

**WTO's contribution to sustainable development governance:
Balancing opportunities and threats
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Trade and the Environment: Where Do We Stand After Doha

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Background

In the context of the WTO and its predecessor the GATT, the trade and environment linkage was first made in the early 1970's. With the increased attention paid to environmental protection in many parts of the world, as reflected in the 1972 Stockholm Conference on the Human Environment, the GATT responded with a focus not on the impact of trade on the environment, but rather the implications of environmental policies on trade. This perspective was echoed during the Tokyo Round of Trade Negotiations (1973-79). With the exception of some unsuccessful work conducted on the question of controlling the export of products prohibited domestically on the grounds of health and the environment, the GATT largely continued to neglect the question of how trade rules and policies might impact the environment and environmental policy-making. It was not until the two *Tuna-Dolphin* reports, which found that measures to protect dolphins from getting trapped and dying in nets during tuna harvesting were not GATT compliant, that international attention was drawn to the impact that trade rules can have on domestic environmental policies. Surely the attention given to these two reports (although not adopted) contributed to the process, which led to the creation of the Committee on Trade and Environment (CTE) at the end of the Uruguay Round in 1994.

Paragraph 31 (i) and (ii) and paragraph 28 of the Doha Ministerial Declaration

It was only at the Doha Ministerial Conference in 2001 that the CTE was mandated to launch negotiations on trade and environment focusing on specific issues. Paragraph 28 relates to fisheries subsidies, and paragraph 31 relates to the relationship between existing WTO Rules and Multilateral Environmental Agreements (MEAs) and the issue of environmental goods and services. This, admittedly, was a big step given the WTO's general reluctance to discuss the trade and environment linkage from an angle other than how environmental regulation may affect trade. Both the mandate on fisheries subsidies and on environmental goods and services build on the idea that more liberalized trade can directly benefit the environment. The idea is to use the WTO and its goal of liberalizing trade to increase market access to goods and services that are environmentally beneficial and to get rid of environmentally harmful subsidies, in this case, in the fisheries sector. Whether this is possible given the WTO's focus and expertise on trade economic rather than environment is open to debate. The MEA mandate is different. Here, the focus is on the interrelationship of two very different sets of rules. Even if both are aimed at sustainable development, one focuses on making trade as easy as possible, the other aims at protecting the environment or health, with the effect, sometimes, to make trade in

certain products, such as chemicals, genetically modified products and endangered species, more difficult.

MEA-WTO linkage

With respect to MEAs, many NGOs supported and pushed for the introduction of a mandate calling for a clarification of the relationship between MEAs and the WTO. Presently, however, many have been disappointed with the way the mandate is being framed, and have concluded that the MEA-WTO question might best be dealt with outside the WTO. Specifically, some are worried about the trend to follow the agenda and the terminology of the WTO.

Overall, the discussions seem, in part, to be going in the opposite direction from what many had hoped. The promoters of the mandate wanted to address the MEA-WTO issue with a view to strengthening MEA-related measures and safeguarding them from being found inconsistent with WTO rules. The negotiations though seem to be more concerned with the effects of MEAs on the international trading system.

In order to get a clearer picture of where important players stand with respect to the MEA-WTO linkage CIEL organized a meeting earlier this year, in which non-governmental and intergovernmental organizations, including UNEP and MEAs, expressed their views. There was a general agreement that an overall strategy to address the MEA-WTO linkage should be broad, and that there should be work both inside and outside the WTO. In this context participants found it essential to strengthen the work in fora outside the WTO. There was also general agreement that any strategy addressing the WTO–MEA linkage should contain long and short–term elements.

The short-term elements relate in part to the Doha Agenda as set out in paragraph 31 (i) and (ii). In paragraph 31 (i) Members agreed to address the relationship between existing MEAs and the WTO with the view to enhancing mutual supportiveness.¹ Agreement, however, was reached only to commence negotiations with respect to “specific trade obligations (STOs)” and the outcome of the negotiations is limited to apply to WTO Members who are parties to a given MEA. Agreement though was not reached on negotiating a solution to conflicts between MEA parties and non-parties. Delegates are still discussing the meaning and scope of terms such as “STOs” and “MEA”. No agreement has been reached so far.

¹ Paragraph 31(i) reads:

With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

In the negotiations, some Members expressed the view that there is no apparent conflict between MEA and WTO rules and that there is no need for specific clarification. Others contend that there is a potential for conflict and that specific clarification on the linkage is necessary. This clarification could include, for example, a consensus that measures taken pursuant to an MEA are presumed “necessary”. The actual outcome of the negotiations could vary between a simple statement reiterating the concept of mutual supportiveness, a recommendation, a binding interpretation, or an actual amendment of substantive rules.

If the outcome is a general statement, it will arguably be important to ensure that Members clearly and officially state that there is no conflict between MEAs and WTO rules, and that WTO rules should be understood to support and strengthen the rules elaborated under MEAs. If the outcome is a binding interpretation or an amendment of specific rules, it will be important, given the narrow mandate, to ensure that clarification does not backfire with respect to other aspects of the MEA-WTO linkage. For example, if the interpretation pertains only to disputes in which all WTO Members are parties to an MEA, this interpretation should not be allowed to negatively impact the approach that WTO tribunals take when deciding disputes involving MEA parties and non-parties.

With respect to a longer-term strategy regarding WTO-MEA governance, important considerations include: developing an overall vision of a trade regime that is truly supportive of sustainable development, addressing themes outside the Doha mandate and thinking about specific institutional changes.

In sum, the inclusion of paragraph 31(i) negotiations has been a noteworthy step in the WTO’s development. Presently, however, it is unclear whether the outcome will contribute to a governance framework that will support sustainable development and strengthen multilateral efforts to protect the environment.

Paragraph 51 of the Doha Mandate

A more far-reaching development might be the mandate of the Doha Agenda set out in paragraph 51. This provision calls on Members to consider the development and environmental dimensions in all aspect of their negotiations.²

At the *WTO Symposium on Trade and Sustainable Development within the Framework of Paragraph 51 of the Doha Ministerial Declaration*, held in early October 2005, Pascal Lamy, in his speech quite forcefully noted:

While the WTO has discussed [quote unquote] “environmental and developmental issues” in the Committees on Trade and Environment and Trade and Development for many years now, Paragraph 51 of the Doha Development

² Paragraph 51 reads: The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

Agenda has come to reshape our thinking. In Paragraph 51, Ministers instructed us to change our frame of mind. In other words, to no longer compartmentalize our work; discussing environmental and developmental issues in isolation of the rest of what we do. These are issues that permeate all areas of the WTO. In fact, it is through the lens of Paragraph 51 that we must now begin to look at the rest of the WTO. We must remember that sustainable development is itself the end-goal of this institution. It is enshrined in page 1, paragraph 1, of the Agreement that establishes the WTO.

This approach seems to be essential if the Doha Round is to be a real success and could potentially transform the way the WTO does business. An effective implementation of paragraph 51 would allow for, and perhaps require, the addressing of concerns about the impacts of further trade liberalization on the environment and social structures. At the same time, this process could help to alleviate apprehensions of some countries (especially developing ones) with respect to environmental regulation and their effects on trade. Unfortunately, it is unclear, even at this advanced stage of the negotiations, how paragraph 51 will be operationalized.

The neglect of environmental considerations in the negotiations on non-agricultural market access

Let us now examine whether the negotiations are moving in the direction called for in Paragraph 51. How, for instance, is the Negotiating Group on Market Access (NGMA) addressing market access in non-agricultural products? How are negotiators approaching environmentally sensitive sectors, such as the forestry and the fisheries sectors?

Paragraph 16 of the Doha Declaration relating to non-agricultural market access (NAMA) instructs WTO Members "...to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries..."

Negotiations relating to NAMA are primarily taking place in the Negotiating Group on Market Access (NGMA), where much of the discussion in the negotiations to date has centered on cutting tariffs. In that context the discussion has focused on variations of different formulae that, if agreed, would then be applied by all Members to systematically reduce their current tariff levels. In addition, small groups of countries have begun additional "informal" negotiations on the complete elimination of tariffs in specific sectors, including environmentally-sensitive sectors, such as fisheries, forest products, chemicals, and raw materials.

Although sectoral agreements for tariff elimination have generally been opposed by developing countries, this process has moved forward informally amongst interested Members. It is expected that a small group of countries will agree to eliminate tariffs in a variety of sectors, which they will present to the NGMA as finished deals. In this case,

they would extend the benefits to all Members although the commitments would only be binding on the small group of countries involved.

Although some Members have voiced some concerns³, it does not seem that WTO Members are actually taking environmental considerations into account as they engage in tariff elimination negotiations in sensitive sectors. This is despite the fact that some evidence exists to show the likely negative environmental impacts some countries will experience as a consequence of complete tariff elimination. For example, the European Union commissioned a Sustainability Impact Assessment (SIA) of the WTO Negotiations, published in June 2005. The SIA focused on liberalization of the forestry products sector with respect to trade in goods. Using a model scenario of full liberalization (zero tariffs), the SIA study predicts that:

“[d]eveloping countries and also some of the transitional economies that have problems with forest governance may face considerable environmental and social costs, which could offset economic gains from further trade liberalization unless adequate safeguards are adopted.”⁴

Coming back to Pascal Lamy’s speech mentioned earlier, where he stated:

...if you believe in markets, you also believe that they are in need of being [quote unquote] “corrected” every once in a while. In other words, the “invisible hand” itself needs to be “taken by the hand” sometimes.

Later he continued:

So what does all this mean for the WTO? It means that while the WTO has the capacity to open borders — and to thereby switch on an important engine of economic growth — for the benefits of that growth to show, Members will need “accompanying policies.”

If the NAMA negotiators in their pursuit to increase market access, especially in environmentally sensitive sectors, do not take into account the recommendations of conducted SIAs, or, where such assessments do not exist, negotiators do not mandate an SIA to identify mitigating measures, there is indeed a good chance that increased market access will not be overall beneficial. It is unclear how, when, or if environmental

³ Japan, for instance, recognized the dangers for conservation stemming from liberalization in raw materials, particularly fisheries and forestry stating, among other things, in its submission that “... sector-specific tariff reductions in the forest products sector ... ignores the conditions and the management of forests in each country, seriously impedes the promotion of sustainable forest management, and does not represent the position of importing countries.” Submission by Japan (TN/MA/W/15/Add.1). See also Friends of the Earth International, *What you need to know about ‘NAMA’: Why the WTO’s non-agricultural market access negotiations threaten both environment and development*. Oct, 2004, at p. 3.

⁴ Colin Kirkpatrick and Clive George, *Sustainability Impact Assessment of Proposed WTO Negotiations: Overall Project Final Report*, Impact Assessment Research Centre, University of Manchester, at p.16. (June 2005). Available at <http://www.sia-trade.org/wto/index.htm>.

considerations will be brought into that negotiating process. For now, the EC, for example, has presented its SIA results in the CTE, but to my knowledge, did not indicate how the SIA process might feed into the NAMA negotiations or its negotiating position in the NGMA. If the outcome of the NAMA negotiations is to liberalize without a plan with regard to the necessary “accompanying policies”, as Lamy calls them, then it is unlikely that the goal of sustainable development will be attained, at least from an environmental perspective.

Environmental measures and Market Access: Negotiations relating to non-tariff measures

There is a second aspect of the NAMA negotiations worth mentioning here: the discussion in the NGMA relating to non-tariff barriers (NTBs), or better referred to as non-tariff measures (NTMs). This discussion reflects the continued unease of certain governments, including from developing countries, with respect to environment and health measures. The discussion also seems to demonstrate a certain dissatisfaction with trade rules and jurisprudence with respect to market access considerations.

It was at the insistence of developing countries in Doha that the issue of NTMs was included in the negotiations on NAMA. Many developing countries believe that NTMs are the primary market access impediment for their exporters. In the NGMA, Members have been asked to notify the committee on those non-tariff measures that are problematic for their exporters. The notifications are expected to form the basis for the negotiations on NTMs. There are two important points to consider here:

One is the fact that the negotiations will probably tend to be strongly in favour of those countries that have had the capacity to identify their NTMs of concern. To date, out of the 32 countries that have notified NTMs of concern for their exporters, only three African countries (Egypt, Kenya, and Senegal), and one least-developed country (Bangladesh), have submitted notifications. This means that the negotiations will primarily focus on concerns expressed by industries of industrialized Members.

The second point – more relevant to our discussion here - is that several Members, from both developed and developing countries, have notified various environmental, safety and/or health standards as barriers to their exports. Examples include, among many others, policies that promote fuel efficiency distinguishing between vehicles based on engine size, measures that promote energy efficient policies for household appliances, air conditioning units and heating, various sanitary and phytosanitary standards (particularly relating to the fisheries sector), and labeling requirements for wood products.

The notification exercise has been to simply take stock of “trade barriers,” and it is likely that many of the notified NTMs will not be pursued in the negotiations. Nevertheless, remarks of delegates indicate that, to some extent, the notification exercise has led to a questioning and second-guessing of the legitimacy of environmental measures for the mere reason that they may affect trade. Why is this the case? After all, the environment and health measures notified are covered by existing WTO disciplines, including the

TBT, the SPS Agreements and the GATT, so that illegitimate measures could be challenged under their procedures. All of these agreements aim at avoiding the use of protectionist, arbitrary, and “unnecessary” measures. Additionally, SPS measures are subject to strict science-related obligations. Moreover, while it is true that, compared to GATT panels, WTO tribunals have more explicitly recognized the rights of Members to adopt environment and health policies, and have confirmed Members’ right to choose their own level of protection, challenged environment and health measures have more often than not been found WTO inconsistent. The truth is, WTO rules are already strict, and many commentators, experts and policy makers question whether they leave sufficient space for governments to regulate.

Why then are some Members, especially developing countries, calling for stricter disciplines? This might have less to do with the outcome of actual cases and the existing substantive rules, and pertain more to the imbalance of trade advantages between developed and developing countries, which developed countries have the responsibility to address.

Addressing developing country concerns without tightening disciplines further and without further restricting governments’ policy space

A major problem for developing country exporters remains the lack of comprehensive information on the type of health and environment measures applicable to their products. Often, it is extremely difficult for developing country exporters and governments to obtain necessary information. Transparency and notification of SPS and TBT measures are thus essential for assisting developing countries to comply with new standards and gain market access. Also, transparency of measures can help developing countries determine whether it is warranted to challenge measures and their application through formal dispute settlement procedures.

Both the SPS and the TBT Agreements contain transparency-related obligations. However, experience indicates that the notification process has been insufficient for assisting developing countries to identify and understand SPS and TBT measures affecting their exports. Some advances have recently been made in this respect in the context of special and differential (S&D) treatment discussions. In November 2004, Members adopted a decision on a procedure to ensure that the importing Member consults with any developing country Member that has expressed a concern regarding the potential effect of a newly proposed or modified SPS measure on its exports.⁵ Whether the procedure will be effective remains to be seen.

Another problem relates to the fact that, even where environmental and health measures are transparent and developing countries have access to all necessary information, countries may still face problems adapting their exports to new requirements. The Doha Decision on Implementation, for example, urges Members to provide, as much as possible, LDCs with the necessary financial and technical assistance to enable them to

⁵ See “Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members”, doc. G/SPS/33, 2 November 2004.

effectively respond to the introduction of SPS measures that might adversely affect their exports.⁶ In this context, of course, a careful line must be drawn between the obligation of governments to assist and necessity for governments to adequately protect the environment and health. It will be a real balancing act to avoid discouraging governments from adopting new environmental or health policies and regulation.

In the SPS context, efforts are already ongoing to assist developing countries in enhancing their expertise and capacity to analyze and implement international sanitary and phytosanitary (SPS) standards and thus their ability to gain and maintain market access. This undertaking must be dealt with carefully. Under no circumstances, should the focus on international standards lead to a dilution of the rights currently recognized in WTO agreements and jurisprudence for Members to adopt higher levels of protection than provided by the international standards. Moreover, it will be essential to push for effective developing country participation in standard-setting bodies.

Finally, developing countries often lack the capacity and economic leverage to effectively use the dispute settlement system to defend themselves against measures that are, in fact, illegitimate. This problem cannot be solved through stricter disciplines, but rather, needs to be addressed in the context of dispute settlement review. Dispute settlement rules and accompanying technical assistance considerations must be tailored so as to allow developing countries to effectively use the dispute settlement system.

Conclusion / Summing up

History shows that the WTO has focused primarily on the impacts of environmental policy and regulation on trade. Only after the Tuna-Dolphin cases were trade negotiators forced to consider that the trade regime can have negative impacts on the environment and environmental policy, both at the international and national levels. The creation of the CTE and the Doha Ministerial Declaration reflect this development. However, the ineffectiveness of the CTE and the current negotiations show that the WTO has a hard time looking at the trade-environment linkage from more than one angle. Negotiators tend to either disregard potential environmental implications almost completely (NAMA negotiations in sensitive sectors) or -- where the mandate explicitly refers to the trade - environment linkage -- negotiators seem to refrain from effectively addressing the potential adverse impacts of the trading system on environmental policy and regulation.

This has led to some frustration and resignation in the environmental community. MEAs find themselves bending over backwards to explain that their agreements consist of a package of policies aimed at sustainable development and that they are doing everything to ensure that MEAs support WTO rules. Meanwhile the WTO refuses to take action to ensure that the WTO does not impede the functioning of MEAs. As a result, many environmental groups (as well as MEAs) are taking the stance: Let's keep the environment out of the WTO. This, to a large extent, makes sense. The WTO itself says that it is not an environmental organization. However, it is a fact that WTO rules affect

⁶ See Decision of 14 November 2001, "Implementation-Related Issues and Concerns", doc. WT/MIN(01)/17, 20 November 2001, para. 3.6, reproduced in Annex 1 of this module.

domestic policy space in environmental and all other matters. It is also a fact that the negotiations are aiming at further liberalization in goods and services trade, and that this will affect both the environment and environmental policy-making. If the implementation of existing rules and the negotiations leave out environmental considerations, the resulting problems will be difficult to deal with outside the WTO.

We have a responsibility to continue to ensure the WTO does not only look at the impacts of environmental policy and regulation on trade, but rather looks at both sides of the coin. At the same time, we cannot ignore impacts of environmental measures on developing countries. It is simply unfair to impede the economic development of developing countries by restricting market access, even when the reasons are completely legitimate. However, this tension should under no circumstance be addressed in a way that undermines a Members' right to protect the environment. The balance will be hard to strike. The Appellate Body did its best to strike a balance in the Shrimp-Turtle decisions, but jurisprudence has left many aspects open, including with respect to the necessity test and the role of science, for example. Given that it is unlikely that negotiations will resolve issues raised in the context of the trade-environment linkage, the focus of civil society and commentators on the evolution of jurisprudence will be essential. For increased effectiveness here, improved transparency and participation in dispute settlement will, of course, be indispensable.