

UNEP(DTIE)/Hg/INC.1/16



Distr.: General 27 March 2010

Original: English



United Nations Environment Programme

Intergovernmental negotiating committee to prepare a global legally binding instrument on mercury
First session
Stockholm, 7–11 June 2010
Item 4 of the provisional agenda*
Preparation of a global legally binding instrument on mercury

International trade law that may be relevant to the future mercury instrument, including provisions on trade set out in selected conventions

Note by the secretariat

Introduction

- 1. At its meeting held in Bangkok from 19 to 23 October 2009, the ad hoc open-ended working group to prepare for the intergovernmental negotiating committee on mercury agreed on a list of information that the secretariat would provide to the intergovernmental negotiating committee at its first session to facilitate the committee's work. Among other things, the secretariat was requested to prepare materials addressing international trade law that might be relevant to the mercury instrument to be negotiated by the committee, including provisions on trade in relevant existing conventions. The present note responds to that request.
- 2. Multilateral environmental agreements often employ trade-related measures to achieve their objectives. Indeed, in its decision 25/5, the Governing Council of the United Nations Environment Programme (UNEP) requested the intergovernmental negotiating committee, in developing a comprehensive and suitable approach to mercury, to include provisions to reduce international trade in mercury.
- 3. Although they are frequently used, such trade-related measures sometimes raise questions regarding their compatibility with international trade law. Yet international trade law is increasingly receptive to the vital role of multilateral environmental agreements in achieving a coherent framework of global environmental and economic governance. The World Trade Organization (WTO) is the leading political and legal institution responsible for liberalizing international trade and promoting predictable trading relations between States. Because the economy and the environment are both key

K1060697 110510

^{*} UNEP(DTIE)/Hg/INC.1/1.

components of sustainable development, the provisions of multilateral environmental agreements and WTO law necessarily overlap, addressing many of the same issues. That fact has led to an increasingly interdependent and mutually supportive relationship between WTO and multilateral environmental agreements.

- 4. Chapter I of the present note provides a short overview of the multilateral trading system, as embodied in the WTO agreements and the General Agreement on Tariffs and Trade. The chapter includes a discussion of article XX of the latter agreement, which explicitly recognizes that the need to safeguard essential public policy areas may, in certain situations, require exceptions to the Agreement's basic trade rules.
- 5. Chapter II of the present note discusses the increasingly interdependent and mutually supportive relationship between WTO and multilateral environmental agreements. Chapter III discusses provisions on trade set out in a number of conventions and summarizes options for trade-related provisions that the intergovernmental negotiating committee might wish to consider.

I. General Agreement on Tariffs and Trade and WTO

A. Background

- 6. The multilateral trading system, founded on the General Agreement on Tariffs and Trade in 1947 and continuing with WTO, was established with a clear objective: to promote economic growth and prosperity in order to secure and maintain peace. Through successive rounds of negotiations, the General Agreement on Tariffs and Trade over time achieved a dramatic reduction in tariffs, which, in turn, contributed to expanded global trade and economic growth. The establishment of WTO in 1994 realigned and refined the objectives of the multilateral trading system by incorporating the concept of sustainable development.
- 7. The fundamental goals of WTO, set out in the preamble to the Agreement Establishing the World Trade Organization, include raising standards of living; ensuring full employment and a large and steadily growing volume of real income and effective demand; and expanding the production of and trade in goods and services.² These goals are to be achieved while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development and while seeking to protect and preserve the environment.³ In pursuit of them, WTO is charged with overseeing, implementing and administering what are referred to as the "WTO-covered agreements";⁴ serving as a forum for multilateral trade negotiations; and administering the WTO dispute settlement mechanism.

B. General Agreement on Tariffs and Trade

8. The General Agreement on Tariffs and Trade is the principal WTO-covered agreement. It relates to international trade in goods, such as manufactured products, commodities and other tangible items that may be bought, sold or exchanged. To the extent that multilateral environmental agreements contain trade-related measures, they generally relate to trade in goods such as wildlife products, chemicals or living modified organisms. Thus, the General Agreement on Tariffs and Trade is the primary WTO-covered agreement implicated by trade measures in multilateral environmental agreements, including those that might be included in any mercury instrument that may be adopted.

¹ Debra Steger, "Lessons from History: Trade and Peace," in *Trade as Guarantor of Peace, Liberty and Security?: Critical, Empirical and Historical Perspectives, vol.* 12 (Padideh Ala'i, Tomer Broude and Colin Picker, eds., 2006).

² Agreement Establishing the World Trade Organization, preamble, 1867 U.N.T.S. 154, 33 I.L.M. 1226 (1994).

³ Ibid.

The Agreement Establishing the World Trade Organization provides in article II that the "WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included" in the annexes to the Agreement. In addition to the General Agreement on Tariffs and Trade, those agreements include numerous multilateral agreements on trade in goods, including agreements on agriculture, sanitary and phytosanitary measures, textiles, technical barriers to trade and other subjects. There are also agreements on trade in services and trade-related aspects of intellectual property rights, the dispute settlement understanding, and various plurilateral trade agreements. Information on all WTO agreements is available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

- 9. The General Agreement on Tariffs and Trade sets out the basic substantive trade rules that all WTO members are obliged to respect. In connection with multilateral environmental agreements, the most relevant of those rules are:
- (a) Most-favoured nation treatment, which requires States to refrain from discriminating among their trading partners in respect of what are termed "like" products;
- (b) National treatment, which requires States to treat imported products no less favorably than like domestic products;
- (c) Prohibition against quantitative restrictions, which prohibits States from imposing import or export restrictions other than tariffs.

C. Article XX general exceptions

10. The General Agreement on Tariffs and Trade explicitly recognizes that the need to safeguard essential public policy interests may require exceptions to the application of the basic trade rules. Article XX of the Agreement allows such exceptions when, among other things, they relate to the conservation of natural resources or are necessary for the protection of human, animal or plant life or health. Article XX thus can help reconcile tensions that may arise between trade and other legitimate policy goals, including those that arise under WTO and multilateral environmental agreements. The article XX exceptions most relevant to health, safety and environmental measures are found in paragraphs (b) and (g) of that article, which (with the article XX chapeau) read as follows:

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

(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.⁵

II. Trade and environment: WTO and multilateral environmental agreements

- 11. The present chapter discusses the increasingly interdependent and mutually supportive relationship between WTO and multilateral environmental agreements. The chapter first reviews prominent examples of WTO jurisprudence in which WTO has relied on multilateral environmental agreements to interpret and apply the general exceptions of article XX. It then highlights preambular recitals from select multilateral environmental agreements that promote this mutually supportive relationship.
- 12. It should be noted that WTO law binds member States but not intergovernmental organizations or multilateral environmental agreements. Accordingly, the question is not whether a multilateral environmental agreement could itself conflict with WTO but rather whether a party's implementation of a multilateral environmental agreement could be in conflict with its obligations under WTO law. Further, while potential conflicts between multilateral environmental agreements and WTO have been debated by academics and international lawyers for years, they have all been theoretical: the implementation of a multilateral environmental agreement has never been challenged under the WTO dispute settlement provisions.

General Agreement on Tariffs and Trade, art. XX, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (1947).

A. WTO jurisprudence

- 13. WTO jurisprudence has evolved to recognize increasingly the valuable role played by multilateral environmental agreements in achieving sustainable development. That evolution is evident primarily in the interpretation and application of the general exceptions of article XX, through which the article has emerged as a flexible tool for accommodating environmental and health concerns within the international trading system.
- 14. The role of multilateral environmental agreements in WTO law has expanded over time and has contributed to enhanced coherence between the two regimes. WTO dispute settlement panels have relied upon multilateral environmental agreements in making factual determinations. In addition, the WTO Appellate Body (which considers appeals from decisions by WTO dispute settlement panels) has considered the provisions and objectives of multilateral environmental agreements when interpreting and applying the article XX general exceptions to cases under its review.
- 15. Four high-profile trade disputes, relating to reformulated gasoline, beef hormones, shrimp and turtles and retread tyres, demonstrate the evolving WTO approach to multilateral environmental agreements and public international law in general.
- 16. In the reformulated gasoline case, the first to be considered by it, the Appellate Body emphasized that the General Agreement on Tariffs and Trade was "not to be interpreted in clinical isolation from public international law." That decision thus opened the door to considering multilateral environmental agreements in the interpretation of WTO law.
- 17. In the beef hormones case the Appellate Body accepted that the precautionary principle was reflected in article 5.7 of the Agreement on Sanitary and Phytosanitary Measures; it further noted that article 5.7 did not exhaust the relevance of the principle. The decision thus recognized a role for the consideration of principles of international environmental law in the interpretation of international trade law.
- 18. In the shrimp and turtle case the Appellate Body examined several multilateral environmental agreements including the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) to interpret the terms employed in the article XX (g) exception relating to the conservation of exhaustible natural resources. ¹⁰
- 19. In the retreaded tyres case the dispute panel referred to the provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal to determine the international community's policy preference for waste reduction at source and to ascertain the risks posed by used tyres.¹¹
- 20. While detailed analyses of these cases are available elsewhere, the cases support the following observations:
- (a) Multilateral environmental agreements embody the cooperative efforts of the international community and thus dispel fears of disguised protectionism, which is one of the main concerns of international trade law;
- (b) Multilateral environmental agreements reflect a preference for multilateral solutions to multilateral problems, thereby assuaging concerns related to unilateral measures;

⁶ See Nathalie Bernasconi-Osterwalder, Daniel Magraw, Julia Oliva and Marcos Orellana, "Environment and Trade: A Guide to WTO Jurisprudence" (Earthscan 2006).

WTO, "United States – Standards for reformulated and Conventional Gasoline: Report of the Appellate Body", WT/DS2/9 (May 20, 1996).

⁸ The Appellate Body ruled out the possibility that the precautionary principle could provide a defence under WTO law in the absence of explicit reference to that effect. It further declined to rule on the status of the precautionary principle in customary law.

⁹ Howard Mann and Stephen Porter, "The State of Trade and Environment Law 2003: Implications for Doha and Beyond", 28–30 (IISD 2003), available at http://www.iisd.org/pdf/2003/trade_enviro_law_2003.pdf.

WTO, "United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body", WT/DS58/AB/R (Oct. 12, 1998).

¹¹ WTO, "Brazil – Measures Affecting Imports of Retreaded Tyres: Report of the Appellate Body", WT/DS/332/AB/R, (Dec. 3, 2007).

(c) Multilateral environmental agreements reflect minimum standards established by the international community; accordingly, measures adopted to comply with their terms are presumed to have been taken in good faith, which is central to the operation of article XX.

B. Mutual supportiveness of multilateral environmental agreements and WTO

- 21. Article XX recognizes that trade restrictions may be necessary to attain key policy objectives in non-trade areas, including public health and environmental sustainability, and that they can be justified under international trade law. For their part, multilateral environmental agreements can in turn reinforce the legitimacy of trade measures adopted for environmental and health purposes.
- 22. Several multilateral environmental agreements, including within the chemicals cluster, explicitly recognize this mutual supportiveness. For example, the preamble to the Stockholm Convention on Persistent Organic Pollutants includes an explicit statement that the "Convention and other international agreements in the field of trade and the environment are mutually supportive".
- 23. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity were adopted before the Stockholm Convention. Both contain substantially identical preambular language recognizing that trade and environment policies and agreements should be mutually supportive with a view to achieving sustainable development. The Rotterdam Convention, however, also contains the following two preambular recitals, which arguably undercut the goal of mutual supportiveness:

Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements \dots .¹²

24. The intergovernmental committee that negotiated the Stockholm Convention considered, but did not accept, language that was similar to these two recitals. By stating that the rights and obligations under any existing international agreement in the field are unaffected by the Rotterdam Convention, the first recital suggests that any such agreement is superior to the Convention. The framers of the Rotterdam Convention might have believed that such an understanding was appropriate in an instrument that did not prohibit or restrict international chemicals trade. By contrast the framers of the Stockholm Convention, in developing an instrument that did prohibit and restrict trade in persistent organic pollutants, arguably recognized that a clause that could in effect become a supremacy clause could undermine achievement of the Convention's objectives. As it develops provisions to reduce international trade in mercury, the intergovernmental negotiating committee may wish to consider the choices made by the committees that negotiated the Rotterdam and Stockholm conventions in respect of these preambular recitals.

III. Trade-related provisions in multilateral environmental agreements

25. The present chapter discusses provisions on trade set out in selected conventions. It also summarizes trade-related measures that the intergovernmental negotiating committee might wish to consider for the mercury instrument.

¹² See also Cartagena Protocol on Biosafety to the Convention on Biological Diversity, preamble (2000).

¹³ Under the Rotterdam Convention, parties agree to procedures for information exchange, prior informed consent and export notifications in respect of international trade in the substances covered by the Convention; the Convention does not prohibit trade in the substances.

A. Provisions on trade set out in selected conventions

- 26. Trade-related environmental measures are included in a number of multilateral environmental agreements to enhance their effectiveness in limiting damage to the environment and human health. Out of the approximately 200 multilateral environmental agreements in force today, more than 20 make use of trade measures to accomplish their aims. ¹⁴ They include the Basel Convention, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Stockholm Convention, CITES and the Rotterdam Convention.
- 27. The Basel Convention uses trade measures to control the import and export of hazardous wastes. Parties may export specified wastes only if the importing Party has not banned their import and has consented to their import in writing; exports allowed under these provisions are subject to additional restrictions. Imports and exports from and to non-Parties are prohibited. Otherwise permitted imports and exports of wastes are prohibited when there is reason to believe that the wastes will not be dealt with in an environmentally sound manner at their destination. The Convention further provides that transboundary movements in contravention of the Convention constitute criminal illegal traffic and that exporting and importing States, depending on who is at fault, must take steps aimed at taking control of any wastes shipped in contravention of the convention and ensuring their environmentally sound disposal.
- 28. The Montreal Protocol, as a means of encouraging States to become parties to it, prohibits trade in substances controlled by the Protocol with non-parties except when the Meeting of the Parties determines that a non-party is in compliance with the Protocol's control measures and has submitted data to that effect. The Protocol also requires its parties to "determine the feasibility" of banning or restricting from non-party States the import of products produced with, but not containing, controlled substances. Export credits and subsidies to non-parties related to the production of controlled substances are restricted; exports of related technologies are similarly discouraged. Each party must also establish and implement a system for licensing the import and export of controlled substances and must periodically report on such imports and exports.
- 29. The Stockholm Convention prohibits the import and export of persistent organic pollutants covered by the Convention except for the purposes of environmentally sound disposal or if the importing party is to use the chemical in accordance with a specific exemption or acceptable purpose listed in the annexes to the Convention. The Convention prohibits trade with non-Parties except for those who provide annual certifications that they are committed to meeting various requirements.
- 30. CITES establishes a system for regulating international trade in designated species that includes permits, trade bans, quotas and other measures. If a party does not comply with the Convention's requirements then the CITES Standing Committee may recommend that other parties refrain from all trade with that party in species covered by the convention.
- 31. The Rotterdam Convention establishes a prior informed consent procedure whereby, subject to exceptions, no pesticides or other chemicals covered by the Convention may be exported from one party to another unless the importing party has consented in the manner prescribed by the Convention. In addition, labelling and information requirements apply to the trade in substances covered by the Convention.
- 32. Under its prior informed consent procedure, the Rotterdam Convention includes a provision to ensure that parties comply with the most-favoured nation and national treatment rules under the General Agreement on Tariffs and Trade.¹⁵ A party that either prohibits or restricts the import of a chemical from another party must likewise prohibit or restrict the import of the chemical from any other source and domestic production of the chemical for domestic use.¹⁶ Parties to the Rotterdam Convention are thus prevented from using it to protect their domestic chemicals industries from imports and to discriminate among exporting States.

¹⁴ UNEP, Division of Industry, Technology and Economics, International Institute for Sustainable Development, *Environment and Trade: A Handbook*, section 5.10 (2005), available at http://www.unep.ch/etu/etp/acts/aware/handbook.pdf.

¹⁵ See paragraph 9 above for a summary of those rules.

Rotterdam Convention, art. 10, para. 9.

33. The Cartagena Protocol on Biosafety establishes a prior informed consent procedure in respect of international trade in living modified organisms. ¹⁷ In contrast to the Rotterdam Convention, however, the Biosafety Protocol includes no provision ensuring most-favoured-nation or national treatment for imports of living modified organisms. Neither does the Basel Convention require a State of import to apply the most-favoured nation or national treatment rules when considering whether to consent to a specific import of hazardous wastes or other wastes. ¹⁸

B. Trade-related issues that may arise under the mercury instrument

- 34. In its decision requesting the UNEP Executive Director to convene an intergovernmental negotiating committee with the mandate to prepare a global legally binding instrument on mercury, the UNEP Governing Council instructed the committee to develop a comprehensive and suitable approach to mercury including, among other things, provisions to reduce international trade in mercury. The decision thus demonstrates that trade-related measures should be among the means by which the mercury instrument protects human health and the environment.
- 35. Among its requests to the secretariat, the ad hoc open-ended working group to prepare for the intergovernmental negotiating committee on mercury asked the secretariat to prepare a paper describing options for substantive provisions that might be included for effective implementation of the mercury instrument. In response the secretariat has prepared a note (UNEP(DTIE)/Hg/INC.1/5), chapter II of which discusses, in section D, provisions for reducing international trade in mercury. The section describes several kinds of trade-related measures, based on relevant provisions of a number of conventions, that the committee may wish to consider.
- 36. In respect of trade with parties the measures discussed in the section include measures:
- (a) To prohibit or restrict imports and exports of elemental mercury and specified mercury-containing compounds and mercury-added products, except for the purpose of environmentally sound disposal;
- (b) To establish a system for licensing the import and export of elemental mercury and specified mercury-containing compounds and mercury-added products;
- (c) To require labelling for exports of elemental mercury and specified mercury-containing compounds and mercury-added products;
 - (d) To develop a data reporting system for monitoring global mercury trade;
- (e) To require periodic party reporting on imports and exports of elemental mercury and specified mercury-containing compounds and mercury-added products;
- (f) To establish a prior informed consent procedure for international trade in elemental mercury and specified mercury-containing compounds and mercury-added products not subject to the Rotterdam Convention's prior informed consent procedure;
- (g) To provide that transboundary movements in contravention of the mercury instrument constitute illegal traffic.
- 37. In respect of trade with non-Parties, the section discusses measures:
 - (a) To prohibit trade with non-Parties in mercury and mercury-containing products;
- (b) To prohibit or restrict imports from non-Parties of products produced with, but not containing, mercury or mercury compounds;
- (c) To allow the import and export of specified mercury-containing compounds and mercury-added products from and to non-parties that the governing body of the mercury instrument finds to be in compliance with the control measures of the instrument;

¹⁷ See Cartagena Protocol on Biosafety, arts. 7–13 (specifying application of the "advance informed agreement procedure"; the procedure for living modified organisms intended for direct use as food or feed or for processing; and a simplified procedure for approving imports of living modified organisms).

See Basel Convention art. 4, para. 1.

¹⁹ Report of the Governing Council of the United Nations Environment Programme Governing Council/Global Ministerial Environment Forum (A/64/25 (Supp)), annex I, decision 25/5, para. 27 (d), available at http://www.chem.unep.ch/MERCURY/GC25/GC25Report_English_25_5.pdf.

- (d) To allow the import and export of specified mercury-containing compounds and mercury-added products from and to non-parties that provide an annual certifications that they are committed to complying with relevant control measures of the instrument.
- 38. More detailed information on the options for provisions to reduce international trade in mercury, including citations to the instruments upon which the options are based, may be found in section D of chapter II of document UNEP(DTIE)/Hg/INC.1/5.

8