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## Breaking the Deadlock: A Positive Agenda on Trade, Environment, and Development?

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### 1. Introduction

The “Positive Trade Agenda” is an initiative of the Secretary-General of the United Nations Conference on Trade and Development (UNCTAD), Rubens Ricupero, taken after the first ministerial meeting of the World Trade Organization (WTO) in 1996 in Singapore. The rationale is that, rather than being passive reactors to agendas set by developed countries, developing countries have to set their own agenda to play a more proactive role in future negotiations.

This chapter tries to define elements of a “Positive Agenda” on trade and environment. This may appear a difficult task, because developing countries have had legitimate apprehensions about engaging in a discussion on trade and environment in the first place. Although the issue has already been on the multilateral trade agenda for some time, work has so far focused on discussions aimed at clarifying trade and environment issues—a process that is still ongoing—not on negotiations. However, there is now some pressure to “mainstream” trade and environment in several WTO agreements and to include the theme, in one way or another, in a possible new round of multilateral trade negotiations (the “Millennium Round”).

This creates both risks and opportunities for developing countries. These countries need to be aware of the full implications of engaging in a possible Millennium Round where environment is expected to play an important role. They also need to be aware of the implications of the explicit inclusion of environment in the negotiating agenda.

There is no doubt that developing countries are fully committed to both trade liberalization and enhanced environmental protection. The UN General Assembly's Special Session, in its first five-year review of progress in the implementation of Agenda 21, recognized that "[t]he multilateral trading system should have the capacity to further integrate environmental considerations and enhance its contribution to sustainable development, without undermining its open, equitable and non-discriminatory character."<sup>2</sup> However, developing countries have to strive to ensure that any further accommodation of environment into the multilateral trading system is achieved in a balanced manner and that it takes account of their own environmental and developmental conditions. They may therefore have to resist certain proposals that may run counter to their interests. In particular, developing countries should firmly resist unilateralism and other measures that threaten to undermine the multilateral trading system.

Any Positive Agenda on trade and environment should be based on the concept of sustainable development, which includes both protection of the environment as well as the eradication of poverty. Basic parameters for a Positive Agenda have been set by the UN Conference on Environment and Development, in particular through the Rio Declaration and Agenda 21. A Positive Agenda on trade and environment should promote positive interactions between economic activities, particularly international trade, the multilateral trading system, and the environment. Essentially, it should:

- contribute to the further integration of developing countries, particularly the less developed countries, into the world economy as well as to their growth and development in the short term and the long term;
- help to achieve environmental and sustainable development objectives based on multilateral cooperation and the principle of common but differentiated responsibilities.

These objectives can be achieved only by considering trade and environment interactions within the broader context of development. Recent analysis and debate have indicated that strategies to achieve such objectives may be rendered more effective by:

- strengthening policy coordination at the national and multilateral levels;
- strengthening capacities in developing countries to deal with trade-related environmental issues and environment-related trade issues;
- promoting multi-stakeholder approaches to identify cost-effective and development-friendly options for trade and environment policy integration;
- implementing positive measures, in particular as outlined in Agenda 21.

Although focusing on the trade and environment debate in the WTO, this chapter also emphasizes the WTO's limitations in resolving trade and environment problems. Consequently, the chapter also examines the role that UNCTAD and the Commission on Sustainable Development (CSD) could play in further integrating trade and environment in the pursuit of sustainable development. In this context, it is hoped that this chapter (as well as other papers that will be prepared on specific issues) may also make a contribution to preparations for UNCTAD X.

## 2. Background

Following the first WTO Ministerial Conference in Singapore in 1996, interest in trade and environment initially seemed to have diminished somewhat. Today, however, the intensity of the trade and environment debate, as measured for example by the number of meetings, seminars, research papers, and technical cooperation projects, seems to be higher than ever before. Much of the renewed interest is focusing on the WTO and how trade and environment will evolve in the context of the multilateral trading system.

Developing countries, however, have expressed grave concerns about recent developments in the debate. Most of them are strongly resisting the inclusion of this issue in future trade negotiations. An important question thus becomes whether their present position obviates the need

for the development of a “Positive Agenda” on trade and environment. This chapter argues that developing countries may have sound reasons to oppose broad WTO negotiations based on environmental considerations. In addition, they may have sound strategic reasons to oppose the inclusion of environment in the build-up to the Seattle Ministerial Conference in December 1999. However, the chapter also argues that it may be very difficult for them to sustain their opposition to the entry of environment in a new round for a number of reasons.

First, the recent Appellate Body decision on *Shrimp-Turtle* has generated new uncertainty on how the multilateral trading system will further accommodate environmental concerns. Whereas many observers in developed countries have welcomed the decision as a demonstration of the ability of the multilateral trading system to incorporate environmental considerations, others have expressed renewed concern over the effects of environmental policies, particularly the use of trade measures related to processes and production methods (known as PPMs), on developing countries. Developing countries may be brought to a situation where they have to resort either to a litigious regime (involving clarification of trade and environment issues on the basis of case-law rather than a broad-based consensus) or to a precautionary exploration of trade and environment issues to avert conflicts. In the latter case, a Positive Agenda would be of some help.

Second, proposals have been made to “mainstream” trade and environment issues into existing WTO agreements. This would imply that environment would be addressed in practically all relevant agreements of the WTO, including the built-in agenda and planned reviews of agreements. The risks associated with mainstreaming environmental issues in the WTO for developing countries will be discussed in the next section. However, mainstreaming also implies that developing countries could be forced to engage in negotiations on trade and environment issues, even without an explicit inclusion of environment in the negotiating mandate.<sup>3</sup>

Third, the possibility of a new round of multilateral trade negotiations has triggered renewed concerns about the possible environmental effects of further trade liberalization and hence calls for environmental impact assessments of trade policies and agreements. Similarly, the possibility that there will be a new round has generated new expectations as well as interest among non-governmental organizations (NGOs) to propose

issues to be included in the negotiating agenda. Both phenomena may add their own dynamics to the negotiating process. Formulating a positive agenda or alternative positions may help to prevent developing countries being taken by surprise in crucial negotiations.

Current pressures from developed countries that are of particular concern to developing countries would centre on three issues:

1. A review or reinterpretation of GATT Article XX, to provide further accommodation of trade measures (including discriminatory trade measures against non-parties) pursuant to multilateral environmental agreements (MEAs). This may have implications for the use of unilateral measures.
2. Accommodation of trade measures based on non-product-related PPMs on environmental grounds, particularly in the context of eco-labelling.
3. Greater scope for the use of the precautionary principle.

Any or all of these may go against the economic and trade interests of developing countries. There may be two ways of dealing with this pressure. One is to resist the entry of issues by referring back to the Singapore report (and the Rio Declaration and Agenda 21), or to propose solutions outside the multilateral trading system. Another option for developing countries would be to develop their own environmental agenda so that, if this issue comes up for negotiations, they can pursue issues that could yield certain benefits to them. (On many issues, it may be possible to find alliances with certain developed countries).

There is also pressure for greater NGO inputs to the WTO processes, in particular its dispute settlement mechanism. Civil society, both NGOs and the business community, can play an important role in promoting a balanced trade and environment agenda. However, there is a risk that certain proposals that may be labelled under the heading "transparency," such as those facilitating the submission of *amicus curiae* briefs to dispute settlement panels, could, in practice, accentuate certain imbalances in the agenda. This is because NGOs in the South have fewer financial resources to avail themselves of such opportunities.

Environmental considerations have also emerged in the debate on agricultural subsidies, one of the most important issues in the built-in agenda. The Cairns Group and other like-minded countries have used

the Committee on Trade and Environment (CTE) as yet another forum to strengthen the case for the elimination of environmentally harmful subsidies. Future trade negotiations, combined with the strong public interest in environmental protection and sustainable development, could provide an opportunity to gain support for the elimination or reduction of some existing trade policy failures, in particular in developed countries, such as trade restrictions and trade-distortive and environmentally harmful subsidies in agriculture and fisheries. These are areas where consensus has already been built between a range of developed and developing countries. Identifying “win-win” scenarios could constitute part of a Positive Agenda, provided that due attention is paid to possible adverse short-term economic effects on certain developing countries.<sup>4</sup>

Except for issues that should be clearly resisted, proposing their own agenda may be a desirable option for developing countries. These countries now have an opportunity to bring greater balance in the treatment of different issues already on the agenda, as well as adding new issues. This should help to strengthen the development dimension in the trade and environment agenda.

Before trying to define elements of a possible Positive Agenda, it is important to understand some of the developing countries’ legitimate apprehensions about the WTO debate and to work out those aspects of the current debate that could yield potential benefits. Section 3 therefore analyses some of these concerns in relation to current and future discussions at the WTO and elsewhere for developing countries. It is in this framework that developing countries should assess the costs and benefits of engaging in discussions on trade and environment.

After this assessment has been completed, they should then examine the current discussions and see whether there is scope within the current framework to accommodate their concerns. Section 4 examines some key trade and environment issues with a view to highlighting some questions and issues that developing countries can legitimately ask. It also highlights their points of entry into a discussion that has so far been polarized and develops elements of a positive agenda for developing countries.

Such a positive agenda is however not limited to the arena of the multilateral trading system, but also spans national and regional policies and includes the private sector players. These different approaches are

discussed in section 5. Section 6 draws some broad conclusions. An overview of existing problems in the trade and environment agenda, as well as possible solutions—both in and outside the WTO context—from the perspective of developing countries, is provided in Appendix II of this volume.

### 3. Concerns of developing countries

Given the pressure for the environment to be mainstreamed into the multilateral trading system (MTS) or included in a Millennium Round, it is necessary first and foremost to redress the imbalances in the agenda on trade and environment.

Trade and environment is an important issue for developing countries. Indeed, starting from a position where several developing countries had argued that there was essentially no linkage between trade and environment issues, not only have developing countries acknowledged such linkages, they are proposing a constructive agenda on dealing with these linkages. For example, several of the proposals described in this chapter have already been flagged by developing countries in the CTE. The great interest in technical assistance for capacity-building also demonstrates developing countries' interest in further articulating a proactive agenda. However, mainstreaming environment issues in the WTO also raises some crucial questions for developing countries.

#### Mainstreaming environment in the WTO?

Some developed countries have proposed including the environment in future negotiations of specific WTO agreements. The European Union (EU), for example, has proposed to examine “the scope for and need to factor environmental concerns into the WTO across the board (mainstreaming).” The EU has argued that “in any future negotiations on trade liberalization there will be no single body within the WTO with the power to ensure that environmental aspects are taken into full consideration throughout the process: the CTE discusses but does not implement policy.”<sup>5</sup> Instead, the EU proposes that each relevant WTO committee should deal with environment in the area under its authority. Other

countries, such as Canada, Iceland, and Norway, have also made suggestions concerning “mainstreaming.”

In the High Level Symposium on Trade and Environment in 1999, the United States (while not mentioning the term “mainstreaming”) proposed that the CTE should look systematically and transparently at all the various areas of negotiation on a rolling basis. “The CTE would identify and discuss issues, but not try to reach conclusions or negotiate these issues in the CTE itself. Rather it would provide a report of its discussions to Members and the relevant negotiating groups.” The United States also expected that “the CTE’s work would play a valuable role in providing input to deliberations at the national level on positions to be taken in the actual negotiating groups.”<sup>6</sup>

“Mainstreaming” environmental issues in different WTO agreements could take place either in the context of already planned reviews of specific agreements or in the context of a possible round of new trade negotiations. There are several risks that could arise from such mainstreaming for developing countries.

First, mainstreaming the environment into several committees would make it more complicated for developing countries to participate effectively in corresponding WTO deliberations and negotiations. Developing country delegates would find it difficult to give attention to environmental issues because “environment” would be diffused in several committees and meetings. The capacity of developing country delegates with expertise in environmental issues to service numerous committees in the WTO is relatively limited. Most delegations in Geneva are small and have several meetings to prepare for and attend. Backup support from the capitals would also be lacking in most cases. Moreover, many developing countries are not ready for it, just as they are not ready for the Millennium Round of trade negotiations. This implies that there is an urgent need to build capacity at the national level, a task in which UNCTAD could assist.

Second, maintaining trade and environment within a common framework (as is the case of the CTE) would allow cross-sectoral discussions and the identification of possible trade-offs if negotiations on environment were to be taken up. Diffusing the CTE agenda would mean that several checks and balances would no longer be possible. The CTE process helps to ensure that a balanced agenda is maintained and that



every issue is discussed. Although every issue is a stand-alone and systematic issue, the CTE package helps to ensure a holistic treatment.

Third, diffusing the environmental agenda to several committees would imbalance the well-negotiated agenda of the CTE. It is also important in this context to understand what mainstreaming would entail in the context of issues that are of key interest to developing countries on the one hand, and issues that are proposed by certain developed countries on the other.

Developing countries, whether or not in alliance with certain developed countries, are the main proponents of the following three issues:

1. *Additional market access, including through the removal of agricultural subsidies and reduction of tariffs.* These issues are already on the agenda of discussions. Mainstreaming these issues is unlikely to generate benefits that are additional to those that can be obtained through current discussions on implementation issues and the built-in agenda and subsequent negotiations.

2. *Agreement on Trade-related Intellectual Property Rights (TRIPS).* Several issues of concern to developing countries can be pursued in the process of the built-in mechanism for review. These could first be discussed in the CTE, under its current work programme, with a view to exchanging views and building consensus on issues that developing countries could pursue in the review process.

3. *Domestically prohibited goods (DPGs).* Developing countries have to review whether any gains would be politically feasible or whether they should pressurize member countries to honour their previous commitments on notification of DPGs. In any case a moot point is where this would be mainstreamed.

On the other hand, developed countries are the *demandeurs* of further accommodation in the MTS of trade measures pursuant to MEAs (including discriminatory measures), trade measures based on non-product-related PPMs, and trade measures based on the precautionary principle. All of these would facilitate the use of trade restrictions for environmental purposes. In addition, proposals to multilateralize environment impact assessments of trade policies and agreements could all involve a risk that interest groups might seek to use such assessments to introduce obstacles to import liberalization in favour of developing countries.

Developing countries could argue first of all that the existing WTO provisions are sufficient to accommodate environmental concerns. Secondly, to the extent that mainstreaming implies further trade restrictions, it cannot be considered a desirable option because the WTO is about further liberalization not about increasing the scope of trade restrictions. Thus, developing countries may have little to gain and a lot to lose from the proposed option of mainstreaming. Whereas some developed countries argue that mainstreaming provides an opportunity to make progress on certain issues, many developing countries argue that the trade and environment agenda requires greater balance if progress is to be made.

#### **Lack of balance in the trade and environment debate**

Lack of balance in the discussions on trade and environment has led developing countries to adopt defensive postures in international debates.

For example, there is considerable dissatisfaction with the fact that, for the most part, the trade and environment debate has explored only some aspects of the linkages. The CTE discussions, for example, have focused largely on issues such as the need to accommodate trade measures pursuant to multilateral environmental agreements (MEAs) as well as eco-labelling based on non-product-related PPMs. Although it is important to ensure a harmonious relationship between MEAs and the MTS, as well as between transparent and non-discriminatory eco-labelling programmes and the MTS, it should nevertheless be noted that “developing country issues,” such as safeguarding and further improving market access, controlling the export of domestically prohibited goods, and promoting technology transfer, appear to have received far less attention.

Thus, although in the developed countries there is pressure to accommodate the use of trade measures for environmental purposes within the framework of WTO rules, it appears that there is no concomitant effort actually to control exports of environmentally harmful products and obsolete technologies to developing countries.<sup>7</sup> This is shown by the fact the issue of exports of domestically prohibited goods seems to have been set aside too early as a priority issue for the WTO. Developed countries

have argued that this is a technical issue and other forums are better equipped to deal with it. It should be noted, however, that the same arguments could be used to refer a great deal of the discussions on the use of trade measures pursuant to MEAs to the Conferences of Parties of the Conventions.

A challenge for developing countries is to develop a system that facilitates trade restrictions if necessary on such environmental “bads.” It is interesting to observe that at the High Level Meeting on Trade and Environment several governments and NGOs called upon the trade community to reorient the trading system to promote safe products and discourage or bar trade in harmful products.

Another feature of the trade and environment debate is that, although there is continuous pressure to legitimize the use of trade restrictions (including unilateral and extra-territorial restrictions), based on non-product-related process and production methods (PPMs), much less attention is given to encouraging the dissemination of environmentally sound technologies (ESTs) that would help developing countries move towards more environmentally friendly PPMs. It is to be noted that at the High Level Symposium a prominent NGO (the Third World Network) pointed out that, rather than being subject to trade sanctions, developing countries should benefit from access to sophisticated environmental technology, technical and political support from the international community, and funding for environmental protection from multilateral lending institutions. The representative of the World Bank noted that allowing unilateral sanctions against pollution or environmental degradation in another country would fundamentally shift the trading system towards one based on power rather than on rules.

Similarly, although some would like an explicit recognition to extend the coverage of the Agreement on Technical Barriers to Trade (TBT) to include eco-labelling schemes (including non-product-related PPMs), there seems to be much less effort to examine how developing countries can benefit from trade in inherently environmentally friendly products that use traditional and indigenous knowledge. This may be a serious shortcoming to the extent that it can be argued that, whereas eco-labelling is a tool to provide information to the consumer as well as some market advantages to products that are relatively less environmentally benign, the promotion of the sustainable trade in products based on indigenous

knowledge actually fosters conservation. Not only should products produced using indigenous knowledge be excluded from patentability (which prevents developing countries from exporting these products), an effective branding and labelling scheme should help promote markets for such products.

Furthermore, although some want to accommodate eco-labelling using life-cycle analysis in the TBT Agreement, it has not been possible to make progress on guidelines on the eco-labelling of genetically modified organisms (GMOs), whose environmental and health effects will become known only after several years.<sup>8</sup>

#### **Lack of financial and technological capacity to address environmental concerns**

Whereas there has been a lot of attention to the environmental effectiveness of trade and other measures, the capacity-building needs to enable developing countries to meet stricter environmental norms and enhance environmental performance have been underestimated. It is not lack of interest that hinders faster progress on trade and environment integration in developing countries, but the inability of many of these countries to bear the related adjustment costs. Measures and timetables to address global environmental problems may not take sufficient account of the implementation and monitoring capacities of developing countries. Thus, whereas trade measures may be effective in inducing changes in developed countries, the incapacity to monitor would imply that, although the economic effects of trade restrictions are felt by developing countries, the expected environmental improvements do not necessarily occur.

The expectations of some may have been geared too much towards blunt policy solutions, such as trade measures, when the complexity of the issues seems to impose a gradual approach and a priority for enabling measures that create conducive economic conditions for the dissemination and effective use of ESTs. In particular, environmental problems created by the informal sector receive insufficient attention. This is the case despite the fact that the informal sector often accounts for 50 per cent and more of the management of environmentally problematic natural resources, such as heavy metals or hazardous chemicals, and is a key source of pollution.

Developing countries also lack the capacity to build credible certification bodies, with the result that their firms often encounter problems in certifying compliance with international standards. Enforcing environmental standards and norms and monitoring them are also enormous problems for developing countries. The lack of finance, of extension services, of coordinating agencies, and so on, also creates severe bottlenecks in moving towards higher standards. In all these areas UNCTAD has an important part to play.

Although the “precautionary principle” has an important role in environmental policy-making, this should not prevent comprehensive and balanced packages of policy instruments being devised to address all aspects of an environmental problem. There has often been insufficient time to study the underlying economics of environmentally motivated trade measures or other environmental measures that affect trade. In fact, there is a general lack of information on economic and social adjustment costs in developing countries.

### **Lack of political will**

These imbalances in the agenda become especially important because there has been little progress in implementing supportive mechanisms at the multilateral and national levels. The assessment in 1997 of progress on the implementation of Agenda 21 by the United Nations General Assembly showed that little progress has been made on what Agenda 21 calls “implementation issues” such as finance, access to environmentally sound technologies, and, perhaps to a lesser extent, capacity-building. Imbalances in the trade and environment agenda can be addressed only if sufficient emphasis is placed on the development and implementation of such measures.

If the ultimate objective of a trade measure is to fulfil environmental objectives, then such objectives cannot be met by the trade measure alone. In fact, trade measures without supportive measures (such as capacity-building, finance, and access to technology) may further hamper the capacity of developing countries to move towards sustainable development. The argument that supportive measures lie outside the purview of the WTO is no longer sustainable because the purview of the WTO

has been broadened considerably by the Uruguay Round agreements on trade-related intellectual property rights, special and differential treatment (S&D), and other provisions concerning technical assistance. The provisions on S&D have so far turned out to be largely empty boxes, and compliance with these provisions by developed countries would allay some fears of developing countries about the use of environmental measures as protectionist devices.

Notwithstanding these concerns, developing countries have to identify the points of entry into the current debate on trade and environment. Whereas some issues must clearly be resisted, there are others where both trade and environmental gains may accrue to developing countries. It is necessary therefore to identify a strategy for trade and environment, either with a view to engaging in negotiations should they arise, or with a view to providing a counter-agenda to avert negotiations.

#### 4. Points of entry into the agenda of the multilateral trading system

##### Trade provisions in MEAs and the provisions of the MTS

###### *Summary of the discussions so far*

The international community has fully recognized the important role that multilateral environmental agreements play in addressing trans-boundary and global environmental problems, based on international cooperation and the principle of common but differentiated responsibility. There has been considerable debate, however, on the policy instruments used to achieve the objectives of MEAs. Discussions in the Committee on Trade and Environment have focused on the relationship between trade measures pursuant to MEAs and the provisions of the multilateral trading system.<sup>9</sup> Some developed countries may continue to press for an adaptation of GATT Article XX in order further to accommodate the use of trade measures specifically mandated by MEAs. Recent decisions by the Appellate Body may have reduced such pressure, although the Appellate Body decision on *Shrimp-Turtle* may have shifted attention away from subparagraphs (b) and (g) (or the introduction of a new subparagraph) to the headnote of Article XX.

*Points of entry for developing countries*

- There is a need to improve the implementation of supportive measures under MEAs as well as to examine to what extent the multi-lateral trading system can help to remove possible obstacles to better implementation. This would be particularly relevant for the transfer of technology provisions in the MEA.
- There should be strengthened cooperation between MEAs and the WTO to avoid future conflicts. This would also obviate the need for Article XX amendments. Such coordination should also examine other WTO rules and aim at strengthening the compatibility of the transfer of technology provisions in MEAs with WTO rules.
- There is a need to examine the consistency of TRIPS provisions and the Convention on Biological Diversity.
- Unilateral and extra-jurisdictional trade measures to address issues of global environmental concern should be avoided. The chapeau test of Article XX should not allow trade measures that constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. This includes trade measures implemented by one or several countries, purportedly “pursuant to” an MEA, but that may be considered arbitrary or unjustifiable by other countries.

**The Agreement on Trade-related Intellectual Property Rights***Summary of the discussions so far*

Of special concern to developing countries are provisions in the TRIPS Agreement that deal with the transfer of technology and the protection of biodiversity. Developed countries have emphasized that this agreement is meant to foster innovation. Some have noted, however, that in several cases there may be a trade-off between the positive effects of intellectual property rights (IPRs) on the generation of environmentally sound technologies and the negative effects of IPRs on the dissemination of technologies. The TRIPS Agreement, including through its review mechanism, must find ways and means of balancing these two effects. It is important to bring to the discussion the empirical evidence gathered on the dissemination of ESTs in relation to the use of IPRs. Trademarks and trade secrets may also affect the dissemination of ESTs.

In the manufacturing sector the TRIPS Agreement may:

- adversely affect technology transfer, for example by restricting the use of compulsory licensing mechanisms by governments of developing countries;
- increase the price of goods and technologies because of increased concentration of industries;
- have negative effects on innovation, particularly in developing countries, including in the area of environmentally sound technologies.<sup>10</sup>

Several developing countries argue that the agreement and, more specifically, its implementation do not necessarily promote the dissemination of environmentally sound technologies or the protection of biodiversity. The system of intellectual property protection should also find a way of recognizing indigenous technologies, knowledge, and systems of species preservation because these may be of considerable value in protecting biodiversity.<sup>11</sup> Ironically, the system of IPRs could have adverse effects on research and development on account of several factors. First, innovations in biotechnology for the agricultural sector have traditionally been dependent on land races. Without granting adequate protection to land races, TRIPS may erode the very germplasm that forms the basis of biotechnological innovations. Secondly, granting protection to plant varieties would imply that plant breeders and researchers would be forced to buy patented material at exorbitant prices, if they are allowed access to it at all. This would discourage research, especially in developing countries where there is a cash crunch. Thirdly, granting broad-based protection to life forms instead of to the genes that produce those characteristics would discourage further research into effective ways of producing those characteristics. This would have a particularly chilling effect on public research, for which funding is in most cases difficult to obtain and justify.

*Points of entry for developing countries*

- Developing countries should exclude all life forms and related knowledge from patentability, as is currently permitted under the WTO.<sup>12</sup>
- There is a need for further analyses of different options for the implementation of effective *sui generis* systems, as called for by Article 27.3(b). In particular, the implications of using the model of the



Union for the Protection of New Varieties of Plants (UPOV)<sup>13</sup> for Plant Variety Protection (PVP) need careful examination. Harmonizing *sui generis* systems to UPOV 91, which *inter alia* imposes genetic uniformity as a legal requirement for IPRs, would be inappropriate for developing countries. These countries should have different options for the implementation of effective *sui generis* systems. For example, they could consider systems such as FAO 1983, which protects land races and traditional medicinal plants as intellectual property. Other *sui generis* systems that meet national conservation objectives should also be encouraged.

- Developing countries may seek additional time for examining the full implications of Article 27.3(b) as well as for a consideration of different options for implementing *sui generis* systems. They may also insist that priority should be given to further examination of the relationship between the provisions of the Convention on Biological Diversity (CBD) and the TRIPS Agreement.
- The WTO TRIPS Agreement should be made consistent with relevant provisions of the CBD, especially in the areas of biological resources and traditional knowledge systems.<sup>14</sup>
- There is a need also to study the application of Article 27.2, which can exclude from patentability technologies that can harm the environment. This would particularly apply to genetically modified organisms (GMOs) that are known to be harmful. It may be necessary to build some scope for a precautionary measure in this Article too.
- In all patent applications for biotechnological innovations, the country of origin of the germplasm should be indicated. It should also be indicated whether prior informed consent was obtained for the biological genetic resource or traditional knowledge, so that mutual benefit-sharing arrangements can be made. Such documentation should also be attached to the patent application.
- Articles 66.2 and 67 of the TRIPS Agreement should be fully implemented. Article 67 obliges developed country members to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation to developing countries. Article 66.2 obliges developed country members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed countries. Reviews

of the implementation of these two Articles by developed countries should emphasize that these are binding obligations and not just best endeavour clauses. It is also necessary to examine what forms of recourse would be available to developing countries in the event of non-implementation of these Articles.

### **Market access**

#### *Summary of the discussions so far*

Market access remains an issue of key concern to developing countries. Safeguarding market access for products exported by developing countries has been discussed extensively at the WTO. It has been pointed out that developing countries may be more vulnerable to environmental measures because of the composition of their exports. They may also find such standards difficult to meet on account of several constraints, many of which have to do with the nature of operation of small and medium enterprises (SMEs), which account for a large share of exports from developing countries.

Preferential market access and other trade preferences are of key importance for many developing countries, in particular the least developed amongst them. The erosion of such preferences, which may be accentuated as the result of the Millennium Round, could have adverse effects on the exports of certain developing countries and reduce their ability to achieve sustainable development through trade.

A lot of emphasis has been placed in this context on identifying win-win opportunities in trade and environment. "Win-win" situations arise when the removal or reduction of trade restrictions (high tariffs, tariff escalation, and remaining non-obstacles to trade) and distortions have the potential to yield both direct economic benefits for developing countries as well as positive environmental results.<sup>15</sup> Much of the discussion so far has concentrated on removing trade distortions in sectors such as fisheries, agriculture, and energy. More research is needed to identify further examples of products where the removal of trade restrictions and distortions might result in "win-win" situations.

With regard to eco-labelling, discussions in the CTE have focused on multi-criteria eco-labelling schemes, especially those that are based on non-product-related PPMs. The effects of "type-1" eco-labelling on the

market place and international trade, particularly on imports from developing countries, have so far been limited.<sup>16</sup> It would appear that the interest in eco-labelling in the context of international trade is at least in part attributable to the fact that, from a conceptual and trade policy point of view, it involves many complex issues, such as PPMs, the definition of international standards, and equivalency. So far, little progress has been made in dealing with the PPM issue in the context of eco-labelling (see below). In particular, the debates in the WTO and the International Standards Organization (ISO)<sup>17</sup> have made very little progress on developing the concept of “equivalency.”

*Points of entry for developing countries*

- Under the existing code of good practices, a mechanism could be devised for voluntary measures aimed at avoiding the use of trade discriminatory measures based on PPM-related requirements.
- Greater accountability and WTO discipline is needed for NGO campaigns and policies of local governments—for example in the context of the Plurilateral Agreement on Public Procurement—that might have a potentially significant adverse impact on developing country exports, such as bans on the use of tropical timber imposed by several municipalities.
- There is a need to build consensus on certain concepts to be taken into account in the development and implementation of newly emerging environmental measures with potential trade effects, particularly for developing countries. The role of sound science and the concept of risks that non-fulfilment may create also need to be examined in greater detail, particularly with a view to understanding the appropriate balance between reducing environmental and health risks and adverse effects on trade.<sup>18</sup> Measures that incorporate both these concepts are especially valid for agro-based products and marine products, areas that contribute a significant amount of export earnings to developing countries.
- The concept of proportionality, which is implicit in national environmental policy-making, should be examined in the context of international trade rules.
- It may be necessary to examine whether differential treatment for SMEs is available within the existing framework of WTO rules.

- Guidelines to ensure that eco-labelling processes are transparent and non-discriminatory, and capable of dealing adequately with the trade implications of using criteria based on non-product-related PPMs, need to be further developed. To achieve this, progress has to be made on concepts such as equivalency.
- Two lessons drawn from the eco-labelling discussions are that there may be a need to arrive at a definition of what is “an international standard” and that a true international standard requires effective and representative participation of WTO member states at all levels of development. Similarly, there is a need to support the effective participation of developing countries in international standard setting.

### **Domestically prohibited goods**

#### *Summary of the discussions so far*

Many developing countries are concerned about the health and environmental effects of exports to their markets of goods whose domestic sale has been prohibited or severely restricted in the exporting country. Developing country importers need adequate information about the risk that such products could pose to public health and the environment. Apart from information problems, developing countries may also lack the infrastructure (including testing facilities) and other capabilities to monitor and control imports of DPGs. Developed countries on the other hand argue that a number of multilateral agreements and instruments already address this issue. Although duplication is to be avoided, there is a need to examine whether existing instruments, such as the prior informed consent procedure, are sufficient from the perspective of developing countries, in particular with regard to product coverage and procedures. In addition, membership of several multilateral agreements and instruments may be limited, and thus the only option for resolving disputes may be in the WTO.

#### *Points of entry for developing countries*

- The definition of DPGs has to be clearly established and agreed upon. It is also necessary to discuss which of the existing DPGs should be considered at the WTO.
- Possible gaps, in terms of product coverage (for example, certain cosmetics and other consumer goods), in existing agreements and

corresponding international notification procedures need to be identified.

- There is still a need to design and implement concrete mechanisms for enhancing transparency. For example, the DPG notification system established by a Ministerial Decision that had been in existence between 1982 and 1990 should be revived (the Decisions taken to establish it remain in force today).
- As recognized in the CTE, technical assistance should be provided to assist developing countries in strengthening their technical capacity to monitor and, where necessary, control the import of DPGs.

### **Environmental review of trade agreements**

#### *Summary of discussions so far*

As mentioned above, the possibility of a new round of multilateral trade negotiations (a “Millennium Round”) has triggered renewed concerns about the possible environmental effects of further trade liberalization, and hence calls for environmental impact assessments (EIAs) of trade policies and agreements. It is widely recognized that trade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential contribution to improved environmental protection and the promotion of sustainable development through the more efficient allocation and use of resources.

Several suggestions have been made so far. One set of suggestions deals with examining the sustainability implications of the Millennium Round (the European Union and the United States have already announced that they will carry out “sustainability impact studies”) and another deals with examining the environmental implications of existing agreements. It has also been suggested that an environmental impact assessment of the Uruguay Round and its agreements should be carried out, in order to draw lessons for future negotiations.

Several developed countries have suggested that an environmental impact assessment of trade policies be included in the Trade Policy Review Mechanism of the WTO. Many developing countries argue that, although EIAs may be useful domestic policy instruments, there may not be a need to multilateralize them.

So far, EIAs have been used mainly in the evaluation of projects. There is little practical experience, particularly in developing countries, with EIAs of trade policies. The challenge is to promote the integration of environment and economics and to anticipate potentially adverse scale effects of trade liberalization. However, there is a need to avoid undue pressures to carry out overly complicated environmental impact assessments that might adversely affect further trade liberalization and distract from emerging efforts in developing countries to integrate environmental considerations into economic policy-making.

Some points need to be stressed. First, it is generally recognized that any assessment of environmental effects should be the responsibility of national governments. Secondly, EIAs are not only a tool for the minimization of negative environmental impacts; their principal objective is to focus on and to be used in promoting sustainable development. In a broad sense, EIAs promote the integration of environment and economics. Thirdly, EIAs should not narrowly focus on scale effects, but also examine income and technology effects. It may also be necessary to examine “with” and “without” scenarios, i.e. what the environmental effects would be of economic growth patterns that might evolve in the absence of the proposed trade agreement.

*Points of entry for developing countries*

- There is a need to strengthen capacities of developing countries to integrate environmental considerations into economic policies.
- Developing countries could propose an environmental review of the TRIPS Agreement.
- It may be appropriate to carry out an environmental review of the Agreement on Subsidies, especially those relating to agriculture.
- Developing countries could propose an environmental review of trade in “environmental bads” and DPGs.

## **5. Integrating trade and environment at national and regional levels in developing countries**

The integration of trade and environment concerns in developing countries has emerged as one of the priority areas in moving towards sustainable development. Intensive debate and dialogue as well as pilot

projects at the national and regional levels have led to the evolution of possible strategies, elements of which are slowly becoming visible. It is now becoming clear that integrating trade and environment in a development-friendly manner needs concrete mechanisms that span several aspects of national and international economic activity. The national and international debate on these issues has also highlighted the fact that the integration of trade and environment is often intrinsically linked to the culture of operation of economic activities at the national level. Hence mechanisms to integrate trade and environment should include initiatives that deal with national and international legislation, national and international policy-making, business partnerships, infrastructure building, civil society participatory activities, and other related activities.

Better policy coordination at the national level can help prevent or defuse conflicts at the multilateral level, as well as maximize the benefits (or minimize the adjustment costs) of measures taken pursuant to multilateral environmental agreements as well as of environment-related measures with potential trade effects adopted in developed countries.

Agenda 21 has already proposed a positive agenda on trade and environment.<sup>19</sup> However, the implementation of that agenda has been disappointing. It seems appropriate to renew commitments as well as to develop new proposals for pragmatic approaches to trade and environment integration. Such an agenda could *inter alia* include the following:

*National legislation and policy-making*

- promoting policy coordination at the national level;
- identifying packages of measures for SMEs to meet environmental challenges;
- developing legislation and initiatives to mitigate the adverse environmental effects of trade in DPGs;
- identifying packages of measures aimed at supporting developing countries' efforts to join MEAs and complying with national obligations;
- developing effective *sui generis* systems for the protection of traditional and indigenous knowledge as well as effective implementation of Article 27.2, which excludes environmentally harmful technologies from patentability.

*Building business partnerships and civil society participation*

- identifying how to enhance the contribution that foreign direct investment can make to the dissemination of environmentally sound technologies and better environmental management through the supply chain in the host country;
- building supply capacities for enhanced environmental management at the national and regional levels;
- widening trading opportunities for “environment-friendly” products and services in the context of the greening of consumption patterns in developed countries;
- developing multi-stakeholder approaches in moving towards environmentally friendly production processes and sustainable resource management.

*Integrating trade and environment through regional cooperation agreements*

- interregional cooperation in developing common positions and approaches in dealing with third countries;
- interregional cooperation in developing mechanisms to cope with national and regional trade and environment problems.

## 6. Conclusions

From the analysis presented in previous sections, the conclusion could be drawn that several steps should be taken in order to make progress in the trade and environment debate:

- There is a need for greater balance in the trade and environment debate, because it pays insufficient attention to issues of concern to the developing countries.
- The debate should pay more attention to the constraints facing many developing countries in responding to environmental challenges, such as the lack of technical, institutional, and supply capacities, and the fact that many environmental problems in developing countries are of a very different nature.
- There should be sufficient political will to take account of the previous points in building a broad-based agenda on trade and sustainable development in several forums.



- Developing countries need to identify a positive agenda such as that outlined above and to start a process of consensus-building along those lines.

Progress in constructing a more balanced agenda and in strengthening the development dimension can be made only to the extent that countries, in particular developed countries, show greater political will. This includes, for example, the full and timely implementation of the developed countries' Uruguay Round commitments in areas such as textiles. Governments have to adopt larger responsibilities, for example with regard to the notification of exports of DPGs and in reviewing TRIPS for facilitating technology transfer to developing countries. But such political will also has to be shown outside the WTO context, for example through greater progress in providing finance, in facilitating access to and diffusion of ESTs, and in capacity-building, supported by multilateral and bilateral aid programmes.

Developed countries should be aware of the implications of their environmental policies for developing countries and avoid unnecessary adverse effects on developing countries' exports. It is necessary to develop a better understanding of the production conditions in developing countries, their legal systems, and their monitoring capacities. Any calculation of incremental costs under MEAs should take account of these differences.

### The role of national governments

The trade effects of environmental standards and requirements raise issues in the area of development and/or *trade promotion policy* as well as in the area of *trade policy*.

In the area of trade promotion policies, for example, governments and the business sector can adopt several policies and measures aimed at promoting standards and quality with a view to enhancing competitiveness. These include *inter alia* establishing and/or improving supporting infrastructure (e.g. appropriate testing, certification, and accreditation facilities), the dissemination of information, promoting cooperation between the government and the business community, promoting cooperation between retailers/importers and producers/exporters, as well as

special measures in favour of SMEs. International organizations as well as bilateral and multilateral aid agencies can play important roles in establishing and upgrading national capacities in promoting quality, testing, and certification.

In the area of international trade policy, the emphasis is on reducing the likelihood that standards will restrict trade. Such trade policy measures include the harmonization of product standards whenever appropriate, the maximum possible recognition by importing countries of tests conducted by testing bodies in exporter countries, and the recognition that standards that may have significant effects on trade should be subject to trade rules and disciplines, including provisions for consultation.

### **The role of UNCTAD**

As UNCTAD's special role in the area of trade and environment is to examine issues from a development perspective, it should play an important part in strengthening the development dimension in the trade and environment debate and in helping to identify issues of interest to developing countries. However, developing a positive agenda on trade and environment is first and foremost a responsibility of developing countries themselves.

UNCTAD's work on capacity-building could be of key importance. Strengthening capacities for policy analysis and better coordination between trade and environmental policies could help to reduce some of the obstacles to the achievement of sustainable development in developing countries. Multi-stakeholder approaches are important, in particular where the interests of different groups have to be weighed. UNCTAD's work, including joint activities with the United Nations Environment Programme (UNEP), shows that multi-stakeholder approaches may also help to anticipate the economic and social implications of globalization and trade liberalization and, where necessary, identify suitable packages of measures. The role of UNCTAD is crucial in this context. In particular, UNCTAD, in close cooperation with the WTO secretariat, could play a vital part in research and capacity-building, including on issues listed in the next section.

UNCTAD and UNEP could establish a joint programme of capacity-building on trade, environment, and development. To help implement such a programme, the two institutions could set up a task force with the explicit aim of building capacity by pooling the technical expertise of these two organizations. It could be envisaged that a trust fund might be set up to support technical cooperation activities. The pooling of expertise could assist the two organizations to promote:

- public awareness sessions for policy makers;
- national and regional training workshops for trade and environment officials and civil society;
- demonstration projects to address the environmental and economic effects of trade liberalization at the national level;
- the design of appropriate packages of economic instruments and other policy measures to promote sustainable development;
- developing countries' access to environmentally sound technologies as well as the strengthening of capacities for their indigenous development.

The aim of this task force would be to build capacity for promoting trade expansion in an environmentally friendly manner and to build capacity for trade and MEA negotiations.

### **A Positive Agenda for the WTO**

Finding a certain balance in the terms of reference of the CTE has been a difficult task. This balance could be lost if issues of concern to developing countries were to receive less attention than other issues. In addition, greater attention must be given to measures that take account of the difficulties of developing countries in integrating trade and environment, such as S&D provisions, measures that provide better access to information such as transparency and notification provisions, and measures that might assist small and medium enterprises to respond to environmental challenges. Furthermore, it is important to ensure that all aspects of the issues on the agenda receive adequate attention. For example, attempts to clarify possible inconsistencies between MEAs and the rules of the multilateral trading system should include full consideration of the concerns of many developing countries and of NGOs in

these countries with respect to differences in the IPR concepts and regimes in the Biodiversity Convention on the one hand and the WTO TRIPS Agreement on the other.

In the context of a Positive Agenda, there are several specific issues and approaches that merit consideration and could be pursued in the WTO. For example, such an agenda could:

- reconfirm the Rio Declaration and Agenda 21, in particular as they relate to WTO rules;
- strengthen the role of the CTE in clarifying trade and environment linkages, taking into account the need for a balanced and integrated approach as well as the importance of building consensus;
- promote market access for products from developing countries, through safeguarding existing market access (e.g. through an interpretative statement on the concept of proportionality) and creating additional market access, including for environmentally friendly products;
- examine “win–win” areas, taking into account the effects of individual countries, including the net food importing countries;
- enhance the transparency of trade in DPGs, including the revival of notification provisions;
- promote compatibility between the TRIPS Agreement, the diffusion of environmentally sound technologies, and mutual benefit-sharing agreements as prescribed by the Biodiversity Convention.
- seek accommodation in the WTO rules for the special environmental problems and lack of capacity of SMEs;
- promote capacity-building to strengthen capacities for national and regional coordination on trade and environment policies;
- promote a coordinated approach to finding better forms of S&D and implementing the existing provisions of S&D.

### **A coordinated agenda in several forums**

Developing and implementing a Positive Agenda based on the concept of sustainable development requires coordinated efforts in several forums. For example, the WTO debate on the relationship between trade provisions in MEAs and the provisions of the MTS would be more balanced if supportive measures were pursued in forums such as the UN

Commission on Sustainable Development, UNEP, UNCTAD, and the relevant Conventions. These forums could also cooperate in promoting policy coordination as a means of helping to prevent conflicts between trade measures in MEAs and the rules of the multilateral trading system, thereby obviating the need for a modification or reinterpretation of GATT Article XX. The WTO, UNCTAD, UNEP, and other institutions could similarly cooperate in the identification of incentives and supportive measures (rather than trade restrictions) to address issues such as PPMs.

## Notes

1. The views expressed in this paper are those of the authors and do not necessarily reflect those of the United Nations Conference on Trade and Development.
2. *United Nations General Assembly Nineteenth Special Session, Overall Review and Appraisal of the Implementation of Agenda 21: Report of the Ad Hoc Committee of the Whole of the Nineteenth Special Session*, A/S-19/29, 27 June 1997, para. 29.
3. Note that six Uruguay Round Agreements incorporated explicit references to the environment, even though environment was not included in the Punta del Este mandate: the Agreement on Technical Barriers to Trade (TBT); the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); the Agreement on Agriculture; the Agreement on Trade-related Intellectual Property Rights (TRIPS); the Agreement on Subsidies and Countervailing Measures; and the General Agreement on Trade in Services (GATS).
4. Due attention should also be paid to food security objectives.
5. See Communication from the European Union, High Level Trade and Environment Meeting, WT/L/273, July 1998.
6. WTO High Level Symposium on Trade and Environment, 15–16 March 1999, "Linkages Between Trade and Environment Policies," Statement by the United States.
7. However, some progress has been made in designing multilateral agreements and instruments to regulate trade in DPGs. These include the Rotterdam Convention on Prior Informed Consent, the proposed Convention on Persistent Organic Pollutants (POPS), and the Basel Convention.
8. Positions vary across countries. The United States (which, however, is not a party to the CBD) is against labelling requirements and other measures that might restrict trade. Countries with strong or growing biotechnology industries, including Argentina (currently the second-largest producer of transgenic crops), Australia, Canada, and Mexico, support the United States. Argentina and Canada, in particular, support the US opposition to the use of labelling to inform consumers about whether food products are genetically modified or not. They argue that this would increase handling, storage, and transport costs by as much as 20 per cent. Others, in particular African countries, Malaysia, and some Latin American countries, favour a restrictive

protocol, based on the precautionary principle. This includes ample testing for risks to human health and the environment before the release of any GMO. The European Union, although wanting to respond to growing public concern about GMOs and to keep the option of controlling imports of certain products, also wants to protect exports of its own GMOs. Source: *The Economist*, 20–26 February 1999.

9. Forums such as the CSD, UNCTAD, and UNEP have emphasized the importance of supportive measures (such as capacity-building, improved access to finance, and access to and transfer of technology) to assist developing countries in meeting multilaterally agreed targets in MEAs, in keeping with the principle of common but differentiated responsibility. It has also been stressed that MEAs may use packages of instruments (which could contain both supportive measures as well as trade measures) to achieve their objectives. Finally, UNCTAD and other institutions have also stressed the need to examine the trade and economic effects on developing countries of different policy instruments used or proposed in MEAs.

10. See UNDP, *Human Development Report 1999*, Chapter 2 on “New Technologies and the Global Race for Knowledge.”

11. In accordance with the TRIPS Agreement, in order to be patentable, an invention must be new, involve an inventive step, and be capable of industrial application. It has been argued that the TRIPS Agreement seems to contemplate only the Northern industrialization model of innovation. It fails to address the more informal, communal system of innovation through which farmers in the South produce, select, improve, and breed a diversity of crop and livestock varieties. Thus, Southern germplasm achieves an inferior status to that of contemporary biotechnologists’ varieties. The intellectual property of Southern farmers is apparently denied recognition, and hence protection. J. Cameron and Z. Makuch, “The UN Biodiversity Convention and the WTO TRIPS Agreement,” WWF International Discussion Paper, Gland, Switzerland: WWF International, 1995.

12. Unless Article 27 of the TRIPS Agreement is interpreted broadly, the patenting of genetic materials could turn more and more life forms into patentable commodities, with long-term environmental, economic, cultural, and ethical impacts. Cameron and Makuch, “The UN Biodiversity Convention,” *op. cit.*

13. UPOV governs an international system of PVP. Some 37, mainly developed, countries are members. The 1978 UPOV treaty allows certain exceptions for farmers and breeders to use protected materials. However, the treaty is being replaced by its 1991 successor, which eradicates the farmers’ privilege and gives breeders control over further use of a farmer’s harvest of protected seeds. The 1991 treaty came into force on 24 April 1998. As a result, the 1978 version was closed to further signature one year later, on 24 April 1999. See <<http://www.upov.int>>.

14. The international law of treaties uses various criteria to determine which treaty takes priority. Under the rule that *later treaties take priority over earlier treaties*, the TRIPS Agreement (which was agreed at the end of the Uruguay Round in December 1993 and signed in April 1994) would take priority over the CBD (which was agreed in May 1992). However, under the rule that *more specific treaties take priority over general treaties*, the CBD would take priority because the CBD’s language on IPRs in the context of the transfer of technology for biodiversity diversification is more specific than that of the TRIPS Agreement. It is also to be noted that Article 16.5 of the CBD states that: “The contracting parties, recognizing that patents and other intellectual

property rights may have an influence on the implementation of the convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of, and do not run counter to, its objectives" (emphasis added), Cameron and Makuch, "The UN Biodiversity Convention," op. cit.

15. *Environmental Benefits of Removing Trade Restrictions and Distortions*, Note by the WTO Secretariat, WT/CTE/W/67, 13 March 1998.

16. "Type-1" eco-labels, in the terminology of the ISO, may be awarded by a third party to products that meet (multiple) pre-set environmental criteria, generally following a "life-cycle" approach.

17. In the ISO, progress has been made on developing guidelines on transparency, conformity assessment, and mutual recognition.

18. For example, if reducing the standard of aflatoxins from 5 to 2 ppb increases the risk of cancer by 2 per billion people, then is such a standard appropriate?

19. For example, Agenda 21 called upon all countries to collaborate on global environmental problems on the basis of "common but differentiated responsibilities." It was recognized that developing countries should be provided with improved market access, access to and transfer of technology, and finance.

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