

## International Conference



### **Moving forward from Cancún**

### **The Global Governance of Trade, Environment and Sustainable Development**



**30 – 31  
October  
2003  
Berlin  
Germany**

## **Precaution Through Process in World Trade - Consumer Policy, Environmental and Sustainability Impact Assessments of Trade Policy and the WTO**

**Markus W. Gehring, Abteilung Europäisches Gemeinschaftsrecht,  
Hamburg / Germany and Centre for International Sustainable  
Development Law, CISDL, Montreal**

---

This conference is part of the international research project CAT+E, funded by the 5th Framework Programme of the European Commission - DG Research. In co-operation with the Task Force Global Issues of the German Federal Foreign Office.

Conference organised by Ecologic – Institute for International and European Environmental Policy  
Pfalzburger Str. 43/44, 10717 Berlin, Tel.: +49-30-86880-0, [www.ecologic.de](http://www.ecologic.de).

cat  $\Rightarrow$  e

„Moving forward from Cancún“

---

## Precaution Through Process in World Trade

-

Consumer Policy, Environmental and Sustainability  
Impact Assessments of Trade Policy and the WTO

Markus W. Gehring, Abteilung Europäisches Gemeinschaftsrecht, Hamburg  
and Centre for International Sustainable Development Law, CISDL, Montreal

# Outline

---

## I. Introduction

1. terminology
2. different levels of regulation for international trade
3. precaution through process

## II. Case Study 1: The Canadian SEA of Trade Policy

1. legal framework
2. objectives
3. process

## III. Case Study 2: The WTO GATS Assessment

## IV. Consumer Interests in Precaution through Process Mechanisms

1. legal frameworks
2. relevance to consumers
3. challenges

## V. Impact on the International Level?

1. problems with national assessments
2. integration of an SIA/EIA in WTO negotiations?

## VI. Prospects

# Terminology

---

- EIA: Environmental impact assessment  
(EC directive proposal 1980, in force 1988)
- EA: Environmental assessment  
(2001 EC directive on Plans and Programms)
- EIS: Environmental impact statement  
(NEPA USA 1970)
- SEA: Strategic environmental assessment  
(Kiev Protocol on Strategic Environmental Assessment)
- SIA: Sustainability impact assessment  
(EU studies since 1999)
- Integrated assessment  
(UNEP studies since 2000)

# Different Levels of Regulation

- **World trade is regulated on different legal levels:**
  - national level: *e. g. Aussenwirtschaftsgesetz  
UVP-G (-), Canada & USA EA (+) etc.*
  - regional level: EC, NAFTA, Mercosur, ASEAN, EAC  
*SLA of the EU, NAFTA enviro. assessment, etc.*
  - bilateral level: EC-Mexico Treaty, Canada-Costa Rica Trade Agreement, US-Jordan Trade Agreement  
*US EIS of US-Jordan Trade Agreement*
  - global level: WTO  
*discussions but no institutional assessment instrument*

But note: all legal instruments derive from developed countries

# Precaution through Process

## Precaution

- Where is this found in the law?
  - General legal principle, in international law?
    - Old analysis: if principle, where *opinio juris* / general practice?
    - New analysis: whether principle or approach, how to apply?
  - Principle contained in various multilateral environmental agreements (MEAs) *e.g. Cartagena Protocol*
  - Legal principle of various national legal orders
  - If general legal principle, also relevant to WTO law.

# Precaution through Process

---

- The precautionary principle:

“In order to protect the environment, the precautionary approach should be widely applied by states to their capabilities.” Where there are threats of serious or irreversible damages, lack of full scientificity shall not be used as a reason of postponing cost -/effective measures to prevent environmental degradation.” *Principle 15 Rio Declaration*

- Two tiered principle of sustainable development law:
  - scientific uncertainty, keeping possibilities open (material)
  - information, participatory approach, EIA, SIA (process)



# The Canadian EA of Trade Policy

## 1. Legal framework

- Canadian Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals (1999)
- Framework for Conducting Environmental Assessments of Trade Negotiations (Feb. 2001)
  - process
  - analytical framework
  - public participation



# The Canadian EA of Trade Policy

## 2. Objectives

Two key objectives for conducting environmental assessments of trade negotiations:

- to assist Canadian negotiators integrate environmental considerations into the negotiating process by providing information on the environmental impacts of the proposed trade agreement; and
- to address public concerns by documenting how environmental factors are being considered in the course of trade negotiations.

# The Canadian EA of Trade Policy

## 3. Process

- Four step process for conducting environmental assessments of trade negotiations (Feb. 2001)
  - Notice of intent to conduct an EA  
*announced when trade negotiation announced;*
  - Preparation of an Initial EA  
*released in advance of negotiation;* scoping
  - Preparation of a Draft EA  
*released at the start of negotiation; and* analysis of effects
  - Preparation of a Final EA Report  
*released after negotiation concludes.* documentation

# The WTO GATS Assessment

---

- Commitment to conduct assessments of trade in services  
“For the purposes of establishing [negotiating] guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including [increased developing country participation]” Art. XIX:3  
GATS
- 2000 Special Session of the Services Council (and 2002 Symposium)
- Members decided on an ongoing exercise and received various contributions over the last two years, including recent ones from Thailand, South Africa, China and the USA
- Specific development focus (see also UNCTAD and International Trade Centre studies)
- No public participation / no single methodology

# Precaution through Process: Consumer Interests

---

## 1. Legal Framework

- At present, each EA uses a different legal framework.
- Very few contain provisions giving consumer interests special recognition:

Ex: Sec. 2102 c (4) US Trade Act of 2002: “take into account other legitimate U.S. domestic objectives, including but not limited to the protection of legitimate health or safety, national security, and consumer interests and related law and regulations”

# Precaution through Process: Consumer Interests

---

## 2. Relevance of EAs of Trade to Consumers:

- Initial economic impact analysis phase considers consumer goods and services
- Participation mechanisms can permit consumers to raise (env. or other) concerns
- Can use information from consumer groups (esp. SIA, as is broader)

## 3. Challenges

- Can consumer concerns be integrated?  
eg. In Chile-US FTA Enviro Review, groups raised concern that pesticide use could change and negatively affect workers and consumers, while the USTR made reference to the Labour chapter, the Final Environmental Review of the U.S. – Chile Free Trade Agreement (p. 34)  
But note: only environmental consumer groups participated
- Can consumer groups learn to use ‘Precaution through process mechanisms’ effectively?
- Can the focus of these mechanisms be broadened toward sustainable development priorities?

# Transfer to the global level?

---

- **Problems with national assessments**
  - Is it possible to analyse global environmental effects at the national level?
  - Will the industrialised countries negotiating position be strengthened, to detriment of developing countries?
  - Is expensive technical expertise required?



## Integration of an SIA/EIA in WTO negotiations?

- Legally possible but not yet required by law (but see para. 51 of the Doha Ministerial Declaration)
- Processes are easier to install than hard standards
- Concrete steps are possible in the WTO:
  - green room process can be opened up
  - co-operation with UNEP just started (1999), can to be deepened
  - ex ante / ex post assessment?



# Recommendations

- Integrate developmental and consumer interests into national environmental assessments of trade
- Integrate environmental and consumer interests into WTO reviews (CTD/CTE)
- Set mechanisms in place for transparency and participation
- Go beyond window dressing = set mechanisms for increased accountability with regard to study results in place



# Thanks

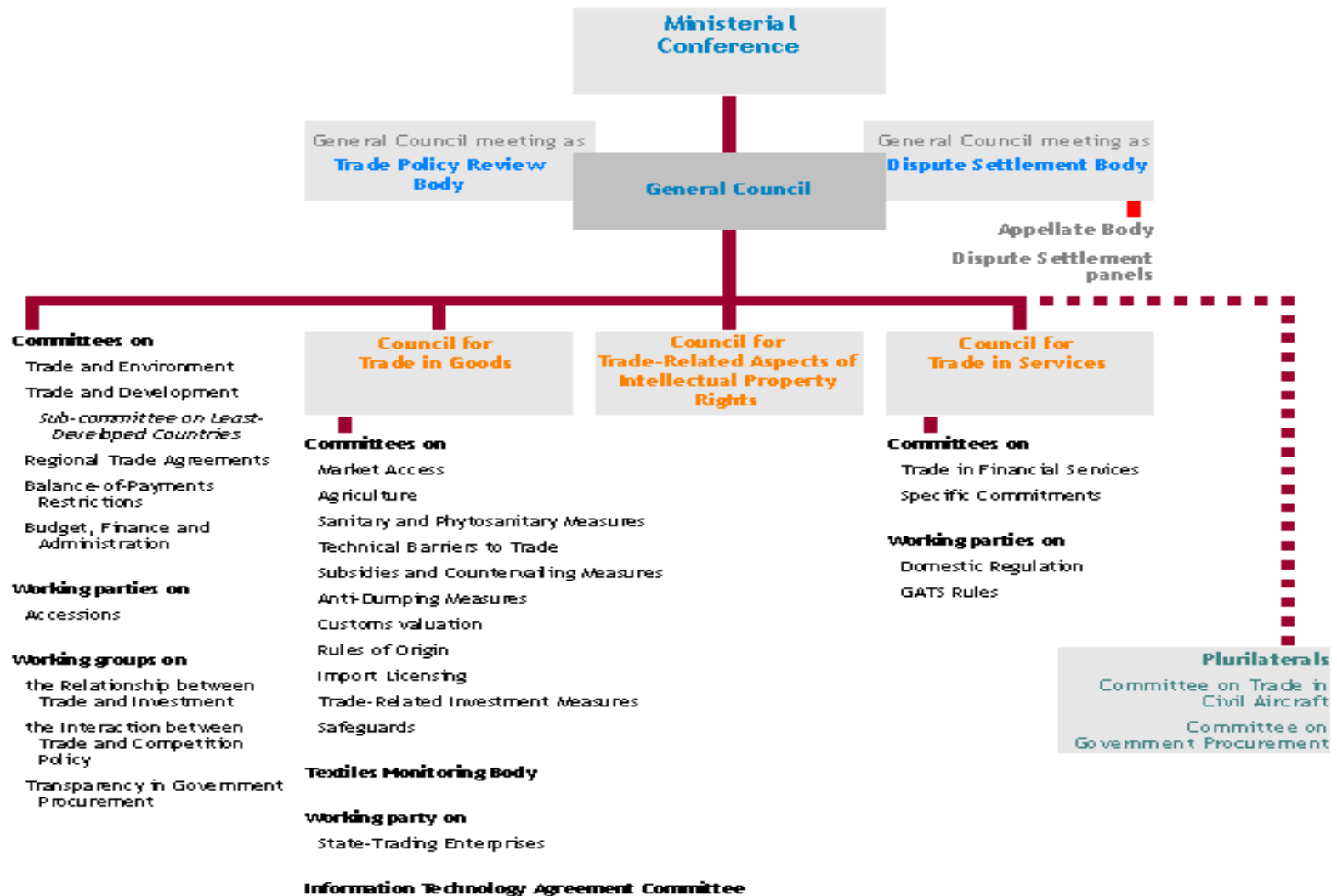
- Markus W. Gehring

M\_Gehring@public.uni-hamburg.de

or

mgehring@cisd1.org

# The WTO structure - an overview



# Important WTO rules

## **Article I GATT 1994**

### *General Most-Favoured-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, 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 GATT 1994**

### *National Treatment on Internal Taxation and Regulation*

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

## **Article XX GATT 1994**

### *General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (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;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

# Important WTO rules

## **Article II GATS**

### *Most-Favoured-Nation Treatment*

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

## **Article XIV GATS**

### *General Exceptions*

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (iii) safety;

## **Article 3 DSU**

### *General Provisions*

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.