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on the Trade and Environment Issues Contained in
Paragraphs 31 and 32
of the WTO Doha Ministerial Declaration**

*Project on Building Capacity for Improved Policy Making and Negotiation on Key Trade
and Environment Issues*

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Background paper

**Briefing note on recent discussions on the issues
contained in Paragraph 32 of the WTO Doha
Ministerial Declaration**

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Introduction

1. In paragraph 32 of the WTO Doha Ministerial Declaration (DMD), the Committee on Trade and Environment (CTE) was instructed, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules, and the Committee was instructed to report to the Fifth Session of the Ministerial Conference (10-14 September 2003 in Cancun, Mexico), and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.

2. At its last meeting on 7 July 2003, the CTE regular session adopted its report to the Cancun Ministerial (the "CTE Cancun Report").¹ The CTE Cancun Report notes Canada's proposal to review the work programme of the CTE, claiming that this has remained unchanged since 1994 and some of its items have generated very little interest.²

A. PARAGRAPH 32(i)

3. The CTE has discussed the two aspects of paragraph 32(i) separately:

- a) The effect of environmental measures on market access especially in relation to developing countries, in particular the least developed among them ("market access");
- b) The situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development, the so called "win-win-win" situations. This aspect has been discussed sector by sector, focusing on: agriculture, energy, fisheries, and forestry ("sector analysis").

A.1. PARAGRAPH 32(i) - THE EFFECT OF ENVIRONMENTAL MEASURES ON MARKET ACCESS

4. The importance of improved market access is stressed in Paragraph 2 of the Doha Ministerial Declaration which states that "international trade can play a major role in the promotion of economic development and the alleviation of poverty", and in this context enhanced market access has an important role to play. Discussions under Paragraph 32(i) focussed on how to design legitimate environmental measures in a manner appropriate to development concerns.

¹ Committee on Trade and Environment (CTE) *Report to the 5th Session of the WTO Ministerial Conference in Cancun: Paragraphs 32 and 33 of the Doha Ministerial Declaration*, 11 July 2003, WT/CTE/8. See also CTE Minutes of Meetings WT/CTE/M/29-34.

² WT/CTE/8, para 2.

5. The debate within the CTE on this subject has mainly developed around the issues put forward by a paper submitted by India,³ which was supported by several other Members, including The Philippines and Thailand.⁴ India's paper focused on the negative effects of environmental measures on market access of developing countries, and suggested a number of steps to take in order to mitigate these effects and to ensure greater market access for environmentally friendly products from developing countries.

6. The paper highlighted how environmental measures in major export markets may hamper the entry of developing country goods that are in themselves environmentally friendly. India cited jute packaging as an example. Despite the fact that jute, being biodegradable, is an excellent environmentally sound packaging material, goods exported with jute packaging are not able to meet the eco-packaging requirements in developed countries because these requirements are not designed with jute in mind. A similar case related to packaging materials made from wood taken from sustainable forestry or plantations. These packaging materials fail to meet environmental requirements in developed countries relating to restrictions on the use of tropical timber, such as requirements for cardboard boxes imposing a certain recycled content. Another case cited in the Indian paper concerned traditional farming practices and organic certification. Farming without the use of chemical fertilizers and pesticides is quite common in developing countries. However, food products made with such traditional practices find it difficult to obtain certification for organically-produced produce or meet the high standards in developed countries because of requirements for documentation and traceability.

7. Several Members agreed that there was the need for environmental measures designed to address local environmental problems in importing countries to take account of the particular environmental and developmental context to which they applied in exporting countries, as underlined also by Rio Principle 11⁵. It was suggested to add flexibility into the design of environmental measures, for example by providing exceptions for environmentally-friendly products, or for environmental standards in exporting countries which are equivalent in effect to the ones in the importing country, although different in themselves.

8. A number of ways to mitigate the negative effects of environmental measures on market access for developing country were proposed. These included: the involvement at an early stage of developing countries in the design of environmental measures; longer time frames for compliance; dissemination of information; technical assistance; and the need to recognise the equivalence of environmental measures in developing countries.

9. Developing countries face numerous difficulties in complying with environmental requirements in export markets. Among the reasons, acknowledged in India's paper, why developing countries are more vulnerable to the adverse effects of environmental measures on market access and competitiveness are: (a) lack of infrastructure and monitoring facilities; (b) limited technology choices and inadequate access to technology; (c) inadequate access to environmentally friendly raw materials; (d) inadequate access to information; and (e) the fact that environmental requirements are highest in the sectors of export interest to developing countries

³ The effects of Environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, Submission from India on Paragraph 32(i) of the Doha Ministerial Declaration, WT/CTE/W/207, 21 May 2002.

⁴ See WT/CTE/M/29, paras 17 and 23 respectively.

⁵ Principle 11 of the Rio Declaration states that "environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".

and where they tend to have a comparative advantage (such as textiles, leather and footwear, forestry and food products).

10. Discussions highlighted how the adverse effects that stringent environmental measures can have on market access of developing countries are particularly felt by small and medium sized enterprises (SMEs).⁶ In fact, with limited capacity to bring additional capital, managerial and technological constraints, and higher cost of compliance, SMEs face additional difficulties. Several Members have underlined the particular hardships encountered by SMEs, and the need to address these constraints with specific actions, including technical assistance and technology transfer⁷. It has been pointed out how developing countries have very few choices, and their responses seem to be limited to either adapting to these requirements by modifying their production techniques or searching for alternative markets or losing the market. Evidence seems to suggest that faced with these options, SMEs usually drastically reduce or even give up exports and redirect their sales to the national market.

11. There was broad agreement among developing countries on the need for longer time frames and flexibility in complying and adapting to the various environmental measures and for a greater involvement of developing countries in the development of environmental measures. It is useful to note that at the UNCTAD “Expert Meeting on Environmental Requirements and International Trade” (Geneva, 2-4 October 2002)⁸, some experts felt that extended adjustment periods for developing countries, especially for SMEs, should be considered under WTO rules and by standard-setting countries, notably in cases where higher standards than internationally recognised ones are used, and when such standards are not pressing for health reasons.⁹ Some WTO Members underlined the need to place importance on the development phase of the measures so as to ensure that environmental requirements be developed and later applied in a manner so as to minimise trade effects. It argued that providing adequate time for adjustment, technical assistance or information, although appreciable, was only in the implementation phase. Some Members also underlined the importance of developing country participation in the work of international standard setting organisations, such as ISO, Codex Alimentarius Commission and others that related to environmental/health requirements.

12. Some Members agreed on the fact that while it was for the governments in developing countries to take advantage of the comparative advantage of their products (particularly environmentally friendly products in environmentally conscious markets), it was as important to safeguard the existing market access against unjustified environmental measures. It was suggested by Cuba that the CTE could look at the establishment of guidelines for the application of environmental requirements without affecting market access as a means of efficient and operational provision of special and differential treatment.¹⁰

13. The importance and the need for effective information gathering and dissemination about new environmental requirements to the exporting units were also underlined. There is, in fact, the need to improve the information flow regarding changes in environmental regulations and voluntary standards to enable exporters to have time to understand the changes and respond to them well in time. This issue also emerged during the UNCTAD “Expert Meeting on

⁶ See, for example, WT/CTE/M/31, para 45.

⁷ For further information see the reports of recent CTE meetings: WT/CTE/M/30, Report of the meeting held on 13-14 June 2002; WT/CTE/M/31, Report of the meeting held on 8 October 2002; WT/CTE/M/32, Report of the meeting held on 14 February 2003.

⁸ Relevant information regarding the meeting, as well as numerous country contributions, are available at: www.unctad.org/trade_env/.

⁹ See WT/CTE/M/31, paras 56, 58.

¹⁰ See WT/CTE/M/31, para 54.

Environmental Requirements and International Trade” (Geneva, 2-4 October 2002)¹¹ and the OECD Global Forum on Trade workshop (New Delhi, 27-28 November 2002)¹². Serious gaps remain in information gathering and dissemination. With regard to the notification system under the SPS and TBT agreement of mandatory technical regulations, not all Enquiry Points in member countries seem to function well in reacting to relevant notifications and disseminating the information to exporters. Moreover, there is no obligation to notify to the WTO voluntary standards and buyers requirements, and information clearinghouse services for these do not exist as yet. Reference was made, in this respect, to the creation of “Sustainable Trade and Innovation Centres”.¹³

14. Developed country Members agreed about the importance of the points put forth by India and said they were prepared to engage in discussions on these issues. Other Members highlighted the importance of market access to products of export interest to developing countries¹⁴ and welcomed the suggestion that developing countries identify sector-specific examples of environmental measures impacting export performance, so that positive measures such as capacity building, technology transfer and technical assistance could be directed at finding means for exporters in developing countries to meet requirements of other countries. They encouraged standard-setting bodies to find ways to further involve developing countries in the early stages of the standard-setting process. At the same time, they underlined that Members have the right to set their own appropriate level of environmental protection and measures were generally put in place to address legitimate environmental concerns. In their view, the answer to concerns about reduced market access lies in enabling exporters to meet such standards, not in weakening them. Moreover, some Members considered that there was sufficient scope in existing WTO agreements to ensure that environmental measures do not unduly restrict developing country exports and that certain issues raised in India’s paper could already be addressed under the TBT Agreement and in the SPS Agreement.

15. To address developing countries' need for support to effectively participate in pre-standard setting consultations and implement pro-active adjustment strategies to strengthen producers' capacities to respond to health and environmental requirements, UNCTAD is currently exploring the possibility of the creation of a Consultative Task Force (CTF) on environmental requirements and international trade. The CTF would be an open-ended multi-stakeholder forum of government, private sector and NGO representatives from developed and developing countries that would aim at (i) discussing ways of and making a contribution to improving collection and dissemination of information on environmental requirements, notably on voluntary standards, and analysing key underlying trends; (ii) reviewing "best practices" in the development and implementation of regulations and standards that may have significant implications for developing countries and fostering active participation of developing countries in pre-standard-setting consultations in export markets; and (iii) discussing pro-active adjustment policies and measures in developing countries. An exploratory meeting of experts that discusses and further develops the concept note on the CTF is foreseen for the Fall of 2003, as well as the initiation of illustrative activities in the main activity clusters of the CTF, i.e. information gathering and dissemination; analysis of best or good practice in standard setting; and guidance for pro-active adjustment strategies in developing countries.¹⁵

¹¹ Relevant information regarding the meeting, as well as numerous country contributions, are available at: www.unctad.org/trade_env/.

¹² See the Report of the workshop (COM/ENV/TD(2002)106) and WT/CTE/GEN/3.

¹³ See WT/CTE/8, para 8.

¹⁴ See e.g. statement by Malaysia, WT/CTE/M/32, para 29.

¹⁵ Further information is accessible on the web site of the Trade, Environment and Development branch of UNCTAD at: http://r0.unctad.org/trade_env/test1/projects/taskforce.htm

A.2. PARAGRAPH 32(I) - SITUATIONS IN WHICH THE ELIMINATION OR REDUCTION OF TRADE RESTRICTIONS AND DISTORTIONS WOULD BENEFIT TRADE, THE ENVIRONMENT AND DEVELOPMENT

16. Members in the CTE have discussed the issue of the elimination or reduction of trade restrictions/distortions, the so-called win-win-win situations (win for trade, win for development and win for environment) sector by sector, focusing on agriculture, energy, fisheries and forestry.

Agriculture:

17. The need to protect the environment has been recognized as one of the non-trade concerns¹⁶ explicitly mentioned in the Preamble of the DMD. Many proposals made to the Committee on Agriculture, Special Session¹⁷ have highlighted that protection and trade-distorting domestic support policies encourage environmentally harmful agricultural practices such as intensive farming, including high use of fertilizers and pesticides. The result is resource degradation and environmental stress. Furthermore, trade-distorting support, including export subsidies, can have negative environmental effects in third countries, particularly developing countries.

18. Research has indicated that structural price depression caused by export subsidies for agricultural products in OECD countries¹⁸ has two major effects on developing country farmers: First, below-cost imports drive developing country farmers out of their own local markets. Second, farmers who sell their products to exporters find their global market share undermined by the lower-cost competition.¹⁹ For instance, levels of US dumping of agricultural products (expressed as the percentage of the export price remaining below production costs) have recently reached about 40 percent for wheat, 25-30 percent for corn/maize, and 30 per cent for soybeans.²⁰ Most of the related support measures were directed towards large companies, in a vertically integrated market, where the cost of each of the different stages of production, processing and marketing are internalised, and there is no price discovery at different stages of production, and there is considerable cross-subsidization. The elimination of trade and production distorting subsidies would allow international commodity prices to reach market levels, thereby increasing return from agriculture and encouraging investment and production in developing countries.

19. In the agricultural negotiations, the debate has not centred on the question whether non-trade concerns such as the protection of the environment are legitimate policy objectives. Rather, the debate has been about what are the appropriate and effective instruments to achieve these objectives. A number of Members (the Cairns Group of agricultural exporting countries) consider that targeted, transparent and non-, or no more than minimally, trade-distorting measures are effective tools. Thailand was among the major agricultural exporting countries which had faced numerous environmental requirements from developed country trading partners.²¹ Some other countries (so-called "Friends of Multifunctionality") argue that they need some trade-distorting support and border protection to achieve their non-trade objectives, including the protection of the

¹⁶ Other non-trade concerns raised in the WTO negotiations include food security, livelihood security, poverty alleviation, rural development, food safety and animal welfare. See Committee on Agriculture Special Session, *Negotiations on Agriculture: Overview*, TN/AG/6, 18 December 2002, para 9.

¹⁷ For a survey of the specific proposals, see TN/AG/6.

¹⁸ Practically, all agricultural support measures, no matter whether domestic support, export subsidies or export credits, eventually lead to export price distortions, because they are fungible. Therefore, the theoretical distinction between 'trade-distorting' and 'non-trade-distorting' support is of extremely limited value in practice.

¹⁹ See Institute for Agriculture and Trade Policy, US dumping on world agricultural markets: Can trade rules help farmers? Cancun Series Papers, No. 1, accessible at www.tradeobservatory.org/pages/home.cfm

²⁰ Id.

²¹ See WT/CTE/M/29, para 23.

environment.²² There is also fairly wide support for the proposal to accept support measures, which are essential to encourage conservation measures in developing countries.²³

Energy

20. Governments have intervened in the energy sector through numerous direct and indirect financial and administrative instruments, on the basis of different policy goals, including: (i) achievement of energy security through maintenance of certain levels of domestic energy production and diversification of sources, (ii) maintenance of certain levels of employment, and (iii) generation of revenue.²⁴ Environmental protection is a more recent concern, and has begun to be a driver of energy policies especially in relation to the commitments under the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.

21. Discussions within the CTE have developed around the existing subsidy schemes in relation to policies developed to address climate change and limit CO₂ emissions. Some Members and one Observer (Saudi Arabia) consider that existing taxation and subsidy schemes in OECD countries are generally biased against petroleum products. They suggested that subsidies be removed and that fuel taxation be restructured so as to reflect carbon content. Other Members noted that the CTE is not the appropriate forum to discuss the impact of measures taken to mitigate climate change, preferring to pursue this issue under the auspices of the UNFCCC.

Fisheries

22. Discussion on this issue centred on whether the cause of global fisheries depletion was attributed to subsidies, or to poor fisheries management and open-access fisheries. Some Members, such as Japan²⁵, argued that poor fisheries management and open access fisheries, coupled with increasing world demand, create economic incentives to over fishing and lead to illegal, unreported and unregulated fishing, and are, therefore, the main cause of depletion of world fisheries resources. Thus, overcapacity would occur regardless of subsidies. The effect of subsidies on resources would thus differ depending on the status of resources and management. Moreover, subsidies may yield positive effects in terms of reducing capacity, for example through vessel buy-back programmes. Japan proposed to retain flexibility among products when determining the appropriate level of tariffs, taking into account the level of fisheries resources and the status of fisheries management. Japan also suggested that shrimp was the most important fisheries commodity for least developed countries.²⁶

23. Other Members (so-called “Friends of Fish”) were instead of the view that subsidies are the main cause of over-capacity and, therefore, a significant part of over-exploitation of fisheries.²⁷ While sound fisheries management is essential in reducing overcapacity, subsidies

²² In this regard, many developing countries have made the point that their non-trade concerns are of a fundamentally different dimension than those of developed countries. See TN/AG/6, para 9.

²³ For a more in-depth review of the environmental issues raised in the agriculture negotiations, see WTO document WT/CTE/GEN/8.

²⁴ For an overview of the energy sector see WT/CTE/W/200, "Environmental benefits of removing trade restrictions: The Energy sector", Note by the Secretariat, 18 September 2001.

²⁵ “Analysis on the Relationship between Fisheries Subsidies and Over-exploitation of Fisheries Resources”, WT/CTE/W/226, 24 April 2003, and “Sustainable Development and Trade of Forest and Fishery Products”, WT/CTE/W/222, 6 February 2003, submissions by Japan.

²⁶ See WT/CTE/M/32, para 42.

²⁷ Members include, *inter alia*, the United States, New Zealand, Peru, Chile, Argentina and Malaysia. See WT/CTE/M/32.

could impede this objective. Trade liberalisation, together with sustainable resource management, could stimulate more efficient production with more long-term benefits. Moreover, it was argued that tariffs are no substitute for efficient resource management.

24. Considering that negotiations on fisheries subsidies are taking place at the Negotiating Group on Rules (NGR), many Members felt that the NGR is the appropriate body for substantive discussions.

Forestry

25. Delegations recognised the importance of sustainable forest management, as also underlined in the WSSD Plan of Implementation. It was pointed out that the multiple benefits provided by forests (e.g. conservation of biological diversity, mitigation of global warming, prevention of soil erosion, etc.), and their interdependence with other sectors required a cross-sectoral approach. Therefore the need to include a discussion of trade-relevant elements.

26. Several Members expressed their concern about illegal logging. International trade of illegally harvested forest products could undermine conservation efforts in exporting countries. The importance of appropriate domestic regulation was emphasised, and the capacity to implement and monitor such regulation, and the need for technical assistance in this regard. It was as well pointed out that there is a need to analyse the root causes of illegal logging when discussing appropriate measures, and it was underlined that poverty and high indebtedness fuelled illegal exploitation of forestry resources and are at the root of the problem. Japan underlined the importance of labelling and certification of forestry products as an effective tool to address illegal logging and promote sustainable forest management. Brazil noted FAO forest certification work.²⁸ It was however pointed out by the International Tropical Timber Organisation (ITTO) that currently about 92 per cent of certified forests are located in developed countries. Thus, there is the need to facilitate the participation of developing countries in the process.

27. Some Members, while recognising the necessity of trade measures taken for the protection of forests and the promotion of sustainable forest management, questioned export restrictions imposed solely on unprocessed logs and not on processed wood products made of the unprocessed logs as well, and suggested that the consistency of such measures with the WTO agreements need to be analysed.²⁹ Others maintained that such measures constituted part of the country's sovereign right to protect its forest resources and were consistent with Article XX(g) of the GATT.³⁰

28. Japan³¹ asserted that there is a relationship between tariff levels and the degree of exploitation of forestry resources and claimed that it was crucial that each Member retained flexibility among products when determining the appropriate levels of tariffs, by taking into account such factors as the trends of domestic production and consumption and the international supply and demand of each product, while giving due consideration to the conditions and the management of forests. Other Members argued that tariff and non-tariff measures were no

²⁸ See WT/CTE/M/31, para 38.

²⁹ See statement by Japan, WT/CTE/M/32, para 17.

³⁰ Article XX of the GATT states that: "Subject to the requirement 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, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: "... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"

³¹ "Sustainable Development and Trade of Forest and Fishery Products", submission by Japan, WT/CTE/W/222, 6 February 2003.

substitute for efficient resource management and that tariff elimination would not inevitably lead to an exhaustion of natural resources. In addition, the focus on tariff levels would have implications and open up a possibility of discrimination with regard to processes and production methods (PPMs), which remained unacceptable to them. Lastly, it was underlined that the Negotiating Group on Market Access was the appropriate body to discuss the modalities of tariff reductions.

29. It should be noted that Japan, in cooperation with Indonesia, initiated an Asia Forest Partnership whose objective was to promote sustainable forest management in the Asian region. Under this partnership, partners were (i) to develop and enhance identification systems of legally harvested wood; (ii) to expand the information exchange on illegal logging and associated trade; and (iii) to promote effective measures in both importing and exporting countries in order to eliminate illegally harvested wood from trade.³²

B. PARAGRAPH 32(ii) - The relevant provisions of the TRIPS Agreement

30. Discussions on this topic have focused on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), including the protection of traditional knowledge (TK), access to genetic resources (GR) and the exclusion from patent protection of plants and animals under TRIPS Article 27.3(b). Several WTO Members believe that conflicts between the TRIPS Agreement and the CBD could arise at the implementation level. It was pointed out how, in the absence of clear provisions providing for a mutually supportive relationship of the TRIPS Agreement with Members' obligations under the CBD, the implementation of the TRIPS Agreement could result in systemic conflicts with the CBD.

31. There are concerns that the genetic resources and traditional knowledge of developing countries are often used commercially and/or patented in developed countries with little or no benefit to the owners of the genetic resources (the sovereign States, as per the CBD) or the traditional knowledge, and without their prior informed consent. Article 16(5) of the CBD recognizes that patents and other intellectual property rights (IPRs) may have an influence on the CBD implementation and requests Parties to cooperate in this regard to ensure that such rights are supportive of and do not run counter to the objectives of the Convention. The TRIPS Agreement makes no mention of the CBD or its principles. The TRIPS Agreement contains no provisions preventing a person from claiming patent rights in one country over genetic resources that are under the sovereignty of another country. In particular, the TRIPS Agreement contains no provisions allowing a Member to enforce fair and equitable sharing of benefits from the patenting of its own genetic resources abroad.³³

32. Several developing countries are of the view that, in order to avoid conflicts in implementation, an amendment of the TRIPS Agreement to accommodate some essential elements of the CBD would be necessary. It was proposed by India and others that the TRIPS Agreement be amended so that applications for patents relating to biological materials or to TK shall provide, as a condition to acquiring patent rights, (i) disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention; (ii) evidence of prior informed consent through approval of authorities under the relevant national regimes; and (iii) evidence of fair and equitable benefit sharing under the national regime of the country of origin.³⁴ Such measures would be fully in line with the provisions of the CBD and the

³² See WT/CTE/M/32, para 37.

³³ See e.g. WT/CTE/M/30, para 37.

³⁴ For example, see: WTO document IP/C/W/356 and statement by India, WT/CTE/M/30, para 8. See also comments by India and Peru, WT/CTE/M/32, paras 48-49.

recommendations of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation*³⁵ and would provide a legally binding defensive protection against "bad patents" based on misappropriation of genetic resources and TK, and facilitate benefit sharing. Peru further presented the Statement of Megadiverse Countries that the mechanism of access to genetic resources and traditional knowledge should ensure the conservation and sustainable use of biological diversity to the countries of origin with all types of benefits, including monetary benefits, transfer of technology, development of value added products, and an improvement of economies in favour of peoples, particularly local and indigenous communities.³⁶

33. Several Members underlined the need for positive protection, such as national *sui generis* systems for the protection of TK, TK registries and databases. Switzerland, among others, proposed the creation of a database on traditional knowledge that could be useful for authorities granting patents in determining the novelty of an invention associated with traditional knowledge.³⁷ In Switzerland's view, inscription of TK in a database could assist authorities since traditional knowledge is often transmitted orally. This could constitute an important step towards a better understanding of issues linked to traditional knowledge and to the sharing of benefits resulting from use of this traditional knowledge. There have also been many calls from developing country Members for an international framework, which would recognize protection of TK at the national and regional levels.³⁸

34. Some developed country Members recognised that, although there is no legal conflict between the TRIPS Agreement and the CBD, problems could arise in the implementation of the two legal orders. There was, however, no need to amend the TRIPS Agreement in their view. Both agreements need to be implemented in a mutually supportive way in order not to undermine their respective objectives, and in this connection sound national legislation is a key element. The United States argued that contractual systems, developed to protect sovereign rights over genetic resources or traditional knowledge, could render changes to the TRIPS Agreement unnecessary.³⁹

35. The European Communities expressed a willingness to examine and discuss the possible introduction of a system such as a "self-standing disclosure requirement" which would allow all WTO Members to keep track, at a global level, of all patent applications with regard to genetic resources for which they themselves had granted access. They claimed that such system would ensure transparency and would allow the authorities of countries granting access to their resources to keep track of patent applications linked to the use of these resources. With regard to the protection of traditional knowledge, the EC proposed to explore methods of documenting and sharing information on TK, such as databases and registers. They claimed that, when traditional knowledge is used as a basis for further innovations, disclosure of the original TK from which innovations are derived would be an important way of ensuring that holders of the TK share in the

³⁵ Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, in Decision VI/24 on Access and Benefit-sharing as related to Genetic Resources, CBD, COP-6, April 2002, The Hague, Netherlands at www.biodiv.org/decisions/. See also WT/CTE/M/30, para 11.

³⁶ The Megadiverse Countries include: Bolivia, Brazil, Colombia, Costa Rica, the People's Republic of China, Ecuador, Philippines, India, Indonesia, Kenya, Malaysia, Mexico, Peru, South Africa and Venezuela.

³⁷ IP/C/W/284, 15 June 2001, TRIPS Council, Review of Article 27.3(b): The View of Switzerland, Communication from Switzerland.

³⁸ For example, see document WT/CTE/W/156, IP/C/W/198, 14 July 2000, Protection of Biodiversity and Traditional Knowledge – The Indian Experience, Submission by India.

³⁹ IP/C/W/257, 13 June 2001, TRIPS Council, Views of the United States on the Relationship between the Convention on Biological Diversity and the TRIPS Agreement, Communication from the United States.

benefits.⁴⁰ Furthermore, the EC supported further work towards the development of an international *sui generis* model for legal protection of TK. The EC have noted they are willing to negotiate on disclosure of origin, while clearly setting limits for the terms under which any such requirements could be acceptable; recognise that the UPOV Convention was not the only valid *sui generis* system for plant variety protection; and acknowledge the rights of small farmers in developing countries to save, exchange and sell protected seeds under certain conditions.⁴¹

36. Recently, the Africa Group has submitted a paper to the TRIPS Council addressing the patenting of life forms, *sui generis* systems for the protection of plant varieties and protection of traditional knowledge.⁴² It was affirmed that "any protection of genetic resources and traditional knowledge will not be effective unless and until international mechanisms are found and established within the framework of the TRIPS Agreement. Other means, such as access contracts and data bases for patent examinations, can only be supplementary to such international mechanisms, which must contain an obligation on Members collectively and individually to prohibit, and to take measures to prevent, the misappropriation of genetic resources and traditional knowledge."⁴³ Moreover, it was stated "patents on life forms are unethical and the TRIPS Agreement should prohibit them, through modifying the requirement to provide for patents on micro-organisms and on non-biological and microbiological processes for the production of plants or animals. Such patents are contrary to the moral and cultural norms of many societies in Members of the WTO."⁴⁴ The paper analysed possible areas of agreement, and areas on which a common understanding was still to reach and called for progress to be made. It was proposed that the WTO adopt a Decision on traditional knowledge that would establish a WTO committee on TK and enforcement of rights of WTO Members.⁴⁵

C. PARAGRAPH 32(iii) - Labelling requirements for environmental purposes

37. Labelling requirements for environmental purposes have been the subject of discussion in the CTE and the Committee on Technical Barriers to Trade (TBT Committee) since they were established in 1995.⁴⁶ In approaching this issue in the context of the Doha Round of negotiations, WTO Members still have to reach an agreement on how to address the issue of labelling for environmental purposes in the CTE, while discussions on labelling in general take place in the TBT Committee. Some Members, considering the mandate contained in paragraph 32(iii) which instructed the CTE to give particular attention to labelling requirements for environmental purposes, argue that the CTE should make progress on environmental labelling. They are of the view that work in the CTE should not be conditional on progress in the TBT Committee, since it did not have a mandate specific to labelling for environmental purposes. Other Members, however, consider the TBT Committee the most appropriate forum to address WTO rules vis-à-vis labelling, and argue that the CTE should not pre-empt or duplicate the work carried out in the TBT Committee.

⁴⁰ WT/CTE/W/223, IP/C/W/383 (TRIPS Council), 17 October 2002, Review of Article 27.3(b) of the TRIPS Agreement, and the Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore, Communication from the European Communities, "A Concept Paper". See also statement by EC, WT/CTE/M/30, para 21.

⁴¹ See WT/CTE/M/31, para 74.

⁴² IP/C/W/404, 26 June 2003, Taking forward the review of article 27.3(b) of the TRIPS Agreement -Joint Communication from the African Group

⁴³ Id. at 2.

⁴⁴ Id.

⁴⁵ Annex I of document IP/C/W/404.

⁴⁶ See e.g. CTE, "Information Relevant to the Consideration of the Market Access Effects of Eco- Labelling Schemes" Note by the Secretariat, WT/CTE/W/150 29 June 2000; TBT Committee, "Notifications Related to Labelling (1 January 1995 – 31 August 2002)", Note by the Secretariat, G/TBT/W/183 8 October 2002; TBT Committee "Specific Trade Concerns Related to Labelling Brought to the Attention of the Committee Since 1995", Note by the Secretariat G/TBT/W/184 (and Corr.1) 4 October 2002.

38. Switzerland⁴⁷ had presented proposals for making progress on the work in the CTE on environmental labelling, suggesting that the Committee approached discussions in a structured way and examined a number of aspects with regard to environmental labelling, including definition of "eco-labelling." Some Members agreed on the necessity of agreeing on a common definition of eco-labelling. Several types of labelling for environmental purposes can be identified, according to their legal status (mandatory or voluntary); according to the rule-setting body (governmental or non-governmental); according to their geographic scope (national or international); according to the review mechanisms for criteria (static or dynamic); according to whether they use or not criteria based on non-product related processes and production methods (PPMs); and finally, according to whom they are directed towards, if ordinary consumers or professional consumers (enterprises, wholesalers and retailers).⁴⁸ The People's Republic of China noted that eco-labelling schemes were an effective environmental policy instrument provided they observed relevant WTO rules. It stressed the need for transparency, and the taking into account of developing country concerns in the development and implementation of eco-labelling schemes.⁴⁹ China and other Members cited harmonisation, equivalence and mutual recognition as ways to address concerns raised by diverse eco-labelling schemes.⁵⁰

39. Although most Members agreed on the need to better understand the WTO disciplines that had a bearing on labelling, for example those in the TBT Agreement, many did not see a need to negotiate new or additional disciplines. Moreover, while most Members agreed on the need to have a structured approach to the discussions and to avoid duplications, many Members did not see the need to clarify existing rules with regard to labelling, and considered the TBT Committee the most suitable forum for discussing labelling.⁵¹

40. It has been noted in studies undertaken by the OECD, UNCTAD and other organisations that the use of the various types of environmental labelling schemes has increased considerably in recent years.⁵² The use of such schemes is no longer confined solely to developed countries as developing countries have started to design such schemes themselves, including China and Thailand.⁵³ There are, however, growing concerns of the effect that environmental labelling schemes could have on international trade.⁵⁴ They could become a serious hurdle both for market access and even more for market entry. Although the majority of environmental labelling schemes are voluntary in nature, they could become a *de facto* product standard. They could be likely to discriminate between imported and domestically produced goods, for example if the local industry influences the choice of products they cover as well as the selection of criteria on which they are based. Eco-labels may also be discriminatory against foreign producers in the process of conformity assessment by, for example, placing undue restrictions on the conformity assessment bodies to be used. In addition, when requirements vary from one market to another, compliance with divergent requirements can pose special difficulties for developing country producers. Several developing country Members claim to have experienced significant difficulties due to the

⁴⁷ Labelling for environmental purposes, Submission by Switzerland, WT/CTE/W/219, 14 October 2002.

⁴⁸ See e.g. WT/CTE/W/225, Labelling for environmental purposes, submission by the EC, para 18.

⁴⁹ See WT/CTE/M/31, para 26. See also statement of Japan in WT/CTE/M/32, para 54.

⁵⁰ See e.g. views of Korea (citing Switzerland, Canada, and EC), Indonesia, WT/CTE/M/31 paras 15 and 17 and India in WT/CTE/W/207.

⁵¹ See, e.g. views of Canada in WT/CTE/W/229, The Philippines in WT/CTE/M/31 para 27, Thailand in WT/CTE/M/33 para 61 and the US, WT/CTE/M/31 para 24.

⁵² See for e.g. OECD, "Developing-country access to developed-country markets under selected eco-labelling programmes", COM/ENV/TD(2003)30.

⁵³ Examples of developing countries that have developed voluntary eco-labelling schemes and are members of the Global Eco-labelling Network (GEN) are Brazil, China, India, Indonesia, Korea, Malaysia and Thailand. See WT/CTE/W/225, para 4.

⁵⁴ See, e.g. statement by Japan, WT/CTE/M/31, para 14.

complexity and diversity of eco-labelling requirements in export markets. The proliferation of different types of eco-labelling schemes could not only be confusing, but also increase the cost of implementation and compliance for producers, especially in developing countries.⁵⁵

41. Some WTO Members argued that the increase of eco-labelling schemes reflected the increasing interest of consumers in developed countries in obtaining information on environmental aspects. Moreover, the importance of consumer information related to sustainable consumption had been recognised at the recent World Summit on Sustainable Development (WSSD)⁵⁶. Eco-labelling could represent a useful way to provide consumers with information about the environmental impact of purchased products, as well as provide producers in developing countries market access, and possibly a price premium, for products that are environmentally friendly.⁵⁷ Where certification is needed, though, the high cost for compliance assessment may not always be balanced by commercial benefits. Many countries remain concerned about the fact that eco-labels may act as non-tariff barriers. High costs and technical difficulties in obtaining labels, along with lack of information, are pointed out as major constraints, especially for small producers in developing countries.⁵⁸

42. Past studies have found no evidence of changes in trade flows arising from eco-labelling programmes⁵⁹. Nevertheless, concerns remain as to potential effects, especially with respect to mandatory environmental labelling based on life-cycle approaches that incorporate non-product-related PPMs. Some developing country Members fear that the use of these labels could undermine what is perceived to be a competitive advantage of developing countries. Several Members implied that such an approach may open the backdoor for consideration of the precautionary principle that goes beyond the current approach in the SPS Agreement.⁶⁰

43. The European Communities (EC) have recently proposed to start discussions on *voluntary* eco-labels based on the life-cycle approach.⁶¹ Within the CTE, the EC aim at obtaining recognition in the WTO that “the use of voluntary eco-labelling schemes based on life-cycle approach is legitimate within the rights and obligations of the WTO Agreements”.⁶² It was argued that an internationally agreed standard exists for such schemes, notably the ISO 14024 of 1999, and “the use of relevant international standards when preparing, adopting and applying such schemes ensures that such schemes do not become unnecessary barriers to trade”.⁶³ Moreover, the EC proposed that “those using such schemes should to the extent possible be encouraged to reflect the principles of the TBT Code of Good Practice, including its objectives of transparency, in their operations, and to keep their schemes under review”.⁶⁴ Lastly, the EC suggested considering the necessity to discuss the possibility of notification of existing and new voluntary labelling schemes under the TBT Agreement. This proposal had been previously tabled at the TBT Committee in

⁵⁵ See, e.g. statement by Indonesia, WT/CTE/M/31, para 16.

⁵⁶ Paragraph 14(e) of the WSSD Plan of Implementation encourages to “Develop and adopt, where appropriate, on a voluntary basis, effective, transparent, verifiable, non-misleading and non-discriminatory consumer information tools to provide information relating to sustainable consumption and production, including human health and safety aspects. These tools should not be used as disguised trade barriers”. See EC, WT/CTE/W/225, para 13.

⁵⁷ See e.g. statement by Canada, WT/CTE/M/31, para 11.

⁵⁸ See WT/CTE/W/225, para 9.

⁵⁹ A study of OECD in 1997 on the impact of eco-labelling schemes on trade (OECD/GD/(97)105, Eco-labelling: Actual effects of selected programmes) revealed that the information gathered during the course of the study did not show hard evidence of changes in trade flows arising from the selected eco-labelling programmes.

⁶⁰ See statement by Argentina, WT/CTE/M/31, para 83.

⁶¹ “Labelling for environmental purposes”, Submission by the European Communities under Paragraph 32(iii), WT/CTE/W/225, 6 March 2003.

⁶² See WT/CTE/W/225, para 28

⁶³ WT/CTE/W/225, paras 22 and 28.

⁶⁴ WT/CTE/W/225, para 28. See also statement by China WT/CTE/M/31, para 26.

June 2002.⁶⁵ The EC proposed that "the Committee could examine transparency and consultation provisions in the TBT Agreement, and explore ways to enhance their effectiveness",⁶⁶ concerning both mandatory and voluntary labelling. Pointing out that, in the absence of an obligation to notify voluntary labelling schemes to the WTO, transparency provisions under the TBT Agreement appear weaker than for mandatory labelling, the EC proposed that "the TBT Committee examines how to enhance the effectiveness of transparency provisions relating to voluntary labelling".⁶⁷

44. Progress of the discussions on this issue may be beneficial to developing countries, because as long as eco-labels remain outside the scope of WTO agreements they can lead to inappropriate discrimination. Nevertheless, several WTO Members expressed doubts about the EC proposal. Some Members asked the EC to further elaborate the proposal for a system of notification of voluntary standards, since it did not appear clear what kind of obligations it would generate and how it would operate. In addition, it was reaffirmed that the proper forum for these discussions was the TBT Committee.⁶⁸ Although the EC had clarified that they did not intend to renegotiate the TBT Agreement through the backdoor, or to extend the discussion on PPMs, several WTO Members remained unconvinced of the fact that the life-cycle approach would not relate to PPMs. Moreover many Members expressed concerns with regard to the proposed statement in respect of life-cycle approaches being legitimate within the right and obligations of WTO agreements. They would not accept any statement implying that these schemes are automatically legitimate without further consideration whether they are consistent with the obligations of the TBT Agreement.

45. At the CTE Meeting of 7 July 2003, the EC, as part of their comment on the first draft of the Cancun Report, proposed that the CTE should hold, before the end of 2004 and in addition to its usual schedule of meetings, (three) "dedicated sessions" to engage in dialogue on governmental and non-governmental eco-labelling schemes, notably those based on life-cycle analysis.⁶⁹ Japan and Canada were open to the possibility of further discussion on this issue. However, other Members – including Australia, Brazil, China, Hong Kong, Indonesia, Malaysia, the Philippines, Thailand and the US – opposed the EC's proposal. Reiterating comments made in earlier meetings, these Members expressed concern that a life-cycle approach would introduce the issue of PPMs, and continued to call on the TBT Committee as the appropriate forum for discussions on labelling.⁷⁰

⁶⁵ Labelling, submission by the European Communities, WT/CTE/W/212 or G/TBT/W/175, 12 June 2002.

⁶⁶ See Id. at para 6.

⁶⁷ See Id. at para 7

⁶⁸ See e.g. WT/CTE/M/31, Philippines at para 27, and Malaysia at para 33.

⁶⁹ See JOB(03)/130.

⁷⁰ See International Centre for Trade and Sustainable Development, "WTO ENVIRONMENT COMMITTEES STUCK ON ROLE OF MEA SECRETARIATS, ECO-LABELLING". Bridges Weekly, 10 July 2003, available at <http://www.ictsd.org/weekly/03-07-10/story2.htm>.