

How the WTO is being used to challenge environmental protection

Examples from the EU

BACKGROUND PAPER

JULY 2006



**Friends of
the Earth
Europe**

Tobias Reichert
Consultant

FoEE gratefully acknowledges financial support from the JMG Foundation, the Sigrid Rausing Trust, the European Commission's DG Environment and the 31 national member groups of FoEE. Sole responsibility for content lies with the authors of the report. The JMG Foundation, Sigrid Rausing Trust and European Commission cannot be held responsible for any further use that may be made of the information contained therein.

Executive Summary

The WTO-negotiations market access in non-agricultural goods (NAMA) are mandated to reduce or where appropriate eliminate non-tariff-barriers to trade (NTBs). In the course of these negotiations about 200 domestic laws, regulations and other measures with environmental objectives have been notified as NTBs and are therefore under threat to be eliminated or changed as a result of these negotiations. This is in spite of the fact that the WTO has already established an elaborate set of rules to ensure that domestic regulations do not result in discrimination between domestic and imported products and are “not more trade restrictive than necessary”. These rules put already significant constraints on the application of environmental principles, especially the precautionary principle, which can be challenged in the WTO Dispute Settlement mechanism.

The NAMA-NTB negotiations therefore address primarily those measures which are likely to be in line with current WTO rules but nevertheless considered obstacles to trade by other WTO members. In the negotiations, a number of current or pending environment-related EU regulations and laws are addressed. This paper looks at car-taxes, the proposed chemicals legislation REACH and the labelling of fish products. In all cases negotiations on these issues with the objective to make them more “trade friendly” are likely to have a negative impact on their environmental effectiveness, or in the case of fish-labelling make it more difficult to turn them into environmentally useful instruments. In the case of REACH, WTO negotiations are also likely to be used as an argument by the EU chemicals industry to support its demands for a further watering down of the proposed legislation.

However, the EU is not an innocent victim in the NTB negotiations. On the contrary, in concert with other developed countries such as Japan the EU calls for disciplines on export duties on natural resources levied by developing countries. This is in spite of the fact, that export duties are so far not considered NTBs in the WTO and therefore no mandate exists to address this issue in the current negotiations. From an environmental perspective, it is of great concern that the experience with the elimination of export duties on timber in a number of developing countries has contributed to increased exports and accelerated deforestation.

So far it is not clear, how the negotiations on these and other measures will be conducted in the NAMA-NTB framework and whether they can be concluded within the current Doha Round of negotiations. Hence, the main outcome of the negotiations may be the establishment of a new permanent mechanism to deal with NTBs in the WTO. Both the EU and the NAMA 11 group of developing countries have made rather similar proposals on how such a mechanism would look like. They suggest that a “trade or industry expert” would act as a facilitator on specific measures identified as NTBs, consult with the country applying such a measure and the one that sees its trade impacted by it, and then comes up with a “trade friendly” recommendation to resolve the issue. WTO-members would not be obliged to implement the recommendations, but state the reasons if they decide not to do so. The process is supposed to take not more than three months and therefore allows very little time for external input, e.g. by environmental experts – on top of the fact that its deliberations are supposed to be confidential and only the resulting recommendations be published.

Friends of the Earth is concerned that such a mechanism will not result in balanced recommendations when applied to measures with environmental and other public policy objectives. Even when they are not legally binding, these purely trade based recommendations

may be used in the diplomatic or domestic policy debate to promote deregulation and the dismantling of environmental policy instruments.

Therefore the scope of the mechanism must be limited to purely trade related issues such as customs valuation or import licensing procedures. Trade problems that arise from the application of measures with broader public policy objectives should be dealt with outside the WTO by organisations with genuine environmental expertise such as the International Court of Justice, the Permanent Court of Arbitration or the International Court of Environmental Arbitration and Conciliation.

Introduction

The impact of international trade rules on environmental regulations has been of great concern since the creation of the WTO in 1995. The 2001 mandate of the Doha Round of negotiations includes the clarification of the relationship between the WTO and multilateral environmental agreements (MEAs). It also aims at liberalisation of trade in environmental goods and services. There has essentially been no movement on these issues. On the other hand the negotiations on “non-agricultural market access” (NAMA) – while not part of the trade and environment mandate – may have the biggest impact on environmental regulations.

In the NAMA-negotiations on non-tariff-barriers or NTBs, WTO member states requested a wide range of environmental (as well as other) measures of other members such as taxes and regulations to be removed or made less trade restrictive. They claim that these measures hinder their companies’ exports to the respective markets and therefore stand against the objective of the WTO to create freer and more liberal trade. These challenges to environmental measures are raised in these negotiations in spite of the fact that the WTO already has an elaborate set of rules to ensure that domestic policy measures are not discriminatory and not more trade restrictive than “necessary”.

This paper gives a brief overview on the current WTO rules that affect environmental measures, showing that they already put significant constraints on domestic environment and health related policies. The main part will be an assessment of the issues brought forward in the NAMA negotiations, including a more in-depth analysis of four environment-related measures:

- car-taxes in a number of EU-member states;
- the proposed EU chemicals regulation REACH;
- the mandatory labelling of fish products in the EU;
- and export duties on natural resources, especially timber, in many developing countries.

The proposals by the EU and the NAMA 11 group¹ of developing countries to create a “facilitative” or “problem solving” mechanism outside the formal dispute settlement procedures will also be analysed from an environmental perspective.

The paper concludes with the recommendation to handle environmental and trade problems outside the WTO to ensure a balanced assessment of the environmental merits of the measure in question.

¹ Argentina, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa, Tunisia and Venezuela

1. Why are environmental measures considered “non-tariff” trade barriers in the WTO?

The central objective of the GATT² is the liberalisation of trade through the reduction of tariffs and other trade barriers as well as the elimination of discriminatory practices in international trade. Therefore, any measure or practice that makes international trade more costly, complicated, or prohibits it altogether can be a potential target for elimination.

Initially the focus of GATT negotiations was almost exclusively on tariff reduction. After significant tariff reductions were agreed, more attention was given to “other trade barriers”, commonly referred to as “non-tariff-barriers” (NTB) or “non-tariff measures” (NTM). The scope of what is considered a non tariff barrier is extremely broad. It ranges from instruments directly related to trade, for example quantitative restrictions on imports, to regulations that affect international trade in practice although they were designed for different objectives. Mandatory standards for the safety of electrical appliances are one example, but also environmental measures fall under this category, including:

- restrictions on the import and marketing of products containing certain environmentally damaging ingredients such as heavy metals;
- incentives for the purchase of environmentally friendly goods, such as tax breaks for cars with low emissions;
- mandatory information on the production processes of certain products, such as the use of wood and the emission of waste water in paper production;
- mandatory information on the environmental impacts of certain products such as chemicals;
- voluntary certification and labelling of products that were made with environmentally sound production processes, such as organic agriculture or sustainable forest management.

In the WTO, environmental measures can be seen as a trade barrier from two perspectives:

- 1) as discriminating between domestic and foreign products;
- 2) requiring exporters to fulfil requirements and procedures that result in additional costs or otherwise hinder trade.

These two perspectives on barriers are dealt with in different WTO agreements. The GATT deals with the first perspective in its Article III that generally prohibits discrimination between “like products” from foreign and domestic producers. In the context of environmental measures it is crucial whether and under what circumstances products with different environmental impacts are considered “like products” in the WTO.

The second perspective is dealt with in the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) that require technical regulations, standards and measures to protect human, animal or plant life or health to be not more trade restrictive than necessary to fulfil legitimate objectives. The SPS requires in addition that measures are “based on scientific principles”. In the context of environmental

² General Agreement on Tariffs and Trade, now incorporated into the WTO, is defining the rules for trade in goods.

measures it is crucial which criteria are used to assess whether a measure is more trade-restrictive than necessary and which scientific principles and methods are considered valid.

Non-tariff measures which are “illegal” according to WTO rules can be challenged under the dispute settlement system.

Section 2 gives a brief overview of existing WTO rules on NTBs and how they are interpreted in relation to environmental measures. The rest of the paper will look at the negotiations on NTBs in the current Doha Round. These negotiations serve as an additional channel for exporting countries and industries to challenge environmental and other measures independent of the question on whether they conform to current WTO rules or not.

2. How are NTBs related to the environment currently dealt with in the WTO?

An environmental measure needs to meet two basic criteria to be considered consistent with current WTO rules:

- 1) It does not discriminate between “like products”, or does so only under limited exceptions;
- 2) It is not more “trade restrictive than necessary”, to achieve its objective.

The following section will describe the central provisions of the relevant WTO-agreements and how they were interpreted by WTO dispute panels.

2.1. GATT

Article III of the GATT requires that products imported from a WTO member are treated “no less favourably” than “like products” from domestic production or imported from a third country. There is no definition of “like products” in the GATT. The broadest understanding of the likeness of products is when they compete in the same market, i.e. they can be used for the same purposes. Despite the lack of a formal definition, Panels and the Appellate Body in disputes that involved the question of whether imported and domestic products are “like”, have used the following standard criteria to determine the likeness of two products:³

1. Physical properties, nature and quality;
2. End uses;
3. Consumer tastes and habits; and
4. Tariff classification.

³ UNEP/IISD: Environment and Trade: A Handbook, 2005, p. 35

Environmental and health aspects are not mentioned as separate criteria. However, additional criteria can be used to assess likeness, and in a ruling on the EC import-ban on products containing Asbestos, the Appellate Body found that if health risks arise from the physical properties of a product, it is not “like” an otherwise similar product that doesn’t pose these health risks. The GATT-panel in the dispute on US-taxes that differentiate between cars based on their fuel consumption also found that a country can differentiate between otherwise “like products”, if the policy objective is not to protect domestic industries but another (legitimate) domestic policy objective⁴ - in this case the protection of the environment. The panel report was never formally adopted⁵ but is nevertheless considered to be an indication that environmental criteria can be considered when differentiating between products.

In all cases, the panels required that a strong linkage exists between the physical properties of the product and the environmental and health criteria. Therefore, distinguishing between products on the basis of the environmental effects that occur during their production is generally considered not to comply with Article III of GATT.

However, Art. XX of GATT on general exceptions allows measures which would otherwise be inconsistent with the GATT rules if they are (inter alia):

...

“necessary to protect human, animal or plant life or health;”

...

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

...

“provided that those measures do not constitute an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction to international trade.”

So far, this general exception clause has only once been invoked successfully with regards to an environmental measure: The Appellate Body found that a US import ban on shrimps that were caught with methods that pose a threat to sea turtles can be allowed subject to a number of additional criteria.⁶ Although the shrimp caught with methods protecting turtles have exactly the same physical properties, end use and tariff classification as those caught with methods harmful to turtles and are therefore “like products”, they can however be treated differently according to their production methods. The Appellate Body gave a number of reasons for this decision, including that sea-turtles were classified as an endangered species by the CITES Convention on International Trade in Endangered Species of wild flora and fauna – a multilateral environmental agreement (MEA).

Most trade and environment analysts consider the shrimp-turtle decision as a landmark case, broadening the scope for applying environmental measures in the WTO regime and strengthening the position of MEAs in the WTO. However, future panel and appellate body decisions do not necessarily have to be in line with previous decisions, and in its preliminary report, the panel in the EU-Biotech-case seems to be considerably more restrictive towards environmental considerations (see Box 1).

⁴ Housman and van Dyke: Trade principles relevant to multilateral environmental agreement; in UNEP: The use of trade measures in select multilateral environmental agreements, 1995, p.27f

⁵ Before the WTO Dispute Settlement Understanding came into force, panel reports became legally binding only when all GATT members accepted them.

⁶ For a brief summary, see: UNEP, IISD, 2005, p. 32f

The decisions of different panels, and especially of the Appellate Body, seem to indicate some flexibility regarding the treatment of environmental “non-tariff” measures in the WTO. This flexibility exists however mainly in the field of the definition and treatment of “like products”, i.e. products can be treated differently according to certain environmental criteria.

Flexibility seems to be smaller with regards to the absolute disciplines which require (environmental) measures to be “not more trade restrictive than necessary”, defined and in the TBT and the SPS agreement.

2.2. The Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement came into force with the foundation of the WTO in 1995. It covers technical regulations and standards and contains many provisions that aim at preventing these measures from becoming barriers to trade.⁷ In accordance with the interpretation of “like products” in GATT, the agreement is restricted to physical product characteristics, and covers production methods only insofar as they directly affect the product characteristics. For example, an import ban on textiles dyed with certain colours that can pose a health risk would be considered a TBT measure, as would be additional testing requirements for cotton which is produced with heavy use of pesticides, since in both cases the harmful substances may be contained in the end-product. On the other hand, requiring imported wood to originate from sustainable forestry would not be considered a TBT measure, since forest management does not affect the physical properties of the wood. Such a requirement would therefore fall under the scope of the GATT - and probably be ruled to be illegal unless it can be justified through the Art. XX general exception.

In addition to the non-discrimination requirement of GATT Article III, the TBT agreement requires that measures are “not more trade restrictive than necessary to achieve a legitimate policy objective”. The protection of the environment is included in the illustrative list of legitimate policy objectives.⁸ Domestic regulations and standards shall be based on international standards, unless these would be ineffective to achieve the legitimate objective. This reliance on international standards has two important disadvantages:

- In many international standard setting bodies, the industry for which the standards are defined plays an important and influential role in defining the contents of the standards, without adequate engagement of other stakeholders. This is likely to weaken environmental and health considerations in the standards.
- Developing countries are often underrepresented in these bodies and lack the financial and technical resources to influence the definition of international standards.

So far, the TBT hasn’t played a prominent role in WTO-dispute cases on environmental measures. It is therefore difficult to assess, how strictly its “necessity-test” is going to be applied.

⁷ Rotherham: Implementing Environmental, Health and Safety Standards, and Technical regulations. The developing country experience, IISD, 2003, p. 26f

⁸ TBT-Agreement, Art. 2.2

2.3. The Agreement on the Application of Sanitary and Phytosanitary Measures⁹ (SPS)

The Agreement on Sanitary and Phytosanitary Standards, like the TBT agreement came into force in 1995. It is more specific and deals exclusively with standards “necessary” to protect humans, animals and plants from certain hazards associated with the movement of plants, animals and foodstuffs in international trade. The SPS Agreement does not apply to measures falling under the scope of the TBT agreement and vice versa. Hence in assessing the WTO conformity of a measure, a panel needs to decide first, which agreement applies to it.

Like the TBT Agreement, the SPS Agreement requires the use of international standards, where these exist, as a basis for domestic regulations.¹⁰ If a country wants to achieve a higher level of protection than would result from applying an international standard, it has to give a scientific justification for doing so. In general, standards have to be based on scientific evidence and risk assessments. Special provision is made for temporary measures when current scientific information is insufficient to do a full risk assessment before adopting permanent measures. This makes the SPS Agreement one of the few WTO agreements that relates to the precautionary principle, albeit in a very restrictive manner. All dispute settlement cases that involved temporary measures in a situation with limited scientific information, the country defending these measures lost the respective case.

Box 1: EC-Biotech-case

After lengthy deliberations, the panel in the dispute between the US, Canada and Argentina on the one hand, and the EU and its member states on the other, issued its report on the challenged EU measures regarding the approval and importation of Genetically Modified Organisms (GMO).^{11,12,13}

The claimants did not challenge the EC-Biotech regulation as such, which requires that the potential risks of GMO products are assessed before they can be approved for sale and used in the EU. They claimed however that the regulation was applied in a manner that resulted in unnecessary trade barriers. The claimants had challenged three types of measures taken by the EU and EU Member States:¹⁴

- An alleged EC moratorium on approvals for biotech products: The claimants argued that there had been a de facto suspension of approvals of GMO, in spite of existing regulations for their approval.
- Various product-specific EC measures related to the approval of biotech products: The claimants argued that the failure of the EC to consider specific applications for approval of biotech products also constituted a violation of WTO rule.

⁹ UNEP/IISD, 2005, p. 39f

¹⁰ The SPS agreement explicitly refers to standards defined by three international organisations, the Codex Alimentarius Commission (dealing with food safety), the International Office of Epizootics (dealing with animal health) and the International Plant Protection convention (dealing with plant health), the problems of high industry and low developing country participation apply to these organisations as well.

¹¹ The official title of the case refers to „Measures affecting the approval and marketing of Biotech products”. The term “biotech products” refers essentially to GMO and products derived from them.

¹² The final report of the panel is not publicly available yet. However, FOEE was able to obtain and publish a leaked copy of the interim report. In most cases the final reports of WTO panels are usually very similar to the interim reports. Hence the analysis of the interim report allows for an adequate assessment of the panel findings.

¹³ The following analysis is based on an assessment by CIEL: EC-Biotech: Overview and analysis of the panel’s interim report, Geneva, 2006

¹⁴ CIEL: 2006, p.5f

- Various EC Member State measures related to the import and/or marketing of specific biotech products: The claimants challenged that some EC Member States, including France, Germany, Italy, and Greece, did not allow the marketing and use of some GMOs, in spite of the fact that they had been approved by the EC. National ‘safeguard measures,’ in the EC regulations, allow for this practice if member states have additional information on new risks. The claimants argued that the restrictions were not based on scientific evidence, as required by WTO rules. The EC, claimed these measures were in full compliance with relevant WTO disciplines, given their provisional nature.

The findings of the panel on these challenges are worrisome from an environmental perspective for a number of reasons:

- The panel used very broad criteria for the application of the stringent SPS-agreement (see above), thereby restricting the scope of the more flexible TBT agreement. For example the panel found, that a product, like seeds, can be considered “food”, even it is not meant to be consumed by humans or farm animals, but may be eaten by wild animals. The panel also found that the EU’s objective to protect the environment (an objective normally falling within the scope of the TBT agreement) is falling under the scope of the SPS agreement. The reason it gives for that is, that the protection of plant and animal health, core SPS objectives are a part of environmental protection, and the EU regulation was mainly aiming at these.
- The panel also ruled that a “de-facto-moratorium” on the approval of GMOs existed in the EU, and that this violated procedural requirements of the SPS agreement. The moratorium was causing “undue delay” in the approval process. The reason quoted by a number of member states for blocking the approval of new GMO: the pending amendment of the relevant regulation was not considered valid by the panel for causing a delay.
- The only substantive – rather than procedural – finding in the case was made on the national safeguard measures by member states that limited the importation and marketing of GM-products already approved by the EC. The panel found that the national safeguard measures were inconsistent with the SPS agreement, since they were not based on a risk assessment. The panel found that sufficient information for a risk assessment of the products in question was available¹⁵ and therefore the right of EU member states to apply temporary measures could not be invoked.
- The panel also decided not to take the Convention on Biological Diversity and its Biosafety Protocol – which deals explicitly with international trade in GMO - into account, when interpreting the WTO rules in this case. It argued that it would only have been required to do so if all WTO-members had ratified the Biosafety Protocol. Since the US as a complainant has not ratified the Biosafety Protocol, the panel found that it had no obligation to consider the protocol. The panel still had the possibility to consider its provisions if it found them informative. However, it decided not to do so, without giving a particular reason for this decision.

This strict ruling increases the likelihood that environmental measures may be challenged and defeated in the WTO dispute settlement system. This may increase the readiness of countries maintaining such measures to “negotiate” with countries that consider these measures as a trade barrier in the ongoing NAMA-NTB negotiations to avoid a dispute. Thereby environmental measures could come under greater pressure even without a formal dispute.

In summary, it can be stated that the WTO agreements already put significant constraints on the design and implementation of environmental policies:

- The differentiation of products according to the environmental impacts of their production processes has so far only been allowed once as an exception. If panels in future disputes will follow the line taken in the shrimp-turtle case is far from clear;
- While the differentiation of products according to the environmental impacts of their use or disposal is accepted in the WTO to a certain extent, there seems to be a trend towards increasingly strict scrutiny of the “scientific basis” of this differentiation. The reference to

¹⁵ The panel based this decision on the fact that the original EC approval of these products was based on a risk assessment.

international standards, the definition of which is strongly influenced by business interests makes the consideration of genuine environmental and health concerns more difficult.

- This problem becomes most obvious with the treatment of the precautionary principle – the conditions for its application are so limited that it so far has not been accepted in a dispute as a justification for a measure affecting trade.

In spite of this, the current negotiations in the Doha Round, provide yet another avenue for business interests to challenge those environmental measures, even if they are likely to be in line with WTO-rules but nevertheless have an impact on trade.

3. The new challenges to environmental measures in the current negotiations

In 2001 trade ministers launched, after controversial discussions, a new round of negotiations at the WTO Ministerial Conference in Doha/Qatar. While the negotiations are often referred to as the “Doha Development Agenda” by the WTO secretariat and representatives of developed countries the actual negotiation mandate defined in the ministerial declaration is focused on the “core business” of the WTO: The liberalisation of international trade. The preamble of the Doha declaration also claims, that “... under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are... in accordance with the provisions of the WTO agreements.”¹⁶ Which essentially says that the WTO allows countries to do things which are in accordance with WTO rules – even if they serve to protect the environment.

Paragraph 16, which defines the mandate for the NAMA negotiations, is silent on the environment. It states however that the negotiations shall aim “...to reduce or as appropriate eliminate tariffs,...., as well as non-tariff barriers, in particular on products of export interest to developing countries.”¹⁷

The NAMA negotiations so far have focused on the question to what extent tariffs should be reduced. Since developed countries already have relatively low tariffs on most products, it is mainly them that ask for a sharp reduction that would mostly affect developing countries. Most developing countries on the other hand want to maintain higher tariffs and the flexibility to be able to protect certain industries which are not yet able to compete at world market conditions. Environmental considerations play little if any role in these negotiations. This is in spite of the fact that the expansion of trade in natural resources such as forest products and fish is likely to contribute to the further depletion of these already over-used resources.¹⁸ Alarming, the idea to exempt these critical natural resource sectors from further tariff reductions until adequate policy measures are in place to ensure that freer trade does not lead to their further destruction is not even discussed amongst WTO-member states. On the contrary, a number of countries have proposed to reduce tariffs in those sectors even more than for other products.

¹⁶ Doha Ministerial Declaration 2001, para. 6

¹⁷ *ibid.*, para. 16

¹⁸ Bernasconi-Osterwalder and Sherman: NAMA negotiations: an environmental perspective, CIEL, 2005, p.1

The negotiations on NTBs have so far received less attention than the overall formula for reducing tariffs.¹⁹ This is due to the fact that extensive rules on NTBs as described in section two already exist in the WTO and that NTBs –unlike tariffs - take very different forms which makes them much more difficult to deal with in a uniform approach in multilateral negotiations. The method members have chosen to deal with NTBs in the current negotiations was a notification exercise, in which all countries could notify all measures of another country which they considered NTBs that hindered their trade. Following these notifications, members have to decide how to deal with the notified measures in negotiations. The WTO-secretariat has identified four categories of notified measures according to their relation with existing WTO-rules.²⁰

- 1) NTBs that are covered by an existing WTO agreement that does not have a specific separate negotiating mandate, e.g. the TBT and the SPS agreement.
- 2) NTBs that are covered by an existing WTO agreement, that is also the subject of a specific separate negotiation mandate such as the Agreement on Anti-Dumping, and the Agreement on Subsidies and Countervailing Measures.
- 3) NTBs that are not covered by an existing agreement, but related to on-going negotiations in the Doha Round, most importantly the negotiations on trade facilitation which deal with customs procedures.
- 4) NTBs not covered by an existing WTO agreement and not related to on-going negotiations. These include export taxes, fiscal incentives and tax and duty exemptions.

From an environmental perspective, categories one and four are probably of greatest concern, since anti-dumping or trade facilitation measures normally do not have a strong link to the environment. At the same time it is still not clear, how they will be dealt with in the negotiations. While the measures falling in categories two and three will most likely be dealt with in the mandated negotiations in the respective areas (e.g. trade facilitation or customs valuation), members have proposed different approaches to address measures falling into categories one and four.

For category one the proposals include:²¹

- to discuss and clarify the NTBs in the relevant committee, such as the TBT-Committee, and keep the negotiation group on market access informed;
- to negotiate in the Negotiation Group on Market Access (NGMA) or bilaterally or;
- to take the issue to dispute settlement, when the measure is deemed to be not in compliance with the respective agreement.

The dispute settlement option exists independently of the negotiations and doesn't add anything to the current treatment of NTBs in the WTO. If TBT and other measures would however be negotiated in the NGMA, this could result in measures to be changed or eliminated as a result of negotiations, that are in line with current WTO rules. It is unclear what the discussion in the relevant committees would entail and whether this would add anything to the existing procedures of the TBT and other agreements, where such discussions take place already. For category four all proposals involve some form of negotiations in the NGMA, ranging from horizontal approaches covering NTBs in all sectors, sector specific approaches (e.g. all measures affecting trade in cars), to negotiations addressing specific groups of NTBs such as export taxes, import quotas either horizontally or sector specific. All

¹⁹ *ibid.*, p.2

²⁰ *op. cit.*, p.5f

²¹ *op. cit.*, p.7f

these approaches could result in new general WTO-disciplines and potentially impact on environment related national policy measures.

Measures addressed in the second stage of the NTB negotiations, per sector and measure...

Measure /Sector	Fish	Fore st	Mine rals	Petr oleu m	Food	Chemi cals	Pharma	Textiles/ Footwear	Auto	Elect rical	Environ mental Goods	Generi c	total
Ex		3	2					1				1	7
Inv				1					2				3
Lab	4	2	1		4	5	5	2	1		1	7	32
Reg	5	3			3	11	4	3	4	6	1	13	53
total per sector	9	8	3	1	7	16	9	6	7	6	2	21	95
Sector groups													
nat. resources		21								Ex	Export restrictio ns		
manufacturin g		47								Inv	Investm ent		
Food		7								Lab	Labellin g/certific ation		
Generic		21								Reg	Regulati ons		

...and how they may be dealt with (which is not formally agreed yet). The figures per group of measures and per negotiation method do not necessarily add up, since they contain a number of “double counts”.

Negotiations in	Ex	Inv	Lab	Reg	total
Trade Facilitation Rules Committee			1	1	2
TBT/SPS Bilateral			11	16	27
NGMA	5	1	14	19	39
Trade Negotiations Committee			1		1
Delete	1		2	4	7
Not clear			1	1	2

The overview shows that the majority of issues is likely going to be dealt with in specific negotiations, either in the NGMA or bilaterally. The second largest group of measures will be dealt with in an existing Committee (most of them in the TBT Committee and a significantly smaller number in the SPS committee alone or in the TBT and the SPS Committee in parallel). As pointed out above it is not yet clear what the decision to refer the measures to these Committees would add to their already existing work.

Box 2: Environmental regulations in services – the GATS negotiations on domestic regulation

The General Agreement on Trade in Services (GATS) deals almost exclusively with non tariff measures as there are practically no tariffs applied on international trade in services. Unlike the GATT, GATS does not automatically prohibit discrimination between foreign and domestic service suppliers. The removal of discrimination is a result of negotiations on liberalisation commitments in specific sectors. So far, disciplines that require measures to be not more trade restrictive than necessary to achieve legitimate domestic policy objectives, such as those defined by the TBT and SPS agreements for trade in goods, do not exist in trade in services. However, GATS Article VI: 4 mandates Members to develop any necessary disciplines to ensure that qualification requirements and procedures, licensing requirements and procedures, and technical standards do not constitute unnecessary barriers to trade.

A central issue from an environmental perspective is disciplines on technical standards. A number of countries, especially Switzerland and Mexico, have essentially proposed to establish a TBT like agreement in GATS. This would include the requirement that measures are not more trade restrictive than necessary to fulfil a national policy objective. Interestingly, unlike in the TBT agreement, the illustrative list of national policy objectives provided by Switzerland and Mexico in their proposal does not include environmental protection. Since the list would be non-exhaustive, this would not rule out that environmental objectives are accepted. However, the omission seems to indicate that environment-related standards have a low priority for the proponents. The proposal, which is by far the farthest reaching in the discussions on technical standards, gives a very broad definition of technical standards, which includes international standards. The scope of regulations that may be affected by this definition is still unclear, particularly given that international standards for services hardly exists in many sectors.

The concerns raised with regards to the proposal on domestic regulation are similar to those on the TBT agreement. They include the requirement to use international standards as the basis for national standards and a necessity test. A number of developing countries including Brazil, the Philippines, the ACP Group, Africa Group and the Small and Vulnerable Economies have alternative proposals stressing the right to regulate and rejecting the “necessity test” (for the entire Article VI: 4 disciplines). Furthermore, they reject the idea of imposing the use of international standards, particularly on establishing international standard setting bodies, in which all WTO Members are not full and equal participants, as norms in the WTO. Also major developed countries like the US reject the necessity test or as the EU have up to now not taken a clear position.

The strong position taken by a large number of countries against a TBT like agreement in services provides some hope that at least in the area of domestic regulations the space for environmental policy making in standards for services may be less restrictive.

4. An analysis of selected environmental measures and standards challenged in the current negotiations

4.1. Car taxes

One of the NTBs the US has notified for negotiations is vehicle taxes for automobiles that are based on engine size. The US argues that this is providing a competitive advantage to vehicles with smaller engine sizes. Conversely, American cars, which usually have bigger engines are disadvantaged.²²

If the negotiations in the WTO would result in a requirement to change these vehicle taxes, several EU member states would be affected. Since tax policy is not part of the EU competencies, each member state operates different systems of car taxes, with differing tax bases and tax burdens.²³ A number of countries, including Greece, Germany, Ireland and the UK do base taxes for cars at least partly on engine sizes. In other countries like the Netherlands, Italy, and Austria other criteria are used, which are also closely related to car sizes such as weight and horsepower, and would most likely also be affected by an outcome of negotiations that eliminates “discrimination” against larger cars and engines.

Since larger cars with larger engines normally consume more fuel and therefore emit more carbon dioxide the current system of car taxes can be expected to have environmental benefits insofar as it encourages customers to buy smaller cars, which are normally more fuel efficient. However, only three countries base their taxes for cars directly on environmental criteria: Denmark uses fuel consumption as a base, the UK which uses a combination of engine size, the type of fuel and CO₂ emissions and Germany grants temporary tax rebates for cars with low emissions of other pollutants such as NO_x.²⁴

These tax systems are put into question by the US request. It is difficult to predict the outcome of these negotiations. Nevertheless, possible scenarios are discussed below.

- 1) Elimination of all car taxes. This would obviously ensure maximal conformity with WTO rules – and at the same time is likely to have very negative environmental impacts, since governments would give up an important economic instrument to influence the behaviour of car-buyers. Given the fact that car taxes (not including taxes on fuel) account for as much as 4% of total tax revenues in some EU member states, this option seems quite unlikely. In the face of budgetary constraints, the foregone revenues would have to be replaced with tax increases in other areas, which is likely to be very unpopular. This is especially the case for the environmentally preferable option of compensating the revenues from car taxes with an increase in fuel taxes. While this would strengthen the link between CO₂-Emissions (which are of course a direct result of fuel consumption) and taxation, it seems politically unfeasible in a situation of increasing fuel prices. In addition it would not allow to address pollutants like NO_x or particles, which result more from engine technology than from the amount of fuel consumed.

²² TN/MA/W/46/Add.8/Rev.1

²³ Consultores em Transportes Inovação e Sistemas, S.A., et al.: Study on vehicle taxation in the member states of the European Union – Final Report, January, 2002, Study conducted for European Commission DG Taxation and Customs Union.

²⁴ Consultores em Transportes Inovação e Sistemas, S.A., et al.:

- 2) Changing the tax base to “non-discriminatory”-criteria like a uniform tax for all cars or the purchasing price. Both options are likely to be in line with WTO criteria. The former is obviously “non-discriminatory”. With the latter it could be argued, that it “discriminates” against more expensive cars, but the same could be said of the VAT, which so far has not come under attack in the WTO. Also, the registration taxes for cars, which are based on the purchasing price in many EU countries are not mentioned in the US request. From an environmental perspective, these options are as bad or even worse as the elimination of car taxes, since revenues stay the same but without any relation to environmental performance. A tax based on the purchasing price could even discourage buyers to opt for a more fuel-efficient and less polluting car, since the technology involved may well make it more expensive than a more polluting model of the same size.
- 3) Changing the tax base to criteria directly related to environmental performance such as fuel consumption or emissions of CO₂ or other pollutants. In fact, the European Commission has, independently of the US request in the WTO, proposed to harmonise the base for car taxes in all EU member states. The Commission proposal would require member states to base at least 50% of the tax on CO₂-Emissions by 2010.²⁵ While such a system would also “discriminate” against large cars, it is likely to be considered compatible with WTO rules, which allow for products to be treated differently according to their environmental performance.²⁶ In fact in 1994 a panel of the WTO’s predecessor GATT ruled that a US car tax based on fuel consumption, was compatible with GATT rules²⁷. Although the panel report was never formally adopted by the members, it was de-facto accepted by the complainant in this case: the EU.

The Commission proposal for an emission based tax is currently debated in the European Parliament, and after the Commission has taken its views into account it will be transferred to the Council. The likelihood of it being adopted there appears quite small, since decisions on tax matters require unanimity and the member states are generally very reluctant to let the Commission expand its influence on tax policies.²⁸

The analysis shows that negotiations on car taxes as a non-trade barrier will not necessarily lead to environmentally inferior regulations (scenario 3). However, tax systems that are unrelated to environmental criteria would be the easiest options to meet WTO-criteria (scenario 2).

The fact that there is strong industry input into the official discussions in the WTO implies that environmental considerations are unlikely to play a prominent role in potential negotiations on car taxes. The ongoing discussions on NTBs in the automotive sector are linked to the “Global Automotive Industry Dialogue”, a forum of the auto industry associations of the world’s leading car manufacturers^{29, 30}. The members of this group have made several presentations to NAMA negotiators in Geneva and made recommendations on how to address the most important NTBs from an industry perspective.

²⁵ Commission of the European Communities: Proposal for a council directive on passenger car related taxes, COM (2005) 261 (final), 2005

²⁶ see 2.1 above

²⁷ Rao, P.K.: Environmental Trade Disputes and the WTO, 2001, p.47

²⁸ For the same reason, Commission officials doubt that member states will give the EC a mandate to negotiate on car taxes in the WTO. In general member states are anxious to keep tax issues a national prerogative. Korea and other Asian countries may be affected more by the US request.

²⁹ WTO: Market access for non agricultural products, Progress Report: WTO NAMA Discussions on Autos NTBs, Communication from the United States, Addendum, TN/MA/W/18/Add.9 7 November 2005

³⁰ Terms of reference for the global automotive industry dialogue; APEC, 2005/ADSC/009

The dominant industry influence and the fact that environmentally unsound scenarios are most likely to meet WTO criteria confirms FOE's view that the WTO is not appropriately equipped to deal with problems related to environmental measures on its own.³¹ A mechanism that meets the requirements of sustainable development must ensure that alternatives to current tax regimes in whatever sector are better or at least as good in environmental terms as the current one. The NAMA-NTB negotiations have no means whatsoever to ensure this. Consequently, the issue of car taxes should not be dealt with in the NAMA negotiations.

4.2. REACH

In 2003 the European Commission proposed a comprehensive regulation that aims at gathering basic safety data on the chemicals used in the EU. It is meant to replace existing laws that require very strict testing for chemicals to be newly introduced. However laws currently in force allow for around 30.000 chemicals which have already been in use before 1981 to be sold without any safety information available. The proposed REACH (Registration, Evaluation and Authorisation of Chemicals) legislation will require information on the health and environmental risks of these chemicals. Based on this safety information the use of certain chemicals may be subject to authorisation by the EU member state authorities.

The proposed REACH (Registration, Evaluation and Authorisation of Chemicals) legislation sets out a range of procedures and requirements for the registration, notification, evaluation, authorisation and restriction of industrial chemicals manufactured or sold in the EU. In particular, REACH provides that:³²

- The manufacture or import of unregistered chemicals in quantities over one tonne each year will be prohibited after a certain "phase-in" period.
- Registration requirements apply to the manufacture or import of chemicals in quantities over one tonne each year, whether they are manufactured or imported on their own or in preparations, e.g. being mixed with other substances.
- Different information requirements apply for registration depending on the volume of chemicals produced each year, commencing with one tonne and increasing to 10, 100 and 1000 tonnes each year.
- Manufacturers or importers submitting chemicals produced in quantities over ten tonnes each year for registration must assess the safety of their use in terms of human health and environmental hazards, and document the assessment in a chemical safety report.
- Registration documentation, and chemicals submitted for registration that are suspected of presenting a health or environment risk, may be evaluated by member states.
- Registration requirements also apply to 'dangerous chemicals' in quantities over one tonne contained in, and intended to be released from articles (such as finished products) produced or imported into the EU.
- Chemicals of 'very high concern' – such as those that cause cancer or accumulate in living bodies or equivalent chemicals 'identified as causing serious and irreversible effects to humans or the environment' – cannot be sold in the EU after a specified date

³¹ Friends of the Earth International: The tyranny of free trade, Amsterdam, 2005

³² Palmer, Alice: REACH and 'proportionality' under WTO rules, WWF, June 2004, p.10f

unless they have been authorised. Authorisations shall be granted where the risks to human health and the environment of the use are ‘adequately controlled’.

- Dangerous chemicals contained in articles which are likely to be released in quantities that may adversely affect human health or the environment must be notified to the newly created European Chemicals Agency, which may then require their registration.

The REACH regulation has not come into force yet, partly due to the fact that “the European Commission, the European Parliament and member states have been subject to unprecedented lobbying”,³³ especially by the European Chemical industry companies and their federations. Industry and federations from other countries are also active in lobbying often in close co-ordination with and vigorously supported by their governments, e.g. in the US.³⁴

One of the arguments brought forward (albeit usually not the main one) was that the REACH would create an unnecessary barrier to imported chemicals and would therefore be inconsistent with the EU’s commitments in the WTO. REACH was also discussed in the WTO’s TBT committee, in which the EU had notified the draft regulation.³⁵ In this process, the representatives of Japan and Chile, amongst others argued that REACH would be more trade restrictive than necessary to achieve its legitimate objectives.³⁶ The American Chamber of Commerce to the European Union (AmCham) complains in a recent paper³⁷ about the proposal in REACH to compile and publish a list of chemicals with potentially hazardous properties (‘substances of very high concern’).³⁸ Articles to be sold in the EU would have to be notified, if they contain more than 0,1% of a substance on this list. AmCham claims that this act of creating transparency on potentially hazardous chemicals and their use amounts to an unnecessary trade barrier and therefore violate the TBT agreement. It is especially afraid that “green NGOs and their governmental supporters”³⁹ will “force companies, not to use these substances” especially not in toys, cosmetics and other consumer products. This would be in spite of the fact that the use of these substances would be legally permitted under REACH. AmCham claims that foreign producers would be affected more strongly since EU producers were more likely to use only registered, and - where applicable – authorised substances. In order to avoid negative economic and trade effects, AmCham proposes to leave consumers in the dark about potentially hazardous substances in the products they buy, until at most one year before the authorisation process starts. Through this process it wants to make sure, that potentially hazardous substances can be used without restrictions until proof of their harmful effects is established.

On the other hand, an analysis by the Foundation of International Environmental Law and Development (FIELD) has shown that the provisions of REACH are in line with the rules of the TBT agreement.⁴⁰ In fact, compatibility with WTO rules has been one of the objectives of the Commission in drafting REACH. Hence it is far from certain that countries like the US or Japan would succeed in a potential WTO-dispute against REACH. In addition, a formal dispute settlement in the WTO can only be started after REACH has come into force.

³³ Former Swedish MEP Inger Schorling, quoted in: Friends of the Earth Europe: Profits before health and the environment. How the chemical industry is undermining European chemical legislation; p.30

³⁴ Greenpeace International: Toxic lobbying. How the chemical industry is trying to kill REACH, p.16

³⁵ The TBT agreement does not require the notification of draft legislations but encourages it (Article?)

³⁶ Palmer, Alice: REACH and ‘proportionality’ under WTO rules, WWF, June 2004, p.17

³⁷ Amcham EU: Position paper on concerns and priority issues on REACH, 10th April 2006

³⁸ These substances would later become subject to the authorisation process, but this could take some years due to capacity constraints – in the meantime, the substances can be sold in the EU.

³⁹ Amcham EU: Position paper on concerns and priority issues on REACH, 10th April 2006; p.3

⁴⁰ Palmer, Alice: REACH and ‘proportionality’ under WTO rules, WWF, June 2004, p.5f

In this situation, the NAMA negotiations on non-tariff barriers provide opponents of REACH with an additional opportunity to challenge the draft regulation, even before it is adopted. A number of countries including Japan, Korea and Cuba have mentioned REACH in their initial notifications of issues they may want to address in the NAMA NTB negotiations. However, so far none of these countries has followed up with a formal request for negotiations. The EC expects a significant number of requests – both in the ongoing NAMA negotiations and, if adopted, in the framework of facilitation mechanisms proposed by the EU and the NAMA 11 (see 5.2 below).

The potential outcomes of these negotiations are difficult to predict. They will almost certainly not result in abolishing the REACH proposal. WTO-member states challenging REACH, as well as chemical industry, claim that they accept the “legitimate” objectives of the proposal. However, their main and already partly successful objective is to water down REACH to the extent that it will become widely ineffective and unworkable. So far, as a result of industry lobbying, much less safety information is required for chemicals produced and imported in volumes under 10 tonnes per year, and production of the most dangerous substances can be continued if their use is “adequately controlled”, even when safer alternatives are available.⁴¹

In spite of these lobbying “successes”, the chemical industry continues to press for a further watering down of REACH. In June this year, the US managed to gain the support of ambassadors to the EU from a broad group of countries on its allegation that even the watered down REACH would be “potentially disruptive to international trade”.⁴² The meeting was hosted by AmCham⁴³, and the statement of the ambassadors reflects many of AmCham’s criticisms described above. Although the ambassadors do not mention the WTO, it seems very likely that their governments will take up these complaints in the WTO and the NAMA-NTB negotiations. This outside pressure on REACH is almost certain to be used by domestic lobby groups to further weaken REACH. Therefore, a WTO process with a narrow focus on trade effects, can become an important obstacle for environmental regulations. Consequently, international concerns about REACH should be dealt with in a framework which has the necessary expertise in environmental and health questions.

4.3. Labelling of origin of fish products

Labelling is mentioned frequently in a broad range of sectors as an NTB to be addressed in the NAMA negotiations. Most countries which have notified labelling issues as NTBs propose to deal with them either in the framework of the TBT agreement or –for almost half of the labelling issues – in the negotiation group on market access. EC officials do not expect that labelling “as such” will be negotiated. Hence negotiations would not result in a new set of disciplines that would apply to all labelling schemes of WTO members. Instead negotiations would concentrate on specific labelling schemes and sectors, which could result in concrete changes in labelling schemes of individual countries or more general disciplines for labelling in a specific sector such as textiles. A number of labelling issues to be negotiated relate to natural resources and the environmental performance of products, and the fact that they are

⁴¹ Friends of the Earth Europe: Profits before health and the environment. How the chemical industry is undermining European chemical legislation; p.30

⁴² Beundermann, M.: EU chemicals bill under fire from US-led coalition; EU Observer, June 9, 2006

⁴³ United States Mission to the European Union: REACH requires further improvements according to EU trading partners, http://useu.usmission.gov/Dossiers/Chemicals/Jun0806_REACH_Statement.asp

questioned in the WTO is therefore of considerable concern from an environmental policy perspective.

Four of the notified labelling requirements apply to fish and fish products, and the submission by Egypt – without mentioning it explicitly - challenges the EU label for fish that requires the following information:⁴⁴

- The production method, i.e. whether the fish is caught in the ocean, in freshwater or farmed in aquaculture.
- The commercial and scientific name of the fishes.
- The area in which the fish is caught or farmed, i.e. whether they originate from one of the following regions:

North-West Atlantic	Central-Western Atlantic
North-East Atlantic (excluding Baltic Sea)	South-West Atlantic
Baltic Sea	Indian Ocean
Central Eastern Atlantic	Pacific Ocean
South East Atlantic	Antarctic
Mediterranean Sea	Black Sea

Egypt contends that these requirements need well developed technological systems that developing countries cannot afford.

From an environmental perspective on the other hand, the EU’s labelling scheme leaves a lot to desire. For example it gives no information on the status of the fisheries from which the fish were caught, nor on the management practices of fish farmed in aquaculture. The labelling requirement does not apply to fish products at higher stages of processing such as canned fish and breaded fish (e.g. fish sticks).

However, the labelling of species allows at least informed consumers of fresh fish and fillet to identify – and avoid - endangered species such as deep sea fish. The catch of deep sea fish does not only endanger the species itself, but in addition leads to severe damages to the marine environment, such as the destruction of coral reefs and other plant and animal life on the sea ground.⁴⁵

The information and documentation required for the labelling and especially the fact that information must be available at all stages of the marketing chain⁴⁶ can at least help to address some of the most damaging forms of fishing: illegal, unreported and unregulated fisheries. Given that three quarters of the world’s fisheries are either utilised to the limit or already over-fished, sometimes to the verge of extinction, more rather than less information and regulation of fisheries will be necessary, both in developed and in developing countries.

The fact that even the basic information requirement that from the EU labelling scheme is considered a “trade barrier” in the WTO, can serve as an obstacle to environmentally meaningful information requirements about fisheries.

⁴⁴ Food Safety Authority of Ireland: The labelling of fish and aquaculture products according to the European Communities, Guidance Note 7, 2005

⁴⁵ Greenpeace International: Murky waters – hauling in the net on Europe’s high seas bottom trawling fleet.

⁴⁶ Eurofish Magazine: Retail presentation of fish; issue 2 / 2003, April

4.4. Export duties on raw materials, example timber

Industrialised Countries, especially the EU and Japan have used the NTB-negotiations to challenge export taxes and duties.⁴⁷ These are used almost exclusively by developing countries to tax the exports of natural resources and agricultural products. Most developing countries insist that the mandate of the Doha-Declaration does not cover export taxes and duties, and are therefore opposed to negotiations in the framework of NAMA-NTB. They claim that a separate negotiating mandate would be necessary to address this issue.

A study by the OECD⁴⁸ has analysed the export duties of 100 WTO members (counting the EU as 15) based on information provided in the WTO's Trade Policy Review Mechanism. Out of these 100 countries, 39 had export taxes, and only 2 of these were developed OECD countries. Therefore the other 37 countries are either developing or transition economies out of which 10 are LDCs.⁴⁹

Table 1. Overview of export duties, by product basis

Products	Number of Members using export duties (out of 39/100)
Forestry products	13
Fishery products	12
Mineral products, metals, precious stones	17
Leather, hides and skins	9
Agricultural products (sugar, coffee, etc)	22

Source: OECD: Analysis of non-tariff-measures: The case of export duties, 2003, p. 13

Since agricultural products (including, hides and skins, but not leather) are negotiated separately in the WTO, they will not directly be affected by the NAMA-negotiations on NTBs. However, if the negotiations should result in horizontal disciplines on export taxes, which is what the EU and Japan are aiming at, it is highly likely that there will be attempts to expand these to agricultural products at a later stage.

Currently, there are no real disciplines on the use of export duties in the WTO agreements. According to the OECD the use of this instrument has been decreasing, often due to conditionalities imposed in the framework of IMF structural adjustment programmes, or in the framework of bilateral trade agreements.⁵⁰ Also, members acceding the WTO have had to make commitments to either eliminate export duties or bind their use to a limited number of products and restrict the level of the duties. China was especially affected by that.⁵¹ On the

⁴⁷ There is no uniform terminology for these measures, here the term „export duties“ is used.

⁴⁸ OECD Trade Directorate: Analysis of non-tariff measures: The case of export duties; TD/TC(2002)54/Final, 31 January 2003, Paris

⁴⁹ The actual number of LDC using export duties may be higher, since not all of them have completed a trade policy review yet.

⁵⁰ OECD: 2003, p.9

⁵¹ OECD: 2003, p.11

other hand, the EU's Sustainability Impact Assessment of trade liberalisation in the forestry sector⁵² quotes reports that the use of export duties is static or even increasing.

The main motivations that the countries give for the use of export duties are threefold.⁵³

- Fiscal revenue,
- Promotion of industries processing the respective raw materials, especially in cases where tariff escalation in (developed country) export markets exists,
- Protection of the environment and natural resources, especially with regard to forestry and fishery products.

Indonesia, Malaysia, the Philippines, the Dominican Republic, Mexico (OECD-member but considered a developing country in the WTO) and Nicaragua have explicitly stated that the export taxes levied in their country serve environmental and resource conservation objectives.

From an environmental perspective, export duties on timber are of special interest. However, there has been no definite study on the environmental impacts of log export restrictions.^{54,55}

The World Bank argues, that export duties on unprocessed timber have led to lower domestic prices in the exporting countries. This had encouraged the establishment of over-capacities and relatively inefficient processing industries in countries like Indonesia, which need higher inputs of raw timber to produce the same amount of output (e.g. veneer sheets or furniture) than the most efficient processors (presumably in developed countries). The World Bank estimates that 10% of Indonesia's log harvest was wasted in the 1980s as a result of export restrictions.⁵⁶ According to similar studies, domestic processors in Malaysia use 5-15% more logs per unit of production than importing countries. Hence, the World Bank studies imply that the removal of export duties may lead to environmental benefits.

On the other hand, the experience in countries that removed their export taxes in unprocessed timber as part of broader liberalisation measures in the forestry sector, does not reveal environmental benefits either. In Tanzania, exports of processed wood increased alongside domestic production, while only little technological improvements were undertaken.⁵⁷ As a result, timber harvesting and deforestation have increased dramatically. In Indonesia the drastic reduction of the export tax on logs has led to a rapid growth of both legal and illegal exports of logs, resulting in increased deforestation.⁵⁸

Malaysia has argued that in its national institutional context it is very difficult to implement environmentally more efficient instruments like fees on the number of cut trees or the auctioning of logging quotas. Taxation of natural resources is under the jurisdiction of State Governments, which are presumably not willing to use those instruments, while the Federal Government is allowed to implement uniform export taxes and timber products. Therefore, export taxes were the "second best" policy in the current circumstances.

⁵² Katila, M. and Sivula, M.: Final report for the forest sector study, Sustainability Impact Assessment of proposed WTO negotiations, Manchester, 2005, p.19

⁵³ OECD: 2003, p.14

⁵⁴ Porter, G: Natural Resource Subsidies, Trade and Environment: The Cases of Forests and Fisheries, , CIEL, Washington, w/o year, p.11

⁵⁵ export restrictions include measures such as export bans on top of export duties

⁵⁶ *ibid*

⁵⁷ UNEP: Integrated Assessment of trade liberalisation and trade related policies, A case study on the forestry sector in Tanzania, New York and Geneva, 2002, p. 12

⁵⁸ Pribadi, A.: Indonesia's forest policy and reviews; in: FAO: EC-FAO Partnership programme 200-2002, Forest policies and forest policy reviews, April 2002 p.65

In general, the major problems in timber exporting countries are weak governance structures and a lack of ability and will to enforce existing regulations and forest protection measures. Trade liberalisation tends to exacerbate such problems, and therefore lead to increased deforestation and loss of biodiversity.⁵⁹ Hence from an environmental perspective, the restriction and eventual elimination of export duties on natural resources is likely to be counter-productive. It will in many cases lead to rising exports of wood products resulting in increased deforestation, while expected improvements in efficiency of processing industries do not seem to materialise automatically. While export taxes are inferior to instruments such as stumpage fees from an environmental policy perspective, they can be used as a “second-best” instrument that is easier to administer especially in countries with relatively weak governance structures. Consequently, instruments like export taxes and duties should not be challenged in the WTO. Similar to the example of car taxes, the issue needs to be dealt with in a framework that allows for sufficient environmental policy input and expertise to ensure that alternative instruments are environmentally more efficient or at least as good as the current practice.

4.5. Potential impacts of an arbitration mechanism as proposed by the EU and the NAMA 11 on all types of regulations

In late April/early May 2006 both the EU and the NAMA 11 group of developing countries⁶⁰ submitted proposals^{61, 62} on how to deal with existing and emerging NTBs outside formal negotiations, the regular meetings of the relevant WTO-Committees and the dispute settlement mechanism. According to delegates from both the EU and NAMA 11 countries, this initiative reflects the expectation of many countries, that a large number of the notified NTBs will not be resolved in the current round of negotiations. The proposals would allow WTO members to deal with the issues after the conclusion of the round. It would also serve to address newly emerging NTBs that arise from new regulations.

Both, the “facilitative mechanism” proposed by the NAMA 11 and the “problem solving mechanism” proposed by the EU have the objective to resolve NTB issues in a pragmatic and more technical manner. The mechanism shall not consider the legal aspects of a measure and therefore not conclude whether one member has the “right” to maintain a measure, or the other party has the “right” to request its removal. According to the proponents, this focus on “pragmatic” solutions would lead to something of a “self selection” of issues to be dealt with: “Big” political issues such as GMOs, export duties or tax issues in general were unlikely to be addressed, since no one expects a technical solution to these political problems. At the same time, the scope of the issues to be dealt with would not be formally restricted.

Conversations with officials from the EU and NAMA 11 countries left the strong impression that there has been some exchange of ideas before the separate proposals were submitted.

⁵⁹ Katila, M. and Sivula, M., 2005, p.vi

⁶⁰ Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa and Tunisia

⁶¹ European Communities: Negotiating proposal on WTO means to reduce the risk of future NTBs and to facilitate their resolution; WTO, TN/MA/W/11/Add.8, 1 May 2006

⁶² NAMA 11: Resolution of NTBs through a facilitative mechanism; WTO, TN/MA/W/68/Add.1, 8 May 2006

Comparison EU-NAMA 11 proposal

Issue	EU	NAMA-11
Scope	Non-tariff measures which adversely affect trade, whether or not they breach existing obligation	Issues adversely affecting the trade of a member and identified by it to be an NTB
Start of procedure	Request notified to relevant WTO body	Request notified to relevant WTO body
Participation of requested member	“shall favourably consider and provide a written reply – to be notified”	“required to engage”, “obliged to submit itself”, “participating in the procedure will be mandatory”.
Timeline	Facilitator to be appointed 15 days after receipt of request. After that no more than 60 days.	No timeframe given for agreeing on a facilitator. Once facilitator is appointed no more than 60 days.
Facilitator	Expert to the subject matter. Appointed by WTO-DG if no agreement.	Expert in one or more of the concerned fields. Appointed by WTO-DG from pre-established roster if no agreement.
Role of facilitator	Assist parties to bring clarity to the trade effects and reach solution without reference to the legality of NTB. May hold hearing of the parties, may consult with relevant experts, affected industry and other NGOs	Enable members to reach amicable solution. Without going into legality of the measure. Empowered to offer solutions. Consult with involved members, may also consult with industries and other NGOs. DSU would not apply.
Confidential	Strictly, third parties allowed if both parties agree.	Atmosphere of, third parties allowed if both parties agree. Collective requests possible.
Reporting	By facilitator at the end of procedure on process, fact-finding and agreed solutions if any	Result published and communicated to relevant body.
Implementation	Voluntary, party that does not want to implement proposal, is expected to state reasons	Voluntary, party that does not want to implement proposal is required to state reasons in relevant body
Relation to DSU	Parallel, information and solution shall not be used in dispute settlement	Parallel, information and solution would not be used in dispute settlement

The most apparent difference between the two proposals is on the question of whether the member that was requested to enter into consultations would be obliged to participate in the process. While the NAMA 11 states clearly that such a participation would be mandatory – while the implementation of the results wouldn’t - the EU is vague on this question. According to an EU official, the EU is deliberately vague, since it is afraid that too many requests may be put to it at the same time. An example could be REACH, whereby a large number of countries could put requests simultaneously so that the EU can’t handle all of them. According to the EU official, China may face similar problems with some of its own measures. Therefore the EU wants the mechanism to be mandatory in principle, with a “safety valve” for cases in which it may be requested for consultations by many countries simultaneously. In these instances it wants the flexibility to either cluster the requests or deal with them jointly or consecutively.

Both the EC and NAMA 11 argue that official discussions in the WTO are often fairly controversial. On the other hand, private bilateral meetings between countries were often very constructive, although completely lacking transparency. According to the EU-official many governments, especially in Asia and industry basically everywhere including in the EU were

opposed to “naming and shaming” and discuss conflicts in public. But they were happy to report after they had resolved an issue. The transparency requirements would be essentially limited to the agreements reached. The proceedings themselves and the reports on them shouldn’t be too transparent.

The statement that industry is not too keen on transparency is confirmed by the fact that UNICE, the European Employer’s federation – came forward with its own proposal on a “problem solving” mechanism for NTBs in December 2005.⁶³ While the EU’s proposal differs in a few details (UNICE wants to establish national contact points for information exchange), the reasoning and motivations are clearly similar. UNICE also stresses the need for a confidential process.

From an environmental and a broader public policy perspective, the proposed new mechanism is of considerable concern, due to a number of factors including:

- the focus on trade experts and industry experts as mediators (or facilitators or whatever term might be chosen). While this may be appropriate for cases which involve purely economic and administrative questions such as customs valuation, it is clearly not when the measure in question has broader societal aims such as environmental protection or public health. The mediator is entitled to consult other experts and NGOs but this is not ensured in the proposed mechanisms. Hence the recommended solutions may not take non-trade objectives sufficiently into account.
- The confidentiality and therefore the lack of transparency during the proceedings exacerbates this problem. If it is not publicly known who is consulted and what arguments were brought forward until the end of the process (if at all) it will be almost impossible for NGOs to provide the parties and the mediator with information on potential environmental and health concerns in the deliberations.
- The results of the facilitation mechanism could also be used in domestic debates on environmental and regulations. Industry and political groups interested in deregulation, could use the recommendations or even the fact that the “problem-solving” process has started as an argument to water down or even reject certain laws and regulations. An area where this is very likely to happen is REACH, where internal and external lobby efforts are already well co-ordinated. While the EU would be free from a legal perspective to reject any recommendation on REACH if it considers it inappropriate to meet environmental and health objectives, it will be politically difficult if the recommendation is the result of a “neutral” multilateral process in the WTO.
- Finally, it is probably more difficult to separate the “problem-solving mechanism” from the formal dispute settlement than the proponents contend. This especially the case in TBT and SPS related conflicts that involve a “necessity test”. (see 2.2 above). A proposal by the mediator in the mechanism might be seen as a “less trade restrictive” alternative, to the measure discussed in the mechanism. This could put additional pressure on a country that doesn’t want to concur with the mediator’s proposal. While a panel will not be allowed to use information and proposed solutions directly, the fact that an “expert” mandated by a WTO-body came up with a more trade friendly solution through a formal process in the WTO, may well influence the perception of the panel as to whether the disputed measure can pass the “necessity test”.

⁶³ UNICE: UNICE Initial Views on a WTO problem-solving mechanism for implementation related non-tariff barriers; Position papers 10 December 2005,
[Hhttp://212.3.246.117/3/KAHMMOGAIPPCMABHJCDECPPHPDBN9DBYP39LI71KM/UNICE/docs/DLS/2006-00227-EN.pdf](http://212.3.246.117/3/KAHMMOGAIPPCMABHJCDECPPHPDBN9DBYP39LI71KM/UNICE/docs/DLS/2006-00227-EN.pdf)

The analysis shows that the “facilitative” or “problem-solving” mechanism proposed by the EU and NAMA 11 poses considerable risks to environmental and health regulations. While it is not supposed to be legally binding, the recommendations to be developed by “trade experts” have the potential to be used politically and diplomatically to weaken existing or upcoming regulations. In addition, it might also influence the perception of panellists in the WTO-dispute settlement system, as to whether a measure is “not more trade restrictive than necessary” to achieve its policy objective.

Consequently, the mechanism, if adopted, should not be applied in cases that involve environment, health and other public policy objectives. Its scope should rather be limited to purely trade related issues such as customs valuation and import licensing. Measures that fall within the scope the TBT and the SPS agreements should not be subject to the facilitative mechanism.

Policy measures that aim at broader public policy objectives cannot be assessed from a pure trade policy perspective. Consequently, a mechanism that is designed to deal with trade concerns arising from such measures should be housed outside the WTO and benefit from the input of experts in the relevant field of public policy as much as from the advice of trade experts.

Friends of the Earth Europe, Greenpeace and Adelphi Research have analysed a number of already existing fora outside the WTO to address trade and environment related concerns.⁶⁴ Whilst this analysis looks mainly at legally binding options to settle conflicts between WTO-principles and provisions of multilateral environmental agreements it also provides useful guidance for the debate on a non-binding voluntary mechanism. It finds that a number of existing international legal bodies such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA) and the International Court of Environmental Arbitration and Conciliation (ICEAC) have a higher environmental expertise than the WTO and operate more transparently. To facilitate the solution of trade problems a new mechanism could be created in one of these institutions, which could draw on the environmental expertise of bodies like the UN Environmental Programme (UNEP), the secretariats of Multilateral Environmental Agreements (MEAs) or the World Health Organisation (WHO) as well as on the trade expertise of the WTO, UNCTAD or the International Trade Centre (ITC) to whether the possibility exists to design environment and health related measures in a more trade friendly way without compromising their effectiveness to achieve public policy objectives.

⁶⁴ Pfahl, Stefanie: Is the WTO the only way? Briefing paper; Greenpeace international, Adelphi Research, Friends of the Earth Europe, Brussels, 2005

5. Conclusions

The analysis has shown that existing WTO-rules amount already to considerable obstacles in the development and application of environmental measures. The TBT and the SPS-agreement in particular have an impact on the domestic regulations of WTO members that is well beyond the scope of a trade organisation like the WTO.

The on-going negotiations on NTBs have the potential to exacerbate this problem by attacking even those measures that can be considered as being in compliance with current WTO rules. Therefore, all negotiations on NTBs that arise from environment and health related measures should be stopped immediately. Rather than turning them into “bargaining chips” in trade negotiations, it is necessary to evaluate measures that are considered NTBs by one or more trading partner on their environmental merits first, not on their trade effects. Only such an approach can ensure that environmental and other public policy objectives are not compromised in the process of negotiations.

According to the assessment of a number of negotiators and observers, it is unlikely that a negotiated agreement can be achieved on most of the NTBs in the current Round of negotiations, if they are to be concluded in 2006. Hence, an agreement on a “facilitative” or “problem solving” mechanism as proposed by the NAMA 11 and the EU could be the only important outcome of the NAMA-NTB negotiations.

However, the scope of such a mechanism should be limited to purely trade related issues and not cover regulations that aim at broader public policy objectives. Trade related concerns arising from such measures should be dealt with in a body that does not have trade liberalisation as its primary objective, but rather within a framework, that gives at least equal weight to non-trade objectives. A possible mechanism must not relate exclusively on trade and industry experts as facilitators and mediators as is currently foreseen in the EU and NAMA-11 proposals. The WTO with its focus on the elimination of “trade barriers” is not in a position to assess the environmental benefits of the measures in question and is therefore highly unlikely to arrive at balanced recommendations. At the international level a number of bodies do already exist which are in a much better position than the WTO to assess the environmental merits of a measure in question and use the expertise of a broad range of environmental and trade organisations. They could also organise the process in a manner that is transparent and open to inputs from civil society. These organisations include:

- the International Court of Justice (ICJ),
- the Permanent Court of Arbitration (PCA) and
- the International Court of Environmental Arbitration and Conciliation (ICEAC).

Obviously, these organisations would have to be equipped with sufficient resources to handle a new facilitative mechanism in a timely and effective manner. As proposed elsewhere,⁶⁵ these fora could also be used to resolve legal questions on the relationship between environmental regulations and trade rules.

The fact that the EU itself is using the NTB negotiations to attack export duties of developing countries which can serve environmental purposes and proposes a “WTO-only” mechanism

⁶⁵ Pfahl, 2005

for resolving trade problems arising from (amongst others) environmental regulations makes its “trade and environment” rhetoric sound hypocritical. In order to regain its credibility, the EU should withdraw all environment and natural resource related demands in the NAMA negotiations and actively promote a mechanisms outside the WTO to address problems at the trade and environment interface.