

Negotiations issue by issue:

MEAs:

The MEA issue continued to prove the most difficult issue for the WTO, given the potential for an MEA to impact on a number of WTO provisions. In essence, the issue is under what circumstances or conditions can the provisions of an MEA prevail over the provisions of the WTO and thus derogate from the contractual rights and obligations negotiated in the multilateral trading system, particularly with respect to disputes between two WTO Members, one of which is a non-party to the MEA. While the debate has been somewhat theoretical to date given lack of MEA-related disputes in the WTO, the institutional issue of compatibility of two separate systems of international law remains a central issue.

Part of the problem for the CTE was the lack of clarity from governments acting in the context of multilateral environmental community of what was required - the lack of an authoritative multilaterally-agreed statement stating when and how trade measures were required in MEAs set the stage for competence issues to arise. Without such clarity, the efforts by delegations presenting proposals for an accommodation invariably had to develop their own specific conditions, with the result that the demandeurs would then counter that this "conditionality" was more within the competence of the environmental community than the WTO. Needless to say, the implied case-by-case consideration of environmental negotiators of how and when trade measures should be used only increased the inherent conservatism of the trade policy officials that comprised most national delegations. Many of these would thus often state that an accommodation for MEAs was a solution searching for a problem given the lack of WTO disputes involving MEAs.

An additional issue, largely undiscussed, was that the weakness of MEA compliance and disputes settlement mechanisms, in sharp contrast to the binding dispute settlement mechanism of the WTO, increased the risk that MEA related-disputes would be brought to the WTO given lack of effective alternatives. While there has never been an MEA-related dispute in the WTO, this potential remained an issue of concern to many delegations, including Canada.

The MEA issue was clearly the EU priority. The EU tabled its environmental window proposal based upon the Article XX general exceptions at the February CTE and throughout the proposal phase was engaged in pressing its proposal. The USA appeared to lose interest early on and, in increasingly acerbic tones, criticized all other MEA proposals, including those from delegations that were making a serious attempt at policy integration. Following the Appellate Body report on reformulated gasoline³, the USA became even more explicit in its view that any possible result from the CTE process could only be more restrictive than the now better clarified status quo. The EU also started to disengage in the counter-reaction phase, and in one telling short intervention at the July CTE⁴, appeared to join the USA in terms of its assessment of the implications of the Appellate Body report in terms of what Article XX meant substantively for MEAs while noting that the legal relationship remained to be clarified.