the Relationship between Trade Measures taken Pursuant to MEAs and WTO Rules".</p> <ul style="list-style-type: none"> • The new <i>Article XX (k)</i> would read: "taken pursuant to specific trade provisions of an MEA complying with the 'Understanding on the Relationship between Trade Measures taken Pursuant to MEAs and WTO Rules.'" • The main elements of the "<i>Understanding</i>" would be: <ul style="list-style-type: none"> - That "An MEA is an international written instrument adopted in conformity with the customary international law as codified by the Vienna Convention on the Law of Treaties, creating a legal obligation among Parties and aimed at solving environmental problems the solution of which requires action at the international level." - That "Subject to the requirements of the headnote to Article XX, measures taken pursuant to specific provisions of an MEA shall be presumed to be 'necessary' for the achievement of the environmental objectives of the MEA if the MEA in question is: <ul style="list-style-type: none"> (a) open to participation by all parties concerned about the environmental objectives of the agreement; (b) reflects, through adequate participation, the interests of parties concerned, including parties with relevant significant trade and economic interests."

- That MEAs should inform the WTO of trade measures whose use they envisage, and that these should be subject to the transparency requirements of WTO.
 - That in the event of a dispute, a Panel shall determine whether the MEA satisfies the criteria in the Understanding. And, "Measures taken pursuant to specific provisions of an MEA complying with the provisions of this Understanding shall be deemed to be necessary to achieve the environmental objectives of the MEA but shall remain subject to the requirements of the headnote to Article XX."
 - That panels should make use of Article 13 of the Dispute Settlement Understanding (DSU), that allows for the consultation of outside experts, and if necessary MEA Secretariats.
- 2. An amendment to GATT Article XX (b), but no change to the headnote of the Article, plus an "Understanding."** This option is broader than the first, in that it addresses not only MEAs and WTO rules, but the relationship between the multilateral trading system (MTS) and trade measures taken for environmental purposes more generally.
- The objective of option (2) is not to expand the scope of Article XX's coverage to unilateral measures, since trade measures taken for the protection of the "environment" and not taken pursuant to "specific provisions of MEAs" would continue to undergo full WTO scrutiny (including the "necessity test"), and would not benefit from the option (2) special track.
 - Amended *Article XX (b)* would read: "necessary to protect human, animal, plant life or health *or the environment; and measures taken pursuant to specific provisions of Multilateral Environmental Agreements complying with the provisions of the 'Understanding on the Relationship between measures taken pursuant to MEAs and WTO Rules.'*"
 - The main elements of the "*Understanding*" would be:
 - The same as the Understanding above, with only two drafting changes (italicized below) to replace the term "necessary for the achievement of the environmental objectives of MEAs" with "necessary to protect the environment", simply because the word "environment" becomes part of the text of XX(b):
 - "Subject to the requirements of the headnote to Article XX, measures taken pursuant to specific provisions of an MEA shall be presumed to be 'necessary' *for the protection of the environment* if the MEA in question:....".
 - In the event of a dispute, a Panel shall determine whether the MEA satisfies the criteria in the Understanding. And, "Measures taken pursuant to specific provisions of an MEA complying with the provisions of this Understanding shall be deemed to be necessary *to protect the environment* but shall remain subject to the requirements of the headnote to Article XX."

<p>HONG KONG</p> <p>[NON-PAPER, 22 JULY 1996]</p>	<p><u>Communication / Guidelines & Waivers:</u></p> <ol style="list-style-type: none"> 1. Enhanced Communication: A consolidated guide on the main principles of the WTO Agreement should be developed for use by MEA negotiators. Communication between MEAs and the WTO should be enhanced through regular meetings between the Secretariats. 2. Guidelines for the Granting of Waivers in WTO: WTO Members, parties to an MEA, may apply for waivers for trade measures mandated by, or taken pursuant to, an MEA. The following guidelines should apply: (1) The MEA should reflect a genuine international consensus. The terms for negotiation and participation should be open and equitable for all interested parties. Participation should reflect the interests of consumer and producer nations of the products covered. MEA negotiators should notify the WTO before the negotiation of a new MEA and inform the WTO of developments at important stages of negotiations; (2) the headnote to Article XX should be met; and (3) the granting of a waiver should not prejudice the rights and obligations of any WTO Member under the WTO DSM (irrespective of whether they are party to the MEA). <ul style="list-style-type: none"> • Trade measures specifically mandated in MEAs should be subject to the "least-inconsistency with WTO provisions" test, and measures not mandated by MEAs, but taken pursuant to them, should be subject to the more stringent criteria of necessity, least-trade restrictiveness, effectiveness and proportionality. Members may approve waivers on a multi-year basis, but review them annually under Article IX.4 (Decision-Making) of the Marrakesh Agreement Establishing the WTO to see if the exceptional circumstances justifying them still exist. • The guidelines should apply to all trade measures mandated in or taken pursuant to MEAs, irrespective of whether they are intended for application between parties or to non-parties. • Even if MEAs have DSMs of their own, WTO Members shall have the right to use the WTO's DSM. For non-parties, the WTO's DSM will be the only option.
<p>INDIA</p> <p>[NON-PAPER, 23 JULY 1996]</p>	<ul style="list-style-type: none"> • An MEA is an agreement: (1) negotiated under the aegis of the United Nations or a specialized agency (such as UNEP); (2) whose procedures open participation to all countries, (3) in which countries belonging to different geographical locations, and at different stages of economic and social development, have effectively participated; and (4) which provides for the accession of countries which are not original members on equitable terms. • Focus on trade measures in the CTE should not encourage dependence on these measures. Positive measures, such as financial flows and technical and technological assistance should be considered. • Various factors influence the formulation of MEAs, and it cannot be assumed a priori that trade measures incorporated in MEAs will successfully pass the tests of necessity, effectiveness, least trade distortion and proportionality.

	<ul style="list-style-type: none"> Existing WTO provisions are adequate to deal with trade measures taken pursuant to legitimate environmental objectives in existing MEAs. Trade measures in future MEAs should be formulated in accordance with GATT/WTO rules. The WTO's DSM is capable of dealing with trade-related MEA disputes. It already allows for the consultation of outside experts
<p>KOREA [NON-PAPER, 12 JUNE 1996]</p>	<ul style="list-style-type: none"> The OECD has classified trade measures into four categories: (1) MEA obligations: trade measures taken by individual countries based on MEA obligations; (2) MEA authorizations: trade measures taken by individual countries based on an authorization within an MEA, which acknowledges or clarifies the rights of countries with regard to the use of stricter trade measures than required by an MEA; (3) MEA-related: trade measures related to an existing MEA, but which are discretionary rather than mandatory or recommended; (4) National law: trade measures taken by individual countries based on national laws and regulations without any mandate from the MEA (COM/ENV/TD(93)89). For Korea, trade measures based on "MEA obligations" are "specific", while trade measures based on "authorization" are "non-specific." Other trade measures are "unilateral." Members should commit themselves to avoiding the use of unilateral measures. To ensure the <i>transparency</i> of trade measures: (1) WTO Members should notify trade measures taken pursuant to MEAs to a WTO Secretariat database; and (2) cooperation between the WTO and MEAs should take place (exchange of information, participation in meetings, access to documents, etc.). <p><u>Differentiated WTO Disciplines:</u></p> <p>Two Options:</p> <p>1. Codification (combines <i>ex ante</i> predictability and <i>ex post</i> scrutiny):</p> <ul style="list-style-type: none"> Allowing a specific trade measure set out in an MEA to prevail over the WTO rules to the extent of the inconsistency between them. Codification could be applied to trade provisions agreed upon by Parties to an MEA. The rights of WTO Members to invoke the DSU would be reversed for codified measures, and codification would be considered on a case-by-case basis. Procedural and differentiated substantive disciplines would be applied to codified measures. Procedural disciplines would include that: (1) MEA parties notify the trade provisions for codification to the WTO. If no objections are raised within 90 days, the measures would be codified; and (2) any party that objects to the proposed codification would enter into a bilateral or plurilateral consultation with the notifying parties. If no agreement on codification is reached, the trade provision would not be codified.

	<ul style="list-style-type: none"> • Codification would also be subject to <i>differentiated substantive disciplines</i>. Specific trade measures between parties to an MEA should be subject to the least stringent disciplines, i.e. no necessity test, just a least-WTO inconsistency test. Non-specific trade measures between parties to an MEA would be subject to qualified codification. Criteria such as least-trade restrictiveness (includes proportionality) and necessity (includes effectiveness) could be applied. Non-specific trade measures in MEAs should be reconsidered, possibly through an amendment to the MEA. <p>2. Accommodation (<i>ex post</i> scrutiny):</p> <ul style="list-style-type: none"> • This approach would specify the exceptional circumstances under which a situation would be eligible for treatment under GATT Article XX. It would allow for the testing of trade measures against pre-determined criteria on an <i>ex post</i> basis, after a dispute has been initiated. • It would be premature to accommodate specific trade measures against non-parties to an MEA (dispute settlement or waivers on a case-by-case basis). Accommodation of non-specific measures against non-parties would not be desirable, and WTO Members should demonstrate firm commitment to avoiding unilateral action.
<p>SWITZERLAND</p> <p>[NON-PAPER, 20 MAY 1996]</p>	<p><u>Cooperation / Coherence Clause:</u></p> <p>1. A Cooperation Mechanism: A "Decision on Cooperation Between the WTO and Relevant Institutions of Multilateral Environmental Agreements Providing for Trade Measures" should be adopted to provide the WTO Director-General (DG) with the mandate to enter into cooperation agreements with MEAs. These would need to be approved by the General Council or the Ministerial Conference. No amendment of WTO rules would be required.</p> <ul style="list-style-type: none"> • The cooperation agreements would: (1) allow the WTO Secretariat to respond, on its own responsibility, to requests from MEAs for factual information on WTO provisions relevant for trade measures in MEAs, (2) invite MEAs to brief the WTO on their trade measures, and (3) grant observer status to those MEAs in a cooperation agreement with WTO on reciprocal terms. <p>2. A Coherence Clause: Clause that would provide that in case of conflict between WTO rules and a specific trade provision of an MEA, the WTO would limit its scrutiny to whether the measure has been applied in a manner which constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. The legitimacy of the environmental objective and the necessity of the measure taken would not be examined.</p> <ul style="list-style-type: none"> • MEAs subject to Clause: Either (1) MEAs that contain trade provisions that have been notified to the Director-General of WTO by their Depository and which have received General Council approval based on Article IX.1 of the Marrakesh Agreement Establishing the WTO; or (2) any MEA notified to the Director-General of WTO by its Depository. Each WTO Member would have the right to propose to the General Council to remove an MEA from the List. The General Council would then take a decision on the proposal based on the procedure of Article IX.1 (Decision-Making) of the Marrakesh Agreement Establishing the WTO.

	<ul style="list-style-type: none"> • The Coherence Clause should be included in an "Understanding on the Agreements in Annex 1 of the Agreement Establishing the WTO Concerning the Relationship between the Provisions of the MTS and Trade Measures taken Pursuant to MEAs." The adoption of the Understanding would constitute an amendment of the Agreements listed in Annex 1, and its adoption would therefore need to be decided based on Article X (Amendments) of the Marrakesh Agreement.
<p>UNITED STATES</p> <p>[NON-PAPER, 11 SEPTEMBER 1996]</p>	<ul style="list-style-type: none"> • Framework for consideration by Ministers including, amongst others, the following elements: <ul style="list-style-type: none"> - WTO rules should not hamper the ability of MEAs to achieve their environmental objectives; - while trade measures have been and will continue to be effective in achieving environmental objectives, they have and will not always be necessary and should be used prudently; - trade measures should be used when needed, and MEA negotiators are in the best position to determine this; - when negotiating trade measures in MEAs that apply between parties, governments should consider how the intended use of these measures relates to the rules of the MTS; - a non-party to an MEA should not be discriminated against if it takes actions equivalent to those taken by parties; - close coordination between trade and environment officials within capitals and at the international level should take place; - broad scope is already provided by existing WTO rules for Members to take measures for environmental protection, including pursuant to MEAs; - the WTO's DSU provides panels may seek information and technical advice from any individual or body they consider appropriate. Such information can and should be sought in MEA-related disputes. - the WTO Secretariat has and should continue to cooperate with MEA Secretariats, and inform WTO Members of trade-related developments in MEAs.

TABLE 2: SUBMISSIONS BY MEMBERS

SUBMISSION	PROPOSAL
<p>ASEAN</p> <p>[WT/CTE/W/39, 24 JULY 1996]</p>	<p><u>Multi-Year Waiver & Non-Binding Guidelines:</u></p> <ul style="list-style-type: none"> • The proposal applies to existing and future MEAs. Specific trade measures in MEAs (between parties or <i>vis-à-vis</i> non-parties) may be recognized, on a case-by-case basis, as exceptional circumstances qualifying for multi-year waivers under Article IX (Decision-Making) of the Marrakesh Agreement Establishing the WTO. The multi-year waivers could be reviewed annually to determine if the exceptional circumstances which led to them still exist, and if their terms and conditions continue to be met. The approach overcomes the need to define an MEA • Non-binding guidelines for the application of a waiver would provide both <i>ex ante</i> predictability for MEA negotiators and set parameters for dispute settlement panels to consider. Under the guidelines, specific discriminatory trade measures would be examined against the following criteria: <ul style="list-style-type: none"> - Necessity; - least trade restrictiveness; - effectiveness; - proportionality; - the degree of scientific evidence. • Non-specific trade measures pursuant to MEAs, and unilateral trade measures, would remain subject to the status quo. In a <i>quid pro quo</i> for the opening of an "environmental window" for specific trade measures under MEAs, "WTO Members shall formally agree not to in future resort to the use of non-specific measures pursuant to MEAs and the use of unilateral extra-jurisdictional trade measures to protect extra-jurisdictional environmental resources." • The rights of WTO Members to resort to WTO non-violation dispute settlement action would be preserved for measures granted waivers.

<p>CANADA</p> <p>[WT/CTE/M/10 & OTHERS]</p> <p>Also circulated at March 1999 WTO High Level Symposium on T&E</p>	<p><u>Principles and Criteria Approach:</u></p> <ul style="list-style-type: none"> • Approach to assist WTO panels in assessing MEA trade measures & MEA negotiators in contemplating the use of trade measures. It includes (1) MEA qualifying principles, and (2) criteria for determining the need for trade provisions in MEAs. • MEA qualifying <u>principles</u> consist of the MEA: (1) being open to all countries; (2) reflecting broad-based international support; (3) precisely drafting those provisions that specifically authorize trade measures; (4) permitting trade with non-parties on the same basis as parties, when non-parties provide equivalent environmental protection; and (5) negotiators having explicitly considered the criteria for the use of trade measures. • The <u>criteria</u> consist of: (1) trade measures being chosen only when effective and when other alternative measures are either considered ineffective in achieving the environmental objective, or ineffective without a trade component; (2) trade measures not being more trade-restrictive than necessary to achieve the environmental objective; and (3) trade measures not constituting arbitrary or unjustifiable discrimination.
<p>CHILE</p> <p>[WT/CTE/W/2, 16 FEBRUARY 1995]</p>	<ul style="list-style-type: none"> • The United Nations Convention on the Law of the Sea (UNCLOS) sets an important precedent in transferring to GATT/WTO all competence in matters relating to subsidies and restrictive trade practices. While GATT/WTO is not accorded competence in environmental aspects of UNCLOS, for which a specific DSM exists, it has competence over the trade aspects. This approach helps ensure convergence of the aims of MEAs and WTO while safeguarding their respective spheres of competence and overcoming problems of overlapping jurisdiction.
<p>EUROPEAN COMMUNITIES</p> <p>[WT/CTE/W/170, 19 OCTOBER 2000]</p>	<ul style="list-style-type: none"> • An MEA is "a legally binding instrument the aims of which include environmental protection, open to all countries concerned, and relevant to the aims set out in the headnote of GATT Article XX and subparagraphs (b) and (g). To avoid lacunae, relevant regional agreements, such as regional fisheries agreements, should also be covered." <p><u>Reversal of the Burden of Proof / Code of Good Conduct / Other:</u></p> <ul style="list-style-type: none"> • Consensus on Basic Principles on WTO Rules and MEAs: <ul style="list-style-type: none"> - The WTO and MEAs should be mutually supportive; - the best way to solve international environmental problems is multilaterally; - multilateral environmental policy should be made within MEAs and not in the WTO; - conflict between Parties to an MEA should be solved within the MEA; and - WTO rules should not be interpreted in clinical isolation of complementary bodies of international law, including MEAs.

	<ul style="list-style-type: none"> • Clarification that MEAs are not Subordinate to WTO Rules: Confirmation that WTO rules and MEAs are separate but equal bodies of international law, and MEAs are not subordinate to WTO rules or vice versa. • Accommodation Mechanism for Specifically Mandated Trade Measures Taken Pursuant to MEAs: To accommodate specifically mandated trade measures taken pursuant to MEAs, a possibility would be to reverse the burden of proof under GATT Article XX. Under this proposal, a country challenging a measure taken by a trading partner would have to prove that that measure does not meet the conditions of Article XX. • Dialogue with MEA Secretariats: Dialogue with MEA Secretariats undertaken in the CTE is very useful and should be continued for conflict prevention. • Code of Good Conduct: A Code of Good Conduct for the use of trade measures in an MEA may help develop a mutually supportive relationship between MEAs and WTO rules, and avert potential conflict. The Code would need to be jointly developed and owned by the WTO, MEA Secretariats, and UNEP.
<p>JAPAN</p> <p>[WT/CTE/W/31, 30 MAY 1996]</p>	<p><u>Non-Binding Interpretative Guidelines / Dialogue and Coordination:</u></p> <ul style="list-style-type: none"> • Guidelines should be developed as a reference for future MEA negotiators, and to help assess the compatibility of MEA trade measures with the WTO Agreement (in light of Article XX of GATT 1994). • Three sets of criteria should be incorporated in the guidelines: <ul style="list-style-type: none"> 1.a (i) An MEA should be open to any country sharing the environmental objective of the agreement; (ii) an MEA should reflect, through adequate participation, the interests of major parties concerned, such as parties with substantial trade interests, actual and potential major producers and consumers of the materials concerned; (iii) an MEA should specifically mandate the use of trade measures. Their content and conditions for application should be transparent and clearly defined; (iv) the trade measures taken pursuant to the MEA should not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade (the preamble of Article XX). 1.b (i) an MEA should have as its environmental objective protecting an irreplaceable "part of the natural system of the earth"; (ii) the trade measure taken pursuant to the MEA to achieve its environmental objectives should be scientifically based, should have no effective alternatives and the minimum trade restricting or distorting effect; (iii) the trade measures taken pursuant to the MEA should be applied in a way that minimizes their trade restrictive or distorting effect and only when no effective alternatives exist to achieve the environmental objective.

2. With respect to (1.b), Decisions made by Parties to an MEA should be taken into account if the MEA meets the criteria of (1.a).

- **Enhanced dialogue and coordination between the WTO and MEAs:** The CTE should invite MEA Secretariats to brief it on their trade measures, and should itself express its views on trade measures contemplated in the new MEAs, or in amendments of existing agreements. UNEP could be involved in the dialogue.

NEW ZEALAND

**[WT/CTE/W/20,
15 FEBRUARY 1996]**

Understanding:

- That would be applicable across the entire WTO Agreement that allows for the accommodation of trade measures based on their conformity with both procedural and substantive criteria, reflecting the policy context in which a measure is taken.
- The procedural criteria would ensure that measures to be accommodated are taken in the context of cooperative international agreements between concerned countries contributing to the environmental problem and its solution. They could stipulate that MEAs reflect a genuine international consensus by requiring: (1) negotiation and participation in an MEA to be open on equitable terms to all interested countries; (2) broad participation of interested countries in both geographical and level of development terms; and (3) adequate representation of consumer and producer nations of the products covered.
- The substantive criteria would ensure that measures necessary for environmental protection are not unnecessarily disruptive to trade. They would include "effectiveness", "least-trade restriction/distortion", and "proportionality."
- **"Specific trade measures" between parties** to an MEA (MEA that meets the procedural criteria) would be codified to prevail over WTO rules to the extent of the inconsistency between them (NAFTA Article 104 approach). Such measures could also be jointly notified to the WTO by the parties. The WTO's DSM would not be available to challenge the notified measure, and disputes could then be taken to the DSM of the MEA. To avoid unintended interpretations, Members would need to clearly define the nature of the accommodated measure, the products it covers and its duration.
- For **"non-specific trade measures" between parties** to an MEA (MEA that meets the procedural criteria), the principles of international law would apply (such as that of specificity). They would be accommodated, if they meet the substantive criteria, through a waiver or through dispute settlement. Trade measures falling within this category could be notified to WTO by the country taking the measure. If the country on whom the measures are imposed agrees to them, they could be jointly notified, and the procedures outlined for specific measures would then apply.
- **Measures against non-parties** should only be accommodated when specifically mandated by an MEA. The Member imposing the measure should notify it to WTO, with the possibility of joint notification by affected parties in case of consensual application (where "specific trade measures track" between parties would then be used). Non-specific measures would be addressed through a WTO waiver, or an amendment to the MEA to explicitly authorize the measure.

	<ul style="list-style-type: none"> • For other bilateral or regional environmental agreements (dealing with transboundary, instead of global, problems for instance), the same approaches could be used. Unilateral measures should be avoided, or WTO waivers sought for them. Sanctions (trade measures applied on products unrelated to those causing environmental harm), applied either on non-parties or non-complying parties, could be addressed through existing GATT Article XXI (Security Exceptions) or XIVbis (Exceptions to the Rule of Non-Discrimination) that cover actions mandated under the United Nations Charter.
<p>NEW ZEALAND</p> <p>[WT/CTE/W/162, 10 OCTOBER 2000] AND [WT/CTE/W/180, 9 JANUARY 2001]</p>	<p><u>Consultative Mechanism / Dialogue:</u></p> <ul style="list-style-type: none"> • It is important to encourage the clear drafting of future-trade-related provisions in MEAs, as well as the creation of robust MEA DSMs. • Voluntary Consultative Mechanism: It is important that consultation with the country/countries on which trade measures are to be applied be undertaken. A consultative process could assist in providing the countries involved with an opportunity to consider a range of policy instruments suitable to resolve the specific environmental problem. It should assist in identifying first-best policy options, targeted at the source of the environmental problem, and in understanding different points of view. The mechanism would minimize conflict between parties on trade and environment policies, while avoiding inefficient environmental and economic outcomes. <ul style="list-style-type: none"> - The mechanism could be put to wide use, allowing for consultations with significant non-parties, as well as on global environmental problems not covered by an MEA. - WTO Members should consider including VCMs in new MEAs, and using VCMs prior to applying trade measures under existing ones. • Informal Mechanism for Dialogue: An informal mechanism for dialogue and discussion of trade and environment issues could be set up, and involve UNEP, the WTO, MEA Secretariats, non-governmental organizations (NGOs), and industry. Such a mechanism would allow interested parties to develop a better understanding of the trade and environment linkage (including the relationship between the WTO and MEAs), in a forum which is not a negotiating body. The general aim would be to devise mutually supportive trade and environment policies.
<p>SWITZERLAND</p> <p>[WT/CTE/W/139, 8 JUNE 2000]</p> <p>AND</p>	<p><u>Mutual Supportiveness and Deference:</u></p> <ul style="list-style-type: none"> • An interpretative decision should be adopted to clarify that both trade and environmental regimes should focus on their primary areas of competence, while showing deference to each other. • While assessing whether a specific trade measure is arbitrarily discriminatory or protectionist falls fully within the WTO's competence, determining the legitimacy of an environmental goal and the necessity and proportionality of the measure to achieve this goal must remain within the competence of the MEA.

**[WT/CTE/W/168,
19 OCTOBER 2000]**

- A trade measure provided for by an MEA should benefit from a *presumption of WTO conformity* (eg. should be determined to be "necessary" to protect the environment), but the *implementation* of such a measure should remain subject to WTO requirements (to not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade).
- The MEAs towards which deference should be paid could be identified on the basis of: being open to all countries; reflecting broad-based international support via their actual membership, and the precision with which provisions requiring or authorizing the use of trade-related measures are drafted.

ANNEX

LIST OF DOCUMENTS UNDER ITEMS 1&5 SUMMARIZED IN THIS NOTE⁸

Member / Document Symbol	Date Issued
New Zealand [WT/CTE/W/180]	10 January 2001
European Communities [WT/CTE/W/170]	19 October 2000
Switzerland [WT/CTE/W/168]	19 October 2000
New Zealand [WT/CTE/W/162]	10 October 2000
Switzerland [WT/CTE/W/139]	8 June 2000
ASEAN [WT/CTE/W/39]	24 July 1996
Japan [WT/CTE/W/31]	30 May 1996
New Zealand [WT/CTE/W/20]	15 February 1996
Chile [WT/CTE/W/2]	16 February 1995

Member Non-Paper	Date Issued
Non-paper by the United States	11 September 1996
Non-paper by Hong Kong	22 July 1996
Non-paper by India	23 July 1996
Non-paper by Egypt	18 June 1996
Non-paper by Korea	12 June 1996
Non-paper by Switzerland	20 May 1996
Non-paper by the European Communities	19 February 1996

⁸ As previously stated, Canada's contribution to WTO High Level Symposium on Trade and Environment, held in March 1999, is also summarized in the Note. It was presented to the CTE in detail in July 1996 (WT/CTE/M/10) and in several other meetings.