

Federation of German
Consumer Organisations

Consumer Interests and Sustainable Development in International Law

Imprint

Publisher:

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Date:

April 2004

This paper is based on a study undertaken by Richard G. Tarasofsky, Gary Knapp, Markus Knigge and Lutz Strack of Ecologic, Institute for International and European Environmental Policy – www.ecologic.de. Commissioned by the Federation of German Consumer Organisations (vzbv).

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1 Summary

This study examines the international legal rules affecting consumer interests and sustainable development. With the advent of sustainable development as a central objective of law and policy making, new approaches to consumer protection have evolved. The focus of discussion no longer rests on issues relating to utility maximisation, pricing, competition and product-safety and -quality alone, but has shifted to environmental, social and health policy. This change is due to the realisation that although the existing consumption patterns are one of the main causes for global environmental damage and social tension, consumer policy can also play a key role in achieving sustainable development.

For these reasons, one essential aim of sustainable consumer policy is to raise the awareness on the consumer's side for the need to change consumption patterns and thereby to influence existing production patterns. In this context it is important to consider that, nowadays, the majority of product and service prices do not internalise environmental or social costs. Therefore, sustainable products are often disadvantaged in comparison to conventional ones. The step towards sustainable consumption should therefore aim to raise awareness on the consumer's side that sustainable products and services do mean an increase in quality, e.g. by being less polluted. To this end, sufficient information is undoubtedly a decisive prerequisite. At the same time, the consumer must have the financial means to include societal interests into his/her consumption decisions. This necessitates state regulation that seeks to compensate for the market failure caused by the price disparities between sustainable and conventional product and services. States, however, are bound to international obligations and are therefore restricted in their choice of measure. They cannot arbitrarily promote sustainable products but must respect the rights and freedoms of all market actors.

These considerations are at the core of this paper. With the point of departure being sustainable consumer policy, the paper aims to analyse the extent to which States are required or restricted in their choice of measures by international obligations, and, thereby, to identify the space available for regulation to enact and implement sustainable consumer policy. In order to identify concrete measures of sustainable consumer policy the study refers to a number of exemplary international documents that explicitly address these issues, in particular to the "*UN-Guidelines for Consumer Protection*", "*Agenda 21*" and the "*Johannesburg Plan of Implementation*".

As these international instruments lack binding force and in the absence of any international codification of consumer policy, the analysis further focuses on the implications for consumer interests arising from legally binding international instruments in related areas. In other words, international instruments that do not primarily aim at consumers, but which affect sustainable consumer policy, are analysed. This assessment is done in the framework of the three pillars of sustainable development: economic, environmental, and social equity.

Concerning the economic pillar, the study concentrates on the law of the World Trade Organization (WTO), including that of its dispute settlement mechanism. In this respect, many issues were identified, such as the general law on trade in goods, sanitary and phytosanitary measures, services trade liberalisation, and agriculture liberalisation. The analysis revealed several potential incompatibilities between WTO law and consumer interests, such as in the area of labelling and measures based on the precautionary approach. However, it also found that there was some policy space available for countries to restrict trade for health or environmental purposes, so long as specific criteria are observed. Nonetheless, the rules on trade liberalisation, as well as potential new rules on investment liberalisation, raise important and troubling questions about the ability of States to regulate matters relating to sustainable development. The study raises several options for improving WTO law, both substantive and procedural. Substantive options are directed towards specific WTO Agreements, such as the General Agreement on Trade in Services and the Agreement on Agriculture. More general options include placing a reference to sustainable consumer policy in the preamble of the Agreement Establishing the WTO and adding to the general exceptions of Article XX of the General Agreement on Tariffs and Trade (GATT), although the political feasibility of such changes is not considered very high. As regards procedural changes, the study recommends allowing the participation of consumer interests groups in WTO bodies, e.g. the Committee of Trade and Environment (CTE) or the Committee on Technical Barriers to Trade (TBT-Committee), as well as the submission of *amicus curiae* briefs in WTO disputes.

As regards the environmental pillar, the study analyses key international instruments such as the Biosafety Protocol, as well as the Aarhus and Stockholm conventions. While these instruments do contain numerous measures that could support sustainable consumer policy, they form a patchwork and are not always well suited to consumer policy. This is because the tools they use are not always directed at the consumer as well as they could potentially be, and because they, in themselves, are not sufficiently open for a broad consumer policy to be based. Specifically, the study suggests that consumer interests should be included earlier in the negotiations and consultations within these regimes through enhanced participation of interest groups and experts.

As regards the social pillar, the study examined international instruments concerning human rights, health and social standards, such as those of the World Health Organization (WHO) and the International Labour Organization (ILO). The study found, although containing important social principles, this body of law to be relatively weak in implementation and, with some exceptions, to be of limited utility to consumer policy. Nonetheless, of particular interest is the Convention on Tobacco Control that was recently adopted, as well as the *Codex Alimentarius* Commission, which is incorporated by reference into WTO law.

The study concludes that the existing body of international law does not sufficiently provide a basis for sustainable consumer policy. A short-term remedy is to focus on creating rules and procedures that allow consumer experts and interest groups to par-

ticipate fully in relevant international law making, and in enhancing synergies between applicable international treaties and institutions. In the long run, a comprehensive international codification of sustainable consumer policy, backed by a corresponding institutional framework, will be necessary.

2 Zusammenfassung

Seit der Einführung des Konzepts der nachhaltigen Entwicklung auf nationaler, europäischer und internationaler Ebene hat sich in der Verbraucherpolitik über die letzten Jahren ein umfassender Politikansatz herausgebildet. Im Zuge dieser Entwicklung hat sich die politische Debatte zunehmend von den klassischen ökonomischen Vorstellungen des Verbraucherschutzes emanzipiert. Im Fokus der Diskussion stehen nicht mehr allein Fragen der unmittelbaren Nutzenmaximierung von Verbrauchern wie Preisgestaltung, Wettbewerb oder Produktsicherheit und -qualität. Es rücken hingegen vermehrt Fragestellungen der Umweltschutz-, Sozial- und Gesundheitspolitik in den Vordergrund. Dies gründet sich insbesondere auf der Erkenntnis, dass Konsummuster zwar gegenwärtig zu globalen Umweltschädigungen und sozialen Problemen beitragen, aber Verbraucher generell ein sehr großes Potential besitzen, Märkte in Richtung einer nachhaltigen Entwicklung zu beeinflussen.

Ein wesentliches Ziel nachhaltiger Verbraucherpolitik ist, den Verbraucher zu einer Änderung seiner Konsumgewohnheiten zu bewegen, um auf diese Weise Einfluss auf die Produktion geltend zu machen. Zum einen setzt dies ausreichende Information voraus. Zum anderen muss der Verbraucher aber auch finanziell in der Lage sein, gesellschaftspolitische Gesichtspunkte in seine Kaufentscheidungen einzubeziehen. Dabei ist zu berücksichtigen, dass die Preise heute in aller Regel nicht die Umweltkosten oder soziale Kosten eines Produktes oder einer Dienstleistung abbilden. Produktion unter Berücksichtigung ökologischer und sozialer Kriterien ist jedoch zumindest in der Phase der Umstellung häufig kostenintensiver als konventionelle Herstellungsverfahren. Der Nutzengewinn für den Verbraucher wird in der Regel aber nur mittelbar empfunden. Hieraus ergibt sich eine ökonomische Benachteiligung dieser Produkte, die zu einem Marktversagen führt. Der Schritt hin zu einer Veränderung des Konsumverhaltens schließt deshalb eine Regulierung der öffentlichen Hand mit ein. Staaten sind jedoch an internationale Vorgaben gebunden und demnach in ihrer Maßnahmenwahl für die Verbraucherpolitik beschränkt.

Diese Erwägungen führen zum Kern dieses Papiers. Ausgehend vom Konzept einer nachhaltigen Verbraucherpolitik wird im Folgenden analysiert, inwieweit Staaten durch internationale Verpflichtungen in ihrer Maßnahmenwahl beschränkt sind oder welche Spielräume ihnen zur nationalen Durchsetzung nachhaltiger verbraucherpolitischer Maßnahmen zur Verfügung stehen. Um konkrete Maßnahmen einer nachhaltigen Verbraucherpolitik zu bestimmen, werden exemplarisch internationale Dokumente wie die *"UN-Guidelines for Consumer Protection"* oder die Ergebnisse des *"Rio-Prozesses"* untersucht, die explizit auf nachhaltige Verbraucherpolitik eingehen.

Mangels der rechtlichen Verbindlichkeit dieser Instrumente sowie einer einheitlichen völkerrechtlichen Kodifizierung einer nachhaltigen Verbraucherpolitik stellt sich die Frage nach anderen rechtlich verbindlichen internationalen Instrumenten. In der Studie werden Schnittstellen zu Verbraucherinteressen aufgezeigt, und es wird der Frage nachgegangen, ob und inwieweit sich aus dem *"Flickwerk"* internationaler Verpflicht-

tungen ein ganzheitlicher Ansatz im Sinne einer nachhaltigen Verbraucherpolitik kreieren lässt. Dafür werden internationale Instrumente und Institutionen untersucht, deren primäres Ziel nicht das des Verbraucherschutzes ist, die aber Auswirkungen auf verschiedene Aspekte einer nachhaltigen Verbraucherpolitik haben. Ebenso wird der Frage nachgegangen, wie die verschiedenen Regime im Sinne einer kohärenteren Verbraucherpolitik miteinander in Einklang zu bringen sind.

Im klassisch ökonomischen Bereich konzentriert sich die Studie auf das Recht der WTO, einschließlich der Streitschlichtung durch den "Dispute Settlement Body". Hier lassen sich zahlreiche Schnittstellen zu Verbraucherinteressen nachweisen. So nimmt die Präambel des WTO-Gründungsvertrages ausdrücklich auf die Verpflichtung zu nachhaltiger Entwicklung Bezug, woraus sich bisher allerdings noch keine direkten Konsequenzen hinsichtlich einer nachhaltigen Verbraucherpolitik ergeben haben. Zur Änderung dieses Status Quo werden verschiedene Maßnahmen analysiert, welche Änderungen sowohl im materiellen Welthandelsrecht als auch in den institutionellen Organisations- und Entscheidungsstrukturen vorsehen würden. Diskutiert werden unter anderem die Aufnahme des Zieles einer nachhaltigen Verbraucherpolitik in die Präambel der WTO oder die Ausweitung der Ausnahmetatbestände des Artikel XX GATT. In verfahrenstechnischer Hinsicht wird eine verstärkte Beteiligung von Interessenvertretern in bestehenden Organen, wie bspw. dem CTE oder TBT Komitee, sowie eine stärkere Beteiligung Dritter im Streitschlichtungsverfahren unter anderem durch die Einreichung sogenannter "amicus curiae briefs" angeregt. Darüber hinaus werden das Verhältnis zu multilateralen Umweltschutzabkommen (MEAs), die Kennzeichnung von Produkten und das TBT-Abkommen, sowie das GATS-Abkommen und eine mögliche Beschränkung der öffentlichen Regulierungsmöglichkeiten diskutiert und Vorschläge zur Stärkung der nachhaltigen Verbraucherpolitik erarbeitet.

Im umweltrechtlichen Bereich geht die Studie auf zentrale internationale Instrumente wie das Biosafety Protokoll oder die Aarhus und Stockholm Konventionen ein. Während diese Instrumente eine Vielzahl von Maßnahmen vorsehen, die eine nachhaltige Verbraucherpolitik unterstützen können, sind sie in der Mehrzahl auf bestimmte Anwendungsbereiche beschränkt. Die Studie regt insbesondere an, institutionelle Vorkehrungen für Transparenz und Partizipation zu treffen, damit Konsumenteninteressen schon in den Vertragsverhandlungen und -beratungen verstärkt berücksichtigt werden.

Im sozialen Bereich konzentriert sich die Studie auf die Instrumente der Weltgesundheitsorganisation und der Internationalen Arbeitsorganisation. Diese Instrumente haben jedoch zum großen Teil in der Praxis nur eine geringe Durchsetzungskraft. Eine Ausnahme ist hierbei die kürzlich in Kraft getretene Konvention zum Schutz vor Tabakkonsum. Beispielhaft ist die Aufwertung der Codex Alimentarius Kommission (CAK) durch das Recht der WTO. Dieser Einbeziehungsmechanismus könnte zukunftsweisend sein.

Abschließend wird festgestellt, dass ein ganzheitlicher Ansatz im Sinne einer nachhaltigen Verbraucherpolitik durch das bestehende internationale Recht zur Zeit nicht gewährleistet ist. Mittelfristig könnte jedoch nachhaltige Verbraucherpolitik im internatio-

nen durch eine verstärkte Einbeziehung von Verbraucherinteressen und durch transparentere Verhandlungsprozesse Recht weiter verankert werden. Langfristig wird angeregt, auf eine einheitliche internationale Kodifizierung einer nachhaltigen Verbraucherpolitik und auf die Schaffung eines entsprechenden institutionellen Rahmens hinzuwirken.

3 Introduction

Consumer interests are increasingly recognised in most countries' national legislation, prompted in some cases by recent scandals, such as mad-cow disease in the food sector. However, to date, there has been almost no examination of the extent to which consumer interests are protected at the international level. Such an examination is necessary in an era of increasing globalisation, where consumers are increasingly international economic actors, and are increasingly affected by impacts that originate beyond national boundaries.

Focusing on the international level becomes all the more important when one considers consumer interests in the context of sustainable development. One of the key features of sustainable development has been the rapid evolution of a large body of international law that aims to support it. Another important feature of international law has been the rapid development of international trade law, particularly under the auspices of the World Trade Organization (WTO), which interacts not only with much of the international law of sustainable development, but also establishes norms that can impact on consumer instruments at the national level. In principle, liberalised trade can be beneficial to consumers by providing them with a wider choice of products and competitive prices, but this must be done under the right conditions and with certain limitations in order to achieve sustainability. These conditions include, *inter alia*, making parallel and complementary progress in the pursuit of environmental, labour, and consumer rights.

Accordingly, this study will assess the status of consumer policy instruments and sustainable development in international law, and will conclude with some recommendations for reform. The study is limited to the realm of public international law. Consumer protection is dealt with extensively in private international law, e.g. in the context of the international sale of goods, enforcement of national judgements, choice of law, etc., but private international law does not concern itself with sustainable development. In addition, this paper does not address the European Union's consumer protection law,¹ as the focus is meant to be global.

Despite the rationale for considering consumer interests in the context of international law, it must be emphasised that consumers, per se, are not subject of international law. Rather, international law mainly governs States, which in turn bear the primary responsibility for establishing instruments that protect consumer interests. Thus this study focuses on the international laws between States, which then impacts on particular consumer interests.

¹ E.g., Articles 3(1)(t) and 153 of the EC Treaty.

4 Consumer Interests and Sustainable Development

4.1 Identification of Consumer Interests

Although consumer issues consist of a wide range of particular topics, they can be clustered into three levels: **economic**, **fundamental** and **societal interests**:

4.1.1 Economic Interests

Economic interests are often referred to as “classic” consumer interests since they came first into focus of national politics that recognised the necessity for a consumer protection policy. The foremost interest in this respect is the maximisation of utility on the consumer’s side with regard to the goods and services purchased. This includes the best possible product quality and safety at the lowest price. Apart from other conflicting consumer interests (illustrated below), this interest is, in a liberal market economy, opposed by the main interest of producers to maximise their revenues and profits.

4.1.2 Fundamental Interests

Whereas economic interests mainly concern consumer interests *within* a market economy, fundamental interests relate to the opportunity to gain access *to* the market and participate in consumption without being harmed. The first and foremost of fundamental interests is the protection of consumers’ health². This includes the supply and fair and equitable distribution of those goods and services that are essential for survival, such as water, food and medicine, as well as an adequate degree of quality and product safety. Fundamental interests are also strongly connected to the issue of poverty eradication.

Although these fundamental consumer interests represent in fact a subcategory of economic interests, it is necessary to differentiate. As will be illustrated below, fundamental interests have in view of their provision, implementation and enforcement strong implications on human rights issues. The degree of consumer concern for fundamental interests is often anti-proportional to the level of industrial development or wealth, respectively, of the region concerned and therefore a predominant issue in developing countries. Over-consumption in industrialised countries enhances this imbalance and may further affect the pursuit of fundamental interest in the developing world by depriving consumers of resources to satisfy their fundamental needs.

² Commission on Human Rights resolution 2000/10, p. 2 as well as Third Expert Consultation on the Right to food, p. 4.

4.1.3 Societal Aspects of Consumption

Societal aspects of consumption relate to the interest in a healthy ecological and balanced social environment. These interests are at the core of sustainable development, but they are only partially original consumer interests. The reason being that the motivation to support these interests is only partly governed by the economic self-interest of individual consumers. While for the economy as a whole, an intact ecological and social environment is absolutely indispensable, the individual consumer in many cases does not profit economically from buying ecologically or socially beneficial goods or services. Conversely, the consumer who buys ecologically or socially harmful goods, such as those produced by child labour, is unlikely to feel the societal consequences of this purchasing decision.

A consumer policy that is committed to the aim of sustainable development therefore should strengthen the ties between the economic self-interest of consumers and the interest of society as a whole in sustainable development – by internalising social and ecological costs into prices, by rising awareness for the quality advantages of sustainable products and by providing the necessary information about social and ecological aspects of production methods.

4.1.4 Complementary Interests

Finally, complementary or flanking consumer interests are of a more general nature and a precondition for the facilitation of the aforementioned interests.³ These include, *inter alia*, the interest to be provided with adequate (product and service) information and education, legal entitlements and access to justice, as well as (group-) representation in the policy making process and capacity building.⁴

4.2 The Concept of Sustainable Development and Consumer Policy

The concept of “**Sustainable Development**” was first internationally presented in 1987 in the so-called “*Brundtland Report*”⁵, the official report of the World Commission on Environment and Development. According to the often cited and central definition, development is sustainable, if it

³ CI, Consumers International 2001: *Consumers and Competition - Consumers International Global Competition Report*. London: Consumers International, p. 21.

⁴ CI, Consumers International 2003: *Rights and Responsibilities*. available from: <http://www.consumersinternational.org/about_CI>: Consumers International.

⁵ Brundtland-Report 1987: *Our Common Future*. No. A/42/427. New York: World Commission on Environment and Development; available from: <<http://www.uno.de/umwelt/entwicklung/nachent.htm#1987>>.

“meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁶

The overall objective is to prevent further social and environmental degradation while attempting to improve the standard of living for everyone. The causes and necessary measures identified are manifold. The essence of this concept, however, comprises a *holistic, global and long-term* approach to balance and concord conflicting principles and interests and thus to sensitise as well as enable States to take the necessary and proportionate measures. Regarding this definition alone, however, the exact notion of sustainability remains unclear. It only implies that in view of the needs of present and future generations measures must provide for a long-term validity and not be of a short-sighted nature. This can only be realised given that the approach chosen for a measure is holistic, i.e. aiming to equally consider and weigh *economic, social and environmental* aspects. Finally, it must be global, realising that conflicts need to be solved at international rather than national or regional level as most developments have undergone a considerable globalisation over the past decades. As a consequence, the concept of Sustainable Development can provide a suitable and effective instrument for international consumer policy as it guides States or governments, respectively, to identify and solve the aforementioned conflicting consumer interests in a way that complies with the principles of proportionality. In addition, the “Brundtland Report” already identifies various causes for “**Unsustainability**”, such as poverty, lack of energy and water supply and of food security, that bear strong implications for consumption and thus for consumer policy. Therefore, as consumption plays a decisive role as a cause for many societal problems, it can play the key role to reverse this effect. For this reason sustainable consumption has been recognised as an indispensable issue by a number of international bodies and other stakeholders and has become an integral part of the sustainable development policy agenda.

One way to further clarify the concept of sustainability is to illustrate the various areas of consumer policy relating to sustainable development. Reference is being made to the two most prominent international sources specifically relating to consumption and sustainable development: the Rio Process and the UN Guidelines for Consumer Protection.

4.2.1 The Rio Process

4.2.1.1 The United Nation Conference on Environment and Development (UNCED)

Agenda 21 is a non-binding instrument developed as part of the UN Conference on Environment and Development in Rio de Janeiro in 1992.⁷ Chapter 4 of Agenda 21

⁶ *Ibid.*, p. 24, para. 27 and p. 54, para. 1.

⁷ UN-Document A/CONF.151/26, Vol. I, Annex II (12 August 1992).

focuses on the implementation of sustainable consumption patterns set out in Principle 8 of the *Rio Declaration* on Environment and Development.⁸ It identifies unbalanced or unsustainable consumption and production patterns in the developed and developing world to contribute to global environmental stress and poverty. The exaggerated use of natural resources is found to deprive developing countries of the ability to satisfy even the fundamental interests of its consumers, i.e. the supply of essential goods and also to cause considerable environmental damage.⁹ For this strong global interdependence “*all countries should strive to promote sustainable consumption patterns*” by developing national policies and strategies. The principle of common but differentiated responsibility imposes mainly on industrialised countries the obligation to reduce their use of natural resources and to limit the environmental damage resulting from consumption, while developing countries are assigned more leeway for future development.

4.2.1.2 Earth Summit +5

At the Earth Summit +5, the “Programme for the Further Implementation of Agenda 21” was adopted by the General Assembly.¹⁰ Regarding sustainable consumption, the Programme reiterated the importance to strengthen international cooperation, particularly between the developing and industrialised countries.¹¹ It also included provisions on internalisation of costs, the definition of best practices as well as the encouragement of the media to participate in the promotion of sustainable consumption.

4.2.1.3 World Summit on Sustainable Development (WSSD)

The *Plan of Implementation* was the most important output of the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002. It contains several recommendations relevant to consumer interests. The Johannesburg Plan of Implementation mainly reiterates the measures adopted in Agenda 21 and the Programme for further Implementation, adopted at the Earth Summit +5 in 1997.¹² The main new outcome consists of the decision

“...to encourage and promote the development of a 10-Year Framework of programmes in support of regional and national initiatives to accelerate the shift towards

⁸ *Ibid.*, Annex I.

⁹ *Ibid.*, para 4.3 and 4.5.

¹⁰ Programme for Further Implementation of Agenda 21, UN-Document A/RES/S-19/2 (19 September 1997).

¹¹ *Ibid.*, para. 28, lit. f and g.

¹² *Ibid.*, para. 13 et seq.

*sustainable consumption and production to promote social and economic development... .*¹³

4.2.2 United Nations Guidelines for Consumer Protection and the 1999 Modifications to Incorporate Sustainable Consumption

The United Nations Guidelines for Consumer Protection are a non-legally binding set of recommendations adopted by the UN General Assembly.¹⁴ In 1999 the Guidelines for Consumer Protection were expanded to include a section on sustainable consumption. According to the general principles of sustainability, the Guidelines attempt to **internationalise** and **internationally harmonise** the level of consumer protection while recognising the danger of misusing consumer protection policies as a justification to erect barriers to international trade and trade obligations.¹⁵ Furthermore, declaring all societal groups to be stakeholders of sustainable consumption¹⁶, the Guidelines recommend numerous instruments to strengthen or install sustainable consumption in the Member States. The future measures should comprise a mixture of instruments and policies, including representation, information and education, public-awareness raising, and fiscal instruments, including internalisation of costs, subsidies and public procurement as well as standardisation, i.e. best practices, and research. In this context, particular emphasis is placed on fundamental and societal interests, as well as on developing countries¹⁷ paying due regard to the principle of common but differentiated responsibility.¹⁸

Accordingly, the Guidelines start out by stating the commitment of states to consumer interests as follows:

“Taking into account the interests and needs of consumer in all countries, particularly those in developing countries; recognising that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection... .”

The core recommendation calls on governments to:

¹³ *Ibid.*, section III, para. 14.

¹⁴ See Art. 13 UN-Charter.

¹⁵ General Assembly (54/449). United Nations Guidelines for Consumer Protection (as expanded in 1999), para.2 and 10, section H.

¹⁶ *Ibid.*, para. 43,44.

¹⁷ *Ibid.*, para. 4.

¹⁸ *Ibid.*, para. 1.

*“...develop or maintain a strong consumer policy(...) and each Government should set out its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of the population, bearing in mind the costs and benefits of proposed measures...”*¹⁹

4.3 Policy Areas and Proposed Measures

Building upon the general description of the international instruments to promote sustainable consumption, this section aims to give an overview of the concrete policy areas concerning all consumer interests while particular emphasis is placed on fundamental and societal interests, as well as the proposed measures that States should take in their support. The majority of the measures are taken from the UN-Guidelines for Consumer Protection.

4.3.1 Economic Interests

□ Free and fair Competition

Consumers have an interest to obtain an optimum benefit from their economic resources (main economic interest).²⁰ Accordingly, it is in the interest of consumers to have the greatest choice of products and services at the lowest cost. For one, this can be achieved by fair and effective competition among producers and suppliers.²¹ Furthermore, it requires fair market conditions between the consumer and the producer, i.e. an adequate degree of protection against abusive business practices, including consumer privacy and balanced bargaining power.

□ Product and Service Quality

In addition, maximisation of utility also connotes the best possible quality of the supplied goods and services. This comprises an adequate degree of safety, particularly a protection against health damages. According to the UN Guidelines, consumers *“should have a right of access to non-hazardous products.”*²² Moreover, consumers have an interest in an adequate degree of product reliability and durability including the provision of product service.

□ State Instruments or Measures

¹⁹ UN Guidelines, II, 2 (General Principles).

²⁰ United Nations Guidelines for Consumer Protection (as expanded in 1999), para. 15.

²¹ United Nations Guidelines for Consumer Protection (as expanded in 1999), para. 1 (g), 19.

²² *Ibid.*, para. 1, 3 (a) and sec. A.

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Free and fair competition requires effective competition and anti-trust laws as well as mandatory standards against abusive business practices which adversely affect consumers, including means for enforcement of such measures.²³ This also includes the protection against such contractual abuses as one-sided standard contracts, exclusion of essential rights and unconscionable conditions of credit by sellers, as well as against false or misleading product claims.²⁴ The UN Guidelines refer in this context to the “*Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*” which function as legally non-binding guidelines.²⁵

Product safety encompasses the protection against health damages caused by the inherent risks of product such as toxicity or allergenic potential of food or safety risks of technical appliances. Manufacturers should have the obligation to notify the authorities of any unforeseen hazards after the product is placed on the market²⁶ and, as the case may be, recall, replace or modify it.²⁷ In the attempt to “internationalise” consumer protection, Governments should comply to or orientate themselves on international standards as far as product, production, and distribution safety standards are concerned. With regard to specific products and services the UN Guidelines for Consumer Protection refer to certain international standard setting bodies. In respect of food standards they expressly refer to the *FAO/WHO Codex Alimentarius*.²⁸ In relation to medicines, the *WHO Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce* should facilitate product standards²⁹ and with regard to water Governments should comply to the goals and targets set out in the “*International Drinking Water and Sanitation Decade*.”

Reliability and Durability: States should introduce certain product and service standards concerning reliability and durability to ensure that they are suited for the purpose for which they are intended.³⁰ This also includes an adequate degree of after-sale service (e.g. availability of spare parts).³¹

²³ *Ibid.*20,para.17.

²⁴ *Ibid.*, para. 21.

²⁵ *Ibid.*, para.17 (the Principles and Rules were adopted by the General Assembly in resolution 35/63, 5 December 1980).

²⁶ *Ibid.*, 13.

²⁷ *Ibid.*, para. 14.

²⁸ *Ibid.*, para.57.

²⁹ *Ibid.*, para. 56-62.

³⁰ *Ibid.*, para. 18.

³¹ *Ibid.*, para.20.

Apart from mandatory standards, States should also encourage the formulation and implementation of voluntary codices, if possible with participation of consumer groups.³²

- **Information and Labelling**

Education and information programmes should enable consumers to make an informed choice of goods and services, conscious of their rights and responsibilities. Thereby, a high degree of protection can be provided as a well informed consumer can avoid future damage to his interests. Accordingly, the UN Guidelines recommend providing the consumer with adequate, accurate and independent information.³³ Product and service labelling and the role of consumer groups are the most important issues in this context. Accordingly, the UN Guidelines call for consumer warning and instruction of internationally understandable symbols.

4.3.2 Fundamental Interests

Concerning the supply and distribution of essential goods and services, particular emphasis is placed on water, food, energy and the supply of pharmaceuticals. A key provision of the Johannesburg Plan for Implementation contains a commitment to halve the proportion of people without access to safe drinking water by 2015.³⁴ The UN Guidelines suggest that policies on drinking water should be maintained or strengthened to improve supply, distribution and quality within the targets set by the *International Drinking Water Supply and Sanitation Decade*.

4.3.3 Societal Interests

- **Internalisation of Costs**

Internalisation of costs means to add so-called externalities to the calculation of prices.³⁵ Externalities are costs that are not related to the actual production process, such as the cost for environmental damage. The *polluter-pays principle* described in Principle 16 of the Rio Declaration on Environment and Development³⁶ plays a very important role in this context.

- **Eco-Efficiency**

³² *Ibid.*, para. 26.

³³ *Ibid.*, para. 22, 26, F.

³⁴ World Summit on Sustainable Development Plan of Implementation (4 September 2002), para. 6, lit. a.

³⁵ UN Guidelines for Consumer Protection, para.52.

³⁶ *Ibid.*, para. 14, lit. b.

Agenda 21 identifies improvement of efficiency within the production process to be an important remedy for unsustainable production and consumption . This aims mainly at reducing the use of natural resources, while minimising the generation of waste.³⁷ and also encompasses the promotion of recycling schemes and life-cycle impact assessment, i.e. an evaluation of the environmental impact of a product or service during the cycle of its consumption.

□ **State Instruments or Measures**

• ***Fiscal Instruments***

Imported products may be subject to border tax adjustments to compensate for competitiveness losses arising from domestic economic incentives to achieve sustainability.

The Johannesburg Plan of Implementation calls for the internalisation of environmental costs, e.g. through environmental taxing, while paying due regard to the public interests, in particular the polluter-pays principle, and without distorting international trade.³⁸ It also identifies and calls for the reduction of subsidies in certain areas, in particular in the energy sector.³⁹

• ***Public Procurement***

In addition, Agenda 21 encourages States to integrate sustainable consumption into their public procurement policies.⁴⁰

• ***Information***

Information instruments, e.g. certification and labelling, can provide consumers with the choice to purchase sustainable products.⁴¹ The optimal information instruments provide the consumer not only with information about the product per se, but also about the processes and methods used in its production. These tools are not to be used as disguised trade barriers.⁴²

• ***Education***

Moreover, it is seen as necessary to improve consumer *education* by developing awareness-raising programmes, particularly among youths and the relevant segments in all countries and especially in the developing countries, taking into account local, national and regional cultural values.⁴³

³⁷ *Ibid.*, para. 4.17 and 4.18.

³⁸ *Ibid.*, para. 18, lit. b.

³⁹ *Ibid.*, para. 90, 19, lit. q.

⁴⁰ *Ibid.*, para. 4.23-25.

⁴¹ *Ibid.*, para. 4.21, 26.

⁴² *Ibid.*, para. 14, lit. e.

⁴³ *Ibid.*, para 14, lit. d.

- **Participation**

Consumers need to be adequately represented in the decision-making process, e.g. by NGOs which may also be granted entitlements to take legal action in the interest of their members.⁴⁴

- **Voluntary Obligations Concerning Social Responsibility and Accountability**

States are to encourage the industry to improve social and environmental performance through voluntary initiatives, including environmental management systems, codes of conduct, certification, e.g. through audit procedures, and public reporting. Financial institutions could be encouraged to incorporate sustainable development considerations into their decision-making processes.⁴⁵

- **Co-operation and Participation**

The Johannesburg Plan of Implementation calls for an increased dialogue and co-operation between all stakeholders.⁴⁶ The WSSD showed indeed a “new level of dialogue between all stakeholders,”⁴⁷ in particular between governments, civil society, and the private sector. Some “Type II partnerships”, i.e. co-operations among the different stakeholders announced at the WSSD, aim to promote sustainable consumption.⁴⁸ The Plan of Implementation also commends the cooperation of different stakeholders in all areas, i.e. beside governments and international organisations, cooperation between private and state actors is to be encouraged, thus ensuring some form of consumer representation.⁴⁹

- **Capacity Building**

Agenda 21 calls for close international co-operation among countries. This involves, in particular, the transfer of technologies between them, especially from the developed to developing countries, and assistance to use them. At the same time, the collection of information as well as the establishment of the necessary databases and the encouragement to exchange information is regarded as being an essential activity in order to evaluate the implications of unsustainable consumption and production. National actions should encourage,

⁴⁴ *Ibid.*, para. 9 and 11, I, No. 6.

⁴⁵ *Ibid.*, para. 17, lit. a-c.

⁴⁶ *Ibid.*, para. 17, lit. d.

⁴⁷ *Ibid.*, para. 13.

⁴⁸ There are, for example, initiatives by the Federation of German Consumer Organizations (VZBV) for capacity building on sustainable consumption for youth organisations, schools, local authorities and consumer organisations by raising awareness and promoting networking and the exchange of experience among youth, UN-Document. Type II Partnership Initiatives A/CONF.199/CRP.5, p.6.

⁴⁹ *Ibid.*, para. 20.

inter alia, the use of renewable resources, recycling and research in and dissemination of environmentally sound technologies.⁵⁰

⁵⁰ *Ibid.*, para. 4.17 and 4.18.

5 Economic Pillar: Instruments that Relate to International Trade Law

International trade law is increasingly important as consumers are able to globalise their choices, and hence, producers are increasingly gearing their products to international markets. In addition, it is an important source of constraints on State behaviour, particularly as the WTO agenda includes far more than just the movement of goods and services across international borders, by addressing a whole range of consumer concerns, such as health, labelling and availability of sustainably produced goods and services. This section surveys relevant provisions of WTO law, including all relevant WTO Agreements, as well as the WTO as an institution. It will also describe how the WTO, established in 1994, is constantly evolving, through both the "built in agenda" and negotiation rounds.

5.1 Agreement Establishing the World Trade Organization

The Agreement Establishing the WTO formalises, for the first time, the institutional basis of the world trading system. The WTO is to 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 this Agreement". The Agreement specifies the purpose of the WTO, its functions, structure, legal status, and provides for a secretariat.

By joining the World Trade Organization, States agree to accept all the Multilateral Trade Agreements negotiated under the Uruguay Round, which include those described below. In other words, Members cannot pick and choose as between individual agreements, but must accept the entire package.

The Preamble to the Agreement includes the following recitation:

*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of world's resources in accordance with the objective of **sustainable development**, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,...*

The institutional framework that this Agreement establishes has at least two important implications for consumers. Firstly, it is noteworthy that there is neither an express commitment made to consumer policy nor any organisational structure for addressing consumer interests, despite the fact that consumers are profoundly affected by the WTO. Secondly, consumer organisations, as well as other NGOs, are kept at an arms

length from the actual negotiations of the WTO, although they are able to receive official documentation available on the WTO internet site.

Article V provides that the General Council is to make appropriate arrangements for effective cooperation with other intergovernmental organizations and for consultation and cooperation with non-governmental organizations. On 18 July 1996, the General Council adopted a decision entitled "Guidelines for arrangements on relations with non-governmental organizations". Although stopping short of allowing NGOs to participate directly in the work of the WTO or its meetings, it does seek to ensure that information about WTO activities is made available, i.e. by accelerating the rate at which documents are de-restricted. It also directs the Secretariat to play an active role in developing direct contacts with NGOs. Since then, numerous documents, particularly those tabled at the Committee on Trade and Environment, have been made available on the WTO Internet site.

5.2 GATT 1994 – Fundamental Framework Governing Trade in Goods

The GATT 1994 forms the foundation of the WTO agreements. Its three fundamental principles are reflected in Articles I, III and XI, all of which are intended to enhance and protect liberalised trade. In principle, consumers are meant to be key beneficiaries of liberalised trade, which should lead to wider choice and lower prices.

Article I contains the "**most-favoured nation**" (MFN) obligation: Contracting Parties must unconditionally grant all Contracting Parties advantages which are as favourable as those given in respect of "like" products from any individual Contracting Party. This means that there is to be no discrimination in the way any party to the GATT treats other parties to the GATT in relation to matters covered by the Agreement. However, this provision is not absolute. In addition to the General Exceptions provided for in Article XX (see below), other exceptions from the MFN obligation include: specific trade-preferences that arise out of the historic relations between particular States, measures in regional customs unions and free trade areas, and measures taken for national security purposes.

The second fundamental GATT principle is reflected in Article III and is known as the "**national treatment**" obligation: Contracting Parties must treat imported products no less favourably than "like" domestic products. In other words, domestic products and imported products that are alike should compete in the marketplace on an equal basis. WTO jurisprudence, especially the "Asbestos" case, has interpreted the national treatment obligation to allow differentiations on the basis of the health risks incorporated in a product (see the analysis in the Annex, Section 10.1.1).

The third fundamental principle is the prohibition of **quantitative restrictions on import and export of products** (Article XI). This principle is restricted by certain exceptions, e.g. in the area of agriculture,.

Article XX contains **general exceptions**, allowing Contracting Parties to take certain measures inconsistent with other GATT obligations if:

they 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...

Among the types of measures for which this exception can apply are some which may be relevant for sustainable consumer policy, especially those which are

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

(d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating (...) the prevention of deceptive practices;*

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

There is not, however, any specific reference to consumer interests in Article XX. Finally, Article XXV allows for waivers of GATT obligations, if two-thirds of the parties agreed.

The GATT is centrally important for consumers. It is the foundation for liberalised trade, and yet also sets out key exceptions to its rules on non-discrimination. Yet as will be illustrated below, liberal trade may not always be in the interests of consumers, especially those that are fundamental or societal. Therefore the interpretation and application of the exceptions allowed for in Art. XX are critical.

5.3 Agreement on Sanitary and Phytosanitary Measures

The Agreement on Sanitary and Phytosanitary measures (SPS Agreement) regulates the ability of States to take measures aimed at protecting human, animal or plant life or health against risks arising from the entry or spread of pests and diseases or from contaminants in foods, beverages or foodstuffs. Such measures relate to a product's characteristics, as well as to the processes and production methods leading to the end product. Thus, the SPS Agreement relates directly to the fundamental consumer interests relating to product safety and consumer health. While consumer safety is enhanced by the ability of States to take effective SPS measures, the SPS Agreement seeks to establish disciplines to ensure that these measures are not in fact abusive forms of trade protectionism.

The SPS Agreement aims “to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b).” The SPS Agreement is governed by the following principles:

- ❑ Member States have the right to take SPS measures necessary to protect human, animal or plant life or health
- ❑ SPS measures are to be applied only to the extent necessary and not without sufficient scientific evidence
- ❑ SPS measures shall not arbitrarily discriminate between Members where identical conditions prevail and shall not be applied in a manner which constitutes a disguised restriction on trade.
- ❑ SPS measures in conformity with this Agreement are presumed to conform to GATT 1994.

The Agreement applies to measures taken by governments, and obligates central governments to take “such reasonable measures” to ensure that non-governmental and regional bodies follow the same disciplines.⁵¹

The SPS Agreement favours the use of measures based on international standards. It requires Members to base SPS measures on “international standards, guidelines or recommendations, where they exist, except as otherwise provided in this Agreement.”⁵² Measures conforming to international standards are presumed to be consistent with the Agreement and GATT 1994.⁵³ Specific references are made to sources of standards for food (i.e. *Codex Alimentarius*), animals and plants.

Members are, however, afforded some scope to adopt more stringent standards “if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate” pursuant to risk assessment procedures.⁵⁴ In assessing risks, Members are to take into account specific factors, including “available scientific evidence” and certain economic factors.⁵⁵ In setting the appropriate level of protection, they must minimise “negative trade effects” and “avoid arbitrary or unjustified distinctions ... if such distinctions result in discrimination or a disguised restriction on international trade.”⁵⁶ If relevant scientific evidence is “insufficient”, provisional measures may be taken based on what is available, but Mem-

⁵¹ Article 13.

⁵² Article 3.1.

⁵³ Article 3.2.

⁵⁴ Article 3.3.

⁵⁵ Articles 5.2 and 5.3.

⁵⁶ Articles 5.4 and 5.5.

bers must seek further information and review the measures within a reasonable period of time.⁵⁷ Members must also accept the SPS measures of other Members as equivalent, even if different, so long as the exporting Member “objectively demonstrates” that its measures achieve the importing Member’s appropriate level of SPS protection.⁵⁸ The heavy reliance on scientific evidence required by the SPS Agreement leads to the question what room there is for measures to be taken on the basis of the precautionary principle. This question is referred to in part of the WTO’s jurisprudence (see Annex, Section 10.3), but the issue is still being debated, both legally and politically.

Annex B to the Agreement sets forth transparency requirements, pursuant to which Members must provide interested parties “notice at an early stage” of proposed measures, as well as an opportunity to comment. Once finalised, Members must promptly publish the measures and establish an “enquiry point” to supply relevant documents and other information to interested WTO Members.

Thus, the SPS Agreement has important impacts on consumer protection. It places a premium on those processes that comply to international standards, even if those processes are not in themselves legally binding. In so doing, the Agreement allows, but makes it difficult, for Members to depart from these standards. This greatly enhances the importance of international standards. The level of consumer protection increasingly depends on the quality of these standards. The extent to which countries can unilaterally set their own SPS standards, in the context of their own perceptions of risk and precaution, is the subject of ongoing dispute settlement in the WTO (see the analysis of WTO jurisdiction in Annex, Section 10.1.2).

5.4 Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement provides disciplines (i.e. rules) for setting and enforcing technical standards and regulations, so as to reduce barriers to international trade. Such standards and regulations include those established to protect the interest of consumers in a certain quality of a product or the respective processing and production methods and those established to convey certain information to consumers, e.g. through labeling programmes.

The preamble of the TBT Agreement states the following:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

⁵⁷ Article 5.7.

⁵⁸ Article 4.1.

*countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;*⁵⁹

Thereby, the TBT Agreement seeks to establish a balance between the ability of countries to establish standards and the desire to eliminate barriers to trade.

The TBT Agreement applies to a "document" that sets mandatory standards (referred to in the Agreement as "technical regulations") or voluntary standards (referred to as "standards") for products. Unlike the 1979 Agreement, the TBT Agreement covers not only the products themselves, but also the processes and production methods (PPMs), as these are explicitly included in the definitions of standards and technical regulations.⁶⁰ However, it remains in dispute precisely what PPMs are covered: those relating only to the product or also to non-product PPMs? An example of a product-related PPM is a requirement that recycled materials go into the product. A non-product PPM example is a policy to not use timber from non-sustainable sources.

The Agreement fosters the harmonisation of technical requirements by favouring the use of international standards. When a Member adopts or expects to adopt technical regulations for a product, it is required to participate, within the limits of its resources, in efforts to set international standards for that product.⁶¹ If "relevant international standards" exist, then Members must use them as a basis for their technical regulations, unless these standards would be "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".⁶² Article 2.2 explicitly recognises the prevention of deceptive practices, the protection of human health or safety, animal, plant life or health, or the environment as legitimate objectives. A technical regulation for legitimate objectives that is based on international standards is "rebuttably presumed not to create an unnecessary obstacle to international trade".⁶³

Members may, however, choose not to follow international standards. In that event, the TBT Agreement imposes both procedural and substantive requirements. The former are aimed at fostering transparency. Members must provide prior notice and opportunity to comment on draft regulations and must publish promptly final technical regulations.⁶⁴ They must also establish enquiry points to which other Members and interested parties may turn for information.⁶⁵

⁵⁹ Sixth recital.

⁶⁰ See Annex 1.

⁶¹ Article 2.6.

⁶² Article 2.4.

⁶³ Article 2.5.

⁶⁴ See Articles 2.9, 2.11, 5.6 and 5.8.

⁶⁵ Article 10.

At the substantive level, technical regulations and conformity assessment procedures must obey the MFN and national treatment obligations.⁶⁶ In addition, such regulations "shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".⁶⁷

The TBT Agreement applies only to central governments. A Code of Good Practice is annexed, to which non-governmental bodies establishing standards may adhere. Central governments are required to take reasonable measures to ensure that local government and non-governmental standardising bodies comply with the Code of Good Practice.⁶⁸

From the issues covered by the TBT Agreement mandatory and voluntary labelling schemes play an especially important role for consumers. There is considerable debate about what criteria labelling schemes have to comply with in order to be in line with WTO law (see analysis of applicable WTO jurisprudence in the Annex, Section 10.4). One issue of debate is the extent to which the TBT Code of Good Practice applies to voluntary ecolabelling programmes. Potentially even more important is the question whether the TBT agreement allows labelling for so-called "non-product PPMs", which are production and processing methods that are not detectable in the end product. The European rules for labelling of genetically modified food could evolve to be a test case to evaluate the legality of a non-product PPM labelling scheme.

5.5 General Agreement on Trade in Services (GATS)

A key achievement of the Uruguay Round was the conclusion of the GATS, which seeks to liberalise trade in services. Services trade is becoming increasingly important and the availability and quality of services can impact on fundamental and economic consumer interests as well as on sustainable development.

Services are defined very broadly as "any services in any sector except services supplied in the exercise of governmental authority".⁶⁹ This definition is one of the sources of the controversy surrounding GATS. The Agreement goes on to stipulate that "a service supplied in the exercise of governmental authority" is a service that is neither supplied on a commercial basis nor in competition with one or more service suppliers.⁷⁰ With many governments outsourcing their services or engaging in public-private

⁶⁶ Articles 2.1 and 5.1.

⁶⁷ Article 2.2.

⁶⁸ See Article 4.

⁶⁹ Art. I:3(b)

⁷⁰ Article 1:3(c).

partnerships, this definition may result in the liberalisation of key sectors relating to the fundamental interests of consumers, such as health, education, or social services, should the Member choose to include such sectors in its schedule of specific commitments.⁷¹ This potential for liberalisation of trade in services to intrude into sectors traditionally regulated at the domestic level, together with the uncertainty with regard to possible benefits in this area, have generated significant debate. This debate has arisen out of fears that restrictions on the ability of governments to regulate in liberalised sectors will adversely affect the delivery and accessibility of services that relate to consumers' fundamental interests, such as the supply of drinking water. GATS explicitly applies to measures "affecting trade in services",⁷² which appears broader than measures specifically aimed at trade in services,⁷³ which may further widen the scope of the Agreement.

Trade in services is also defined broadly,⁷⁴ as the supply of a service:

- From the territory of one Member into the territory of any other Members;
- In the territory of one Member to a service consumer of any other Member;
- By a service supplier of one Member, through commercial presence in the territory of any other member;
- By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Thus, trade in services comprises more than the import and export of the actual services. Accordingly, the GATS encompasses a wide variety of activities, including foreign direct investment in the services sector.

Whereas GATT essentially covers trade in all goods except for those for which Members make specific exemptions, the GATS is a hybrid agreement whose obligations are divided into the following categories:

- **General Obligations** (obligations apply directly and automatically to all WTO Members for all services)

⁷¹ It should be noted that in February 2003 European Trade Commissioner Pascal Lamy announced that the European Commission would not further commit Europe's health and education sectors to the free market rules of GATS.

⁷² Article I:1.

⁷³ See also European Communities – Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, paragraph 220, which calls for a reading of GATS that implies a broad scope.

⁷⁴ Art. I(2).

- ❑ **Most-favoured-nation (MFN)**,⁷⁵ requires according all WTO Members the same treatment.
- ❑ **Transparency**, which requires Members to publish all relevant laws and regulations governing all service sectors, as well as any changes to laws, rules or regulations that would affect its trade in services.⁷⁶

Specific Obligations

Specific obligations can be applied "horizontally" (across all service sectors or across all modes of supply), or "vertically" (so that they are only applicable to one service sector or to a specific mode of supply):

- ❑ **Market access**, whereby foreign companies are to be allowed to provide cross-border services in a country.⁷⁷ This right is not unlimited, however, in that a country can restrict such access by limiting: the number of suppliers, operations or employees in a certain sector; the legal form of the supplier; the value of transactions or assets; or the participation of foreign capital;
- ❑ **National treatment**, whereby once foreign companies have been allowed to enter a country, they must receive the same treatment as domestic service suppliers.⁷⁸

The liberalisation of services is to be done progressively on the basis of voluntary commitments⁷⁹ through a process of requests and offers, which are done in secrecy with limited stakeholder involvement from civil society. This process is quasi-bilateral, in that negotiations often occur bilaterally, but the result is multilateral in effect. The GATS allows for domestic regulation of sectors where specific commitments have been made, but are not meant to constitute "unnecessary barriers to trade in services" and are not to be "more burdensome than necessary to ensure the quality of the service".⁸⁰ The right to regulate – as defined in its principle appearance in the Preamble – is not, strictly speaking, legally binding. The interpretation of these requirements will determine the scope of permitted domestic regulation, which is one of the most controversial aspects of the GATS.

In addition, Article VI.4, which lays down a "necessity test" similar to that in a number of other WTO agreements, introduces requirements that have the potential to shape the substance of the domestic regulations themselves. Via VI:4, the WTO Council on Trade in Services seeks to develop "disciplines" which ensure that requirements are

⁷⁵ Art. II

⁷⁶ Art. III.

⁷⁷ Art. XVI

⁷⁸ Art. 17

⁷⁹ Part IV

⁸⁰ Article VI(4).

”not more burdensome than necessary to ensure the quality of the service” (Art VI:4(b)). The language of Article VI:4 does not include specific references to services where there have been commitments, unlike other provisions of the GATS, a fact which suggests that this discipline applies even to sectors for which there have not been specific commitments.⁸¹

Article VIII provides for some control of monopolies. However, Article VIII.2 appears to provide some protection for competitors in areas outside the monopoly, but does not contain any reference to the need to protect consumers from some monopoly practices.

Article XIV contains a general exceptions clause that is modelled on GATT Article XX, although it is not identical. For example, there is no equivalent to GATT Article XX(g), which relates to exhaustible natural resources. One addition is the allowance of measures relating to the protection of privacy.⁸² Finally, Members may withdraw or modify their commitments, but other Members may have a right to compensation in the form of withdrawing trade concessions,⁸³ which may prove particularly detrimental for small countries.

The GATS will impact on all types of consumer interests. The full extent will depend on which services are ultimately liberalised and the extent to which this process impacts on government's ability to regulate those sectors in the interests of consumers. As part of the “built-in agenda” of the Doha Development Agenda, the GATS negotiations are included in the single undertaking to be concluded by 1 January 2005.

5.6 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The WTO TRIPS Agreement is a global agreement that establishes minimum requirements for intellectual property rights (IPRs). IPRs are important in determining the market conditions for artistic creations and technological innovations as well as for the related consumer products. On the one hand, consumers receive a benefit from whatever innovation that IPRs stimulate, but on the other hand, IPRs can be a key factor in influencing the availability of affordable consumer products, and in the case of essential products, such as medicines, they relate to fundamental interests. The extent to which the TRIPS Agreement will impact on consumers' access to essential goods depends on how much flexibility Members have in applying the exceptions provided for in the Agreement.

Article 7 lays out the objectives of the Agreement, which are to:

⁸¹ CI, Consumers International 2001: *The General Agreement on Trade and Services: An Impact Assessment*. London: Consumers International, p. 23.

⁸² Article XIV(c).

⁸³ Article XXI.

...contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Although this provision does not create any specific rights or obligations, it can be a useful aid to the interpretation and application of the Agreement. Article 8(1) lays out certain priority public interests, including those determined to be priorities at the national level, but clarifies that the TRIPS Agreement is not to be violated by legislating in these areas.⁸⁴

The Agreement establishes several forms of IPRs, including copyright,⁸⁵ trademarks,⁸⁶ geographic indications,⁸⁷ trade secrets,⁸⁸ and patents.⁸⁹ These rights are to be enforced by civil penalties and, in some cases, by criminal penalties. Of these, patents are the most significant.

Patents are exclusive rights granted to inventors that prevent others from making, using, selling or importing the patented invention, for a term of at least 20 years. The criteria for granting patents are novelty, inventiveness and industrial applicability.

Article 27 establishes what can be patented and the scope for exceptions, including exceptions to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.⁹⁰ In addition, the TRIPS Agreement contains two general provisions that may limit patent rights. One is specified in Article 30, which allows Member to provide limited exceptions to the exclusive rights conferred by patents "provided that such exceptions to do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties." Secondly, Article 31 allows Members to issue "compulsory licenses", whereby use is made of the subject matter of the patent without the authorisation of the rights holder. Compulsory licensing is particularly important for developing countries in the case of access to basic medicines, especially for key diseases, such as HIV/AIDS, malaria, and tuberculosis. Article 31 allows compulsory li-

⁸⁴ "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

⁸⁵ Section 1.

⁸⁶ Section 2.

⁸⁷ Section 3.

⁸⁸ Article 39.

⁸⁹ Section 5.

⁹⁰ Article 27(2).

censing only for goods produced in the domestic market so that developing countries without pharmaceutical manufacturing capacities remain highly dependent on the foreign patent holders.

WTO Members in Doha have committed themselves to agree on a solution to the problem that "WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement."⁹¹ Despite the fact that the Doha Declaration called for resolution of this by the end of 2000, consensus was only reached in 2003, immediately prior to the Cancun Ministerial Conference. The result was the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public health,⁹² which is an interim waiver that allows countries producing generic copies of patented drugs to export those to other countries. This waiver is to last until the TRIPS Agreement is amended. The Decision was controversial and implementation is still at an early stage. Therefore, it is too early to assess its impact.

This indicates that if the issue is of sufficient political import, WTO Members can demonstrate some individual flexibility, even if it is only to forestall hard bargaining. However, on the negative side, it appears that even for what should be a relatively easy case of public health emergencies, current WTO rules can interfere with finding effective solutions. Thus, other potential obstacles to effective access to essential goods and services caused by IPRs may still be problematic for consumers.

5.7 Agreement on Subsidies and Countervailing Measures

This Agreement seeks to establish limits on the use of subsidies. It is relevant to consumers in several respects, especially the prices of subsidised goods. Subsidies may be attractive to consumers if they lead to lower prices, but subsidies must also be financed, inter alia, by consumers. In addition, the Subsidies Agreement relates to sustainable development for two reasons. One is that subsidisation can be an important tool in achieving sustainability objectives. Secondly, "perverse" subsidies of activities harmful to the environment will interfere with achieving sustainability – thus, trade disciplines, combined with effective environmental policy, might be usefully applied to remove them.

Subsidies are deemed to exist where there is (a) a financial contribution by a government or income or price support in the sense of Article XVI of GATT 1994 and (b) the conferral of a benefit.⁹³ Production and export subsidies are covered.⁹⁴ Subsidies are

⁹¹ Doha Declaration on TRIPS Agreement and Public Health, *op. cit.*, footnote 111, para. 6.

⁹² WT/L/540, 2 September 2003

⁹³ Art. 1 (1.1 a (2) and b).

⁹⁴ Art. 1.

divided into three categories: prohibited⁹⁵, actionable⁹⁶ and non-actionable⁹⁷. Prohibited subsidies are those that rely on export performance or are contingent on the use of domestic over imported goods.⁹⁸ Actionable subsidies (i.e. those that can be challenged by other Members) are those which are otherwise permissible, but result in adverse effects on other Members. Adverse effects include:

- injury to the domestic industry of another Member,
- nullification or impairment of benefits that a signatory has a right to under GATT 1994, or
- serious prejudice to the interests of another Member.⁹⁹

The Agreement specifies criteria for determining whether "serious prejudice" exists and provides a presumption that it does exist in certain circumstances.¹⁰⁰ These criteria all relate to economic impacts. Recently, some NGOs and governments have called on the WTO to address environmentally harmful subsidies, particularly in the fisheries sector. Doing so would likely require expanding the notion of "serious prejudice" to deal with impacts on sustainable development.

The Subsidies Agreement did provide that assistance to existing facilities to promote adaptation to new environmental requirements may be non-actionable. However, this provision was time-bound, and is no longer operational, as a consensus did not emerge among WTO Members to renew it.

The Agreement allows injured parties to take countervailing measures, although only after certain procedures are followed.¹⁰¹ Special provision is provided for developing country Members and for Members with economies in transition.¹⁰²

As matters stand now, the Subsidies Agreement may impact on the prices that consumers pay for subsidised goods, and possibly on their availability. But there is little in the Agreement that is aimed at promoting sustainable development.

⁹⁵ Part II, Art. 3 *et seq.*

⁹⁶ Part III, Art. 5 *et seq.*

⁹⁷ Part IV, Art. 8 *et seq.*

⁹⁸ Art. 3.

⁹⁹ Art. 5.

¹⁰⁰ Art. 6.

¹⁰¹ Part V, Art. 10 *et seq.*

¹⁰² Part VIII, Art. 27 *et seq.*

5.8 Agreement on Agriculture

The Agreement on Agriculture (AoA) is vitally important to consumers. It not only impacts on fundamental consumer interests, such as food security, but also on consumers' economic interest relating to a well functioning food market, and to sustainable development, given the significant role agriculture plays in biological diversity conservation and development. The AoA was one of the most difficult instruments to negotiate during the Uruguay Round. Prior to the Uruguay Round, agriculture products were covered by the GATT, but loopholes were also extensive (e.g. ambiguous standards, export subsidies for primary products were allowed, grandfather clauses, certain import restrictions, etc.). As a result of contentious bargaining, the current Agreement contains a number of compromises that are currently the subject of renegotiations.

The Agreement aims to make market access more transparent by expressing preference for tariffs over other barriers to trade. Tariffs for agriculture products of 36% are to be reduced by developed countries (with a minimum of 15% reduction per product). Article 4.2 prohibits the use of agriculture-specific non-tariff measures, although in this case the GATT Article XX exceptions apply. As a result, there is now a complex system of tariffs and tariff quotas (the latter are quotas of products eligible for a reduced tariff, so as to ensure a minimal level of market access) in place, such that virtually all tariffs for agricultural products are "bound". There are also certain emergency actions known as safeguards (e.g. restriction of sensitive products) that are permitted under limited circumstances.

The AoA addresses domestic support in a rather complex manner. Measures that are the most trade distorting by virtue of their effect on production and trade fall in the "amber box". The aggregate amount of support for such measures is to be reduced on a step-by-step basis over 6 years (1995-2001) by 20% for developed countries (lower amounts for developing countries), although there are exceptions.

Domestic support measures deemed to have a minimal impact on trade appear in the "green box" and are permitted. These include programmes not directed at particular products and support for income not related to production level or prices (e.g. certain direct payments under environmental programmes). A "blue box" of measures was also created, whereby certain forms of domestic support are permitted, such as direct payments to farmers to limit production. Only the EU, Norway, and Slovakia use "Blue Box" measures.

The use of export subsidies, a widespread practice before the Uruguay Round was concluded, has been restricted to very specific situations, although it is still significant.¹⁰³ Export restrictions, although still permitted, are to be notified. Article 13 is a temporary "peace clause" (until end of 2003), whereby "green box" domestic support

¹⁰³ This is because the threshold was set at 36% of the 1986-88 period, which was the highest period ever.

measures are not to be subject to dispute settlement procedure under the WTO rules on subsidies or under the GATT.

To the extent that intensive agriculture, promoted by government support policies, is detrimental to biodiversity, the AoA does not eliminate this threat. Also, the AoA does not specifically prohibit dumping of agriculture products. This may cause more intense agriculture in developing countries trying to compete – without regard to the effects of such agriculture to biodiversity.

There have been some studies on the impacts of these policies on consumers and on the potential impacts of trade liberalisation, particularly the negative impacts relating to food security (e.g. breakdowns in supply of food, high prices, etc.).¹⁰⁴ Until the negotiations focus on the provision of a reliable supply of safe, nutritious and affordable food, it is unlikely that these negative impacts will be adequately addressed.¹⁰⁵ National food and agriculture policy as well as the trade liberalisation it self lead to negative and positive externalities. Food and agriculture policy measures can contribute to the reduction of negative (animal and human diseases risks and pollution) and the support of positive externalities (consumer friendly landscape, contributing to a rural development and local cultures).

International trade agreements should recognise such externalities and embody them in fair trading rules , but should also be aware of other policy targets such as structural policy. Other linked effects, e.g. on rural development in developing countries as well as in developed countries should be considered.

In a case by case decision the developed countries have to support developing possibilities for special categories of countries with a specific natural configuration and a specific infrastructure precondition. Trade liberalisation should not lead to the break down of every agricultural business in the developed countries.

As indicated above, the impact of the AoA on consumers around the world is profound, and yet complex. However, its current state reflects the extent of possible agreement at the end of the Uruguay Round, and was designed to be a benchmark for future negotiations. These negotiations have proven exceedingly difficult and intractable.

5.9 Investment liberalisation

Although there already is a WTO Agreement on the Trade-Related Investment Measures, some countries, and the EU, have been pressing for a more far-reaching agreement on investment liberalisation in the WTO. The Doha Declaration contains a

¹⁰⁴ CI, Consumers International 2001: *The Agreement on Agriculture: An Impact Assessment*. London: Consumers International.

¹⁰⁵ Ibid.

commitment to consider initiating negotiations on a multilateral agreement on investment after the next WTO Ministerial Conference. The Doha Declaration calls for the WTO Ministerial Meeting in Cancun to decide, on the basis of explicit consensus, whether to launch negotiations on, *inter alia*, investment liberalisation.¹⁰⁶

Since foreign direct investment is so important to national development, this initiative is very controversial. Among the concerns of sustainable development advocates is that investment liberalisation rules will inhibit the ability of host countries to regulate in areas of importance to achieving sustainable development. This concern arises out of the jurisprudence recently developed under powerful investor-state dispute settlement process established under NAFTA Chapter 11.¹⁰⁷ Most controversial has been the use of expansive notions of "expropriation", which must be accompanied by compensation.¹⁰⁸ These cases have determined expropriation to take place in areas normally within a government's right to regulate according to the internationally recognised concept of police powers, e.g. environment and health.¹⁰⁹ In the Metaclad case, the arbitrators did not consider this concept, but only whether the government measure impacted significantly on "the use or reasonable-to-be-expected economic benefit of property". Although the NAFTA rules do not prohibit the expropriations, the amounts involved can be significant,¹¹⁰ with the result that governments may be deterred from enacting environmental regulations.

It is important to note that the demandeurs of investment liberalisation in the WTO are not pressing for an investor-state dispute resolution, as exists in NAFTA. By having the dispute resolution be an inter-State mechanism, a political filter might be engaged that would inhibit States from launching claims against regulations that they themselves have. In addition, some countries, such as India, have supported the notion of policy flexibility in allowing countries to determine the form of the investment, a positive list approach to undertaking commitments similar to GATS, as well as a development clause. Given the present uncertainties, a definitive assessment of the impact of an agreement on investment liberalisation is not possible at the moment.

¹⁰⁶ *Ibid.*, para. 20.

¹⁰⁷ See IISD and WWF 2001: *Private Rights, Public Problems - A Guide to NAFTA's Controversial Chapter on Investor Rights*. Winnipeg, Canada: International Institute for Sustainable Development and World Wildlife Fund.

¹⁰⁸ Article 1110 of NAFTA.

¹⁰⁹ E.g. Metaclad v. Mexico, available from: <<http://www.dfait-maeci.gc.ca/tna-nac/metalcladCorp-en.asp>> and Pope and Talbot v. Canada, available from: <<http://www.dfait-maeci.gc.ca/tna-nac/pope-en.asp>>.

¹¹⁰ E.g. US \$13 Million in the Ethyl v. Canada case, which was settled, available from: <<http://www.dfait-maeci.gc.ca/tna-nac/ethyl-en.asp>>.

5.10 Further Evolution of the WTO - Doha Development Agenda

The Doha Ministerial Conference succeeded in agreeing a Declaration and a Work Programme for further negotiations¹¹¹, but its impact remains to be seen. Like the WTO, it does not specifically address consumer interests, but contains provisions that impact on consumers. Some issues on the Doha Agenda like compulsory licensing under TRIPS (Section 5.6) or investment liberalisation (Section 5.9) have already been referred to. The following section gives a brief overview over the Agenda in general.

One clear objective of the Work Programme is to increase market access. Paragraph 16 initiates negotiations on reducing or eliminating tariffs and non-tariff barriers on non-agricultural products, but without any stipulation that such reductions should be examined for their sustainability. Indeed, product coverage is to be "comprehensive and without a priori exclusions".

As regards the continued negotiations on liberalising agriculture, the Declaration contains very weak language that merely takes note of the proposals that contain "non-trade concerns" (e.g. environment and sustainable development) and confirms that non-trade concerns will be taken into account in the negotiations.¹¹²

Paragraph 19 instructs the TRIPS Council to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge. However, there is no commitment to creating an equitable relationship between the two treaties or to ensuring the protection of traditional knowledge. In addition, the TRIPS Council has still not accepted the CBD Secretariat's request to become admitted as an observer.

The Declaration contains a reaffirmation of the commitment to sustainable development¹¹³ that appears in the Preamble to the Marrakesh Agreement¹¹⁴, but the Declaration contains few mechanisms or provisions to actually implement this commitment. The WTO Committee on Trade and Environment and the Committee for Trade and Development are to debate the developmental and environmental aspects of the negotiations¹¹⁵, but it is uncertain whether these bodies will actually be able to influence the negotiations.

An entire chapter on trade and environment is included in the Declaration (paragraphs 31–33). Negotiations are to begin on "the relationship between existing WTO rules and specific trade obligations set out in MEAs", but –the Agenda is unlikely to result in

¹¹¹ WT/MIN(1)/DEC/1, 14.November 2001, Ministerial Declaration and Work Programme.

¹¹² *Ibid.*, para. 13.

¹¹³ *Ibid.*, para.6.

¹¹⁴ Agreement Establishing the World Trade Organization, para.1.

¹¹⁵ *Op. cit.*, footnote 111, para. 51.

any actual reform of the trading system Furthermore, the negotiations are only to focus on "specific" trade obligations set out in MEAs¹¹⁶, leaving "non-specific" measures even more vulnerable to WTO challenge.

The Doha Declaration goes on to call for "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services".¹¹⁷ While the concept of environmental "services" is relatively well known through the negotiations under GATS, it is woefully unclear what environmental "goods" mean. There was no discussion at Doha of what this means. The EU has proposed broadening the APEC and OECD lists of environmental goods to include products made in an environmentally sound manner, but this has been strongly rejected by many developing countries, who fear a legitimisation of PPM criteria.¹¹⁸ Some developing countries have suggested an inclusion of environmentally friendly natural products, such as bamboo or jute, in which they have an inherent advantage in the production and trade.¹¹⁹

Negotiations are also to take place on the reduction of fisheries subsidies.¹²⁰ There may be impacts of reduced subsidies on consumer markets, although these are likely to be complex. In the first instance, the objective of reducing subsidies is to contribute to achieving sustainable development of a living resource that is in crisis, as a result of too many boats chasing too few fish. So far, a variety of proposals have been made in the WTO, but there is little consensus.¹²¹

The WTO Committee on Trade and Environment is to give particular attention to the topic of labelling requirements for environmental purposes.¹²² No guidance is given here, which means that the stalemates and uncertainties that characterised previous discussions in that Committee will likely continue. Nonetheless, recommendations are to be made on further action, including the desirability of negotiations.

The Doha Ministerial Declaration grants the WTO Committee on Trade and Environment and the Committee on Trade and Development the right to:

¹¹⁶ *Ibid.*, para. 31 (i).

¹¹⁷ *Ibid.*, para. 31 (iii).

¹¹⁸ ICTSD and IISD: "Trade and Environment." *Doha Round Briefing Series*, Vol. 1, No. 9, February 2003.

¹¹⁹ Indian Ministry of Commerce and Industry, Trade Policy Division: *Trade Liberalisation in Environmental Goods: Considerations for India*, Discussion Paper 2003, online: http://r0.unctad.org/trade_env/test1/meetings/egs/INDIADiscussion%20Paper%20for%20EGS%20Seminar-9-5-03.pdf.

¹²⁰ *Op. cit.*, footnote 111, para. 31 (iii).

¹²¹ ICTSD and IISD: "Negotiations on WTO Rules." *Doha Round Briefing Series*, Vol. 1, No. 7, February 2003.

¹²² *Op. cit.*, footnote 111, para. 32 (iii).

*identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.*¹²³

However, given past experience, it is unlikely that these debates will actually influence the outcomes of the trade negotiations, particularly since so little substantive consensus has yet been achieved in the CTE, despite years of discussion. To date, there has been no agreement on how the CTE and CTD are to perform the functions decided at Doha. The first Ministerial Conference to follow Doha took place in September 2003 in Cancun, Mexico. Although it was mainly a stocktaking exercise, it presented an important opportunity to establish targets and frameworks to ensure a successful outcome of the Doha Round. However, it ended in failure, on account of differences over investment liberalisation and agriculture subsidies.

The NGOs reaction attributed the failure of Cancun predominantly to the EU and USA because they had been unwilling to enter into broad agricultural commitments. Another reason for the failure was seen in some nations like Japan and Korea demanding negotiations on the so-called “New Issues” or “Singapur Issues”, which would broaden the scope of the WTO to include investment, competition policy, transparency in public procurement and trade facilitation. Public analysis of the failure emphasized developed countries did not take into account that key developing countries were building coalitions during the negotiations.

This appears to indicate that in future negotiations developing countries will cooperate more closely than before. The agricultural interests of the less developed countries will therefore be crucial for the success of future negotiations. Also, progress on environmental issues can only be made if the negotiation parties finally agree on these trade related issues.

By the date of finalisation of this study (March 2004), negotiations have not yet been taken up. But EU and USA already pointed out that the year 2004 should not become a lost year for the WTO-negotiations. In respect to the crucial issue of agriculture, the EU declared shortly after Cancun that a reduction in the Amber Box and the Blue Box could be acceptable. On the other hand any reduction of Green Box subsidies would be unacceptable.

Meanwhile the “World Commission on the Social Dimension of Globalization” has presented its report titled “A Fair Globalisation”. The Commission had searched for ways to combine economic, social and environmental interests. Key recommendations in the report aim to make the multilateral system, including the WTO, more democratic and accountable to people, in its decision-making procedures and through parliamentary examination of international policies. The report even recommends a global parliamentary group to develop integrated oversight of the major international organizations including the WTO.

¹²³ *Ibid.*, para. 51.

Consultations between the ILO and the WTO about the report just started and it remains to be seen if the report can accelerate the combination of trade law and labour standards.

6 Social Pillar: International Legal Instruments that Relate to Human Rights, Labour Rights, and Human Health

This section will consider references to consumer interests in the most important international instruments relating to human rights, labour rights, and human health. These relate mainly to fundamental consumer interests, but also to sustainable consumption, as far as human rights apply to the production process.

6.1 Human Rights Instruments

The moral statements expressed in the Universal Declaration of Human Rights¹²⁴ were given legal force through two covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²⁵, forming together the so-called “Bill of Human Rights”. Generally speaking, the provisions of the ICSECR serve to protect, *inter alia*, fundamental consumer interests by obliging the Member States to entitle individuals to the access and distribution of essential goods and services, to health and to education.

The most relevant entitlement for the consumer in this respect is the right to adequate food, expressly referred to in Art. 11 (1) and the right to health in Art. 12 ICSECR. The scope of Article 11(1) is mainly determined by the normative interpretation of “adequacy”. According to the *General Comment No. 12* by the Committee on Economic, Social and Cultural Rights,¹²⁶ the core content of the right to adequate food encompasses, first of all, the possibility of

“...physical and economic access at all times to adequate food or to means for its procurement.” It further states: “The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.”¹²⁷

Accordingly, the normative content of Art. 11 (1) ICSECR includes not only the access to adequate food but also ensures adequate distribution (service) and basic health requirements. This interpretation also enjoys broad consensus among other UN bodies

¹²⁴ General Assembly resolution 217 A(III), 10 December 1948, U.N. Doc. A/810.

¹²⁵ Both entered into force on the 1 January 1976 (signature 1966)

¹²⁶ This committee was established in 1978 by the UN Economic and Social Council (ECOSOC) as a sessional working group for the implementation of the ICSECR, assisting the ECOSOC to fulfil its responsibilities as main “executive” and coordinating body of the ICESCR (ref. Art. 16 ICESCR), see also <http://www.un.org/esa/coordination/ecosoc/sub_bodies.htm>.

¹²⁷ Committee on Economic, Social and Cultural Rights, General Comment 12, *Right to adequate food (Art. 11)*, U.N. Doc. E/C.12/1999/5 (1999), p.2.

that engage in the protection of human rights.¹²⁸ Similarly, the right to health is widely recognised and mainly involves the access to medicines concerning the current major epidemic illnesses, such as AIDS and Malaria.¹²⁹ As illustrated in section 5.6., this bears particular implications on the law of the WTO, particularly in the field of the TRIPS Agreement.

While the purview of Art. 11 (1) and 12 ICESCR seems clear, the implementation appears to be the foremost problem. In contrast to the ICCPR, which contains a provision that allows States and individuals to formally complain to a reviewing body¹³⁰, the ICESCR does not yet provide a comparable procedure. The primary mechanism for enforcement is the state reporting process; pursuant to Article 16 and 17 ICSECR, State parties undertake to submit periodic reports to the ICSECR Committee on the programmes and laws they have adopted and the progress made in protecting Covenant rights. The UN has promulgated guidelines for the preparation of those reports.¹³¹ To address this lack of enforcement at international level, the ICESCR Committee has begun to promote the adoption of a draft optional protocol that bestows to individuals and groups the right to petition to the Committee. In addition, it is even being considered whether third parties, i.e. groups that are deemed to have a "sufficient interest in the matter", should be admitted to the procedure.¹³² At present, however, claimants of these rights may have recourse to the general procedures of the Committee and may use this as an "unofficial petition procedure" based on the modalities of the Committee.¹³³

Thus, the ICSECR has a limited and indirect, but growing potential to help ensure satisfaction of the fundamental consumer interest of access to food.

6.2 International Legal Instruments Aimed at Labour

The International Labour Organization (ILO) has adopted a set of eight treaties that set out "core labour standards". These treaties relate to freedom of association,¹³⁴ abolition of forced labour,¹³⁵ equality,¹³⁶ and the elimination of child labour.¹³⁷ These

¹²⁸ UNHCR / Commission on Human Rights resolution 2000/10, para. 8.

¹²⁹ Committee on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/2003/L.33 (11 April 2003).

¹³⁰ See Art. 41 ICCPR and Art. 2 Optional Protocol to the ICCPR.

¹³¹ UN ICSECR Committee, General Comment No. 1.

¹³² See Commission on Human Rights, Doc. E/CN.4/1997/105, para. 19 and 22 et seq. (proposed Art. 2 of the draft protocol).

¹³³ See The United Nations Committee on Economic, Social and Cultural Rights, Fact Sheet No. 16.

¹³⁴ Freedom of Association and Protection of the Right to Organize Convention, 1948; Right to Organize and Collective Bargaining Convention, 1949.

¹³⁵ Forced Labor Convention, 1930; Abolition of Forced Labor Convention, 1957.

treaties are considered by the ILO to be applicable regardless of a country's state of development. Enforcement of these treaties is done by three general instruments. The first is a regular system of supervision, which entails regular reporting on implementation measures. This reporting is done by governments and then reviewed by a Committee of Experts, who submit a report to each annual session of the International Labour Conference. The second is a group of special systems of supervision, which involve specific allegations against a member State. In general, these procedures required that the Convention concerned be ratified, although infringement of freedom of association principles maybe brought against ILO members even if they have not ratified the conventions concerned.¹³⁸ The third instrument is the use of ad hoc mechanisms to address particular circumstances.

The relationship between trade measures and labour standards has been a topic of considerable controversy in the ILO, WTO and elsewhere. This has emerged particularly in the context of campaigns against the use of child labour, which brought up the issue of using trade instruments, especially import bans, to enforce core labour standards.

So far, there have been no cases at the international level which address the issue. Indeed, labour issues make no appearance in the WTO instruments (with the exception of GATT Article XX(e) which refers to prison labour). Further, the linkage between WTO rules and labour standards has been one of the thorniest, particularly because of disagreements of the impact of trade measures on the improvement of labour standards in all countries, as well as on export oriented industries. In particular, developing countries have been very fearful of allowing developed countries to use trade measures relating to labour standards as a form of trade protectionism. Indeed, for some countries, lower wages and other labour conditions are a comparative advantage, while others question the legitimacy of using labour conditions to gain trade advantages. Unilateral trade sanctions may also lead to a further deterioration of working conditions since they may have a negative impact on export-oriented industries in developing countries.

Attempts to establish a working party in the WTO on labour standards has been discussed on several occasions, most notably in Marrakesh (1994), when the Uruguay Round was adopted, the WTO Ministerial Conference in Singapore (1996), and the Ministerial Conference Seattle (1999). In Seattle, the controversy over labour standards was one of the reasons why that conference failed. At the 1996 meeting, the Ministerial Declaration called for collaboration between the WTO and ILO Secretariats, but affirmed the ILO as the competent body to set and deal with labour standards. The problem with this strategy is that the ratification rate for many of the ILO Conventions

¹³⁶ Discrimination (Employment and Occupation) Convention, 1958; Equal Remuneration Convention, 1951.

¹³⁷ Minimum Age Convention, 1973; Worst Forms of Child Labor Convention, 1999.

¹³⁸ Articles 24 and 26 of the ILO Constitution.

is rather low. Recently, the ILO established a World Commission on the Social Dimension of Globalization, however so far WTO Members have not agreed to include labour rights within the scope of the WTO.

So far, the ILO instruments do not have a direct impact on consumers. They do not provide an established basis for consumers to distinguish between products, e.g. through labelling schemes. They also do not provide any mechanisms for States to take decisions regarding the import and export of goods and services.

6.3 International Legal Instruments Aimed at Protecting Human Health

6.3.1 World Health Organization (WHO)

The WHO Constitution (Statute) contains two provisions directly on consumer issues, although much of its work impacts on consumers. Articles 2(i) and (u) call on the WHO

“to develop, establish and promote int. standards with respect to food, biological, pharmaceutical and similar products”.

Most of the outputs of the WHO are non-legally binding instruments. However, the Framework Convention on Tobacco Control is an important exception.

The negotiations in the Intergovernmental Negotiation Body (INB) for the Framework Convention on Tobacco Control (FCTC), under the auspices of the World Health Organization (WHO), ended in March 2003. The World Health Assembly adopted the Convention on May 21 2003.¹³⁹ The objective of the Convention and its protocols is to:

...protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.¹⁴⁰

Among its guiding principles is that every person should be informed of the health consequences posed by tobacco consumption and exposure to tobacco smoke, that comprehensive multi-sectoral measures are needed to reduce consumption of to-

¹³⁹ WHO <<http://www.who.int>>, accessed on May 22 2003: The FTCT will enter into force after the ratification of 40 signatory States.

¹⁴⁰ Article 3.

bacco, and that participation of civil society is essential in achieving the objective of the Convention.¹⁴¹

The Convention contains several measures relating to the reduction of demand for tobacco, including the use of price and tax incentives,¹⁴² mandatory disclosure of contents and emissions of tobacco products,¹⁴³ and mandatory packaging and labelling requirements.¹⁴⁴ In addition, the Convention provides for regulating advertising, promotion and sponsorship by tobacco companies, including by companies located outside national jurisdiction.¹⁴⁵ A number of measures are stipulated to reduce the supply of tobacco, particularly relating to illicit trade in tobacco products. These include packaging and labelling requirements, and monitoring of cross-border trade.¹⁴⁶ The Convention states that each Party is to promote economically viable alternatives for tobacco workers, growers, and sellers.¹⁴⁷ Parties are further to develop laws to address liability and compensation for the purpose of tobacco control.¹⁴⁸ The INB has also announced that there will be need to further elaborate on these issues and emphasised the necessity for additional protocols.¹⁴⁹ Finally, the Convention encourages the implementation of measures beyond those required by it, including stricter requirements to protect human health that are consistent with the Convention "and in accordance with international law".¹⁵⁰

This Convention will impact on consumers, by virtue of its potentially powerful instruments, but also will restrict consumers' choices in the name of public health.

6.3.2 Codex Alimentarius

The *Codex Alimentarius* addresses important consumer interests relating to food safety. It is the official compilation of standards, guidelines and recommendations developed by the *Codex Alimentarius* Commission (CAC).¹⁵¹ The CAC was established in 1962 with the purpose to counsel the FAO and WHO on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme. The fundamental

¹⁴¹ Article 4 (1, 4 and 7).

¹⁴² Article 6.

¹⁴³ Article 10.

¹⁴⁴ Article 11.

¹⁴⁵ Article 13.

¹⁴⁶ Article 15.

¹⁴⁷ Article 15.

¹⁴⁸ Article 19(1).

¹⁴⁹ WHO Doc. A/FCTC/INB6/INF.DOC./2, 18 January 2003

¹⁵⁰ Article 2 (1).

¹⁵¹ Art. 1, lit. d of the Statutes of the *Codex Alimentarius* Commission.

mandate of the CAC encompasses the development of international standards, norms and guidelines that primarily aim to protect consumers' health in respect of food, and to ensure fair practices in the food trade.¹⁵² It is also to co-ordinate and co-operate with international governmental and non-governmental organisations to harmonise international standards.¹⁵³ To facilitate consumer protection, the CAC has also developed general standards, such as food labelling, that are designed to address the consumer interest in adequate product information.¹⁵⁴

Although the CAC standards are not legally binding from a strictly formal perspective, they are considered to be "international standards" by the WTO Agreement on Sanitary and Phytosanitary Measures and are referred to in WTO disputes (discussed below). They also create strong incentives for governments to comply with these international standards, by virtue of their practical impact in national trading policy. Generally speaking, food production that meets certain internationally agreed requirements is more transparent and can thus facilitate trade by creating greater export opportunities.¹⁵⁵ A further advantage, especially for countries with insufficient financial resources to develop their own specialised standards, is that these standards provide a default set of standards.¹⁵⁶ Although there is a risk of such default standards being lower than appropriate, in many cases, they do serve as an important floor, especially in cases where no national standards exist. As illustrated in section 5.3, the existence of Codex standards does not legally impede countries from setting higher standards, but it may be difficult to justify the necessity of such higher standards in the face of WTO law. In particular, the SPS agreement requires higher standards to be scientifically based, which means that other consumer interests like environmental concerns or the interest to be informed about sustainability aspects – referred to as "other legitimate factors" – are not accepted as justification.

Although membership in the CAC is limited to national governmental bodies, it is also possible for other stakeholders to be accorded "*observer status*" if they meet certain requirements, such as adequate expertise and international scope of activity.¹⁵⁷ The CAC has recognised the necessity to promote the representation of consumer interest groups in the decision-making process. At the same time, the CAC emphasises the resource constraints this entails. Therefore, the future will show whether an effective participation of NGOs will be established; this also includes an equal representation

¹⁵² Art. 1, lit. a of the Statutes of the Codes Alimentarius Commission.

¹⁵³ Art. 1, lit. b and c of the Statutes of the *Codex Alimentarius* Commission.

¹⁵⁴ See e.g.: General Standard for the Labelling of Pre-packaged Foods.

¹⁵⁵ WTO/WHO WTO Agreements and Public Health; A joint study by the WHO and the WTO Secretariat, 2002, p. 64 (Box 7).

¹⁵⁶ WTO/WHO WTO Agreements and Public Health; A joint study by the WHO and the WTO Secretariat, 2002, p. 65.

¹⁵⁷ Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the *Codex Alimentarius* Commission, No. 3.

between consumer interest groups and industry representatives. In addition, the CAC tries to encourage participation at national level.¹⁵⁸ Governments are supposed to establish national Codex Committees to set up a consultative process with stakeholders. In this context, the CAC is also engaged in capacity building in developing countries. Therefore a Trust Fund has been established to strengthen developing countries participation in Codex work both on international and national level¹⁵⁹.

Thus, the CAC is very important for consumers, especially given its linkage to the WTO SPS Agreement. Although it has taken steps to bring in more developing country participation and reach out to NGOs, it is still grappling with key issues on the sustainability agenda, such as implementation of the precautionary principle and the acceptance of other legitimate factors than science for establishing higher standards.

¹⁵⁸ 20th session of the CAC, reiterated in the “Draft Strategic Framework, Medium Term Plan 2003-2007 and Chairperson's Action Plan, Annex II, Table 2, Action 27 (adoption deferred to 2004).

¹⁵⁹ Report of the 25th Session of the CAC, 2003. CAC Document Symbol: ALINORM03/25/5; the main measure suggested was the establishment of a “Trust Fund for Participation of Developing Countries”.

7 Environmental Pillar: International Legal Instruments that Relate to Environmental Protection

This section will survey Multilateral Environmental Agreements (MEAs) that contain provisions relating to consumer interests. MEAs are aimed primarily at protecting the environment, but indirectly can impact greatly on consumer interests, both those relating to health and safety, i.e. fundamental interests, as well as those societal interests relating to sustainable development objectives.

7.1 Biosafety Protocol

The Cartagena Protocol on Biosafety was adopted in 2000 and entered into force in 2003. It applies to the transboundary movement, handling and use of all living modified organisms (LMOs) that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health.¹⁶⁰ LMOs that are pharmaceuticals for humans are excluded.¹⁶¹ Accordingly, the Protocol has profound implications for consumer safety, as well as their societal interests in the promotion of sustainable development.

At the heart of the Protocol is the "advanced informed agreement" procedure, which is to be applied prior to the first international transboundary movement of LMOs for intentional introduction into the importing Party's environment.¹⁶² Exceptions to this are LMOs for direct use as food or feed, or for processing, as well as LMOs decided by the Meeting of the Parties as not likely to have adverse effects on conservation and sustainable use of biological diversity, taking into account risks to human health.¹⁶³ This requires the Party of export to notify the importing Party's competent national authority in writing prior to the intentional transboundary movement.¹⁶⁴ The Protocol provides for the risk assessments,¹⁶⁵ with which import decisions are to be in accordance,¹⁶⁶ as well as a timeline for the taking of such decisions.¹⁶⁷ The precautionary principle is explicitly included in the Protocol: lack of scientific certainty about the extent of potential adverse effects of an LMO on the conservation and sustainable use of

¹⁶⁰ Article 4.

¹⁶¹ Article 5.

¹⁶² Article 7 (1).

¹⁶³ Articles 7(3) and 7(4).

¹⁶⁴ Article 8(1).

¹⁶⁵ Article 15, Annex III.

¹⁶⁶ Article 10(1).

¹⁶⁷ Article 10(3).

biological diversity in the Party of import, taking account of risks to human health, shall not prevent a Party from taking a decision about the potential import.¹⁶⁸

Parties are provided the right to take decisions regarding the domestic use of LMOs for food, feed or processing, including those that are imported.¹⁶⁹ Again, the lack of full scientific certainty about the effects of such LMOs shall not prevent taking decisions regarding imports.¹⁷⁰ Decisions regarding the import of all LMOs may also take into account, consistently with international obligations, socio-economic considerations arising from the impact of LMOs on the conservation and sustainable use of biological diversity.¹⁷¹

The Protocol establishes information requirements that may be important to consumers. Parties are required to include documentation accompanying LMOs for food, feed and processing, clearly identifying that the item "may contain" LMOs which are not intended for intentional introduction into the environment.¹⁷² LMOs intended for contained use and for intentional introduction into the importing Party's environment are to be clearly indicated as LMOs.¹⁷³ However, it is unclear whether this is a labelling requirement that is intended to reach the consumer, or is rather an information requirement that is meant to inform the transporters. From a consumer's perspective, it is desirable that s/he be provided as much information about the product as needed to make the most informed choice.

Parties may enter into bilateral, regional and multilateral agreements regarding the intentional transboundary movement of LMOs, provided that they do not result in a lower level of protection than provided by the Protocol.¹⁷⁴ Such agreements may also be with Non-Parties, although any transboundary movement of LMOs is to be consistent with the objectives of the Protocol.¹⁷⁵

The Protocol also provides that importing Parties may manage risks to the conservation and sustainable use of their biodiversity, taking into account risks to human health, including taking measures based on risk assessments and measures to prevent unintentional transboundary movements of LMOs.¹⁷⁶

¹⁶⁸ Article 10(6).

¹⁶⁹ Article 11(1).

¹⁷⁰ Article 11(8).

¹⁷¹ Article 26.

¹⁷² Article 18(2)(a).

¹⁷³ Articles 18(2)(b) and (c).

¹⁷⁴ Article 14(1).

¹⁷⁵ Article 24(1).

¹⁷⁶ Article 16(1) – (3).

The Protocol requires Parties to promote and facilitate public awareness, education, and participation regarding the safe transfer, handling, and use of LMOs.¹⁷⁷

A process is to be initiated to elaborate international rules and procedures for liability and redress for damage resulting from transboundary movements of LMOs.¹⁷⁸ In addition, the Meeting of Parties is to adopt cooperative procedures and institutional mechanisms to facilitate compliance with the Protocol and address cases of non-compliance.¹⁷⁹

Finally, it is worth noting three recitals in the Preamble that relate to the interaction between the Protocol and other rules of international law. The Preamble provides that trade and environment agreements should be mutually supportive; that the Protocol shall not be interpreted as implying changes in the rights and obligations of a Party under any existing agreement; and that there is no intention to subordinate the Protocol to other international agreements. Although Preambles do not create legally binding obligations, the use of the term "shall" suggests a strong legal commitment. Nonetheless, this language seems to beg the question, without offering guidance, as to what other international agreements require in relation to the subject matter in the Biosafety Protocol. These clauses seem to suggest that the Biosafety Protocol and other rules of international law should be interpreted in a synergistic manner, but that in cases where an actual conflict exists, that the Biosafety Protocol should not be overridden. However, the vague formulation, and their placement in the Preamble, make the ultimate impact of these statements difficult to assess.

The Biosafety Protocol potential impact on consumers is apparent, and represents a major development in international law. However, much will depend on key decisions that remain to be taken, e.g. related to labelling. In addition, the implementation of the Protocol presents challenges that may entail further negotiation and clarification, e.g. relating to the application of the precautionary principle.

7.2 Rotterdam Convention on PIC

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade seeks to promote shared responsibility and cooperative efforts in the international trade of certain hazardous chemicals in order to protect human health and the environment and to contribute to their environmentally sound use.¹⁸⁰ As such, it is relevant to both consumer interests in product safety, as well as sustainable development.

¹⁷⁷ Article 23.

¹⁷⁸ Article 27.

¹⁷⁹ Article 34.

¹⁸⁰ Article 1.

The heart of the Convention is the establishment of a prior informed consent (PIC) procedure for hazardous chemicals and severely hazardous pesticide formulations, which are listed in Annex III. Under the PIC procedure, importing countries are to take a decision in respect of each listed chemical which will either be to consent to import, not consent to import, or consent to import only subject to specified conditions.¹⁸¹ If the decision is not to consent, or to consent with conditions, then it shall simultaneously prohibit or make subject to the same conditions the import of the chemical from any source and the domestic production of the chemical for domestic use.¹⁸² Exporting countries are to take measures that comply with the decisions of importing countries.¹⁸³ Exporting Parties are to ensure that chemicals listed in Annex III are not exported to an importing Party that has failed to transmit a response to the secretariat concerning the future import of the chemical, subject to certain exceptions, such as receiving explicit consent to the import from a designated national authority of the importing Party.¹⁸⁴ In addition, where a chemical not listed in Annex III is banned or severely restricted in the Party of export, it shall provide an export notification to importing Parties containing information specified in Annex V.¹⁸⁵

The COP is to encourage the World Customs Organization to assign specific Harmonised System codes to the chemical listed in Annex III.¹⁸⁶ Exporting Parties are also required to label all exported chemicals listed in Annex III or that are domestically banned or severely restricted to ensure "adequate availability of information with regard to risks and/or hazards to human health or the environment, taking into account relevant international standards."¹⁸⁷ Similarly, exporting countries may place environmental or health labelling on any chemicals that are subject to domestic labelling requirements.¹⁸⁸

The Convention stipulates that Parties are not prohibited from taking action that is more stringently protective of human health and the environment than required under the Convention, "provided that such action is consistent with the provisions of this Convention and is in accordance with international law".¹⁸⁹ In addition, Parties are to establish non-compliance procedures and mechanisms.¹⁹⁰

¹⁸¹ Article 10(4).

¹⁸² Article 10(9).

¹⁸³ Article 11(1).

¹⁸⁴ Article 11(2).

¹⁸⁵ Article 12.

¹⁸⁶ Article 13(1).

¹⁸⁷ Article 13(2).

¹⁸⁸ Article 13(3).

¹⁸⁹ Article 15(4).

¹⁹⁰ Article 16.

The Preamble to the Convention provides that nothing in the Convention is to be interpreted as implying a change in the rights and obligations of a Party under existing international agreements applying to chemicals in international trade or to environmental protection. It also states that the aforementioned recital is not intended to create a hierarchy between the Convention and other international agreements.

The ultimate extent to which this Convention impacts on consumers depends on two factors. One is the choice of chemicals listed in the Annexes. Secondly, the national assessment capacities will determine the effectiveness of the PIC process.

7.3 Stockholm Convention on Persistent Organic Pollutants (POPs)

The objective of the Stockholm Convention on Persistent Organic Pollutants is to "protect human health and the environment from persistent organic pollutants".¹⁹¹ Accordingly, this MEA relates directly to key consumer interests.

The Convention sets forth rules on how persistent organic pollutants listed in its Annexes are to be dealt with. Thus, Parties are to prohibit and/or eliminate the production, use, import and export of chemicals listed in Annex A.¹⁹² Parties are to ensure that chemicals listed in Annex A or Annex B are imported only for the purpose of environmentally sound disposal in accordance with the Convention or for purposes permitted under those Annexes.¹⁹³ The Convention also regulates the export of chemicals listed in Annex A and B. If a production or use specific exemption, or acceptable purpose, is in effect for such a chemical, it can be exported only for the purpose of environmentally sound disposal in accordance with the Convention or to a Party which is permitted to use that chemical under Annex A or Annex B.¹⁹⁴ If the export is to a Non-Party, then that state must provide an annual certification which specifies the intended use of the chemical and indicates that the importing state is committed to protecting human health and the environment by taking necessary measures to minimise or prevent releases, taking measures to reduce or eliminate releases from stockpiles and wastes as specified in Article 6 (1) of the Convention. The importer must also, where appropriate, comply with the provisions of Annex B relating to restricting the use of DDT.¹⁹⁵ Parties that have regulatory and assessment schemes for new pesticides or industrial chemicals are to prevent the production and use of new pesticides or chemicals that display the characteristics of persistent organic pollutants.¹⁹⁶ Parties are required to take measures to reduce or eliminate releases from unintentional production,

¹⁹¹ Article 1.

¹⁹² Article 1 (a).

¹⁹³ Article 3(2) (a)

¹⁹⁴ Article 3(2)(b)(i) and (ii).

¹⁹⁵ Article 3(b)(iii).

¹⁹⁶ Article 3(3).

at a minimum those that are listed in the Convention,¹⁹⁷ as well as to reduce or eliminate releases from stockpiles and wastes.¹⁹⁸

The Convention requires that each Party develop an implementation plan for implementing the obligations of the Convention.¹⁹⁹ These plans are to be developed, implemented and updated in consultations with national stakeholders, including groups involved in the health of children.²⁰⁰ In addition, Parties are to promote and facilitate the provision to the public of all available information on POPs and public participation in developing adequate responses to POPs and their health and environmental effects.²⁰¹

A procedure for determining non-compliance and treating non-complying Parties is to be developed.²⁰²

The Preamble to the Convention states that the Parties acknowledge that precaution is embedded within this Convention. It also provides that the "Convention and other international agreements in the field of trade and environment are mutually supportive".

As with the PIC Convention, the actual listing of chemicals and the capacity to implement the trade provisions will be critical to consumers. In addition, the compliance mechanism to be established may have an important impact on the effectiveness of the Convention.

7.4 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in 1998, is an important breakthrough in establishing key entitlements for civil society in the environmental policy process. It builds on, and expands upon, Principle 10 of the Rio Declaration on Environment and Development, which relates to citizen participation in decision-making and entitlements to receive environmental information. Much of this information, and the entitlements to participate, are of relevance to consumers.

The Preamble recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in as-

¹⁹⁷ Article 5.

¹⁹⁸ Article 6.

¹⁹⁹ Article 7(1)(a).

²⁰⁰ Article 7(2).

²⁰¹ Article 10(1).

²⁰² Article 17.

sociation with others, to protect and improve the environment for the benefit of present and future generations."²⁰³ The Preamble also recognises the importance of the role individual citizens, NGOs and the private sector play in environmental protection.²⁰⁴

The Convention contains three "pillars". The first is a bundle of requirements relating to access to environmental information. The central requirement is that public authorities are to respond to requests for environmental information by making such information available to the public, within the framework of national legislation.²⁰⁵ This information is to be provided without an interest having to be stated and in the form required, subject to certain contingencies.²⁰⁶ The Convention also provides that a request for environmental information may be refused, including if the disclosure would adversely affect international relations and intellectual property rights.²⁰⁷

The Convention also contains provisions for the collection and dissemination of environmental information. Among these is that Parties are to encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary ecolabelling or eco-auditing schemes or by other means.²⁰⁸

Requirements relating to public participation in the decisions on proposed activities listed in Annex I of the Convention form the second pillar of the Convention.²⁰⁹ In addition, these requirements are also to apply, in accordance with national law, to proposed activities not listed in Annex I, but which may have a significant effect on the environment.²¹⁰ The definitions of "public" and the "public concerned" in the Convention²¹¹ do not limit these terms to the public within national boundaries, which suggests that all those concerned, even in other countries, are entitled to participate. Public participation is also to be provided for plans, programmes and policies relating to the environment,²¹² and to the preparation of executive regulations and/or generally applicable legally binding normative instruments.²¹³

²⁰³ Recital 7.

²⁰⁴ Recital 13.

²⁰⁵ Article 4 (1).

²⁰⁶ Ibid.

²⁰⁷ Article 4(4)(b) and (e).

²⁰⁸ Article 5(6).

²⁰⁹ Article 6(1)(a).

²¹⁰ Article 6(1)(b).

²¹¹ Article 2.

²¹² Article 7.

²¹³ Article 8.

The third pillar of the Convention is the entitlement of access to justice for any person to complain that his/her request for information as prescribed under the Convention has been denied.²¹⁴

The Convention also provides for the establishment of "optional arrangements" to review compliance with the Convention.²¹⁵ These arrangements are to allow for public involvement and may consider communications from members of the public.

The Aarhus Convention should prove very useful for consumer advocates. Although it is aimed at environmental information and decisions, many of these issues will be relevant to consumers' fundamental interests and for the interest to be informed about issues of sustainable consumption. In addition, the lessons learnt in applying the Convention could serve as a useful model to be more specifically applied to consumer information and policy making at national and regional levels.

²¹⁴ Article 9.

²¹⁵ Article 15.

8 General Assessment of Consumer Interests in Public International Law

Consumers' economic interests, i.e. the interest in obtaining best quality at lowest prices, are in principle effectively promoted by World Trade Law by creating global competition in goods and services. In some circumstances competition may become destructive and result in low quality. In such a situation WTO law favours a solution on the basis of international standards. If such international standards do not exist or if they are not sufficient, WTO law also recognizes national and international standards to ensure product quality.

Specifically, WTO law recognizes **consumer health** as a legitimate reason for trade restrictions – though the exact criteria for WTO-conformity of such trade restriction are still being debated. In principle, the link between WTO law and the standards of the Codex Alimentarius Commission offers a viable approach to balancing trade and health concerns. Additionally, international environmental law provides for several instruments to protect nature and consumers from harmful substances and from genetically modified organisms (Rotterdam Convention on PICs, Stockholm Convention on POPs, Biosafety Convention). The Rotterdam and Stockholm Conventions, however, still are awaiting the necessary number of ratifications to enter into force. Finally, the Tobacco Framework Convention requires extensive information on the risks of smoking and a liability regime.

Other fundamental interests of consumers, i. e. the interest in basic needs such as food, drinking water and health care being fulfilled, are not protected as effectively. There is some recognition of fundamental consumer interests in international law, especially human rights law, but the human rights rules are not easily enforceable, either in terms of substance or in terms of enforcement machinery. In some instances, World Trade Law may impact negatively on the access of consumers to essential goods and services. For example, it has been asserted that the WTO AoA may adversely affect the agricultural markets in poor countries, by virtue of its significant market distortions. Also, liberalisation of essential services in the context of GATS, e.g. in the water or transport sector, may result in public services obligations being abolished or degraded, but this will depend on whether liberalisation impacts the government's ability to regulate liberalised sectors or not. Finally, TRIPS may impede access to affordable pharmaceuticals, but there is hope that the waiver agreed in 2003 will help to overcome this obstacle.

The international documents in the context of the Rio and Johannesburg Summits set out to improve supply and distribution of essential goods and services, mainly water, food, energy and the supply of pharmaceuticals. These objectives are not legally enforceable, but they are important political commitments for strengthening fundamental consumer interests on the international agenda.

Societal aspects connected with consumption are referred to in the UN Guidelines on Consumer Protection and in the documents from Rio and Johannesburg. These

documents outline the objective of **sustainable consumption** and recommend different measures, including internalisation of ecological and social costs into prices, information, education and eco-efficiency strategies. Some aspects of sustainable consumption policy are also part of **environmental law** conventions, such as those relating to harmful substances, but in general there is no solid legal basis for sustainable consumption policy in international law. WTO law does recognize the objective of sustainable development in its Preamble, but still national policies to promote sustainable consumption may conflict with WTO law. This applies, for example, to mandatory and voluntary labelling schemes that address sustainability aspects of production and processing methods.

Overview of Consumer Policy Instruments in International Law

Policy Area	Instrument	Legally Binding?	In force since / adopted in	Parties	Measures relating to Consumer Protection
Consumer Protection	UN Guidelines for Consumer Protection	NO	04.1985, expanded 12.1999	-----	Food standards (<i>Codex Alimentarius</i>), supply of essential goods, against abusive business practices, competition, product information, education, legal redress, sustainable consumption
Sustainable Development	Agenda 21	NO	08.1992	-----	Sustainable consumption, access to essential goods and services, efficient (and renewable) energy use and waste avoidance (recycling), transfer of technology, information, education, sustainable public procurement, environmental charges and taxes, cooperation and representation with/through private stakeholders (NGOs)
	Johannesburg Plan of Implementation	NO	09.2002	-----	10-year framework for implementation of Agenda 21, access to water, incentives for ("green") investment, intensification of representation through cooperation between stakeholder (Type II outcomes)
Trade	WTO Agreements	YES	01.1995	145	Liberalised trade in goods and services (GATT and GATS), sanitary and phytosanitary measures, technical standards (TBT), intellectual property rights (TRIPS), government procurement (AGP), subsidies (Subsidies Agreement)
Human Rights and Health	International Covenant on Economic, Social and Cultural Rights (ICESCR)	YES	03.1976	145	Implications on the access to essential goods and services, i.e. right to food and health.
	WHO Framework Convention on Tobacco Control	YES	NO; 40 ratifications necessary.	-----	Health and product information, e.g. mandatory labelling, restriction of advertising and promotion activities, price and tax incentives, reduction of illicit trade, monitoring of cross-border trade, liability and compensation
	<i>Codex Alimentarius</i>	YES	05. 1963	165	Product standards, particularly food health standards
Environment	Biosafety Protocol	YES	YES, (adopted 01.2000) 50 ratifications necessary	50	Restrictions on transboundary movement, handling and use of LMOs , sustainable use of biodiversity, awareness raising, education, information
	Rotterdam Convention on PIC	YES	NO (adopted 09.1998), 50 ratifications necessary	40	Prior Informed Consent Procedure (PIC) for certain hazardous chemicals and pesticides in international trade
	Stockholm Convention on POPs	YES	NO (adopted 05.2001), will enter into force on May 17 th 2004.	29	Health protection by elimination and prohibition of the production, use and trade of certain chemicals, special disposal regulations and certification requirements for others
	Aarhus Convention	YES	NO (adopted 06.1998), 60 ratifications necessary	23	Access to environmental information, public participation and entitlements of access to justice

9 Recommendations

This paper has revealed several shortcomings in the state of international law relating to the protection of consumer interests and sustainable development in international law. Firstly, several important consumer interests are not fully reflected in the binding international legal instruments examined in this study. These gaps relate to consumers' fundamental and societal interests, as well as their economic interests. Secondly, there is not full compatibility between all the applicable instruments of international law that relate to consumer interests. The following recommendations are meant to address these shortcomings. These recommendations are meant to provide both short-term and long-term guidance.

Since the focus of the study is on international law, the recommendations primarily refer to issues that are legal in nature. Accordingly, not all the problems raised in this study are addressed in the recommendations below, particularly when they are fundamentally economic or political in nature (e.g. negotiations of the AoA or reductions in tariffs). Also, in some cases it has not been possible to make concrete recommendations, since further assessment of the various options is necessary (e.g. negotiations on fisheries subsidies or compulsory licensing in developing countries for essential medicines).

9.1 Consumer Interests and WTO Law

9.1.1 *The Role of Consumer Interests in the WTO*

At present, there is no reference to consumer rights in the WTO Agreements, despite the reality that WTO laws and policies impact considerably on consumers. This is a serious omission.

The means for integrating consumer rights into the WTO include, in descending order of legal impact: amending WTO Agreements, developing interpretative understandings, adopting waivers or a political declaration.

Most effective, from a legal point of view, would be to adopt **amendments to the relevant treaties**. Such amendments could include a reference to consumer interests in the General Exceptions laid out in Article XX of GATT. This would ensure that consumer interests would not need to be read into that provision through interpretations of other imperatives listed in that Article. Similarly, other WTO Agreements could be amended to insert consumer interests, such as the TBT Agreement, the SPS Agreement, GATS (Article XIV), the TRIPS Agreement (Article 27.2), and the Government Procurement Agreement (Article XXIII).

It is, however, doubtful whether an amendment to the WTO treaties will be politically feasible. In the case of environmental matters, efforts to modify Art. XX of the GATT to

include a reference to MEAs have not garnered much support. A modification that might be easier to achieve is to add "consumer protection" into the preamble of the Agreement Establishing the WTO. Preambles to treaties do not establish substantive rights but can help provide a context for determining the object and purpose of a treaty. Indeed, the WTO Appellate Body has noted the commitment in the Agreement Establishing the WTO to sustainable development in the Shrimp Turtle case.

The option of an **interpretative understanding** may have less juridical weight, but has perhaps the option of being somewhat more politically feasible than an amendment to the WTO Agreements. Such an interpretative understanding would especially help to resolve conflicts between WTO law and MEAs, which are also relevant for consumer interests. It would have the advantage of providing detailed instruction to the interpreters of this provision as to how it should be applied. Such an interpretative understanding could establish the basic principles that should govern a dispute involving the interpretation of MEAs and the WTO and possibly the procedures to be followed. As regards substantive guidance, the interpretative understanding could indicate criteria in which there is a presumption of conformity with GATT Article XX (or equivalent provisions in other WTO treaties). Procedurally, it could address matters relating to burdens of proof and the need to acquire expert evidence.

A **waiver** is perhaps the least desirable option, as it would be of a temporary nature, and would imply that WTO law is legally superior to MEAs. It has the advantage of not requiring full consensus.

A fourth option would be to agree a **non-binding political declaration**. Such a declaration could identify a preference for resolving disputes in other fora, such as the International Court of Justice or the Permanent Court of Arbitration. An additional possibility might be to recommend alternative forms of dispute resolution, such as mediation or conciliation. It could also set out some of the criteria for resolving disputes. However, the main effect of such an instrument will be to provide guidance to Members, rather than providing justiciable or enforceable obligations.

In addition to substantive changes and/or clarification to the WTO treaties, a number of **procedural improvements** could be adopted so as to ensure that consumer interests are better reflected in the WTO. One would be to create a framework that allows Members to address consumer issues directly. This could be in the form of a discrete committee on consumer interests (similar perhaps to the CTE). Another option is to treat consumer issues as a crosscutting matter that should be dealt with in the agendas of existing bodies, such as the CTE, TBT Committee, and SPS Committee. Both these options have strengths and weaknesses that need to be assessed further. Another institutional option would be to create a standing advisory body on consumer issues that can provide advice to the WTO on demand. Such a body can be composed of experts and the modalities can be structured so that WTO outputs are assessed and adjusted in relation to their impact on consumers.

Procedural improvements could also be made to the dispute settlement process in the WTO. The entitlement of consumer groups to submit *amicus curae* briefs should be

affirmed politically. Although the Appellate Body has affirmed this entitlement, a political resolution will enhance the legitimacy of this instrument and possibly enhance its use. A further improvement would be to affirm the practice of having a dispute panel consult experts in consumer affairs when a dispute involves consumer rights. This is within the discretion of panel according to current rules, but a political commitment to do so would help ensure its consistent occurrence.

Recommendations:

1. The WTO agreements should be amended so that consumer interests are reflected in the appropriate places. If this proves to be politically infeasible at the time being, other solutions should be found (interpretative understandings, waivers, political declarations) in order to incorporate consumer interests into WTO law.
2. Representation of consumer interests in the WTO should be improved procedurally, both in the political system of WTO negotiations and in the dispute settlement system.

9.1.2 Trade Measures to Protect Human Health and the Environment

So far, WTO jurisprudence has addressed only disputed measures taken unilaterally by states. There is an inference to be drawn from these rulings that measures taken under Multilateral Environmental Agreements (MEAs) will be WTO-compatible. The political discussions so far, however, do not clearly support this view. Indeed, WTO members seem reluctant to ensure a robust and equitable engagement with MEAs on an institutional level, and there is no consensus on how to accommodate trade measures in MEAs.

The SPS Agreement contains a presumption that trade measures based on international standards are in conformity with it. If a state does not, however, refer to international standards, such as to those from the *Codex Alimentarius* Commission (CAC) of the WHO, but deviates from these, this will automatically bestow the burden of proof upon the state that uses them. In this case, the state must prove that the regulation on the grounds of those standards is based on a sound risk assessment. Although certainty is not required there must be evidence for a risk that the product damages human health. The WTO Dispute Settlement Body (DSB) "jurisprudence" has up to now declined to acknowledge the precautionary principle as a general principle governing the SPS agreement.

Recommendations:

1. WTO rules should be accommodated with other international rules that support sustainable development. This includes MEAs but may also include other international instruments, such as those under the WHO, ILO or international human rights bodies. The relationship between MEAs and WTO law is a specific agenda

point in the Doha Agenda and under this mandate Member States should ensure that MEA secretariats have a standing as observers during the negotiations, such that they can also make appropriate interventions.

2. The Precautionary Principle is an important rule for the prevention of risks, particularly in areas where a long-term effect cannot be easily qualified, e.g. in the case of GMO technologies. It therefore has to be recognised within the WTO rules.

9.1.3 Labelling (Consumer Information)

Presently there are serious concerns as to whether the TBT disciplines allow labelling for "non-product production and processing methods (PPMs)", which are PPMs that are not detectable in the end product. These concerns are of particular practical relevance for the mandatory process-based labelling of genetically modified food.

It is therefore necessary to clarify the TBT Agreement so that it clearly allows certification and labelling of products to inform the consumer fully of product characteristics and sustainability. The Preamble to the WTO Agreement explicitly acknowledges the objective of sustainable development; therefore WTO law has to recognize consumers' right to know about the sustainability of products and services.

The necessary clarification of the TBT Agreement could happen as an outcome of discussions in the CTE or as a result of negotiations under the Doha Round. Such a clarification should address several aspects. One would be to resolve the uncertainty as to whether certification and labels based on "non-product-related PPMs" fall under the scope of the TBT Agreement, and if so, whether they are permissible. From a consumer's standpoint, the TBT Agreement should not undermine legitimate labelling programs, which can be very important information tools. Therefore, should non-product-related PPMs be determined to fall under the scope of the TBT Agreement, it is necessary that the "like products" notion be extended so as to include non-incorporated PPMs. If designed with due regard to the situation in the country of origin of the labelled product, labelling programmes are supportive for both the interest of consumers in sustainable products and for the economy. Thus, it will be important to ensure that such programs are transparent and involve the participation of foreign producers in product selection and criteria development. Countries and voluntary ecolabelling schemes should engage in mutual recognition, as appropriate. In addition, the schemes should take into account the objective conditions present in exporting countries, and make allowances for geographic, environmental, economic and development differences. WTO Members should provide related technical and capacity assistance to developing countries to enable their effective participation in the development of ecolabelling standards and in developing their own schemes.

Recommendations:

1. As there is still a degree of uncertainty, clarification is necessary that measures to inform consumers about the quality of products, including the sustainability of the methods of production, do not violate WTO law. This clarification should be included in both the GATT and the TBT Agreements. It applies equally to mandatory and voluntary labelling systems.
2. Private, independent voluntary certification and labelling programmes should be considered outside the scope of the TBT Agreement.

9.1.4 Agriculture

While WTO law is supposed to provide for free markets, in agriculture it has up to now served to protect European and American markets against competition from abroad. This has led to "dumping" in other markets as local producers have to match prices that are kept artificially low. Export subsidies hinder development and poverty eradication, i.e. the satisfaction of fundamental needs, in the developing countries and are therefore unsustainable. The differentiated treatment of the developing countries has not yet been sufficiently taken into account in the trade agenda. This also includes, besides the issue of export subsidies in industrialised countries, the issue of market access of developing countries to markets in the industrialised countries. In addition, non-trade measures, such as environmental concerns, have not been in the focus of the debate. This is of particular importance for the issue of domestic support. Although some claim that domestic support should, in parallel with export subsidies, be phased, it requires a differentiated approach. In as much as the gradual phase-out of export subsidies is necessary to increase the competitiveness of agricultural products from the developing countries, states should still, to some extent, retain the right to support sustainable production methods, e.g. the production of organic food while unsustainable PPM should be gradually reduced.

Recommendations:

1. Reforms of the Agreement on Agriculture (AoA) should be assessed to ensure that they do not infringe on basic consumer rights to adequate food
2. Governments should introduce targets and timetables to meet the commitments in the AoA and the Doha Declaration to phase out export subsidies and reduce tariffs in developed countries while domestic support for sustainable production methods, e.g. direct payments made upon the condition of obedience to environmental or animal welfare standards, should be exempted from challenges under WTO rules.
3. The elaboration of a "development box" as part of the AoA should be considered, which would ensure that developing countries can use subsidies in a manner that supports sustainability.

9.1.5 Services

The issue of state measures which provide access to essential goods and services also has implications on the General Agreement on Trade in Services (GATS). Services are defined very broadly as "*any services in any sector except services supplied in the exercise of governmental authority*". As many governments outsource their services or engage in public-private partnerships, this definition may result in the liberalisation of key sectors, such as the water sector. This results in a considerable loss of control. The states are left, in case of a challenge, to refer to Article XIV that contains a general exceptions clause that is modelled on GATT Article XX, although there is no equivalent to GATT Article XX(g).

The GATS treaty therefore should be amended and clarified in several of its provisions. The right to domestically regulate should be embedded more firmly into the treaty, ideally within Article 6. Secondly, Article 1 should be amended or clarified so as to affirm the rights of governments to operate public services on a non-competitive basis, even if competitors exist. This would ensure that key public services that relate to consumers' fundamental interests remain outside the scope of the GATS, and therefore unaffected by its disciplines. The exceptions to GATS in Article XIV should be modified to cover measures relating to exhaustible natural resources, as in GATT Article XX(g), as this could help provide governments the flexibility to regulate key sectors, such as water. Furthermore, Article 8 should be amended so as to prevent monopolies from abusing their position vis-à-vis consumers.

Recommendations

1. The GATS Agreement should be amended so as to ensure that the right to regulate is stated in the body of the treaty, so as to operationalise the statement in the preamble.
2. The definition of services "provided in the exercise of government of authority", in Article 1.3, should be clarified to ensure that the provision of essential public services is exempt from the GATS.
3. The term "necessary" in GATS Article VI.4 should be interpreted in accordance with its plain meaning in the context of the treaty, as suggested by recent rulings by the Appellate Body in interpreting this term in Article XX GATT. In so doing, it should be applied only to liberalisation offers by Members in accordance with the positive list mechanism under the GATS, rather than applying it across the board to any services in WTO members.
4. GATS Art. XIV should be modified to justify measures on the basis of consumer or environmental protection.

9.2 Consumer Interests and International Law

The further development of international law relating to consumer interests should take place with the **participation of experts and stakeholder groups** active on consumer issues. For this to take place, consumer groups not only need an entitlement to participate in the law-making process, which is the common practice in MEAs, but also need access to the relevant information. In this regard, the **Aarhus Convention** is a very useful precedent, and its essence should be analysed for its applicability to the consumer context, and the feasibility of agreeing such norms at the global level. It also provides a useful yardstick against which participation in international processes can be measured. Naturally, since the implementation of the Aarhus Convention will also impact on how its parties implement MEAs, this experience should also be analysed so as to draw lessons relevant to consumers. To take full advantage of the possibilities to participate, consumer NGOs will need to become effective in organising themselves, and in developing tactical and strategic alliances with States.

The need for stronger consumer representation is not limited to the WTO. Other international treaties, especially **MEAs**, also contain obligations that impact on consumers. These treaties tend to be developed without due consideration of how consumer interests are affected. For example, a more sophisticated consideration of information instruments, especially labels, might be warranted, so as to enable consumers to make the best choices and to achieve the objectives of the instrument. Thus, treaty negotiators and international organisations anchoring the negotiation process should include consumer rights more consciously in the development of their obligations, particularly the trade-related measures. This will involve ensuring that inputs are received from consumer experts and stakeholders, e.g. through effective consultation processes.

In the long run, consumer interests should be laid down on a **normative and institutional basis in international law**. The normative basis will result from a codification of many of the interests identified in the non-binding instruments listed in this paper. A negotiating mandate will likely have to come from the United Nations for such an effort. A more modest effort can be taken within the UN, regionally or bilaterally, to harmonise different national consumer entitlements. Both initiatives will help reduce trade tensions, by enhancing a multilateral consensus on key interests that should be supported, not undermined, by trade policy.

To date, there is no intergovernmental institution that is dedicated to promoting consumer interests in their entirety. Consumer interests are dealt with in a diffuse and non-integrated fashion by several institutions, such as UNEP, FAO and WHO. Policy coordination and impact would, in principle, be enhanced by the creation of an intergovernmental institution that focussed exclusively on consumer interests. Such an institution could provide a basis for the codification of consumer interests in international law. However, in addition to the questionable political feasibility of such a project, it will be necessary to assess the technical, operational and legal feasibility.

Recommendations

1. The participation and information requirements of the Aarhus Convention should be analysed for its applicability to the consumer context.
2. MEAs should provide for a stronger involvement of consumer representatives.
3. A sufficient normative and institutional basis for consumer interests should be created in international law.

9.3 General Conclusions

Four general conclusions can be drawn from the above-mentioned:

1. International law on consumer interests in sustainable development needs to be strengthened, *inter alia*, through law-making that fills gaps and enhances the effectiveness of existing instruments and the development of an appropriate institutional framework.
2. The WTO needs to take better account of consumer interests, by reflecting them in the application of its rules and in ensuring that its operations are in conformity with these interests.
3. The WTO has to recognise the right of consumers to be informed about aspects that are relevant for the sustainability of products and services, specifically as regards social and ecological aspects of the production chain.
4. The development of international rules, standards, and procedures that support consumer interests requires meaningful participation of consumer organisations. Rules of procedures for the relevant international bodies, such as the WTO and the CAC, should formalise this participation in a manner that includes consumer perspectives appropriate to the institutional context, while ensuring that the outcomes are efficient and effective.

10 ANNEX: WTO Jurisprudence on Consumer Interests in International Trade

This section will assess the benefits and potential interference by WTO rules on consumer interests, as interpreted by the WTO jurisprudence. This section will include both issues where there have been considerable legal developments and the law is relatively settled, and those where the law is unsettled or where possible future WTO rules may be problematic.

The following issues are settled as a result of WTO case law:

- Import bans to protect consumer health and safety
- Import bans to protect the environment

The law is less well settled in relation to:

- Ability of states to take measures based on the precautionary principle
- Labelling of sustainable products
- Use of border tax adjustments.

10.1 Import Bans to Protect Consumer Health and Safety

10.1.1 GATT

The one major GATT case that has involved an import ban to protect consumer health and safety is European Communities -- the Measures Affecting Asbestos and Asbestos-Containing Products. That case involved Canada's complaint that French Decree (No. 96-1133) prohibited the import of asbestos and products containing asbestos fibres. The aim of the Decree was to protect the health of workers and consumers. Canada complained that the Decree was inconsistent with, *inter alia*, the GATT. A WTO Panel found that the Decree was inconsistent with Article III:4 of GATT 1994, which calls for non-discrimination between "like" products, but was saved by Article XX.

The EC argued that since the Decree prohibited "all carcinogenic asbestos fibres", it denied competitive opportunities to all such fibres in an equal manner, thereby complying with GATT Article III: 4. Thus, carcinogenic asbestos fibres were not "like" substitute fibres. Canada supported the Panel's determination that the proper criteria for examining "likeness" are in-use and commercial factors. In its view, the Panel was correct in not taking account of the "dangerousness" of the product as one of the crite-

ria of "likeness", since Article XX was the more appropriate provision under which to conduct such an examination.

The Appellate Body took the view that the Panel's approach to "likeness" under Article III:4 was indeed too narrow, in that it focussed mainly on market-access criteria. The Appellate Body stated that the health risks associated with asbestos should have been considered under this provision, since they are relevant to the physical properties of the product concerned. It stated:

We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are not "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of GATT 1994 (paragraph 118).

The Appellate Body ruled that Canada had failed to demonstrate that the products that have less of a health risk are "like". In addition, relying on the Korea Beef²¹⁶ case, the Appellate Body stipulated that consumers' tastes and habits are significant in determining "likeness". This ruling is of crucial importance. Accordingly, the Appellate Body reversed the Panel's findings that asbestos fibres and PCG fibres (an asbestos substitute) were "like". Finally, the Appellate Body noted that making this finding under Article III:4 would not detract from the effect of Article XX(b).

Although it was not absolutely necessary for the result – since it had already found that the Decree did not violate GATT Article III:4 – the Appellate Body went on to consider whether the Decree falls under Article XX(b). Canada had disagreed with the Panel's application of the "necessity" test under this provision, arguing that there was not a high enough health risk to warrant such a Decree. However, the Appellate Body found that there was no requirement under this Article on a Member to quantify the risk to human health or life, and that it is an accepted right of each WTO Member to determine its own level of protection for its citizens. Accordingly, the Appellate Body found that the Decree was indeed covered by Article XX(b).

Thus, it would appear that the interpretations of GATT Articles III:4 and XX(b) allows considerable scope to countries to take measures to protect their consumers from dangers to their health and safety. This is especially so in light of the new standard for interpreting "necessary" laid out by Asbestos, whereby consumer tastes and habits are relevant.

²¹⁶ WT/DS161/R and WT/DS169/R, 31 July 2000.

10.1.2 SPS Agreement

There have been a number of cases that have examined the possibilities of justifying import bans under the SPS Agreement.

In 1997, the first case involving the SPS Agreement was launched in the WTO, in the case on EC Measures concerning Meat and Meat Products.²¹⁷ The complaints were brought by the United States and Canada and concerned the EC prohibition of imports of beef treated with growth promoting hormones. The allegation was that this measure violated, *inter alia*, the SPS Agreement. The Panel found that the measures were not based on an existing international standard – in this case standards set by *Codex Alimentarius* – and therefore were found to be contrary to Article 3. The Panel also found that the EC failed to fulfil the minimal procedural, as well as substantive, requirements for risk assessment as required under Article 5.1. The EC's defence that it was invoking the precautionary principle was dismissed.

On appeal, the Appellate Body held that the EC is permitted by the SPS Agreement to establish, on a scientific basis, a level of consumer protection higher than international standards and that these provisions do not "exclude a priori from the scope of a risk assessment, factors which are not susceptible of quantitative analysis... ." The Appellate Body also reversed the Panel's imposition of the evidentiary burden on the complainant to prove that the EC measures do not conform to international standards. The Appellate Body indicated that risk assessment need not be a monolithic process, but could consider both mainstream and divergent scientific viewpoints, especially where the risk is great, and that the measure need not be supported by the majority of the scientific community.²¹⁸ In addition, it ruled that the risk assessment need only "reasonably support" the SPS measure at stake, and that it can take account of non-scientific factors. The Appellate Body held, in *obiter dicta*, that the precautionary principle could not override the provisions in the SPS Agreement in order to justify otherwise inconsistent obligations, but, in any event, that the precautionary principle was reflected in various provisions of the Agreement, such as Article 3.3 and 5.7.²¹⁹ The Appellate Body also avoided taking a position as to whether the precautionary principle is a principle of international law.²²⁰ Finally, the Appellate Body found that the EC Regulation constituted a disguised restriction on international trade, thereby violating the terms of Article 5.5. Despite some reversals, the Appellate Body did not overturn the ultimate conclusion of the Panel, and held that the EC import prohibition was inconsistent with the SPS Agreement.

²¹⁷ WT/DS26/R and WT/DS48/R, 18 August 1997 and WT/DS 26/AB/R and WT/DS48/AB/R, 16 January 1998

²¹⁸ *Ibid.*, para. 193.

²¹⁹ *Ibid.*, para. 124.

²²⁰ *Ibid.*, para. 123.

There are two other cases that help illustrate the applicability of the SPS Agreement, although they are not *per se* focused on consumer health. The Australia Salmon²²¹ case concerned Australia's ban on all imports of fresh, chilled or frozen salmon unless the salmon had been heat-treated first, which arose out concern for protecting its native salmon stocks from foreign diseases. Canada brought this case to the WTO, alleging that Australia's import prohibition was inconsistent with Articles XI and XIII of GATT 1947, as well as with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The Appellate Body found that Australia had acted inconsistently with the SPS Agreement's risk assessment requirements. Specifically the Appellate Body said that in this kind of case a risk assessment must identify the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the consequences of these, evaluate the likelihood of entry, establishment or spread of these diseases, as well as the associated potential consequences, and evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.

The Appellate Body referred to its decision in the Beef Hormone case, to say that a risk assessment must do more than conclude that there is a possibility of entry, establishment or spread of diseases and consequences. The Appellate Body specified that likelihood may be expressed either quantitatively or qualitatively, and relied again on Beef Hormone to say that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk.

Nonetheless, the Appellate Body found that Australia did not meet the requirement for a risk assessment, as it does not evaluate the likelihood of entry, establishment or spread of the diseases of concern and of the consequences. The Appellate Body emphasised that some evaluation of the likelihood is not enough.

In Japan -- Varietal Testing²²² the U.S. complained against the Japanese prohibition on imports of seven varieties of fruit - including apples, cherries and peaches - and walnuts from a number of countries, including the U.S. The prohibition can be lifted if the exporting country proposes a quarantine treatment that achieves a level of protection equivalent to the import prohibition. The measure was introduced as Japan said these eight agricultural products could be hosts of codling moth, a pest of quarantine

²²¹ *Australia - Measures Affecting Importation of Salmon*, Report of the Panel, WT/DS18/R, 12 June 1998, on the web via: <http://www.wto.org/wto/dispute/18r00.pdf>, and *Australia - Measures Affecting Importation of Salmon*, Report of the Appellate Body, WT/DS18/AB/R, 20 October 1998, on the web at: <http://www.wto.org/wto/dispute/ds18abr.pdf>

²²² *Japan - Measures Affecting Agricultural Products*, Report of the Panel, WT/DS76/R, 27 October 1998, <http://www.wto.org/wto/dispute/76r.pdf>) and *Japan - Measures Affecting Agricultural Products*, Appellate Body report, WT/DS76/8, 30 March 1999, <http://www.wto.org/wto/dispute/542d.pdf>.

significance to Japan. The U.S. claimed that Japan was acting inconsistently with the SPS Agreement by requiring that the quarantine treatment be separately tested for each variety.

In the course of its deliberations, the Panel sought advice from three experts on matters of science and of quarantine and testing practice. The Panel found that Japan had maintained its varietal-testing requirement "without sufficient scientific evidence" and thus violated Article 2.2 of the SPS Agreement. The Panel looked at whether the varietal testing requirement could be considered a provisional measure, which would be consistent with Article 5.7 of the SPS Agreement when relevant scientific evidence is insufficient. The Panel noted that for such provisional measures to come within the scope of Article 5.7 the Member applying them must *inter alia* seek to obtain the additional information necessary for a more objective assessment of risk, and review the provisional phytosanitary measure at issue within a reasonable period of time. The Panel pointed out that varietal testing had existed in Japan for almost 30 years and almost twenty years for the specific products and pest in question, saying that Japan could have obtained further information relating to the quarantine efficiency of varietal testing during those decades. On this basis, the Panel found no evidence to indicate that Japan had sought the information necessary for a more objective assessment of risk, and had not reviewed the varietal testing within a reasonable period of time.

The Panel also found that by maintaining the varietal testing requirement with respect to apples, cherries, nectarines and walnuts, Japan was acting inconsistently with Article 5.6 of the SPS Agreement, which requires that phytosanitary measures not be more trade-restrictive than required to achieve the appropriate level of phytosanitary protection.

Japan and the U.S. both appealed the Panel's decision on different points of law. Quoting heavily from the Beef Hormone case, the Appellate Body upheld the basic finding that Japan's varietal testing of apples, cherries, nectarines and walnuts was without scientific basis. The Appellate Body also upheld the view that Japan had not sought to find the information required under Article 5.7 of the SPS Agreement within a reasonable period of time.

These cases indicate that it is indeed difficult for importing countries to deviate from established international standards. In addition, the Appellate Body will strictly scrutinise the risk assessment procedures on which countries base their SPS measures.

10.2 Import Bans to Protect the Environment

Import bans to protect the environment are viewed with suspicion because they can discriminate arbitrarily, be economically protectionist, and violate other countries' sovereign rights to determine their own domestic environmental policy. In essence, unilateral measures are power-based, rather than rule-based, in that powerful States can effectively use their economic clout to bully smaller ones.

The issues have played out in several GATT/WTO disputes that have involved interpreting the basic GATT requirements. In particular, these trade measures in issue have distinguished between countries, as well as between products. The distinctions between products have raised the issue of whether products made from different “production and processing methods” (PPMs), but have the same end uses, are “like” for purposes of GATT Article III.

These problems were considered in the well-known Tuna-Dolphin disputes,²²³ which concerned challenges by Mexico and the European Communities to the United States law that barred the importation of tuna from the eastern tropical Pacific Ocean caught using purse seine nets. The panel rulings were very controversial at the time, and indeed, most of their substance has been overturned by subsequent rulings. The United States – Reformulated Gasoline case was the first case in which the Appellate Body considered an environmental import ban. It indicated a new approach to interpreting Article XX. The first step was to provisionally examine whether the measure is covered by one of the sub-paragraphs in Article XX; the second step was to assess the application of the measure in accordance with the chapeau.²²⁴ In that case, although it found the US measures were covered by Article XX(g), it found that those measures did not pass the tests in the chapeau because the statutory measures in issue were only imposed on foreign refiners and that the US did not seek to enter into bilateral agreements with affected countries vis-à-vis the establishment of these measures.

The Panel and Appellate Body also considered these provisions in United States – Shrimp/Turtles,²²⁵ but in a more legally definitive manner than previous cases. For the first time, the Appellate Body suggested that PPMs-based trade measures could be permissible, although it did not address all possible aspects. For example, the Appellate Body did not rule specifically on whether Article XX(g) can be applied extra-jurisdictionally, since it found a sufficient nexus between the endangered sea turtle population that were affected by the trade measures, since those populations migrated to US waters.²²⁶ It also determined that “relating to” standard in Article XX(g) required an assessment of whether there was a substantial relationship between the trade measures and the sea turtles, such that the means were “reasonably related to the ends”.²²⁷ The main analysis of this case was on the Chapeau of Article XX. The Appellate Body, focussing on the actual application of the measure (rather than on the policy goal), found that the cumulative effect of the differences in application constituted

²²³ WT/DS21/R-39S/155, 03.09.1991 (Tuna Dolphin I) and WT/DS29/R, 1606.1994 (Tuna Dolphin II). Neither report was adopted by the GATT CONTRACTING PARTIES, and therefore is not legally binding.

²²⁴ WT/DS2/AB/R, 20 May 1996, p. 22.

²²⁵ WT/DS58/R, 15 June 1998, and WT/DS58/AB/R, 12 October 1998.

²²⁶ *Ibid.*, para. 133.

²²⁷ *Ibid.*, para. 141.

"unjustified discrimination".²²⁸ This is because the measure was coercive in requiring that all exporting States adopt essentially the same policy as the United States.²²⁹ Although the Appellate Body noted that the statute allowed some flexibility, the implementing Guidelines did not. The Appellate Body also took note of the United States' failure to engage other Members in negotiations on the protection of sea turtles,²³⁰ although it stopped short of completely rejecting the use of unilateral trade-related environmental measures.

Both a WTO Panel as well as the Appellate Body considered these issues again, when Malaysia complained that the import ban ruled GATT-illegal in the previous *Shrimp Turtle* case was still in place.²³¹ Although Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (which was the offending measure addressed in the first *Shrimp Turtle* case) had not been changed, the United States had adopted Revised Guidelines, which it claimed provided better due process protections for exporting countries, engaged in efforts to negotiate a Sea Turtle conservation agreement in the Indian Ocean region (although such an agreement was not concluded), and offered more substantial technical assistance to exporting countries. They also provided that the exporter's turtle protection programme need not be identical to that of the US, but that it must be of "comparable effect". This criteria was in contrast to the implicit criteria that was found in the original Guidelines by the Appellate body in the first *Shrimp* case – that of "essentially the same as that of the United States", which was found to involve arbitrary and unjustifiable discrimination. Despite these changes, the U.S. legislation still denied the import of Malaysian shrimp, since Malaysia had not applied for the certification from the United States that would be necessary for its shrimp to be imported.

The Panel supported Malaysia's claim that Section 609 violated Article XI; the analysis therefore shifted to the application of GATT Article XX. In accordance with established WTO jurisprudence, the Panel first examined whether the measure in issue was provisionally justified under one of the subparagraphs of Article XX. As in the first Shrimp case, the Panel affirmed that Section 609 is captured by Article XX(g), since the adoption of the Revised Guidelines had not changed the meaning or interpretation of the Section. Accordingly, the Panel proceeded to examine whether the measure met the criteria set out in the chapeau of Article XX. :

The first criteria to be examined was whether the measure involved "unjustifiable discrimination". After noting that the best solution would be for the trade measures to fall within the framework of a bilateral or multilateral agreement on the conservation of sea turtles, the Panel focused on whether it was sufficient for the United States to

²²⁸ *Ibid.*, para. 176.

²²⁹ *Ibid.*, para. 161.

²³⁰ *Ibid.*, para. 166.

²³¹ WT/DS58/RW, 15 June 2001; AB-2001-4, WT/DS58/AB/RW, 22 October 2001.

have engaged in efforts to conclude such a bilateral or multilateral agreement or whether it was necessary for an agreement to have been concluded. It concluded that the ruling of the Appellate Body in the first Shrimp case required only good faith efforts to reach a negotiated solution. More specifically, the Panel noted that the United States had the following obligations in this case in order to avoid “unjustifiable discrimination”:

- ❑ Take the initiative of negotiations with the appellees, having already negotiated with other harvesting countries (Caribbean and Western Atlantic countries)
- ❑ Negotiations had to be with all interested parties aimed at establishing consensual means of protection and conservation of endangered sea turtles
- ❑ The efforts to negotiate had to be serious and in good faith, and
- ❑ These efforts had to take place before the enforcement of a unilaterally designed import prohibition (Paragraph 5.66).

Applying these criteria, the Panel concluded that United States had indeed made good faith efforts to negotiate an agreement with the harvesting countries.

The Panel then proceeded to analyse the Revised Guidelines. The Panel concluded that the "comparable effectiveness" test in the Revised Guidelines was more flexible than the "essentially the same" test in the original Guidelines. In addition, the Panel noted that United States allowed for a phase-in period for the Revised Guidelines and offered to transfer technologies to countries that requested assistance. Therefore, the Panel found that the United States had met this threshold, and indeed had succeeded in justifying its measure under Article XX.

In so doing, the WTO Panel stated:

The Appellate Body Report [in the Shrimp case] found that, while a WTO Member may not impose on exporting Members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own. ...

After recognising that such a requirement may result in a distortion of an exporting country’s environmental priorities, it stated that, “As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse” in such a situation (Paragraph 5.103).

The Panel then proceeded to examine whether the measure was a "disguised restriction on trade" – a further test contained in the chapeau of Article XX. Since the provision permitted exporting countries to apply programmes not based on the mandatory use of turtle-excluder devices (TEDs), and since the United States offered technical

assistance to develop the use of TEDs in third countries, the Panel ruled that the United States measure was not a disguised restriction on trade.

On appeal, Malaysia argued that United States was under an obligation to conclude an international agreement, and not just negotiate one, prior to imposing an import ban. According to Malaysia, negotiations alone could not "insulate" the United States' unilateral action from being "unjustifiable discrimination". Furthermore, Malaysia claimed that the Panel erred in ruling that the "comparable effectiveness" test in the Revised Guidelines should not be considered discrimination.

The Appellate Body ruled that although a multilateral agreement is "strongly preferred" in resolving this type of dispute, it disagreed with Malaysia that Article XX required the actual conclusion of such an agreement -- indeed, it is sufficient to engage in such negotiations. In so doing, the Appellate Body applied the requirement it enunciated in the first *Shrimp* case, that to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries with "similar opportunities to negotiate" an international agreement (Paragraph 122). The Appellate Body indicated that if the requirement was that an agreement be concluded, an effective veto would be given to any export country over whether the United States could fulfil its WTO obligations.

The Appellate Body also found that the Revised Guidelines were flexible enough to meet the needs of Malaysia and other WTO Members. This was because the Revised Guidelines allowed Members to design their own programs, and that the criteria is "comparable in effectiveness". As stated by the Appellate Body:

In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorising an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory (Paragraph 144).

Furthermore, the Appellate Body noted that a trade measure should be designed with sufficient flexibility to take into account the specific conditions prevailing in any exporting country. However, it went on to assert that:

Yet this is not the same as saying that there must be sufficient provisions in the measures aimed at addressing specifically the particular conditions prevailing in every individual exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in every individual Member (Paragraph 149).

In this instance, the Appellate Body determined that the Revised Guidelines provide such flexibility, noting, *inter alia*, that they call on the United States to take account of demonstrated differences that exporting countries offer when they apply for certification, and provide notification to countries that do not qualify, along with suggestions on how such countries could qualify. Accordingly, the Appellate Body upheld the Panel ruling.

The implications of this jurisprudence for import bans are several. Firstly, based on the marked evolution in the interpretation and application of Article XX, it does appear that considerable space is available to WTO members to institute import bans aimed at the policy objectives listed in the sub-paragraphs of that Article. These bans can involve PPMs and may apply to areas beyond the jurisdiction of the importing country, although this latter point has not been conclusively settled. Secondly, the application of the chapeau of Article XX implies that those establishing import restrictions must follow procedures that indicate that they have taken into account the interests of exporting countries. However, this requirement does not go so far as to obligate the importing country to have entered into a multilateral agreement with exporters – it is sufficient that good faith efforts have been made.

The presence of a multilateral environmental agreement on the trade measures to be used would appear as strong evidence that can be used in meeting the tests in Article XX. However, there remains uncertainty in the WTO as to the relationship between MEAs and WTO rules, and lack of clarity on how conflicts between the different sets of rules ought to be handled.²³² Until this uncertainty is resolved, there will be a significant element of instability in the use of trade measures in international legal instruments relating to sustainable development.

10.3 The Ability to Take Measures Based on the Precautionary Principle

States must be able to take measures to protect consumers and their environment in cases where there is a significant risk, but insufficient evidence. But the extent to which international law permits this is uncertain. The precautionary principle appears in the Biosafety Protocol and several other multilateral environmental agreements,²³³ and is currently being discussed in the context of the CAC. However, to date no international tribunal has affirmed that the precautionary principle is part of customary international law. Even if it were to be affirmed, the precise application of this principle would likely depend on the particular circumstances. Indeed, one of the key chal-

²³² There is a vast literature on this. See, e.g. Matthew, Stilwell and Richard G. Tarasofsky 2001: *Towards Coherent Environmental and Economic Governance - Legal and Practical Approaches to MEA-WTO Linkages*: WWF-CIEL Discussion Paper. WWF International.

²³³ E.g. POPs Convention, UN Framework Convention on Climate Change, and Convention on Biological Diversity.

lenges is how to define the precautionary principle. There are indeed several possible definitions, each of which has important practical implications for the relationship between uncertainty, precaution, and science. In recent years, comprehensive provisions have been developed to apply the precautionary principle in particular contexts, most notably the Biosafety Protocol²³⁴ and the Agreement for the Implementation of The Provisions of The United Nations Convention on The Law of The Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks And Highly Migratory Fish Stocks.²³⁵

The precautionary principle was considered in the Hormones case, although the Appellate Body declined to rule on its substantive application.²³⁶ Rather, it avoided deciding on whether the precautionary principle was customary international law, and stated that it could not override the finding that the EC had not engaged in a substantive risk assessment nor could it override Article 5.1 and 5.2.²³⁷ However, the Appellate Body did note that the precautionary principle found reflection in some provisions of the SPS Agreement, such as the Preamble, Article 3.3 and 5.7, and that these provisions did not exhaust the relevance of this principle.²³⁸ It affirmed that a "rational relationship" can exist between a measure "based on" a risk assessment, even if there is not scientific certainty, thereby meeting the requirements of Articles 5.1 and 5.2.²³⁹ It is also significant that the Appellate Body ruled that the burden of proof lay with the challenger to demonstrate, *prima facie*, that the risk assessment obligation was not complied with.²⁴⁰ This dicta goes some way in explaining how the precautionary principle interacts with the SPS Agreement, but it does not answer all the questions. This is partially because the EC itself did not argue the precautionary principle fully in relation to Article 5.7, which seems to be the most appropriate provision to address precautionary measures that are of a temporary nature.²⁴¹

The precautionary principle has not been explicitly considered in relation to any other WTO instruments. It is arguable that the results in the Asbestos case provide States with the ability to determine their own level of health protection. Indeed, in that case, the Appellate Body referred to its decision in Hormones in interpreting Article XX to assert that governments may act in good faith, even if the scientific opinion diverges from the majority, so long as that opinion comes from qualified and respected

²³⁴ Article 10.2.

²³⁵ Article 6 and Annex II.

²³⁶ Cameron, James 1999: "The Precautionary Principle," in: Sampson and Chambers (eds.): Trade, Environment and the Millenium: UNU, for this and subsequent points.

²³⁷ Paragraph 125.

²³⁸ Paragraph 124.

²³⁹ Paragraphs 187 – 191.

²⁴⁰ Paragraph 253(a).

²⁴¹ National Consumer Council 2000: Public Health and the Precautionary Principle: A Consumer View on Implementing the Precautionary Principle, p.20.

sources.²⁴² The Korea Beef case suggests that precaution may play a role in determining whether a measure is "necessary", under Article XX, if it relates to "common interests or values".²⁴³

If the precautionary principle were to be considered as part of customary international law, then under the Vienna Convention on the Law of Treaties, WTO rules would need to be interpreted in a manner that considered "other rules of international law applicable between the parties."²⁴⁴ Similarly, if a dispute involved an international agreement that applied the precautionary principle, and both disputants were party to that agreement, the precautionary principle would also need to be considered.

10.4 Labelling of Sustainable Products

The most important way that consumers can contribute to sustainability is to purchase products that are sustainable. This assumes that consumers have sufficient information to make this choice, most commonly through product labels. The first Tuna case upheld the voluntary ecolabelling scheme for "dolphin safe" Tuna under GATT. As indicated above (see Section 5.4), considerable controversy exists over the WTO compatibility of such labels with the TBT Agreement, whether they issue from state programmes or from independent voluntary initiatives. Indeed, the legal issues involved are similar and relate to the scope of the TBT Agreement, as well as the interpretation of key provisions in that instrument.

A fundamental controversy is the extent to which the TBT Agreement actually covers voluntary independent labelling schemes. Assuming the TBT Agreement does apply, the Code of Good Practice attached to the TBT Agreement, as noted in Part 5.4, calls on central governments to take reasonable measures to ensure that independent standard setters comply with the TBT rules. However, so far it has not been determined what such measures might be. There have been no cases yet that decided the applicability of the TBT Agreement to ecolabelling schemes. However, the recent decision in Sardines²⁴⁵ is instructive in addressing how the TBT Agreement might be interpreted relating to such schemes, particularly on the applicability of international standards and burden of proof.

The case concerned a challenge by Peru of the European Community Regulation setting forth common marketing standards for preserved sardines (Council Regulation (EEC) 1236/89 of 21 June 1989) ("EC Regulation"). The contentious aspect of that Regulation was Article 2, which specified, *inter alia*, that products prepared exclusively from fish of the species "*Sardina pilchardus Walbaum*" may be marketed as "pre-

²⁴² Paragraph 178.

²⁴³ Paragraph 164.

²⁴⁴ Article 31(3)(c).

²⁴⁵ WT/DS231/R, 29 May 2002 and WT/DS231/AB/R, 26 September 2002.

served sardines". Peru exports a different sardine, *Sardinops sagax*. Therefore, Peru claimed that its sardines exports were being hindered by virtue of the EC rules not permitting it to use the label "preserved sardines". Unlike the EC regulation, the *Codex Alimentarius* Commission of the FAO and WHO adopted a standard for preserved sardines, covering 21 fish species, including *Sardinops sagax*. The Standard also provides that the label shall include other descriptive terms to avoid misleading or confusing the consumer.

The EC appealed the Panel ruling that Codex Stan 94 was not used "as a basis for" the EC Regulation, as called for in Article 2.4 of the TBT Agreement. The EC suggested that the test for whether the standard was used as a basis is whether there is a rational relationship between the standard and the technical regulation. The Panel had ruled that the test is whether the standard is the principal constituent or the fundamental principle of the technical regulation. The Appellate Body indicated that it saw nothing in the TBT Agreement to support the EC's approach. Furthermore, it ruled that in any event, the presence of a contradiction between the international standard and the technical regulation would reveal that the standard was not used as a basis for the regulation. In this case, the contradiction was found in that the EC Regulation effectively prohibited preserved fish products from 20 species of fish other than *Sardina pilchardus* from being marketed with the appellation "sardine", whereas the Codex Stan 94 permitted such marketing for those 20 species. Thus, the Appellate Body upheld the Panel's ruling.

The EC then argued that Article 2.4 of the TBT Agreement allowed it to deviate from using international standards as a basis for their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued." The Panel had ruled that the EC bore the burden of proof under this provision and found that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation, which are market transparency, consumer protection, and fair competition. The EC appealed against both rulings.

The Appellate Body reversed the Panel on the question of burden of proof. It held that this provision was not an "exception", whereby the burden automatically shifted to the respondent, but rather was part of the case that the complainant had to meet. Once a *prima facie* case has been made, the Appellate Body averred, the respondent must then rebut the presumption in order to succeed. Thus, in this case, Peru had to prove that Codex Stan 94 is both an effective and appropriate means for fulfilling the legitimate objectives of the EC Regulation, which were market transparency, consumer protection and competition. The Appellate Body stated that to be "effective", Codex Stan 94 had to have the capacity to accomplish all three of these objectives, while to be "appropriate" it had to be suitable for the achievement of all three. The Appellate Body upheld the Panel's finding that Peru had made a *prima facie* case in this regard.

The implications from the Sardines case for the TBT Agreement and labelling are several. Firstly, the importance of international standards as set by *Codex Alimentarius* has been affirmed in the TBT context, as well as the obligation to base stan-

dards on established international standards. Secondly, it appears that the Appellate Body will not shy away from interpreting the content of these standards. Thirdly, it would appear that the Appellate Body, in engaging in such substantive analysis of the meaning of the term used to identify a product, might also do so if the product is identified in accordance with environmental criteria. Naturally, without a ruling directly on point, it is difficult to know the degree to which this approach will extend to labelling that goes beyond the formal name. Finally, it should be noted that the Sardines case concerned a mandatory regulation; a label based on a voluntary standard might not be subject to such stringent scrutiny, since the requirements for standards are less stringent than for regulations.

There are not many international standards on ecolabelling, although they exist for organic food and some general guidance may be provided by ISO 14020 – 025 standards, which relate to certain types of environmental labelling. If no international standards exist for a particular product, there is still scope for countries to develop standards relating to ecolabelling. As mentioned in Part 5.4, there is an ongoing debate in the WTO as to whether the TBT disciplines allow labelling for so-called "non-product PPMs", which are PPMs that are not detectable in the end product.²⁴⁶ From the perspective of exporting countries there are legitimate worries about standards and regulations based on non-product PPMs creating unreasonable competitive advantages for some products. This is particularly so if these were produced in a non-transparent manner, without the participation of exporters, especially from developing countries, or involve high costs of producers from developing countries. The concerns of exporting countries have to be reconciled with the information needs of consumers by providing for a transparent, participative and objective procedure of developing a labelling scheme.

10.5 Border Tax Adjustments

Another important instrument that States use to complement incentive measures, e.g. for sustainability, are border tax adjustments. Border tax adjustments are important tools aimed at offsetting the international competitiveness of imposing taxes on products, and the ability to impose them is an important factor that governments consider when imposing taxes. Indeed, the use of tax policy to achieve sustainable ends is an important component of current policy making and can significantly influence the choices consumers make. The use of border tax adjustments is permitted under the GATT,²⁴⁷ but some commentators have raised concerns about the extent to which

²⁴⁶ See Appelton, Arthur 1999: "Environmental Labelling Schemes: WTO Law and Developing Country Implications," in: Sampson and Chambers (ed.): *Trade, Environment and the Millenium*: United Nations University Press. and Abdel, Doaa 1999: "The Agreement on Technical Barriers to Trade, the Committee on Trade and Environment, and Eco-labelling," in: Sampson and Chambers (ed.): *Trade, Environment and the Millenium*: United Nations University Press.

²⁴⁷ Article III:1 and III:2.

they can be used to offset environmental taxes that are aimed at PPMs, rather than the product *per se*.²⁴⁸ This has been particularly relevant in debates about carbon taxes, and raises the issue of "like products". However, the more recent cases under the GATT/WTO suggest that, although the issues have not been fully tested in the context of border tax adjustments, there is some flexibility in the rules to allow such adjustments in this context. For example, in United States – Taxes on Automobiles²⁴⁹ the GATT Panel found that tax differentiation on the basis of gasoline consumption, as well as differences in application of a luxury tax, were non GATT-inconsistent even though they applied to cars that were otherwise similar. In that case, the Panel considered the environmental purposes of the tax, which is in contrast to the approach in the Tuna- Dolphin cases, and earlier cases.²⁵⁰ In addition, the Subsidies Agreement provides for remission of taxes on exports in relation to inputs or services consumed in the production of the exported product,²⁵¹ which suggests that tax differentiation on the basis of PPMs may be permissible.²⁵²

²⁴⁸ See Chaytor, Beatrice and James Cameron 1995: *Taxes or Environmental Purposes: The Scope of Border Tax Adjustments Under WTO Rules*: WWF - World Life Fund for Nature. See also report of the GATT Working Group Report on Border Tax Adjustments, 20 November 1970, L/3464.

²⁴⁹ DS31/R, 29 September 1994 (not adopted)

²⁵⁰ United States – Taxes on Petroleum and Certain Imported Substances, 17 June 1987, 27 ILM (1988) 1601.

²⁵¹ See Footnote 61 of Annex II of the Subsidies Agreement, Guidelines on Consumption of Inputs in the Production Process.

²⁵² Chaytor, *op. cit.*, footnote 248.

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