Chapter 3
GATT/WTO and the Environment
International trade law is embodied largely in the rules of the *World Trade Organization* (WTO), the international organization established to provide "the common institutional framework for the conduct of trade relations among its Members...".\(^1\) WTO seeks to achieve its main objective and function – to facilitate the predictable and free flow of international trade – through the regulation of trade restrictions. In fact, the WTO governs *trade* only in so far as it regulates *trade restrictions*.\(^2\)

The multilateral trading system (MTS) originated in the wake of the Second World War as the *General Agreement on Tariffs and Trade* (GATT 1947). Though GATT was originally to have organizational backing in the form of an *International Trade Organization* (ITO), efforts to achieve an organizational setup for international trade relations failed.\(^3\) For almost half a century, GATT 1947, amended frequently and applied provisionally among its Contracting Parties, remained the 'principal regulator' of international trade relations. The central focus of GATT was on tariff reductions. The system was developed through a series of multilateral trade negotiations (MTNs),\(^4\) or 'rounds' held under GATT.\(^5\) While the early rounds dealt mainly with tariff reductions, later negotiations also covered non-tariff barriers to trade. Also, while GATT dealt only with trade in goods, the Uruguay Round (1986-94) expanded the scope of the international trade rules to include trade in services, investment measures and trade-related aspects of intellectual property rights\(^6\) along with goods.

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1. Agreement Establishing the World Trade Organization, 1994, (hereinafter WTO Agreement), Article II(1).
3. A Charter for the ITO (Havana Charter) was negotiated in 1947-48. But it did not come into force as USA failed to ratify it.
5. The first five GATT Rounds concentrated on tariff reductions. The Kennedy Round in the mid-sixties resulted in the Anti-Dumping Agreement. The Tokyo Round of the seventies attempted to tackle non-tariff barriers to trade. In the Uruguay Round, many new agreements and a new dispute settlement mechanism were negotiated and the WTO was formed.
6. The WTO Agreements governing these issues are respectively, the *General Agreement on Trade in Services* (GATS), *Agreement on Trade-related Investment Measures* (TRIMS Agreement) and *Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS Agreement).
GATT finally acquired organizational support when the WTO was negotiated during the Uruguay Round. WTO came into being in 1995, as a successor to GATT. GATT, in a revised form, continues to exist as one of the WTO Agreements and is the 'principle rule-book for trade in goods'. The scope of WTO's coverage can be estimated from its current membership of 144 countries (as of January 2002) covering more than 90% of world trade.

Environmental concerns were first introduced into the MTS in the 1970s. With the increasing intensity of international concern over trade-environment issues, the debate over the 'greening' of the world trading system has also accelerated over the years. These issues, are being debated at the international level at the WTO CTE. As civil society has become an important player in global governance generally, exchanges between the WTO and civil society have also grown. Environmental groups have been at the forefront, as was more than visible during the street demonstrations at Seattle in 1999.

This chapter contains an overview of international trade law as it relates to the environment. Accordingly, it deals with the international trade rules within the GATT/WTO framework that impinge on environmental concerns. Section 1 briefly traces the emergence of environmental concerns within the GATT/WTO framework. Section 2 covers the environment-related provisions contained in various WTO Agreements such as the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Section 3 takes a look at the work of the Committee on Trade and Environment (CTE), the forum set up within the WTO to specifically address trade-environment issues. Section 4 explores some issues of relevance to the trade-environment debate at the WTO.

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8 Besides, around 30 other countries have applied for membership at WTO. For details of current membership status, see http://www.wto.org
WTO, such as the issues of 'linkage', 'openness' and 'ecological reform' of the WTO. Section 5 contains some concluding observations.

1. Emergence of Environmental Component within the GATT/WTO Framework

Considering that environmental protection had not emerged as an issue of concern at the time, it is not surprising that GATT 1947 did not include environmental issues on its agenda. It was in the early seventies that GATT Contracting Parties (CPs) felt the need for addressing in the GATT environmental issues as they relate to trade. During the preparatory work for the 1972 UN Conference on the Human Environment (UNCHE), the GATT Secretariat contributed a study titled 'Industrial Pollution Control and International Trade', focusing on the potential implications for international trade of industrial pollution control measures. The study recognized that Governments need to act to protect the environment without introducing unnecessary new barriers to trade.

1.1. Setting Up of EMIT Group

Institutional framework relating to environmental issues was created for the first time in the form of the Group on Environmental Measures and International Trade which was set up at the General Council meeting in November 1971. The Group was given the mandate, "to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect the human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of the developing countries" and to report on its activities to the Council. This Group was set up in anticipation of problems that could arise in future in this area and it was to convene only at the request of GATT members. For twenty years after it was set up, however, such a need was not felt and the Group remained inactivated. In the 20-year period between the

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10 Document L/3538. This Study was prepared by the GATT Secretariat and was not the formal collective view of the GATT membership.
setting up of EMIT and its actual activation, various developments took place to further the trade-environment interaction.

1.2. Environmental Issues Discussed in MTNs

The issue of environmental standards constituting potential trade barriers came up for discussion at the Tokyo Round (1973-79). A Standards Code, calling for non-discrimination and transparency in the adoption and application of technical regulations and standards, was negotiated. Though the environment issue was not included for negotiation in the Uruguay Round (1986-94), certain issues were nevertheless discussed in the context of GATS and the SPS, TBT, TRIPS, Subsidies and Agriculture Agreements.

1.3. Issue of Domestically Prohibited Goods

This was the only environment-related issue that was addressed by the GATT in the period between the setting up of the EMIT in 1971 and its activation in 1992. At the 1982 Ministerial meeting, the issue of ‘domestically prohibited goods’ (DPGs) was included in the work programme of the GATT after it was raised by the developing and least-developed countries as one of particular concern for them. A Ministerial Declaration\(^\text{11}\) adopted in November 1982 encouraged CPs to notify GATT of the production and export of DPGs. The notification system was set up, but was not very successful; governments tended to notify DPGs whose export had been prohibited rather than those they continued to export. And no notifications were received after 1990, though the 1982 Decision remained in force. In July 1989, the Council established the Working Group on Export of Domestically Prohibited Goods and Other Domestically Prohibited Substances.\(^\text{12}\) The Working Group met between September 1989 and June 1991, and submitted a report in July 1991 together with a Draft Decision on Products Banned or Severely Restricted in Domestic Market. This Draft Decision, however, failed to acquire consensus support. The Working Group failed to resolve the issues and did not meet again as it was agreed in the Marrakesh

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\(^{12}\) L/6553 (21 July 1989).
Ministerial *Decision on Trade and Environment* to incorporate the issue of DPGs into the work programme of the WTO *Committee on Trade and Environment* (CTE).

### 1.4. Environment-related Trade Disputes

Many environment-related trade disputes were brought before the GATT Panel during this period. The cases decided by the GATT Panel like *Herring Salmon* (1988), *Cigarettes* (1990) and *Tuna Dolphin I and II* (1991 and '94)\(^{13}\) involved interpretation of the environmental exceptions to GATT obligations permitted under Article XX of GATT. These cases and rulings underscored the realization that environmental considerations could no longer be kept out of the GATT.

### 1.5. Activation of EMIT Group

This realization of the inevitable interaction of the GATT with environmental issues led to a proposal by the EFTA countries,\(^{14}\) at the 1990 Brussels ministerial meeting, asking that the *Group on Environmental Measures and International Trade* be convened under an updated mandate. It was pointed out that the differences in national environmental policies of countries could result in increased trade disputes. The Group (which now came to be called the ‘EMIT Group’), met from November 1991 to January 1994.\(^{15}\) The EMIT Group based its work on the theme that “Concluding the Uruguay Round successfully would be the best contribution GATT could make to the follow-up on the results of the UN Conference on Environment and Development (UNCED).”\(^{16}\) It examined the following issues:

- (a) trade provisions contained in existing multilateral environmental agreements (e.g., the Montreal Protocol on Substances that Deplete the Ozone Layer, the Washington Convention on International Trade in Endangered Species and the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal) vis-à-vis GATT principles and provisions;

- (b) multilateral transparency of national environmental regulations likely to have trade effects; and

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\(^{13}\) For details on these cases, see Chapter 4.

\(^{14}\) Austria, Finland, Iceland, Norway, Sweden, Switzerland.

\(^{15}\) *See Trade and the Environment* Series, TRE/1 to TRE/14.

(c) trade effects of new packaging and labelling requirements aimed at protecting the environment.

1.6. **GATT and UNCED**

Meanwhile, in 1992, the GATT Secretariat contributed a Factual Note on Trade and Environment to the *United Nations Conference on Environment and Development* (UNCED). In this study, it was emphasized that:

GATT rules ... place essentially no constraints on a country’s right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported goods. Generally speaking, a country can do anything to its imports and exports that it does to its own products, and it can do anything it considers necessary to its own production processes.

... If the door were opened to use trade policies unilaterally to offset the competitiveness effects of different environmental standards, or to attempt to force other countries to adopt domestically favoured practices and policies, the trading system would start down a very slippery slope.

... GATT rules could never block the adoption of environmental policies which have broad support in the world community.\(^{17}\)

Within the GATT, at the July 1992 Council meeting, the Director General suggested that CPs should consider how to proceed on those recommendations of *Agenda 21* that were directly relevant to the work of the GATT in the field of trade, environment and sustainable development.

1.7. **Decision on Trade and Environment**

Towards the end of the Uruguay Round, the *Decision on Trade and Environment* (the Marrakesh Decision)\(^{18}\) was adopted, wherein Ministers noted their desire to coordinate policies in the field of trade and environment, “without exceeding the competence of the multilateral trading system”. The Marrakesh Decision optimistically stated:

\(^{17}\) *Trade and Environment*, Factual Note by the Secretariat, L/6896, 18 September 1991.

\(^{18}\) MTN:TNC/45(MIN) 6 May 1994. See Annexure I.
There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.\(^\text{19}\)

1.8. Committee on Trade and Environment

The Marrakesh Decision directed the first meeting of the General Council of the WTO to establish a *Committee on Trade and Environment* (CTE). Initially, during the Uruguay Round negotiations, developing countries had blocked the creation of a permanent CTE, as they were skeptical about the entry of any environmental objective in the WTO. Eventually, however, they compromised and agreed on a CTE without a strict structural mandate. Pending the establishment of the CTE, work on trade and environment was carried out by a *Sub-Committee on Trade and Environment* (SCTE), which met in the course of 1994.\(^\text{20}\) The SCTE built on the work of the *EMIT Group* and the *Group on DPGs* and transmitted its working documents and reports to the CTE. The WTO General Council established the CTE in January 1995. The CTE meets at regular intervals at Geneva to discuss trade-environment issues categorized under ten broad agenda items.

1.9. Singapore Ministerial Conference

The CTE *Report on Trade and Environment* to the Singapore Ministerial Conference was adopted on 8 November 1996. At Singapore, Trade Ministers endorsed the Report and directed the CTE to continue its work under its existing mandate.\(^\text{21}\) The Geneva Ministerial Declaration of 1998 made only a passing reference to environmental issues, stating an intention to improve efforts towards the objectives of sustainable development.

1.10. The Seattle Debacle

At the Third Ministerial Meeting of the WTO held at Seattle in 1999, the trade negotiations were derailed due to large-scale public protests. Though the protests were

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\(^{19}\) Marrakesh Decision, para 4.  
\(^{21}\) The work of the CTE is dealt with in detail in Section III below.
more generally targeted against the process of globalization, one of the main issues was that of the perceived environment-unfriendly activities of the WTO.

1.11. Doha Ministerial Declaration

At the Doha Ministerial Conference, environmental issues were brought into the main negotiating agenda of the WTO. The issues that have been identified for negotiation are:

(i) the relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question;

(ii) procedures for regular information exchange between MEA secretariats and the WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.22

At present, only limited issues have been incorporated and developing country negotiators feel there is no need to be unduly worried. As stated by the Indian Commerce Minister, "...these negotiations would not widen the environmental window in trade."23 However, commentators predict the likelihood of an expansion of issues in the next round of trade negotiations24 and it would be prudent for the developing countries to be prepared for this eventuality.

The Doha Ministerial Declaration further mandates the CTE to report to the Fifth Ministerial Conference its progress on all items of its agenda, with special attention to the issues of market access, TRIPS and eco-labeling.25

Thus, in tune with the changing imperatives of global realities, environmental and sustainable development issues have now been incorporated into the mainstream

22 Doha Ministerial Declaration Adopted on 14 November 2001, WT/MIN(01)/DEC/1, para 31.
25 See Appendix II.
of WTO work. As noted by some commentators, "...the WTO has started to develop an environmental conscience. With only a few tweaks, it can turn greener still." 26

2. Environment-related Provisions in WTO Agreements

The most significant as well as controversial WTO environment-related provisions are the environmental exceptions contained in Article XX of the General Agreement on Tariffs and Trade (GATT). Apart from these, two WTO Agreements relate directly to environmental concerns as they explicitly take into account the use by governments of measures to protect human, animal or plant life or health or the environment. These are the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). A number of other WTO Agreements also have environmental implications. These are, for example, the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures, the Agreement on Trade Related Aspects of Intellectual Property Rights and the Agreement on Trade in Services. 27

2.1. Agreement Establishing the World Trade Organization: Preamble

The preamble of the Agreement Establishing the World Trade Organization (WTO Agreement) 28 carries explicit mention of the need for 'protection and preservation of the environment' and the objective of 'sustainable development'. It also recognizes the differing environmental needs and concerns of countries at different stages of development. It states:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and

27 Apart from these provisions, another Agreement of relevance to environment-related work in the WTO is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU sets up a strong DSS, within which important environment-trade disputes have been handled. The DSU is covered in Chapter 4, along with the cases.
28 See Agreement Establishing the World Trade Organization in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994.

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services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development....

Environmentalists point out that the concept of 'optimal use' is at variance with that of 'sustainable development' and this needs further clarification.

Significantly, the relevance of the environment-related language in the preamble was enhanced by the decision of the WTO Appellate Body in Shrimp Turtle, wherein it was held that the language of the preamble is indicative of the conscious effort of the signatories to the Agreement to uphold the legitimacy of environmental protection as a policy goal. The ruling justified the interpretation of the WTO Agreements in light of this objective incorporated in the preamble.

As this preambular language reflects the intentions of the negotiators of the WTO Agreement, we believe that it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case the GATT 1994... 

As 'sustainable development' finds mention only in the preamble, environmentalists have criticized the WTO Agreement for what it does not incorporate. The main text of the Agreement does not include sustainable development as an objective. This is in direct contrast to the statute of the European Bank for Reconstruction and Development (EBRD), which has the promotion of sustainable development as one of its functions. The Maastricht amendments to the Treaty of Rome also place sustainable development as a goal of the EEC.

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29 ibid, Preamble. Emphasis added.
32 Article 21(vii) of the Agreement establishing the EBRD has the following stated function, "To promote in the full range of its activities environmentally sound and sustainable development...
33 Article 2 of the Treaty of Rome, as amended by Article G B 2 of the Maastricht Treaty includes as an objective, "...to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment..."
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Other devices which complement sustainable development also fail to find a place in the WTO Agreement. For example:

- The Agreement does not contain any requirement to report on the environmental impact of its activities (the EBRD statute incorporates such a commitment).
- The Agreement contains no meaningful commitment to public participation and consultation with NGOs.
- Neither does it contain any mention of important environmental principles such as the precautionary principle.

For these reasons, the Agreement is described as being, “considerably out of touch with contemporary political morality”. 34

2.2. General Agreement on Tariffs and Trade: Article XX

Nowhere in the text of the GATT does the word ‘environment’ appear. However, a number of provisions of the GATT permit restrictions on trade to protect the environment. 35 Article XX of GATT continues to be the fulcrum of debate on environmental issues in WTO, as it provides for general exceptions (including on environmental grounds) to the core obligations of Members contained in Articles I, III and XI of GATT. The ‘most favoured nation’ principle codified in Article I of GATT states that “...any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like-product originating in or destined for the territories of all other Contracting Parties”. Article III prohibits the extension of protection to domestic production by mandating ‘national treatment’ on internal taxation and regulation between imported and domestic like products. Article XI requires the ‘general elimination of quantitative restrictions’. All these GATT provisions address product regulations and not Process and Production Methods (PPMs). 36

34 Cameron and Ward, n.30, p.3.  
36 For details on PPMs, see Chapter 2.
Article XX allows GATT/WTO Members to depart from the above-mentioned obligations to serve legitimate policy objectives by taking measures, *inter alia*:

(b) necessary to protect human, animal or plant life or health

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

These exceptions, however, are subject to certain conditions stated in the *chapeau* of Article XX, which reads as follows:

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...

Article XX has been more criticized than used because of the confusion over which government actions it sanctions. During the *Uruguay Round*, Austria had proposed that Article XX should be amended by adding the term ‘environment’ in paragraph (b) in order to appropriately reflect the increasingly important relationship between trade and the environment. But this proposal was not given effect.

GATT/WTO panels and the AB have examined Article XX in various disputes. The scope of clauses (b) and (g) has been subject to divergent interpretations just as the *chapeau*’s requirement of the environmental measures to be shown not to be ‘arbitrary’ or to involve ‘unjust discrimination’ has led to much debate. It is argued that in most cases, environmental regulations are inherently discriminatory and that though the scope of clauses (b) and (g) of Article XX has been broadly interpreted, the *chapeau* has increasingly been narrowly interpreted. Thus, measures that may qualify as exceptions tend to fail the *chapeau* test. This argument has been forwarded in defense of demands for amendment of Article XX to more effectively address environmental concerns.

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37 Article XX(b), as amended by the Austrian proposal would read, “...necessary to protect *the environment*, human, animal or plant life or health” (emphasis added).

38 For disputes relating to Article XX, see Chapter 4.
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It has been suggested, for instance that Article XX should be amended by the addition of a provision specifically allowing a country to impose measures relating to protection of the environment, both its own and that of the world at large. The developing countries (and India in particular), however, are against any proposed amendment of GATT as they feel that all legitimate environmental interests can be accommodated within the existing provisions of Article XX of GATT 1994. Recent rulings of the WTO DSS, by accommodating environmental concerns through a broad interpretation of the Article XX exceptions, seem to endorse this view.

2.3. Agreement on Technical Barriers to Trade

The TBT Agreement, which built upon and strengthened the 1979 Standards Code, was negotiated during the Uruguay Round. It governs the preparation, adoption and application of product technical regulations and standards, and of procedures used for the assessment of compliance with them.

The scope of the TBT Agreement extends to all products, industrial and agricultural, but it excludes SPMs, which fall under the SPM Agreement. Under the Agreement, countries can use technical regulations and standards like packaging, marking and labeling requirements in order to protect human, animal or plant life or health, or the environment. For the purposes of the Agreement, regulations are distinguishable from standards in that compliance with the former is mandatory while compliance with the latter is voluntary. Significantly, unlike the earlier Standards Code of 1979, the current TBT Agreement extends to PPMs and is not just restricted to products.

According to Patterson, a 'standard of proof' requiring that such a measure be consistent with, and a part of, the framework of environmental policies of the nation imposing the measure would be sufficient to guard against protectionist measures. See Patterson, n.35, p.107.

See Agreement on Technical Barriers to Trade in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, pp.117-37.

According to the definitions provided in Annex I of the Agreement, regulations and standards apply to product characteristics or their related process and production methods.
In order to prevent the proliferation of different domestic technical requirements, the Agreement encourages but does not require countries to use international standards whenever possible. If a regulation or standard is in accordance with the relevant international standard, it is to be presumed to be consistent with the Agreement. However, if a Member considers that the relevant international standard would not appropriately fulfill the objective pursued, it is permitted to use regulations or standards that suit its needs. The Agreement permits each country the right to set the level of protection it deems appropriate. However, such technical regulations should not create 'unnecessary obstacles to international trade', i.e. they should not be more trade-restrictive than necessary to fulfill a listed objective. Technical regulations can take into account risks that non-fulfillment would create, based on available scientific and technical information. Governments are, however, required to apply technical regulations and standards in a non-discriminatory way; the Agreement incorporates the MFN and 'national treatment' provisions.

Members are encouraged to accept equivalent technical regulations as well as results of conformity assessment procedures of other Members if they are satisfied of their adequacy. Members are also encouraged to participate in the setting of standards and conformity assessment procedures. The Agreement contains provisions for technical assistance to and 'special and differential treatment' of developing country members.

The TBT Agreement provides a high degree of transparency, aiming to make it easier for economic operators to adjust to technical requirements in export markets. Notification obligations include, inter alia, notifying draft technical regulations,

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46 TBT Agreement, n.40, Article 2.4, Annex 3.F.
47 ibid, Article 2.2, Annex 3.E, Article 5.1.2.
48 ibid, Article 2.2.
49 ibid, Article 2.1, Annex 3.D, Article 5.1.1.
50 ibid, Article 2.7, Article 6.1.
51 ibid, Article 2.6, Annex 3.G, Article 5.5.
52 ibid, Article 11.
53 ibid, Article 12.
conformity assessment procedures and standards, and providing other Members with sufficient time to comment on them, as well as notifying the domestic measures taken to implement the provisions of the TBT Agreement.\textsuperscript{54} Notification requirements are complemented by requirements to promptly publish regulations, standards and conformity assessment procedures\textsuperscript{55} and to establish national ‘enquiry points’ which provide, on request, further information.\textsuperscript{56}

The Agreement sets up a Committee on Technical Barriers to Trade composed of representatives from each of the Members.\textsuperscript{57} Regular meetings of the TBT Committee contribute to ensuring the transparent implementation of the Agreement. There is provision for any dispute panel examining TBT-related issues to establish a technical expert group.\textsuperscript{58} So far, the WTO DSS has not addressed disputes relating to the TBT Agreement.

The TBT Agreement interfaces with environmental concerns mainly on the issue of ‘eco-labelling’. The TBT Committee has discussed this issue in parallel with the ongoing discussions on ‘eco-labeling’ in the CTE. Issues raised in the TBT Committee include the applicability of the \textit{TBT Code of Good Practice} to voluntary eco-labelling programmes, the extent to which eco-labelling programmes based on PPMs are covered by the Agreement, the effects of eco-labelling programmes on international trade etc. A major challenge to the TBT Agreement’s effectiveness is the increasing use of regulations and standards that are process-based, as opposed to product-based. So far, no conclusion has been reached on these issues.

Developing countries are concerned that they lack the ability to play a meaningful part in the preparation by international standardizing bodies of international standards. These international standards, which have to be met as a prior

\textsuperscript{54} ibid, Article 2.9, Annex 3.L, Article 5.6;
\textsuperscript{55} ibid, Article 2.11, Annex 3.O, Article 5.8;
\textsuperscript{56} ibid, Article 10.
\textsuperscript{57} ibid, Article 13.
\textsuperscript{58} ibid, Article 14, Annex 2.
requirement for any imports from developing countries, in effect, constitute a technical barrier to trade.\(^{59}\)

In a proposal submitted to the WTO General Council in 1999,\(^{60}\) India, as a developing country, outlined some of its concerns relating to the TBT Agreement. The most significant concern is that proliferation of technical regulations and standards in developed country markets would substantially affect market access of export products from developing countries. Developing country exports would suffer in the face of TBT-inconsistent standards, regulations and conformity assessment procedures implemented by the importing countries. Also, even if the standards and regulations are TBT-consistent, developing countries lack the technical or financial capacity to comply with them. Environmental related measures represent a further barrier to trade from developing country exports. Concern was also expressed over the fact that the ‘special and differential treatment mentioned in Article 12 of the Agreement have been inadequately implemented.

Among the proposed solutions offered are: ensuring effective participation of developing countries in the setting of standards by international standard-setting organizations; compliance by international standardizing bodies with the Code of Good Practice; technical assistance and cooperation to upgrade conformity assessment procedure in developing countries; technical assistance, and acceptance by developed country importers of self-declaration regarding adherence to standards by developing country exporters and acceptance of certification procedure adopted by developing country certification bodies based on international standards.

\(^{59}\) Asoke Mukerji, "Developing Countries and the WTO: Issues of Implementation", *Journal of World Trade*, vol.34, no.6, 2000, at p.49.

2.4. Agreement on the Application of Sanitary and Phytosanitary Measures

The SPS Agreement\textsuperscript{61} regulates the use of sanitary and phytosanitary measures (SPMs) – measures used by countries to ensure that food is free from risks arising from additives, contaminants, toxins or disease-causing organisms, to prevent the spread of plant-, animal-, or other disease-causing organisms, and to control pests.\textsuperscript{62} The agreement fine-tunes legal rights and obligations under GATT Article XX(b). SPMs are applied to domestically produced food or local animal and plant diseases, as well as to products coming from other countries. The SPS Agreement applies to only those SPMs that affect international trade.\textsuperscript{63}

Before the SPS Agreement was negotiated, governments were allowed to adopt domestic standards for food safety, animal and health measures affecting trade, and these measures were subject to GATT rules such as Articles I, III and XX and the 1979 Standards Code. At the Uruguay Round, it was felt that these provisions were inadequate for addressing the potential problems posed by SPMs, and the SPS Agreement was negotiated.

The SPS Agreement recognizes the right of Members to adopt and enforce measures like regulations and import bans necessary to protect human, animal or plant life or health. Such SPMs must, however, be backed by scientific justification and based on a risk assessment, and are to be applied only to the extent necessary. Further, they must not be ‘arbitrary’ or ‘unjustifiably discriminatory’ and must not constitute a disguised restriction on trade. The Agreement also incorporates the MFN and ‘national treatment’ provisions. If an SPM conforms with the SPS Agreement, it is to be presumed to be consistent with Article XX(b) of GATT, since the SPS Agreement basically elaborates rules for the application of the provisions of Article XX(b).\textsuperscript{64}

\textsuperscript{61} See Agreement on the Application of Sanitary and Phytosanitary Measures in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, pp.69-83.

\textsuperscript{62} ibid, Annex A defines SPMs.

\textsuperscript{63} ibid, Article 1.1.

\textsuperscript{64} ibid, Article 2.
Though the SPS Agreement encourages SPMs to be based on international harmonized standards\textsuperscript{65}, Members are nevertheless allowed to maintain SPMs that result in a higher level of protection, if they deem fit. Members are encouraged to participate in the development and review of international standards by relevant international organizations.\textsuperscript{66}

Further, Members are encouraged to accept the SPMs of other Members as equivalent.\textsuperscript{67} The Agreement lays down rules for risk assessment and determination of appropriate level of protection. It allows countries to take provisional precautionary SPMs, i.e. it allows for adoption of provisional SPMs that may be adopted on the basis of ‘available pertinent information’ but must be reviewed within a reasonable period of time.\textsuperscript{68}

The Agreement also provides for technical assistance\textsuperscript{69} to and special and differential treatment\textsuperscript{70} of developing countries. The transparency requirements in the Agreement include requirements of notification, prompt publication and the setting up of national ‘enquiry points’ to respond to requests for more information.\textsuperscript{71} When a trade dispute arising over the use of an SPM involves scientific or technical issues, the Agreement stipulates that the panel should seek advice from experts.\textsuperscript{72} A Committee on Sanitary and Phytosanitary Measures has been established under the Agreement to provide a regular forum for consultations.\textsuperscript{73}

Unfortunately, the international standards recognized by the SPS Agreement are set by Codex Alimentarius and other bodies that are heavily influenced by the industries they are supposed to regulate. The result is that looser international

\textsuperscript{65} These are the FAO/WHO Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention.
\textsuperscript{66} SPS Agreement, n.61, Article 3.
\textsuperscript{67} ibid, Article 4.
\textsuperscript{68} ibid, Article 5.
\textsuperscript{69} ibid, Article 9.
\textsuperscript{70} ibid, Article 10.
\textsuperscript{71} ibid, Article 7, Annex B.
\textsuperscript{72} ibid, Article 11.
\textsuperscript{73} ibid, Article 12.
standards have the potential to displace stronger national, state and local standards. Further, these organizations allegedly function in an opaque manner.

Various cases relating to the SPM Agreement have been brought before the WTO DSS – *Hormones* (1998), *Salmon* (1998) and *Agricultural Measures* (1999). The panel and AB rulings in these cases have involved detailed explorations of some of the provisions of the SPM Agreement and have helped clarify the legal implications of these provisions.74

Developing countries have special concerns relating to the SPS Agreement as well. The export earnings and levels of employment of developing country agriculture exporters have been affected by the application of food safety, and animal and plant health regulations in a protectionist manner. Developing countries point out various implementation problems such as lack of knowledge of SPMs introduced by industrialized countries. These measures are sometimes required to be complied with in an arbitrary manner and notifications of measures allow virtually no time for response by other countries.75

Apart from implementation problems, is the issue of formulation of these measures. Developing countries have expressed ‘...difficulties in actively participating in the development of international standards and the lack of a mechanism to take into account the economic and technical capacity of developing country Members to implement such standards’.76 Mukerji sums up the concerns of the developing countries:

Confronted by such a challenge, developing countries have argued that the WTO should ensure that any ‘international standard’ with which they are expected to comply with [sic] must have been formulated with the effective participation of developing countries, and such effective participation must be an obligation for the concerned international organizations setting such standards. A major challenge facing many developing countries in this respect is the need to create the necessary domestic infrastructure to deal with the

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74 For details on SPS cases, see Chapter 4.
75 Mukerji, n.59, p.50.
76 Quoted in Mukerji, n.59, p.50.
proliferation of national and international standards and measures...without such an infrastructure, it would be difficult for them to either respond to such measures, or even to reflect their concerns during the formulation of such measures. 77

India, in its proposals to the General Council in 1999,78 said arbitrary and restrictive SPMs represented a major obstacle to international trade. SPMs are often developed in a non-transparent manner and developing countries do not get adequate opportunity to respond to the proposed measures. Compliance with the 'special and differentiated' provisions by countries introducing new measures has been largely non-existent. Since participation of developing countries has been limited and ineffective, standards are often adopted without taking into account the problems and constraints of the developing countries. India suggests that international standards should be distinguished according to the purpose for which they are being adopted, i.e. whether for use on a voluntary or a mandatory basis. Further, any universal SPM should be adopted only by consensus.

2.5. Agreement on Agriculture

Environmental policies are aimed at protecting natural resources that are vulnerable to damage from farming extensification (bringing more land into production) and intensification (applying more non-land inputs to raise yields). Agriculture effects more natural resources than any other industry because of its large land and water requirements. Therefore, the effects of expansion of agricultural activity resulting from liberalized trading rules need to be reconciled with the goal of environmental protection. This is more so because the largest environmental risks from agricultural trade expansion lie in less developed countries (LDCs). Most developing countries do not have extensive environmental policies to protect against damage from their growth in agricultural production to serve trade expansion.

77 Mukerji, n.59, pp.50-51.
The AOA\textsuperscript{79} provides for the long-term reform of trade in agricultural products and domestic policies in order to "...establish a fair and market-oriented agricultural trading system...."\textsuperscript{80} It incorporates commitments in the areas of market access, domestic support and export competition.\textsuperscript{81} A significant aspect of the Agreement is the commitment to reduce domestic support for agricultural production, particularly in the form of production-linked agricultural subsidies.\textsuperscript{82}

The preamble of the AoA makes environmental protection an integral part of the Agreement, stating that commitments made under the reform programme should "have regard for...the need to protect the environment...."\textsuperscript{83} Further, Article 20 requires that the negotiations on the continuation of the reform programme take account of non-trade concerns, which include those mentioned in the preamble (eg. 'environment').

The Agreement conditionally exempts direct payments under environmental programmes from WTO commitments to reduce domestic support for agricultural production. Annex 2 of the Agreement, which lists the different types of subsidies which are not subject to domestic support reduction commitments, covers a number of measures relevant to the environment. These include direct payments to producers and government service programmes for research and infrastructural works under environmental or conservation programmes. Only direct payments that are a part of clearly-defined government environmental or conservation programmes are eligible provided they fulfil certain specific conditions under the government programme. Such payments must not create unnecessary trade distortions and are applicable only in cases where the expected benefits of environmental improvement outweigh the anticipated costs. The payments should also be structured to stimulate producer and R&D innovations that minimize long-term compliance costs. Further, the amount of

\textsuperscript{79} See Agreement on Agriculture in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakcsh, 15 April 1994, pp.43-68.
\textsuperscript{80} ibid, Preamble, para 2.
\textsuperscript{81} ibid, Preamble, para 4 and Articles 3 and 4.
\textsuperscript{82} ibid, Article 6, 7.
\textsuperscript{83} ibid, Preamble, para. 6.
the payment is limited to the extra costs or loss of income involved in complying with the government programme. These ‘Green Box’ domestic support measures cannot be the subject of countervailing measures under the SCM Agreement, nor can they be subject to nullification or impairment actions under the GATT.

Members are free to introduce new, or amend existing Annex 2 measures subject only to the general requirement that they have no trade-distorting effect and they come under publicly funded government programmes. Under Article 14, Members agree to give effect to the SPS Agreement.

There remains considerable uncertainty regarding the design and implementation of effective environmental and conservation programmes for agriculture that will not be challenged as trade restrictive. Nor have either the DSS or the CTE clarified the issue.84

The AOA was hailed as a triumph for order and stability in world agricultural trade. It was argued that the Agreement would bring positive benefits for developing countries, and for the environment. Environmentalists question this claim.85 They question the claim that the combination of subsidy cuts and import liberalization now being implemented by the Northern governments will halt the cycle of overproduction and export dumping.

2.6. Agreement on Subsidies and Countervailing Measures

The SCM Agreement identifies three categories of subsidies (traffic light system), depending on their effect on international trade, and provides for different ways of dealing with each category. Prohibited (red light) subsidies are subject to an


accelerated dispute settlement procedure and a Member found to grant or maintain such a subsidy must withdraw it immediately; *actionable* (yellow light) *subsidies* can be granted or maintained, but may be challenged in WTO dispute settlement while *non-actionable* (green light) *subsidies* are not subject to countervailing action nor to dispute settlement challenge.  

The SCM Agreement provides that assistance for environmental purposes, i.e. to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms is a *non-actionable* subsidy, provided that the assistance meets certain criteria.

The SCM Agreement does not have a provision for subsidies designed to capture ‘external benefits’. Also, the green light provision limits the assistance provided to 20 percent of all costs (20 percent requirement). It is not clear how this particular figure has been arrived at and there are suggestions that this figure may need modification in view of the possible development of methods to quantify the social costs of pollution. Another issue that requires clarification is the fact that concessions on environmental taxes may be regarded as a subsidy actionable under the SCM Agreement, though they are not a subsidy for the purpose of environmental policy. Thus, there are inherent limitations in trying to regulate subsidies for environmental purposes under the SCM Agreement, which is a trade agreement embodying trade

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86 See Agreement on Subsidies and Countervailing Measures in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, pp.229-72, Article 8.

87 As per Article 8.2(c) of the SCM Agreement, such assistance will qualify as non-actionable provided it:
   i) is a one-time non-recurring measure;
   ii) is limited to 20 percent of the cost of adaptation;
   iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms;
   iv) is directly linked to, and proportionate to, a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
   v) is available to all firms which can adopt the new equipment and/or production processes.

88 Subsidies given to capture ‘external benefits’ would mean subsidies given to a firm for the amount of positive externalities generated by the firm, such as the growth of forests and the use of biomass, both of which act as carbon sinks for greenhouse gases.
policy considerations. Subsidies relating to environmental policy would possibly be better regulated under MEAs such as the UNFCCC, with the SCM Agreement enhancing such efforts. 89

2.7. Agreement on Trade Related Aspects of Intellectual Property Rights

The TRIPS Agreement 90 provides a common set of rules for the protection and enforcement of intellectual property rights. Article 27 of the TRIPS Agreement defines ‘patentable subject matter’. Specific reference is made to the environment in Article 27.2 which allows Members to exclude from patentability inventions, the prevention of whose commercial exploitation within their territory is necessary to protect, inter alia, human, animal or plant life or health or to avoid serious prejudice to the environment. Article 27.3 further provides that Members may exclude from patentability plants and animals other than micro-organisms, as well as essential biological processes, other than microbiological processes, for the production of plants or animals. Members must, however, provide for the protection of plant varieties either by patents or by an effective sui generis system.

While the TRIPS Agreement is narrowly interpreted by industrialized countries to protect individual rights, the Convention on Biological Diversity (CBD) deals with the sovereign rights of nations over their natural resources. The views of industrialized and developing countries are sharply divided over the issue of harmonization of approaches to the utilization of living resources as set out in the two treaties. Developing countries have proposed that the TRIPS Agreement should be amended to accommodate the objectives of the CBD.


90 See Agreement on Trade-related Aspects of Intellectual Property Rights in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, pp. 319-51.
For developing countries, TRIPS has been of special concern, as it was an area of new commitments and obligations. In its 1999 proposals to the General Council,\(^9^1\) India stressed that the TRIPS Agreement is not about harmonization of standards but about minimum standards of IPRs. India proposed additional protection for geographical indications, developing compatibility between TRIPS and CBD, and operationalizing transfer of technology requirements. In an earlier non-paper,\(^9^2\) India said that the TRIPS Agreement did not provide for specific mechanisms to achieve the objectives of sustainable development and environmental protection and suggested that amendments to the TRIPS Agreement be considered in order to reach the broader objectives of MEAs.

### 2.8. General Agreement on Trade in Services

GATS\(^9^3\) contains an environmental exception provision – Article XIV(b) – which is identical to the Article XX(b) provision of the GATT. The CTE, which has examined the environmental aspects of trade in services, has not till date identified any environmental measure applied to services trade that would not be covered adequately by this provision. The Services Sectoral Classification List annexed to the GATS includes the environmental services sector, comprising four categories:

- **A. Sewage services (CPC 9401)**
- **B. Refuse Disposal Services (CPC 9402)**
- **C. Sanitation and similar services (CPC 9403)**
- **D. Other**

The fourth category includes the environmental services of the CPC which are not specifically referred to in the List, i.e. cleaning of exhaust gases (CPC 9404); noise abatement services (CPC 9405); nature and landscape protection services (CPC 9406) and other environmental protection services (9409). So far, some fifty WTO Members have made commitments under at least one of the four sub-sectors. Other service

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\(^9^3\) See General Agreement on Trade in Services in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, pp. 285-317.
sectors such as research, engineering, construction etc. may also be directly relevant for the environment.

3. Committee on Trade and Environment

3.1. Mandate and Functioning

The CTE, which came into existence in January 1995, has a mandate that includes analytical and prescriptive functions i.e. to identify the relationships between trade and environment and to make any required recommendations to amend the provisions of the multilateral trading system.\textsuperscript{94} The Committee is open to all Members of the WTO\textsuperscript{95} and the CTE process is driven by proposals from individual WTO Members on issues of concern to them. CTE has also extended observer status to various IGOs.\textsuperscript{96} The work of the CTE is structured around ten agenda items covering a host of trade-environment issues. (See Table 3.1).

While its charter is ambitious, discussions at CTE have moved at 'glacial speeds', as governments are stuck in traditional postures and positions. The Committee has strained to find consensus between the North and South, but with little success.

The CTE was mandated to report to the first biennial WTO meeting of the Ministerial Conference, when its work and terms of reference were to be reviewed. Until May 1996, CTE completed two full rounds of analysis of each individual item of its agenda. The CTE Report on Trade and Environment to the Singapore Ministerial Conference (SMC), which was adopted on 8 November 1996, was non-conclusive. It was a mere enumeration of the many and varied proposals discussed before the Committee and contained no specific recommendations for reform. Anyhow, trade

\textsuperscript{94} The CTE's mandate and terms of reference are contained in the Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994. See Annex I.

\textsuperscript{95} The Committee is also open to other signatories of the Final Act that are contracting parties to the GATT 1947 and are eligible to become original Members of the WTO, and other governments with observer status.

\textsuperscript{96} UN, UNCSD, UNCTAD, World Bank, IMF, UNEP, UNDP, CSD, FAO, ITC, OECD and EFTA.
### Table 3.1: Agenda Items of the Committee on Trade and Environment

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Issue</th>
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<tbody>
<tr>
<td>1.</td>
<td>Relationship between the provisions of the MTS and trade measures for environmental purposes, including those pursuant to MEAs.</td>
</tr>
<tr>
<td>2.</td>
<td>Relationship between trade-related environmental policies and environmental measures with trade effects and the provisions of the MTS.</td>
</tr>
<tr>
<td>3.</td>
<td>Relationship between the provisions of the MTS and: (a) charges and taxes for environmental purposes and (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling.</td>
</tr>
<tr>
<td>4.</td>
<td>Provisions of the MTS with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects.</td>
</tr>
<tr>
<td>5.</td>
<td>Relationship between the dispute settlement mechanisms in the MTS and those found in MEAs.</td>
</tr>
<tr>
<td>6.</td>
<td>Effect of environmental measures on market access, especially in relation to developing countries, and environmental benefits of removing trade restrictions and distortions.</td>
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<tr>
<td>7.</td>
<td>Exports of domestically prohibited goods.</td>
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<tr>
<td>8.</td>
<td>TRIPs.</td>
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<tr>
<td>9.</td>
<td>Trade in services.</td>
</tr>
<tr>
<td>10.</td>
<td>Appropriate arrangements with NGOs and transparency of documentation.</td>
</tr>
</tbody>
</table>
ministers endorsed the Report and directed the CTE to continue its work under its current mandate.97

3.2. CTE Report on Trade and Environment

The CTE Report on Trade and Environment98 underscored the importance of both trade and environment as areas of policy-making and the need for their mutual support in the quest for promoting sustainable development. It reiterated its confidence in the WTO, stating that the organization was capable of integrating environmental considerations and enhancing its contribution to the promotion of sustainable development without undermining its open, equitable and non-discriminatory character.99 Of its agenda items, the CTE has dealt with in detail only three issues – the relationship between MEAs and WTO, eco-labeling and the effects of environmental measures on market access.

The Report notes that WTO Member governments are committed to not introducing WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any adverse domestic economic or competitiveness effects of applying environmental policies.100

The issue of the relationship between trade measures in MEAs and the MTS was dealt with extensively. It concluded that a range of WTO provisions, such as those on non-discrimination and transparency as well as the Article XX exceptions, can

97 Paragraph 16 of the Singapore Ministerial Declaration states:
16. ... The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.

98 Report of the WTO Committee on Trade and Environment, PRESS/TE 014, 18 November 1996. For details on the discussions on each of the agenda items, see Kenneth P. Ewing and Richard G. Tarasofsky, The 'Trade & Environment' Agenda: Survey of the Major Issues and Proposals – From Marrakesh to Singapore Environmental Policy and Law Paper No.33 (Gland: IUCN, 1997).
Also see WTO Trade and the Environment Bulletins.

99 ibid, para 167.
100 ibid, para 169.
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accommodate the use of TREMs, including those taken pursuant to MEAs. A number of proposals have been put forward in the CTE to broaden the scope available under WTO provisions for the use of TREMs pursuant to MEAs, but none has found consensus support in the CTE. There is no agreement for the time being on the need to modify WTO provisions in order to provide increased accommodation in this area.

The Report clearly endorsed the use of multilateral solutions as the best and most effective way for governments to address global and transboundary environmental problems. It acknowledged that trade measures have contributed significantly to the success of some MEAs but also pointed at the significance of other effective policy instruments used in MEAs, such as international cooperation provisions, including financial and technology transfers and capacity-building.

Problems are unlikely to arise in the WTO over trade measures agreed and applied among Parties to an MEA. The Report recommended that disputes arising over the use of a trade measure applied pursuant to an MEA between two WTO Members which were both signatory to an MEA should be resolved through the dispute settlement mechanism of the MEA. In case an environment-related dispute is brought to it, the WTO DSS would be able to tackle any problems that arise in the area, as there were adequate provisions for consultations with experts and review groups.

The Report stressed the importance of ensuring policy coordination between trade and environment experts. First and foremost, policy coordination had to take place at the national level. At the international level, the report encouraged cooperation between the WTO and relevant institutions.

101 While some industrialized countries felt that GATT provisions had to be made more explicit to allow the use of trade measures for environmental purposes, the majority of developing countries and some industrialized countries felt that there was no need to amend the existing GATT provisions as Article XX provided an adequate environmental window.
102 CTE Report, n.98, ibid, para 176.
103 ibid, para 171.
104 ibid, paras 173-74.
105 ibid, paras 178-79.
106 ibid, para 175.
The Report said that well-designed eco-labelling programmes could be effective instruments of environmental policy but, at the same time, noted the concerns expressed about their possible trade effects. Increased transparency in their preparation, adoption and application could help deal with trade concerns regarding eco-labelling schemes. The Report stressed the importance of WTO Members respecting the provisions of the TBT Agreements and its Code of Good Practice.\footnote{ibid, pars 183-86.} It did not comment on the more controversial issue of the use in eco-labeling programmes of criteria based on non-product related PPMs.

Transparency provisions fulfil an important role in ensuring the proper functioning of the MTS. However, TREMs should not be required to meet more onerous transparency requirements than other measures that affect trade. No modifications to WTO rules are required relating to transparency of TREMs. The Report mandated the WTO Secretariat to compile all notifications of trade-related environmental trade measures and collate them in a single database accessible to WTO Members.\footnote{ibid, paras 187-92. A WTO Environmental Database of all trade-related environmental notifications to the WTO has been established and is periodically updated.}

On trade-related environmental policies, the CTE discussed mainly subsidies. Both the Agriculture and the Subsidies Agreements make certain exemptions for environmental subsidies. It is argued that the provision in the Subsidies Agreement allowing tax refunds on energy used to produce exports would encourage greater use of energy. No definitive conclusions on subsidies were reached on subsidies and it was agreed that further examination and analysis of subsidies would be required.\footnote{ibid, paras 180-81.}

The Report emphasized the importance of market access opportunities in assisting developing and least-developed countries to obtain the resources to implement adequate developmental and environmental policies, diversify their economies and provide income-generating activities. At the same time, however, the
CTE underlined the necessity for countries to implement appropriate environmental policies in order to ensure that trade-induced growth was sustainable.\(^\text{110}\)

On DPG's, CTE considered that WTO should fully participate in the activities of other organizations that have the relevant expertise for providing technical assistance in this field. The Report stressed the importance of technical assistance and transfer of technology in this field, both in tackling environmental problems at source and in helping to avoid unnecessary additional trade restrictions on the product involved.\(^\text{111}\)

On TRIPS, the CTE noted that positive measures such as access to and transfer of technology could be an effective instrument to assist developing countries to meet MEA's objectives. Further work is needed on clarifying issues such as extent of protection offered by the agreement to indigenous environmental knowledge, extent to which agreement allows for transfer of environmentally sound technology, ethical concerns over patenting of living organisms and the relationship between TRIPS and CBD.\(^\text{112}\)

Regarding 'services', no environmental measures were identified that Members might need to apply to services trade which would not be adequately covered by the provisions of the GATS Agreement, in particular Article XIV(b).\(^\text{113}\)

On the relationship with NGOs, the CTE considered that the primary responsibility for closer consultation and cooperation lay at the national level. It would be inappropriate to allow NGOs to participate directly as observers in the CTE's proceedings. Nevertheless, more information should be made public about the WTO's work on trade and environment. The Report recommended that the WTO Secretariat

\(^{110}\) ibid, paras 195-99.
\(^{111}\) ibid, paras 200-205.
\(^{112}\) ibid, paras 206-209.
\(^{113}\) ibid, paras 210-211.
continue its interaction with NGOs, for example through the organization of informal meetings.\footnote{ibid, paras 212-218.}

### 3.3. What did the CTE Achieve?

It is not difficult to see that the CTE Report did not go a long way in resolving difficult differences over trade-environment issues. One critique entitled *The WTO CTE – Is It Serious?* answers the question posed in its title in the negative.\footnote{Charles Arden Clarke, *The WTO Committee on Trade and Environment – Is It Serious?* Critique, WWF-International, Gland, 1996.} It points out that the Committee took an inordinately long time to come up with weak recommendations and no concrete solutions. It conveniently sidestepped the more difficult issues like PPMs.

Environmentalists claim that the CTE failed to make progress on the relationship between MEAs and MTS because it wanted the WTO to invade into the jurisdiction of MEAs. It wanted WTO to make decisions on what trade measures MEA parties may or may not authorize, and even decide how to interpret the environmental treaty itself. The suggestion that the WTO DSS might offer a forum for parties to MEAs to escape their obligations puts the WTO in a hierarchy above MEAs. “By supporting the possibility of MEA parties taking other MEA parties to the WTO court, the CTE has set international trade law on a collision course with international environmental law.”\footnote{ibid, p.2.} Environmentalists suggest that CTE should confirm that environmental negotiators have the mandate to determine both the objectives of MEAs and the means selected to achieve them. The role of the WTO should be confined to that of ensuring that there is no protectionist abuse of MEA trade measures against non-parties.

The Report recognizes that trade liberalization will yield developmental and environmental benefits, but only if appropriate national environmental policies are in place. Describing this as a ‘chicken-and-egg problem’, environmentalists question
how this is going to be achieved. They suggest as a first step the initiation of an assessment of the environmental effects of implementation of the Uruguay Round. They also suggest that the WTO should work in coordination with other IGOs.

The recommendations on eco-labeling are criticized as ambiguous and even contradictory. The question of whether TBT rules cover eco-labels based on non-product-related PPMs has not been resolved or even addressed. How can WTO rules apply to PPM-based eco-labels without acknowledging that non-product-related PPM distinctions can be made in the WTO? CTE should actively contribute to policy solutions devised in other relevant IGOs and fora. The discussions on TRIPS and services have also progressed little.

For developing countries, the initial years of the functioning of the CTE have demonstrated a complete sidelining of issues of particular interest to them. The fears of the South that the CTE will not adequately represent the South but will merely provide another mechanism for Northern economic dominance within world trade have been borne out to some extent. Issues of concern to the developing countries such as that of DPGs did not receive attention within the CTE. Further, the CTE failed to adequately incorporate the developing country point of view on the necessity of enhancing trading opportunities for developing countries in order to enable them to generate adequate resources to protect the environment. Demands by the developing countries to implement the decisions of Agenda 21 and enhance market access were effectively blocked in the CTE. Instead, the CTE focused on issues such as amending GATT Article XX and regularizing the use of eco-labelling under the WTO. Industrialized countries, partly driven by strong domestic environmental lobbies, attempted to use the WTO to justify restricting access to their markets on environmental protection grounds.117 Developing countries feel that the WTO may not be the appropriate forum for the trade-environment debate to progress in the first place.

117 Mukerji, n. 59, p. 51.
In defense of the CTE’s work, it may be said that CTE has helped deepen Members’ understanding of all the items on the CTE’s agenda and build confidence among Members in this important area of work. Progress also has been made in building coherence and broadening participation in CTE work with respect to other IGOs. The CTE has been described as “a classroom in which WTO Members are learning about the relationship between trade, environment and sustainable development. Though the first end-of-term report is a poor one, the class should not be shut down.” This view is echoed by representatives of the developing countries as well.

3.4. Since Singapore

After Singapore, CTE Members adopted a thematic approach (‘cluster approach’), regrouping the ten agenda items under themes such as ‘market access’ and ‘linkages between the multilateral environment and trade agendas’, so as to allow all items to be addressed in a systematic manner. Work is progressing as scheduled in the ten agenda items, now arranged in clusters. But, no path-breaking developments have yet taken place. As noted earlier, the Doha Ministerial Declaration instructs the CTE to pursue work on all its agenda items and report to the Fifth Ministerial Conference with recommendations. The specific issues earmarked for special attention are market access, TRIPS and eco-labeling. The CTE must work with renewed zeal to meet its mandate and come up with concrete recommendations this time.

4. Issues at the WTO

4.1. The Linkage Issue

The most important over-arching trade-environment issue is that of the appropriateness of ‘linking’ environmental issues to the WTO. The trade-environment linkage question forms a part of the larger theoretical discourses on the ‘outer

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[119] Personal communication to author by an Indian representative at the CTE.
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boundaries of the WTO’. 121 On the one hand, more and more issues are seeking ‘linkage’ with the WTO because it is perceived as an effective and powerful organization.

The vigorous debate about the WTO’s purview demonstrates the vitality of the organization. The WTO has become a magnet for expansionist ideas because it is perceived as powerful and effective. 122

On the other hand, the WTO, facing the threat of ‘institutional overload’, is seeking to define its mandate. Charnovitz, explaining the challenge facing the WTO, quotes three ex Director Generals of the WTO, “[t]he WTO cannot be used as a Christmas tree on which to hang any and every good cause that might be secured by exercising trade power”. 123 While everyone agrees that the WTO ought to address proper issues, opinions diverge over what those issue areas are.

‘Linkage’ concerns have generated immense and intense political and academic interest. Most governments of the South strongly oppose any attempts at introducing ‘linkages’ in the WTO as this brings alive their traditional fear of protectionism. But pretending that linkage concerns are not real is nothing short of wishful thinking; the issue has already transgressed the confines of theoretical debate and needs to be squarely addressed. As aptly summed by one commentator:

...the question is not whether the WTO should or should not deal with the ‘trade and ...’ subjects.... It already does and has done so, in many respects since 1948. The question I would pose is this: how should these so-called non-trade subjects be dealt with within the WTO system? And who should define the scope of WTO recognition/cognizance of these subjects... 124

The following section explores some of the important components of the ‘linkage’ issue from a trade-environment perspective.

121 Jose E. Alvarez, “Foreword, Symposium: The Boundaries of the WTO”, The American Journal of International Law, vol.96, no.1, 2002, pp.1-4. Environment is just one of the various ‘non-trade’ linkage concerns at the WTO such as labour, investment, human rights etc.
123 Quoted in ibid, p.28.
4.1.1. Types of Linkage

Alvarez explains that the 'linkage' issue incorporates a multitude of ways to link, all of which touch upon the trade-environment linkage. The linkage issue can be viewed from the perspective of a carrot-and-stick approach. Thus, linkage may occur through sticks (WTO-authorized trade retaliation against those who fail to comply with environmental standards) or through carrots (conditioning of market access on the satisfaction of environmental goals). Linkage might also occur through the establishment of private rights of action in the WTO for those who suffer environmental injury as a result of action permitted or encouraged by trade rules.

Linkage may take place through the 'judicial' arm of the WTO. For instance, the argument that WTO's dispute settlement system needs to interpret relevant trade rules in light of environmental objectives. Such arguments are premised on the view that trade is not a self-contained regime and therefore cannot ignore other objectives of public international law. Linkage might also be undertaken by the WTO's 'legislative' arm, as through express incorporation undertaken by amending the WTO covered agreements in future trade rounds or the issuance of authoritative interpretations by the members. It might occur more subtly, without a formal amendment, if, for example, WTO members refuse to bring to the WTO challenges to eco-labeling initiatives or to measures taken pursuant to an MEA. Alternatively, non-trade issues might remain confined to the WTO's 'executive' branch, namely its secretariat and committee structure.125

Leebron categorizes linkages according to the basis of the claim for linkage.126 He distinguishes between substantive linkage and strategic linkage. The former links an issue to trade because that issue is substantively related to trade. The latter does not depend on any substantive connection between the two norms. Thus, even if it is assumed that there is no substantive linkage between trade and environment norms, the trade regime may nevertheless be effectively used to further environmental

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125 Alvarez, n.121, p.2.
objectives. A strategic linkage is, therefore, based on the objective of enhancement of relative bargaining power.

The most obvious manifestation of strategic linkage is sanctions linkage, i.e. for instance, the use of trade sanctions applied to enforce environmental norms. Such linkage is usually sought in instances where one of the issue areas, but not the other, is characterized by well-developed institutional structures. In such a situation, institutional and procedural benefits of an existing regime can be obtained by another regime that is not so well-developed. Thus, in the absence of a strong and effective environmental law regime, environmental objectives are pursued with the help of the trade regime. 127

Since strategic linkage claims are not based on a substantive relationship between the linked issues, they are more controversial and disputed. Basic trade norms appear to prohibit the use of strategic sanctions; sanctions are to be made available only if the two regimes are substantively linked at least to some extent.

Leebron further categorizes linkages into three relational categories: deferential, collaborative and autonomous. 128 The relational nature of any regime linkage is highly controversial and is especially contentious when, as in the case of trade and environment, regime norms potentially conflict and there are differences over the relative importance to be given to the two regimes.

Leebron's classification of linkages includes the following distinct but often interconnected types of linkages. The trade-environment linkage encompasses a variety of these mechanisms. 129

128 The linkage is deferential if one regime defers to a determination of the other regime regarding the linked issue. The linkage is collaborative if the resolution of any issue relevant to the linkage must be resolved by some joint mechanism. Linkage is autonomous if the regime maintains its authority, without deference or collaboration, to make a decision.
129 Leebron, n.126, pp.16-24.
1. *Negotiating linkage:* when parties involved in negotiations insist on a satisfactory resolution of both issues before agreeing to either one.

2. *Hierarchical linkage:* through the establishment of a hierarchically superior institution that would resolve conflicts and coordinate activity in overlapping area of authority.

3. *Membership linkage:* through linked membership requirement – a regime in which certain issues are considered relevant requires membership in a separate regime that explicitly governs those issues. A membership linkage could be strengthened with additional linkage mechanisms, including the incorporation of norms and the authorization of sanctions.

4. *Incorporation of an issue area:* by incorporating one issue area into a regime that governs the other issue area. Even when an issue is incorporated, the way it is incorporated can range from weak through partial to full incorporation.

5. *Issue linkage:* by linking some issues from one regime to another. For instance, only environmental subsidies may be linked to trade. Different mechanisms of linkages may be chosen for different issues.

6. *Interpretive linkage:* through the interpretation of the legal provisions governing one or both of the regimes. Under this approach, a WTO dispute settlement panel would take into account the relevant MEAs implicated by the substance of an environment-related dispute.

7. *Participatory linkage:* by creating interactions between the multilateral institutions responsible for those issues. For example, in the *Cigarettes* case, the WTO DSS consulted with the World Health Organization. Such linkage would also include the issue of observer status and participation of NGOs.

8. *Permissive unilateral linkage:* by leaving authority to create a linkage between issue areas with the individual participants in those regimes. Such authority may be explicitly provided by the agreements or result from an interpretation of the applicable provisions.
4.1.2. Objections to Linkage

Various objections are made to trade-environment linkage claims. As regards substantive linkage claims, disagreement with their substance is the principal reason for objection. For instance, there is disagreement over the question of whether free trade results in industrial flight or encourages a race-to-the-bottom. Thus, one ground for objecting to linkage may be a disagreement over the factual and theoretical assumptions on which the claim is based.

Autonomous linkages are particularly problematic. For instance, although some environmentalists are satisfied with the demand for a ‘greening of the GATT’, others do not trust a trade regime to balance the conflicting values of trade and environment concerns. They fear that trade officials will value the benefits of liberalized trade too highly, and discount the benefits of environmental protection. Thus, autonomous linkages are usually accompanied with a demand for additional linkage structures, such as opening WTO proceedings to environmental organizations.

Opposition to strategic linkage is based on a perception of the costs and benefits in terms of the expected results of linking trade and environment. A strategic linkage would be easy to misuse and as far as it refers to a sanctions linkage, would be useful only to the economically powerful countries.

Linkage has the potential to weaken the normative framework for a particular regime. For example, it is pointed out that inclusion of environmental issues in the trade regime is likely to lessen the impact of the MFN clause, which is a central pillar of the trade regime. Thus, linkage may result in the instability of an existing regime. Linking disparate issues into a single regime also poses the risk that the policy goals of one of the issue areas will predominate at the cost of those of the other.

WTO linkage to non-trade issues is said to "undermine both the freeing of trade and the advancing of our social agendas"\textsuperscript{130} because one single instrument

\textsuperscript{130} This is the position taken by Jagdish Bhagwati. See Charnovitz, n.122, p.49.
cannot be used to achieve two targets, the economic and the social. Other analysts argue in favour of giving organizations a focused mandate so that they can be held accountable and their performance can be assessed. But the arguments in favour of ‘functionalism’ and ‘specialization’, though theoretically sound, are difficult to operationalize in practice.

4.1.3. Advantages of Linkage

The strongest argument in favour of linkage is that international linkage may serve to forestall the much bigger threat of unilateral linkage. According to the ‘self-help’ theory advocated by Hudec, if the GATT/WTO system fails to govern a specific area, countries may feel free to rely on ‘self-help’. Member countries, pressured by interest groups would resort to unilateral measures, either by attempting to expand extraterritorial jurisdiction of their domestic laws or by seeking to impose unilateral trade sanctions pursuant to their own trade laws in order to fulfil their policy goals.

The US, by frequently resorting to unilateral measures for environmental purposes, has lent much credence to this theory. It is thus claimed that the US, for instance, might be persuaded to abandon some of its unilateral efforts to link trade to the environment if international economic organizations explicitly incorporate environmental considerations in their activities. Linkage with defined boundaries, arrived at multilaterally through cooperative means, is likely to be preferable and more acceptable than unilateral imposition of linkage.

4.1.4. Identifying the Correct Mission of the WTO

An issue central to the linkage debate is that of identifying the correct mandate of the WTO. Charnovitz points out that the debate about the proper mission of the WTO is political and prescriptive and not primarily a legal debate about clarifying the WTO’s existing mandate. He identifies eight ‘frames’, each of which projects a raison d’etre of the WTO, for identifying the proper mission of the WTO.

Four frames address the reasons for the horizontal relationship between states that come together in a multilateral agreement. These are the expectations of cooperative openness, harmonization, fairness and risk reduction. Two frames that
address the vertical relationship between a national government and the public are those of *self-restraint* and *coalition building*. The third category, which is based on the horizontal relationships between international institutions, explains why a given international organization should be allocated a particular competence. These are the frames of *trade functionalism* and *comparative institutionalism*. These eight frames could be used to test how well a prospective new issue, such as environment, would fit in the WTO. According to Charnovitz, a new issue that can be justified by frames in all three categories should qualify for inclusion in the WTO.

Another suggested approach — termed the ‘measured approach’ — to the inclusion of environment within the WTO is based on the contention that the linkage issue is basically about market access. According to this approach, the question of the optimal WTO mandate should be addressed by distinguishing between market access issues and non-market access issues. Linking the WTO to environmental issues

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131 The ‘self restraint’ frame refers to the fact that Governments sometime construct and join the trading system to prevent themselves from giving in to powerful domestic pressure groups that insist on self-defeating protectionist trade policies. Charnovitz points out that the idea of justifying a trade treaty as a way to restrict the policy options available to democratic governments is questionable.

132 Coalition-building refers to the fact that participation in the WTO helps governments to build and maintain a domestic coalition in favour of liberal trade policy.

133 This frame would imply that international governance should be organized according to ‘tasks’ and ‘functional lines’. The mission of the WTO is self evidently about trade and issues of nonmutual objectives should not be added to the WTO.

134 This frame suggests that the mission of the WTO should be determined from the existing situation concerning other international institutions, i.e. by deciding, based on a comparative study, which IGO would be appropriate to handle a particular issue. “Determining the best IGO for a particular problem involves a menu of decisions: If a new issue is being considered for the WTO, will the WTO take it over from another IGO? Is attention by the WTO an interim strategy for stimulating the creation of a new IGO? For example, the CTE is highlighting the weakness of ecological governance and increasing the calls for a global environmental organization. If another IGO does have such competence, does the WTO intend to compete with it? Or is the WTO’s role complementary? Should assignment to the WTO be subject to specified deference to another IGO? Or should the issue be assigned to other IGO subject to specific deference to the WTO? Sometimes the WTO cannot be directly compared to an alternative IGO because there is none. In that situation, resort to the WTO should be compared to the option of leaving needed government cooperation to bilateral agreements or informal agreements.” Charnovitz, n.122, pp.50-51.

135 Charnovitz, n.122, pp.36-55.

136 This approach is based on the view that the GATT/WTO legal structure aims at facilitating mutually advantageous increases in the degree of market access and creating a system of property rights over negotiated market access commitments that are secure against unilateral infringement. The fundamental problem to be solved by a trade agreement is insufficient market access. See Kyle Bagwell et al., “It’s A Question of Market Access”, *The American Journal of International Law*, vol.96, no.1, 2002, pp.56-76.
generally is not a good idea. But in so far as an environmental issue impacts market access, it should be addressed by the WTO. ‘Race-to-the-bottom’ and ‘regulatory chill’\textsuperscript{137} concerns are identified as market access issues that should be addressed by the WTO. Non market access issues, however, should be left outside the WTO. Thus, linkage issues should address pecuniary externalities alone. The WTO DSS should stick to the idea of protecting market access and not be transformed into a court of general jurisdiction.\textsuperscript{138}

\textbf{4.1.5. Allocation of Jurisdiction}

The linkage issue is also viewed in terms of allocation of jurisdiction.\textsuperscript{139} Three types of allocation of jurisdiction are identified: (i) horizontal allocation of jurisdiction between states, (ii) vertical allocation of jurisdiction between states and international organizations, and (iii) horizontal allocation of jurisdiction among international organizations.

Though the trade-environment linkage involves all three types of ‘allocation’, it is concerned to a large degree with the allocation of jurisdiction among international organizations. Trachtman points out:

\begin{quote}
Today, because of the softness of their law and the weakness of their dispute resolution, as well as the imbalance between adjudicative capacity and legislative capacity in the international system as a whole, the WTO’s competitors do not seem to be strongly contesting the WTO’s authority, at least in formal terms. Informally, and in the world of nongovernmental organizations and public opinion the WTO’s authority is strenuously debated. And the WTO itself recognizes that it might be more successful, or at least less vulnerable, if other organizations took on a greater role.\textsuperscript{140}
\end{quote}

The horizontal allocation of jurisdiction among international organizations is at issue in the trade-environment debate. How should the international trade regime be linked to the international environmental regime? Though various options for

\textsuperscript{137} For details on these two phenomena, see Chapter 2.
\textsuperscript{138} Bagwell et al., n.136, p.76.
\textsuperscript{140} ibid, p.88.
achieving such linkage are proposed, there are still not many practicable answers to this question.

One approach to allocation of jurisdiction is the 'bottom-up' approach suggested by Jackson. He advocates the following steps for analyzing ways of allocation of jurisdiction:

1. **Identification of a market failure**: Is there a need for government action at all?
2. **Subsidiarity principle**: If there is such a need, can the nation-state governments adequately handle the problems, or is there a need for international action?
3. **Adequacy of existing mechanisms**: If nation-state governments cannot take adequate action to solve the problems, is there an existing international institutional framework that can assist, or are new frameworks needed?
4. **Cost-benefit analysis of going international**: Are there dangers in allocating authority to any international institutions available or reasonably constructible, and how can these be compared to uncoordinated action by nation states?

### 4.1.6. Concerns of the South

Bhagwati argues that claims for linkage can be divided into the 'egoistical' (self-serving), driven by competitiveness concerns, and the altruistic (others-oriented), driven by empathy concerns. Trade sanctions are not ideal solutions to problems. Since they apply only to trade, trade sanctions address only part

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141 Jackson opposes a 'top down' approach where an overall guidance for addressing the question at hand is sought by referring to the basic or 'inherent' nature of the WTO as an institution. He points out the difficulties in identifying 'inherent' or 'logical' limits of the WTO, in light of the changing focus of the trade regime. The demands of growing economic international interdependence (globalization) require some kind of institutional response to the huge numbers of intergovernmental tensions that inevitably arise. See John H. Jackson, "Afterword: The Linkage Problem – Comments on Five Texts", *The American Journal of International Law*, vol. 96, no. 1, 2002, pp. 118-25.

142 ibid, pp. 123-5.

143 This last analysis would entail finding answers to the following questions: What is the decision-making structure of the available international organization? Is it democratic? Is it paralyzed by a consensus procedure? Does it tilt too strongly in favour of the rich or towards the poor countries? Does it have important policy advocacy inputs by civil society? Does it incorporate good governance and democratic legitimation?

of the problem at hand. Further, sanctions generally generate resentment and resistance. They are, therefore, unproductive and, at times, even counterproductive. This is especially true in face of the fact that developing countries are usually at the receiving end of sanctions. Many developing countries have consistently questioned the jurisdiction of WTO over environmental issues. At Seattle, India made its position clear on the trade-environment linkage, touching upon the issue of jurisdiction:

India is second to none in its commitment towards environmental protection and sustainable development... The issue here, however, is different. The multilateral trading system has been designed to deal with issues involving trade and trade alone.... Attempts aimed at inclusion of environmental issues in future negotiations go beyond the competence of the multilateral trading system and have the potential to open the floodgates of protectionism. 145

As is evident, linkage concerns are of immense concern to the South. Considering their focus on development concerns, it is natural that the developing countries are worried about any diversion of the possibility of gains from free trade through the dilution of the trade regime. They contend that the trade regime should continue to focus exclusively on trade issues. Bhagwati states:

If we take the North-South divide seriously, we must be more mindful of the serious objection that the developing countries have to some of the linkage issues that touch on their interests directly and adversely. Their fears that they are under assault by our lobbies pushing for such linkage are well-founded; and principles and architecture should not be sacrificed to politics and power as the WTO enters the new century. 146

4.1.7. Suggestions for Effective Linkage

The trade-environment linkage cannot be resisted altogether. As has been aptly pointed out for linkage in general:

...the linkage train left station a long time ago, and it is now time to reflect where that train is, describe it empirically, and then think about where it is heading and if that is where we want it to go. 147

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146 Bhagwati, n.144, p.134.
147 Steger, n.124, p.136.
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The goal must then be to choose the means of linkage that most effectively advance the policies sought to be linked without undermining the ability to make progress on the issue in other regimes. Even if environmental issues are linked to the WTO, they must also be considered and addressed in international environmental fora. In other words, linkage should not substitute attempts to formulate and improve the discrete international regimes that govern a linked area. 148

It has been pointed out that regime borrowing, and sanction linkage in particular, tend to reflect frustration and disappointment with the borrowing regime (or non-regime) governing the issue area to be linked. In the trade-environment linkage, this seems to be the case, with disputes gravitating to the WTO partly due to the absence of an alternative effective forum for dispute resolution. In most such situations, it would be worthwhile to consider developing the unsatisfactory environmental regime independently.

4.2. Openness of the WTO

In recent years, the WTO has faced pressure from a new phenomenon – the demand for increased openness of its functioning. ‘Openness’ includes the element of increased participation in its functioning as well as increased transparency of its work. 149 Though the issue of openness involves the functioning of the WTO in general, it is particularly relevant for environment-related issues in the WTO, as these have generally attracted maximum public attention. Popular participation, open debate, consultation, representation, transparency and democratic accountability are projected as prerequisites for the wielding of authority over any issue of such crucial importance as environmental protection. Since the WTO is increasingly dealing with issues impacting the world’s environment and by extension, human welfare in general,

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148 Leebron, n.126, p.27.
149 For a comprehensive review of the evolution of demands for transparency and participation of civil society in WTO processes and the response of the WTO to these demands, see Gabrielle Marceau and Peter N. Pederson, “Is the WTO Open and Transparent?: A Discussion of the Relationship of the WTO with Non-governmental Organisations and Civil Society’s Claims for More Transparency and Public Participation”, Journal of World Trade, vol. 33, no.1, 1999, pp.5-49.
there is pressure for it to meet all the above-mentioned conditions. Much of this pressure has come from the highly vocal as well as visible ‘civil society’\textsuperscript{150} that expresses concern over the handling of environmental issues in the WTO.

4.2.1. Participation

4.2.1.1. Demands for Participation

As with the GATT,\textsuperscript{151} the WTO accords exclusive authority to its Members, who alone can initiate, conduct and terminate actions.\textsuperscript{152} "Thus, the main focus and raison d'etre of the WTO are the interests of governments."\textsuperscript{153} With the growing ramifications of WTO rules, many NGOs, including environmental ones, have been demanding increased access to and participation in WTO functions to ensure the representation of all interests.

The issue of defining a role for NGOs in the WTO is a direct fallout of “an important structural shift, in the face of large-scale globalization, from statist to post-sovereign governance.”\textsuperscript{154} Categorizing ‘civil society’ into three types of organizations – ‘conformers’, ‘reformers’ and ‘radicals’ – based on their general approach to the WTO,\textsuperscript{155} Scholte identifies environmental NGOs as mainly fitting into the latter two categories.

\textsuperscript{150} The term ‘civil society’ broadly denotes the individual and collective interests lying outside the more structured interests and powers of governments.

\textsuperscript{151} The GATT, which was primarily concerned with technical matters of international commerce and trade, functioned in a fairly non-transparent manner and got away with it. GATT countries insisted on an exclusive role for their representatives, who alone had the authority to initiate discussions and negotiations. Non-governmental interest groups had no representation in the GATT at all.

\textsuperscript{152} Only Members can initiate negotiations in which they remain the sole participants. Within the DSS, initiation of the process, request for the adoption of reports and surveillance of implementation of the recommendations of reports are limited to Members.

\textsuperscript{153} Marceau and Pederson, n.149, p.6.

\textsuperscript{154} Scholte explains that governance has become spread across a host of substate, state and suprastate institutions, with neither holding a clear or complete primacy over the others. Accelerated growth of supraterritorial flows has made state-centric sovereignty questionable. See Jan Aart Scholte and Ors., “The WTO and Civil Society”, \textit{Journal of World Trade}, vol. 33, no.1, 1999, pp. 107-123.

\textsuperscript{155} Conformers broadly accept the established discourses of trade theory and more or less endorse the existing aims and activities of the WTO. These include mainly corporate business associations, commercial farmers’ unions and economic research institutes. Reformers accept the need for a global trade regime but seek to change current policies and procedures. One example of the demand for reforms is the call for greater participation and transparency of the WTO. More substantially, they seek to fight the ill-effects of trade liberalization, such as environmental degradation, from within the WTO system, through its reform. Many environmental NGOs are
4.2.1.2. Factors Favoring NGO Participation

Various arguments are cited in defense of the demand for an enhanced role for NGOs at the WTO. For instance, NGOs have at their command a wealth of knowledge, resources and analytical capacity in their respective area of expertise and can therefore contribute greatly to the search for optimal policies. They can also play a seminal role in disseminating information at the national level, thus garnering broader public support and understanding for trade liberalization policies. Further, NGOs argue that States and Governments are imperfect representatives of public opinion and that allowing NGO involvement in WTO discussions would permit the organization to hear important voices on issues such as environmental protection, which are inherently international, and can compensate for deficient representation at the national level.

4.2.1.3. Arguments against NGO Participation

Resistance within the WTO to NGO participation persists. Firstly, it would seem highly controversial to shift policy-making away from national constituencies. Many of these non-state actors seek direct contact with the WTO, bypassing government authorities in order to influence the working of the multilateral institution itself. Many argue that interest groups should not have ‘two bites of the same apple’ one domestically and one internationally.

Also, questions remain about the actual constituencies, financial backing and transparency of some NGOs. Which NGOs are truly representative and which are not? It has been pointed out that civil society associations can best secure their legitimacy in terms of democratic practices; they have yet to secure democracy in their own operations.

Most NGOs are self-selected, self-funded and often no more representative of democratic values than any industry, company, labor union or other interest group. Moreover, the unequal funding of NGOs and their concentration in but a few countries provides an added base for questioning their claims that their participation is indispensable to legitimate rulemaking ... unlimited access by
NGOs to DSB procedures or other WTO functions is not necessary or desirable.\textsuperscript{157}

Developing countries argue that granting NGOs a more prominent role in the WTO would exacerbate the current imbalance against developing country interests as the large majority of the powerful NGOs represent Western constituencies. Also, it is feared that an increasing number of participants may slow down the traditional efficiency of the WTO.

4.2.1.4. WTO and NGOs

The issue of the role of civil society within the MTS received considerable attention during the early attempts to create the International Trade Organization (ITO) and the Havana Charter specifically provided a role for NGOs.\textsuperscript{159} However, these early attempts failed to culminate in a formal role for civil society in the MTS under the GATT. The process of influencing a Member’s negotiating position continues to be played out by NGOs in the domestic arena of Member countries.\textsuperscript{159}

Article v:2 of the Marrakesh Agreement provides that “[t]he General Council may make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO.” Further, the last paragraph of the Marrakesh Decision on Trade and Environment of 14 April 1994 invites the CTE to “provide input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations referred to in Article v of the WTO.”


\textsuperscript{158}Article 87, para.2 of the Havana Charter provided, “the Organisation may make suitable arrangements for consultation and co-operation with non-governmental organisations concerned with matters within the scope of this Charter.” Inspiration was drawn from Article 71 of the UN Charter, which provides the constitutional basis for arrangements with NGOs.

\textsuperscript{159}Though NGOs exercise considerable influence on WTO procedures and policies through their lobbying at the domestic level, they do not participate directly in the WTO negotiation process. Involving NGOs in the law-making process is addressed by the TBT Agreement. The \textit{Code of Good Practice} imposes on Members an obligation to include a representative of a non-governmental body on its delegation, whenever possible. The Code also imposes on such non-governmental bodies the obligation to consult all interested parties before the establishment of any standard. (See paras G, H, L, M,M, Q of the Code).
In recent years, the WTO has taken some steps to involve NGOs in its functioning. The WTO Secretariat has worked towards ensuring the openness of the WTO’s functioning by issuing bulletins, organizing annual symposia, holding regional seminars. On 18 July 1996, the General Council adopted guidelines clarifying how exactly NGOs could work with the WTO. These guidelines acknowledge the importance of NGOs in the public debate and address issues of transparency, derestriction of documents, role of the WTO Secretariat and Chairpersons, and the restrictions on NGO participation in WTO meetings. This was followed by the announcement by the WTO Director-General in July 1998 of initiatives to enhance the dialogue with civil society. Also, civil society has been accommodated at Ministerial Conferences. According to one Asian commentator, “WTO is clearly running a public relations exercise, keen to reassure its rich clientele in the US that it is green”.

But the WTO does not seem to be inclined towards institutionalizing its relationship with civil society or to involve civic associations directly in policy deliberations. There is currently a broadly held view at the WTO that it is neither possible nor desirable for NGOs to be directly involved in the work of the WTO or its

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160 The WTO Secretariat regularly issues the *Trade and Environment Bulletin* on the work of the CTE, which is also available at the WTO website.

161 Since 1994, the WTO Secretariat has organized an annual *Symposium on Trade, Environment and Sustainable Development* in order to keep civil society informed of the work underway in GATT/WTO on trade and environment. These symposia are generally attended by participants representing environment, development, consumer NGOs, industry interests, academics and Member governments.

162 The Secretariat has also held regional seminars on trade and environment for government officials from developing and least-developed countries in order to raise awareness on the links between trade, environment and sustainable development, and to enhance the dialogue between trade and environment policymakers.

163 Guidelines for Arrangements on Relations with NGOs, Decision Adopted by the General Council on 18 July 1996, WT/L/162.


165 108 NGOs, including ten environmental NGOs, attended the 1996 Singapore Ministerial Conference. The 1998 Geneva Ministerial Conference was attended by 128 NGOs, of which 22 were environmental NGOs.

166 Anil Agarwal and Ors., *Green Politics: Global Environmental Negotiations 1* (New Delhi: CSE, 1999), p.263.
meetings and that the primary responsibility for interacting with NGOs lies at the national level. 167

Interestingly, both The TBT Agreement and the SPS Agreement contain provisions explicitly addressing actions by non-governmental bodies and standards established by NGOs. They ascribe obligations vis-à-vis these NGOs and impute full liability on Members for actions of NGOs or absence thereof but reserve rights for Members. Such provisions may have a direct impact on the manner in which governments deal with the NGOs within their own territory.

Traditionally, in public international law, countries are responsible for the actions of citizens in their territory. However, it is arguably unbalanced that some of the WTO agreements impose specific responsibilities and obligations on these NGOs generally, and subject the activities of NGOs to scrutiny by other Members, without providing equivalent rights of defense or rights to complain against the same entities. 168

4.2.1.5. WTO DSS and NGOs

The demand for increased participation includes the call for an access to the dispute settlement mechanisms of the WTO. This includes the right to provide evidence, interpretations and positions on the matters at issue in dispute settlement procedures. Only Members are permitted to initiate dispute settlement procedures. But Article 13 of the DSU authorizes panels to obtain information from any source. Since this provision is addressed only to panels and not to the Appellate Body, it was argued that the right to obtain outside evidence is limited to evidence, as opposed to legal arguments. However, recent Appellate Body jurisprudence has made acceptable the receiving of unsolicited amicus curiae briefs, not only in the panel but also in the appeals process. This permission to NGOs to access the dispute settlement procedure, however, is still in a flux and does not seem to have found complete and unconditional acceptance, as was indicated by the establishment of an 'Additional Procedure' for accepting amicus curiae briefs by the AB in the recent Asbestos case. 169

167 WT/L/162 (23 July 1996).
168 Marceau and Pederson, n.149, p.41-42.
169 For details on the issue of acceptance of amicus curiae briefs, see Chapter 4.
4.2.1.6. Constraints in WTO-NGO Relationship

A major shortcoming in NGO-WTO relations is that of unequal access. First, the various components of civil society have not enjoyed equal opportunities to engage with the WTO, with 'conformers' having easiest access and some 'reformers' coming a distant second. This has resulted in an artificially optimistic assessment of the popularity and viability of its policies. Second, organizations based in the North enjoy an advantage over those in the South, thereby reinforcing the structural inequalities in world politics. This issue is of major concern to the developing countries and has been thus described:

And the poor countries that have no lobbies anywhere like the sumptuous ones such as the Sierra Club ... now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede, cynically realizing that the bone thrown to these lobbies in their own political space is actually a bone down the gullets of the poor countries. The poor countries protest as best as they can, trying to slow down the threatened capture of the WTO and trade expansion by these lobbies...170

Further, NGO-WTO relations remain shallow, based on improvised procedures for interaction. Contacts with civil society are therefore viewed as merely a 'public relations exercise'. NGOs have also failed to provide precisely formulated and carefully researched inputs. Most NGOs have shown only haphazard and superficial interests in the WTO, becoming intermittently active only around a particular conference, set of negotiations or trade dispute. Interchanges often lack sufficient openness and reciprocity, with both parties talking past each other.171

4.2.2. Transparency

Demands for greater transparency are basically about an increased access for 'civil society' to WTO documents, decision-making processes, meetings and the DSS. The WTO negotiating process must be made more transparent and accountable, both at the national and international levels, in order to maximize participation of all stakeholders in international trade. At the national level, this will entail increased

170 Bhagwati, n.144, p.128.
171 Scholte, n.154, pp.118-120.
consultation between national governments and the various stakeholders affected by WTO rules, together with more regular and effective parliamentary scrutiny of national positions.

Many WTO Agreements contain various publication, notification and transparency requirements that ensure some level of transparency of WTO Member country decisions and measures. For instance, Members are obligated, through various WTO provisions, to have domestic systems of access to information on laws, regulations and other measures relating to WTO matters. Members are also required to notify other Members through the WTO Secretariat of all laws and regulations of general application and any specific measures concerned with WTO matters. Most documents notified to the WTO are circulated to all Members and are freely accessible. A central registry of notifications has been created under the Marrakesh Decision on Notification Procedures, but it is open for consultation to only representatives of Member countries. Extensive notification requirements are contained in various WTO Agreements such as GATS and the TBT, SCM and Agriculture Agreements, including, in some case, provision for cross-notification and setting up of inquiry points.

On 18 July 1996, the WTO General Council adopted the Decision on Derestriction, establishing the principle of unrestricted circulation of all WTO documents with some specified exceptions. Some countries fear that an enlarged distribution of documents as unrestricted will enable private interest groups to frustrate

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172 Of relevance to publication of environment-related domestic and international measures, are Article X of GATT, Article III of GATS, Article 2.9 of the TBT Agreement, Annex B of the SPS Agreement, Article 63 of the TRIPS Agreement and Article 22 of the SCM Agreement. Some WTO Agreements, such as the TBT Agreement, even recognize the legitimate rights of persons outside the government ('interested parties') to request and obtain information on such publications.


174 Working documents, background notes by the Secretariat and minutes of the meetings of all WTO bodies will be considered for derestriction six months after the date of their circulation. Further, any Member may, at the time it submits any document for circulation, indicate to the Secretariat that the document be issued as unrestricted. Panel and AB reports are derestricted at the same time they are circulated to WTO Members.
the negotiating powers of governments at the WTO. But the Decision is further being reviewed in favour of greater transparency and a reduced period of initial restricted time.

However, there are limitations to the transparency principle and the WTO is accused of lacking transparency and operating in ‘secrecy’. WTO notifications often take place after the actions or measures have been implemented. Thus, the possibility for NGOs to influence government decision-making is negligible. Further, NGOs have no right of action and cannot challenge the absence of publication by another Member, unless they pressurize their own government to take such action. In any case, the WTO releases far more information than the GATT ever did. As one NGO representative recently described, “The WTO has evolved from opaque to translucent.” 175

NGOs also challenge the norm-setting that takes place within the WTO. For instance, NGOs the TBT and SPS Agreements’ reliance on the harmonization efforts of international bodies such as the Codex Alimentarius Commission, which are also alleged to lack transparency.

4.3. Reform Agenda for the WTO

Various proposals for reforming the WTO have been suggested and discussed in order to achieve a rules-based MTS conducive to creating a sustainable world economy. There has prevailed a general perception of the GATT/WTO as an enemy of the environment.

…as the GATT was never designed to consider trade-environment issues, its attempts to address these issues have been deeply flawed. When environmental concerns come before the GATT, they are invariably subordinated to the economic and trade interests that the GATT is designed to serve. This subordination of environmental interests threatens to exact a high price from the planet’s ecological health. 176

175 Cited in Scholte, n.154, p.117.
However, the recent turn of various events have led to the belief that the WTO is developing an ‘environmental conscience’. The WTO cannot be expected to solve the world’s environmental problems, because that is not its mandate. But the WTO has to ensure that its rules do not undermine environmental protection and the international agreements and national policies designed to achieve it, nor encourage the unsustainable use of natural resources. In other words, WTO must be consistent with and work in harmony with other international laws aimed at securing sustainable development. Such reform is considered a prerequisite for continued public support of the MTS and for any further trade liberalization conducted under the WTO.  

The issues discussed in the sections above are part of the reform agenda of the WTO, i.e. identifying the appropriate jurisdiction of the WTO and ensuring that it functions in an open and democratic fashion. Apart from these more general reforms, other suggestions relating to the environmental activities of WTO are as follows.

4.3.1. Mainstreaming Environmental Issues

It is maintained by many that the CTE has proved an inadequate mechanism to handle the trade-environment issue and it is, therefore, essential to mainstream environmental issues in the WTO. ‘Mainstreaming’ environmental issues would entail addressing these issues in all negotiating bodies or committees, where environment is affected by WTO rules or liberalization. The environmental effects of trade liberalization must be appropriately reflected in all relevant WTO rules and decision-making processes. Integrating environmental considerations into WTO rules and processes could be guided by ‘sustainability assessments’, which identify the environmental effects of WTO rules and trade liberalization.

This suggestion has, however, been received with reservations. It is not clear what risks and opportunities would result for the developing countries from ‘mainstreaming’ environment in various WTO Agreements. Moreover, mainstreaming

environment into several committees could make it even more difficult for developing countries to participate effectively in trade-environment deliberations. It has thus been suggested that the CTE should retain its lead role in trade-environment issues. The developing countries should lead the CTE towards more intensive discussions on issues of interest to them. 178

4.3.2. Amendment of GATT Environmental Provisions

A formal amendment of Article XX of the GATT has been proposed to specifically incorporate environmental concerns. This could entail an a specific reference to ‘environment’ in the existing Article XX(b) and (g) provisions or an addition of a new sub-clause to Article XX. Article XX(h), for instance, provides that GATT will not prevent the adoption of enforcement for any inter-governmental commodity agreement that meets specified criteria. A similar exception for environmental agreements is up for consideration.

An expansion of the environmental window is especially sought for restrictions on trade to combat transboundary environmental problems. One way to achieve this may be to emulate the NAFTA provision allowing certain MEAs to prevail in case of a conflict with trade rules. The developing countries, however, are opposed to any expansion of the environment window through a formal amendment of WTO Agreements, as they consider the existing provision in Article XX as adequate to address environmental concerns.

4.3.3. The Waiver Provision

In the absence of a formal amendment of the GATT, the waiver provision can be utilized. Article XXV of GATT provides for a waiver of obligations upon an affirmative vote of two-thirds of the votes cast, provided the two-thirds majority constitutes more than half of all contracting parties. If a significant number of the CPs were also parties to an MEA, it is difficult to see how GATT would stand in the way.

It is unlikely that a CP could hold out with impunity from an environmental agreement that the rest of the world finds vital. The developing countries are also open to the use of the waiver provision to address environmental issues. But the waiver provision is a cumbersome and uncertain procedure.

4.3.4. Code or Agreement

An alternative flexible approach is to adopt a Code or Agreement on the complementarity of environmental and trade policies. This has an advantage in that it binds only those that choose to join, thereby diminishing resistance by the opponents who have the choice of not joining. A Code has the advantage of being a flexible vehicle which could contain both new rules and interpret GATT Articles and Codes to apply to environmental measures and policies. 179

4.3.5. Procedural Changes

In addition to the elements of substantial reform, there is also a need for procedural changes. These relate mainly to the functioning of the WTO DSS and are discussed in detail in the next chapter. They also include demands for openness of WTO functioning, already discussed above.

4.3.6. Addressing Equity Concerns

Environmental issues must be addressed in the WTO keeping in mind equity concerns. Developing countries, with a relatively lower contribution of many of the global environmental problems, should not be burdened with part of the repair costs by means of restrictions on trade without appropriate compensation.

WTO Members should identify and take actions to enhance the equity in negotiating capacity among countries. This would require capacity-building at the national level and establishment of mechanisms to increase the participation and effectiveness of negotiators from developing countries. A guiding objective in the WTO must be to increase benefits to the poorest countries from international trade.

179 Patterson, n.35, p.109.
This will require operationalizing and even augmenting the Special and Differential treatment afforded to developing countries under WTO Agreements, which has been described as having remained 'virtually inoperative'. Environmental reforms will have to be carefully designed to ensure that such reform does not increase opportunities for green protectionism. Officials from national environmental ministries and relevant IGOs should be present in the negotiations to improve the coherence of WTO rule-making. Capacity-building for developing countries is essential to achieve policy integration fully; this need could be met by financial and technical assistance from developed countries and the relevant IGOs.

5. Concluding Observations

As is evident from the discussion above, the trade-environment linkage is no longer merely a theoretical discourse. The linkage is already a part of the WTO and the issue at debate now is whether the forms of environmental linkage visible at the WTO are appropriate. From a system established with a strict focus on trade issues, the MTS has evolved into an organization dealing with related issues such as environment. As compared to the earlier GATT, the WTO has many more agreements with a direct or indirect impact on the environment. Thus, the environmental issue linkage pervades the WTO, with specific issues such as environmental subsidies and environmental services covered by the WTO Agreements. Further, the WTO has provided a forum for the trade-environment debate at the international level in the form of the CTE. Despite the lack of concrete results coming from the CTE, the Committee plays a valuable role in providing a forum for the exchange of ideas.

WTO Members have remained divided over whether the trade-environment issue should be tackled through the political process of negotiation or be clarified through judicial interpretation. So far, the WTO has endorsed the interpretive linkage approach, leaving it to its DSS to interpret its environmental provisions. Demands from the North to increase the ambit of the environmental agenda of WTO have met with stiff resistance from the South, which considers WTO the wrong forum for

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180 Arden-Clarke, n.177, p.1.
addressing non-trade issues like environment. With the recent inclusion of environmental issues in its negotiating agenda, the WTO may be initiating a move towards an incorporation of environment linkage.

Participatory linkage is also being enhanced at the WTO and the recent Shrimp Turtle compliance rulings indicate an element of permissive unilateral linkage on environmental matters. Thus, the task now is to assess whether these forms of environmental linkage that already exist are adequate and appropriate.

The most significant environmental linkage at the WTO has been the interpretive linkage. The growing involvement of the WTO DSS in environment-related trade disputes has led to an interpretive expansion of the environmental provisions of the WTO. The WTO DSS has contributed significantly in clarifying the rules on environment-related trade measures. The next chapter contains an assessment of the interpretive linkage of trade and environment at the WTO.