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Joint Working Party on Trade and Environment

**IMPLEMENTATION OF THE OECD PROCEDURAL GUIDELINES:
SUCSESSES AND DIFFICULTIES**

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PREFACE

This document was prepared for and presented to the Joint Working in Party on Trade and Environment, as part of the OECD work programme on trade and environment. Prepared by Sue Mahony, the report summarises the successes and difficulties reported in the responses of 25 countries plus the EC, to a review of implementation of the 1993 OECD Procedural Guidelines on Trade and Environment undertaken in 1998-9.

This document, as well as the national responses to the review of implementation of the OECD Procedural Guidelines, COM/TD/ENV(98)132FINAL, will be available on the OECD websites: <http://www.oecd.org/env/online-eco.htm>, and http://www.oecd.org/ech/index_2.htm and is also available in French.

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IMPLEMENTATION OF THE OECD PROCEDURAL GUIDELINES: SUCCESSSES AND DIFFICULTIES

The Procedural Guidelines on Trade and Environment were developed by the predecessor of the Joint Working Party on Trade and Environment (JWP), and endorsed by the Council of Ministers in 1993.

The Guidelines enjoin Member governments to:

- provide for transparency and consultation with all interested stakeholders in the development of policies in these two areas.
- undertake a review of trade and environmental policies and agreements, in order to identify and address areas where there are potentially significant effects on the other policy area.
- co-operate internationally to enhance the effectiveness of international environmental action, without undue effects on trade.
- when involved in a trade or environmental dispute with another country which affects the other policy area, resolve the matter transparently and utilise expertise involving both policy areas.

In 1995, the Joint Working Party undertook a first review of the experiences of Member countries in implementing the Guidelines. Due to the differences of approach among the 25 countries responding to the questionnaire, the responses varied widely in terms of length and content. Accordingly, rather than synthesising the responses, they were published in the form in which they had been submitted¹.

In the second review, commenced in 1998, respondents were requested to provide more concrete responses illustrated by practical examples, to assist in describing national processes of consultation and transparency.

OECD Member countries have approached implementation with diverse methods. This paper highlights common themes in terms of successes and difficulties in implementing the Guidelines. It is envisaged that presenting examples of more and less favourable outcomes of implementation of the Guidelines can be beneficial for policy decision-makers.

The successes and difficulties are organised below by Guideline - 1) the principles of transparency and consultation, 2) trade and environment reviews, 3) international environmental co-operation, and 4) dispute settlement.

1. OCDE/GD(96)98

1. Transparency and consultation

Governments should provide for transparency and for consultation with interested parties in the development and implementation of trade and environmental policies with potentially significant effects on each other.

This Guideline incorporates consultation by Member governments with other levels of government within the country, with interested persons and groups outside government, and the provision of information to, and the seeking of comments from, the public at large in advance of new or changed policies.

Successes

The areas in which countries reported successful results from their efforts to implement the principle on transparency and consultation- whether expressly pursuant to the Guidelines or otherwise - included the following broad categories:

- Inter-departmental working groups and closer interdepartmental co-ordination
- Sustainable development working groups and plans
- Stakeholder groups
- Strategies and legislation for information disclosure, including the use of information technology

Interdepartmental working groups and closer interdepartmental co-ordination

Interdepartmental working groups are increasingly being established by OECD governments, achieving simultaneously, consultation with interested parties and increased transparency, as well as the greater likelihood of policy integration between the departments involved. Some interdepartmental groups have been established in the framework of sustainable development programs or as a follow up to Rio commitments, while others have been formed specifically on trade and environment. In some countries, both such groups have been formed.

Other countries which had not established formal interdepartmental committees, reported that they undertook closer interdepartmental co-ordination on trade and environment issues. Co-ordination included seeking and taking account of the views of other departments. There were also international fora such as the WTO Committee on Trade and Environment where departments concerned with trade issues and environment issues are both represented.

Sustainable Development civil society groups and strategies

As called for by Agenda 21, stakeholder groups have been included alongside government in a broader sustainable development platform in a number of countries. One such regime involves a national commission on sustainable development which follows up the work of a government interdepartmental working group. Another such group, which includes all major business and non-business interest groups, is a wide- ranging forum for consultation, including all aspects of trade and environment.

In one OECD country, all government departments were required to develop sustainability strategies in consultation with stakeholders, to assess and plan how their activities could support the three limbs of sustainable development.

Stakeholder groups on trade and environment

In some countries, historically there is an institutional structure for various groups in society, particularly those with economic interests, such as labour, agriculture and business, to undertake dialogue with government. In one country, a stakeholder group has been established with the particular aim of securing the integration of environment issues in the new WTO Round. In another, a number of sectoral-specific industry groups provide advice to the government on international trade issues and opportunities. Yet another government has established a relationship with a network of NGOs concerned with trade and environment issues, to ensure that all those particularly involved in the issues, are consulted. In another country there is an obligation for the environment ministry to convene consultative commissions to ascertain the views of government authorities, academic institutions and social and business organisations. The ministry must expressly state its reasons for accepting or rejecting the opinions presented by the commissions.

Some countries are establishing regular public meetings of high level government personnel, including Ministers, with all interested groups in society to discuss issues arising from the new Round of trade negotiations. Other examples of joint government- civil society interaction included brainstorming sessions on issues as varied as investment and sustainable development, an approach to chemicals policy, or property rights and markets.

In some OECD countries, parliamentary committees are convening hearings across the country to canvass citizens' views on international trade issues. In one country, a group of citizens were selected from the public at large, given an intensive education program on an issue that was particularly controversial- GMOs. These citizens formed the panel for a public conference, where they questioned a range of persons, including experts, business people, politicians and NGOs. Governments have also supported conferences or debates on trade and environment issues.

In relation to negotiation and implementation of multilateral environmental agreements, various business advisory groups, as well as broad civil society stakeholder groups, have been established to provide recommendations to government on the negotiation and implementation of international commitments. Several countries report holding briefings for civil society before, and occasionally after, international meetings such as Conferences of the Parties. Several governments have included non-government personnel in delegations to MEA meetings, and others have provided support for NGO symposia held by the WTO either in Geneva, or in developing countries.

One intergovernmental environmental organisation which was established to complement a regional trade agreement, provides a procedure for citizens to initiate investigations of whether environmental laws have been effectively enforced. Another trade agreement has established a committee of government representatives on the issue of civil society participation.

Information provision

A substantial number of countries reported making greater use of new electronic information technology, including the Internet and email, which had increased the speed of information exchange. In addition to enabling wide and rapid circulation of documents within government, which facilitates greater internal consultation, new technologies also enabled greater citizen access to information and reduced the

disadvantage of citizens living far from capitals. In one country, draft proposals and decisions are circulated among government authorities as well as non-government groups before adoption. Another established an open forum on the Internet on genetically modified organisms.

In a number of countries, there is new legislation affording access to government information generally, and in some cases, there are also provisions applying particularly to environmental information. One country said it was taking steps to improve the accessibility and “user friendliness” of information. Some countries are undertaking information strategies on trade and environment issues. There can be a number of purposes underlying such strategies - to educate the public on the issues arising from trade liberalisation, or strengthen government’s dialogue with civil society and keep it involved in the state of play in trade negotiations.

One country reported establishing a telephone information line providing toll-free information on foreign and trade policy and referring specific inquiries to relevant personnel. Another has indicated on departmental publications a person who will act as a focal point for enquiries about trade negotiation issues. In one country, the environment ministry has developed a practice of publishing a report of its activities on environmental protection. A number of countries commonly announce outlines of their proposed programmes and seek input via consultation papers and questionnaires. In some cases, there is an obligation for government to compile and publish the results of public consultation.

Difficulties

The difficulties reported by governments in achieving greater transparency and consultation can be divided into those which concerned matters internal to government, and those which concerned its target audience for a dialogue outside government.

In relation to interdepartmental consultation, governments commonly referred to the difficulty of reaching an agreed position between government departments concerned with trade and environment. Government personnel who had previously been concerned only with matters within the scope of the department were also challenged by the complexity and evolving nature of trade and environment issues. There was also difficulty determining the extent to which consultation and a search for consensus should go, as the boundaries of “trade and environment” were constantly expanding. There were also issues for countries about the resources which they could allocate to interdepartmental co-ordination. In some countries which are undergoing rapid development, there is ongoing restructuring within government which further complicates co-ordination.

In relation to dialogue with civil society, governments commonly pointed to a lack of NGO expertise in this area as a barrier to deeper consultation. Some governments also reported that their traditional interlocutors on trade issues generally represented economic interests, and had not previously included representatives of environmental interests.

2. Trade and Environmental Reviews

Governments should examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area early in their development to assess the implications for the other policy area and to identify alternative policy options for addressing concerns. Governments may co-operate in undertaking such examinations and reviews. Governments should follow up as appropriate: to implement policy options; to re-examine the policies, agreements and any measures in place; and to address any concerns identified in the conclusion of such re-examinations.

Successes

A significant number of countries reported undertaking trade and/or environmental reviews; however, there were also a substantial number which had not. Among the countries which have undertaken reviews, several indicated that the Multilateral Agreement on Investment (MAI) was the first review that the government had done. This exercise had required them to assemble a multidisciplinary team, and had given them experience in the process. Some countries reported benefiting from the contributions of NGOs in this process, through their intellectual input, and power to motivate the public at large. A deepened level of co-operation with NGOs was also noted as a side-effect. A number of countries reported that export credits was also an area that was being targeted for environmental review.

Some of the range of mechanisms used in OECD countries for undertaking trade and environmental reviews include: creating a checklist to remind policy makers of issues to consider when reviewing policies or agreements, placing advertisements in government journals seeking comments from the public, undertaking reviews by interdepartmental committees, as well as committees, consultations or public meetings which include civil society stakeholders. For example on the MAI proposal, one country obtained a legal opinion, another sought judicial review of discrepancies between the agreement and its domestic environmental legislation, and yet another held a seminar during the course of the discussions to discuss, among other things, the trade and environmental issues arising from the MAI.

One country reported that environmental reviews are undertaken through environment working groups in international trade agreements. One country pointed to the co-ordination of domestic policies in advance of their adoption, through interdepartmental working groups as a form of *ex ante* review. Environmental impact assessment of physical *projects* is extant in many OECD countries, and this mechanism has been used in a number of countries for assessments. However the technique is too limited to be adequate for a full assessment of *programmes* such as trade liberalisation; nor is it appropriate to assess the trade effects of environmental policies and agreements.

Some countries individually, or in co-operation with others, have undertaken work towards the development of methodologies for trade and environmental reviews. In one country this took the form of guidelines for undertaking assessment of the economic and environmental effects of government bills. The North American Commission for Environmental Co-operation is developing an analytic framework for assessing the environmental impact of the North American Free Trade Agreement. A number of OECD participants have announced an intention to undertake an assessment of the environmental and other social effects of the new Round of trade negotiations. In one case, a consultant will be engaged to first, develop a methodology for the assessment, and second to apply that methodology to the negotiations.

One government which was rapidly strengthening its legal system through the adoption of new laws, but had not yet undertaken trade or environment reviews, had nonetheless taken note of the interlinkages between the two policy areas. Another country had gone further than undertaking a review of the trade effects of its environmental regulations; it had repealed almost 60% of its environmental regulations which were found to burden economic activity without improving environmental quality.

In addition to trade and environment reviews *per se*, a number of countries have undertaken “national interest or impact analyses” - multi-disciplinary reviews of economic, social and environmental considerations, sometimes in the context of a statutory obligation to undertake assessment of the effects of new regulations.

Difficulties

In a number of countries, reviews have been performed by a consultant engaged by government as an external examination. Some civil society groups have expressed concerns that the transparency and consultation principles embraced by governments in the first OECD Guideline, are not applied to trade and environmental reviews by inviting the participation of all parts of government and civil society. This has been explained in several instances by governments as a function of the urgency of the task - the need for a prompt indication of the trade and/or environmental effects of a proposal in the context of rapidly developing international negotiations

Governments have indicated that a lack of expertise in government for undertaking trade and environmental reviews is a problem. This is caused by the novelty of trade and environmental reviews, as well as the breadth of considerations which are encompassed in measuring the social, economic, environmental effects of proposals. Accordingly, the necessary experience may not be available, even outside government and may need to be developed through experience.

Lack of resources to undertake reviews is a related problem arising from the broad sweep of issues which reviews should encompass. It is an additional burden on government budgets to engage personnel to undertake extensive internal co-ordination and self examination, or consultants to undertake the task externally.

As mentioned above, trade and environment reviews are still relatively new territory, and the basic methodology developed by the OECD in this field was published in 1994. The limited scope of this methodology was mentioned by several countries as a restraint to greater implementation of reviews. There have been calls for the methodology to be further refined and made less abstract, to guide the undertaking of assessments, as well as for the sharing of experience gained internationally in the undertaking of reviews. In the actual process of undertaking the reviews, one country reported difficulty in separating out the environmental effects of changes in trade flows resulting from trade liberalisation, from those attributable to more general economic growth patterns.

3. International environmental co-operation

Governments should co-operate to address transboundary, regional or global environmental concerns, in particular through the negotiation and implementation of environmental policies and agreements among the countries concerned, with a view to enhancing the effectiveness of environmental action and avoiding undue effects on trade.

Successes

As examples of international environmental co-operation many countries pointed to their participation in intergovernmental negotiating meetings or Conferences of the Parties of MEAs and plurilateral environmental agreements, the Convention on Access to Environmental Information and Public Participation in Environmental Decision Making, and the WTO Committee on Trade and Environment.

Around half OECD Member countries are members of the European Union, which itself entails a significant degree of international environmental co-operation. In the Nordic countries, and among the countries which are members of the North American Free Trade Agreement, there is also a platform that provides for international co-operation on a range of environmental issues, including the development of methodologies for assessments.

Other examples cited by countries included:

- drawing attention in APEC to the need to take account of the environmental implications of economic, investment and trade policies;
- incorporating environmental criteria into a national development assistance program;
- organising an awareness building seminar in Africa on trade, environment and development;
- sponsoring NGO symposia following two WTO conferences in different developing countries;
- supporting a university masters degree course directed to building capacity in developing countries on CITES issues, and
- supporting UNCTAD's BIOTRADE, which promotes international markets for biological resources.

Difficulties

Few countries reported difficulty in undertaking international environmental co-operation. One country reported difficulties arising from an unwillingness among other countries to move towards greater transparency in international fora, such as the WTO, as well as a lack of consensus internationally that environment is an issue that should be considered in the trade context.

4. Dispute Settlement

When pursuant to an agreement among countries, a country is party to a trade dispute which had an environmental dimension, or to an environmental dispute which has a trade dimension, the government, in developing its national approach, should recognise the importance of taking into account, as appropriate, environmental, trade, scientific and other relevant expertise and should therefore work further to develop, as necessary, appropriate means to achieve transparency.

A significant number of countries responded simply that they had not been involved in disputes relating to trade and environment.

Successes

A number of countries referred to their support for greater openness in relation to trade disputes, in particular, for greater openness in the WTO dispute settlement procedures. There had been success in achieving the acceptance by the WTO dispute settlement bodies of *amicus curiae* briefs in relation to the shrimp-turtle dispute. Several countries who had prepared and made briefs, emphasised the importance of allowing all views to be put to the Dispute Settlement Panel and the Appellate Body. Some countries reported that they undertook interagency consultation, sought public input in preparing their brief, or briefed industry and environmental bodies on the progress of the dispute. One country has a legal obligation to consult with advisory groups when implementing an adverse panel decision.

One respondent had made a significant submission to the WTO on the review of the Dispute Settlement Understanding including a call that hearings be made open to public attendance, that arguments put to the dispute settlement bodies be made public, and allowing members of the public to express their own views in writing to the dispute settlement bodies.

The rules for disputes under the North American Agreement for Environmental Co-operation (NAAEC) allow for transparency and public participation. The NAAEC citizen initiation procedure allows any citizen to seek an investigation by the Committee for Environmental Co-operation when they believe a Member is failing to enforce its environmental laws.

In relation to disputes concerning MEAs, some countries indicated that they were trying to strengthen dispute settlement procedures in conventions such as the Convention on Prior Informed Consent and the Basel Convention. Some foresaw a need to clarify the interface between MEAs and the GATT in relation to dispute settlement and supported further work toward clarifying the relationship.

Difficulties

Few difficulties were reported in implementing the Guideline on dispute settlement. One country said that its drive to achieve greater transparency in the WTO was being hindered by other countries who opposed such changes. A country who said that it customarily makes public its submissions to the WTO or provides a public version, as required by WTO Rules, reported that other countries failed to do so, which hampered transparency in the international dispute settlement process. One OECD Member expressed the view that non-governmental organisations could express their views to their national governments, but that only interested State parties should participate in a dispute.