

TRADE AND ENVIRONMENT

– An Agenda for Developing Countries

Some trade and environment linkages work out in the same way for developing countries as for developed countries. However, most of the positive environmental spillovers arising out of the process of globalisation and trade expansion accrue at certain threshold levels of economic development,, and more easily to countries which are well integrated into the global economy. On both these counts developing countries risk further marginalisation.

Deliberations at the Committee on Trade and Environment (CTE) of the World Trade Organisation (WTO) have so far been indecisive. However, it is worthwhile to examine what may be the possible implications should a consensus be reached on some of the items on its work programme.

This Briefing Paper examines whether in the structure of the current debate at the CTE there are items of interests to developing countries on which they could formulate a pro-active agenda to fuse their trade expansion and environmental concerns.

Existing Obligations

With regard to the environment, the Preamble to the Agreement establishing the WTO recognises the need to "...protect and preserve the environment and enhance the means for doing so in a manner consistent with the respective needs and concerns at different levels of economic development". In addition, specific associated Agreements also explore the scope of trade rules meeting the objectives of sustainable development as underlined in the WTO Preamble.

While many new Agreements and Committees were added during the Uruguay Round of multilateral trade negotiations, the rules of the General Agreement on Tariffs and Trade (GATT) nevertheless are binding for members of the WTO. Some of the important WTO Agreements vis-à-vis the issue of trade and environment are outlined in brief.

Agreement on Technical Barriers to Trade

Technical barriers to trade that deal with GATT rules governing the use of product standards are main contents of this Agreement. The Preamble to the Agreement recognises "that no country should be prevented from taking measures necessary" *inter alia*..."for the protection of the environment", "at levels it considers appropriate, subject to requirements" that:

- they do not constitute a means of arbitrary or unjustifiable discrimination

between countries where the same conditions prevail, or

- a disguised restriction on international trade, and
- they are otherwise in accordance with the provisions of the Agreement.

The TBT Agreement encourages countries to use international standards, except when these standards are ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued (Article 2.4). In such cases, member states are required to notify their standards or regulations (transparency requirements), if they are likely to have significant trade effects. Another point made in the text is that voluntary standards would also be subject to the transparency/notification obligations. This requirement would be of particular importance in the case of eco-labelling schemes.

The Agreement requires that technical regulations shall not be more restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfillment would create. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific evidence and technical information, related processing technology and intended end use of products (Article 2.2). Special and differential treatment of developing countries focuses on providing them more time to comply with the obligations of the TBT, i.e. with the notification of their domestic regulations. At the same time, it does not give them a differential schedule

for meeting standards in OECD (the Organisation for Economic Co-operation and Development) countries.

Agreement on Sanitary and Phytosanitary Measures

SPS includes, among others, any measure to protect human or animal life or health within the territory of the importing country from risks arising from additives, contaminants, toxins, or disease-causing organisms, in foods, beverages and feed stuff, as well as to prevent establishment or spread of pests. SPS provisions differ from those of the TBT Agreement in three important aspects:

- while the TBT Agreement requires that product regulations be applied on a MFN (most favoured nation) basis, the SPS permits measures to be applied on a selective basis, provided that they “do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail”;
- the provisions of the SPS Agreement provide a greater degree of flexibility to countries to deviate from international standards than is permitted under the TBT Agreement; and
- the SPS Agreement introduces the precautionary principle and permits member countries to adopt SPS measures on a “provisional basis”, in cases where “relevant scientific evidence is insufficient” by taking into account “pertinent information” that may be available with them or with the relevant international organisations. For example, the

European Union’s decision to ban on beef (treated with BST hormone) imported from the US was taken under the precautionary principle.

Agreement on Subsidies and Countervailing Measures

SCM divides subsidies into two categories, viz. prohibited and other subsidies. Other subsidies are further divided into two categories: those, which are actionable by the importing countries and those that are non-actionable. Under Article 8.2(c), certain specific subsidies are considered non-actionable on environmental grounds. The non-actionability or exemption under Article 8.2(c) is provided on a MFN basis to all member countries.

Article 6.7(f) poses an interesting issue. Member countries cannot invoke the serious prejudice provisions against import replacement subsidies where the aggrieved exporter fails to comply with the standards and other requirements of the importing country. This means, in effect, that the importing country could introduce packaging guidelines, provide financial assistance to local firms to meet the regulation, while other member countries would be denied the ability to claim serious prejudice under Article 6.

Agreement on Trade-Related Aspects of Intellectual Property Rights

TRIPs Agreement emphasises on more research and innovation and better access to new technology, including environmentally-sound technologies and/or products (EST&Ps), for all countries. The provision of Article 40(8) enables all member countries to control anti-competitive practices in contractual licenses. However, the special rules excluding the patentability of some specific processes may not balance off, in some cases, the obligations undertaken by developing countries.

Agreement on Agriculture

AoA provides for long-term reform of agricultural trade and domestic policies. It increases market orientation in agricultural trade by providing for commitments in the areas of market access, domestic support and export competition. This would be of some benefit to developing countries.

A significant aspect is the commitment to reduce domestic support for agricultural production, particularly in the form of production-linked agricultural subsidies. The exemptions provisions targeted by this Agreement may also be of some benefit to developing countries.

Box 1: Work Programme of the Committee on Trade and Environment
<ul style="list-style-type: none"> • The relationship between trade provisions in Multilateral Environmental Agreements (MEAs) and WTO rules. • The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system. • The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling. • Transparency of trade measures used for environmental purposes and environmental measures and requirements that have significant trade effects. • The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs. • The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them and environmental benefits of removing trade restrictions and distortions. • The issue of exports of domestically prohibited goods. • Trade-Related Aspects of Intellectual Property Rights. • Trade in Services and the environment. • The participation of NGOs.
<p><i>Source: WTO.</i></p>

CTE Deliberations

Apart from the Uruguay Round Agreements, no specific decisions have so far been made at the WTO on environment. However, discussions on trade and environment, while so far inconclusive, could result in some possible changes in the multilateral trading system. These deliberations at the CTE, while of limited relevance to the wider trade concerns to developing countries, may nevertheless have some implications for their trade promotion programmes.

The Marrakesh Ministerial Declaration, 1994 established the CTE to carry out a work programme on trade and environment and to report the results to the WTO Ministerial Conferences (see Box 1).

Outcome of the CTE deliberations

As mentioned in Box 1, the Marrakesh Declaration elaborated a work programme consisting of ten items, which tried to strike an even balance between the interests of developed and the developing countries. While discussions at the CTE have focussed on all items, there has been some overlap between the discussions on a number of items. Recognising this overlap, the CTE in its sessions after the first ministerial review meeting held at Singapore in December 1996 clustered the items in two groups, dealing with:

- the consistency of trade measures taken for environmental purposes with WTO rules; and
- the environment and trade liberalization issues.

The CTE and Developing Countries

While not all items are of equal interest to developing countries, the next few sections summarise the discussions on some items that would be of interest to developing countries.

Trade Measures Taken Pursuant to MEAs

Different views are expressed on whether any modifications to the rules of the multilateral trading system are required to accommodate trade measures taken pursuant to an MEA. The CTE noted that both the WTO and MEA dispute settlement mechanisms emphasise the avoidance of disputes, including through parties seeking mutually satisfactory solutions (i.e. through consultations).

While the results of the discussion were inconclusive, several interesting ideas that would largely provide guidelines for the use of WTO-consistent trade measures were outlined and discussed. Trade measures were classified in two categories:

- those controlled by an MEA; and
- those taken pursuant to an MEA.

It was feared that limiting the ability of WTO members to resort to dispute settlement could affect

the existing balance of WTO rights and obligations. Panels may have interpreted WTO rules relating to the use of trade measures pursuant to an MEA.

On the other hand, there is no consensus in the CTE to do so. Modifications of trade rules to accommodate trade measures, if approved, may be of some concern to some developing countries. However, their impact will depend on the products whose exports are affected by these modifications. These modifications may however have a *chilling effect* on the trade promotion opportunities of developing countries as most developing countries export a range of natural resource based products that may fall within the purview of some MEAs.

Trade Effects of Environmental Measures

The major part of the CTE's work so far on the trade effects of environmental measures has involved an analysis of voluntary eco-labelling schemes/programmes, including those based on life cycle approaches, their relationship to WTO provisions, and to the TBT Agreement in particular.

The transparency provisions contained in the TBT Agreement, including the Code of Good Practice for Standardizing Bodies contained in Annex 3 of the Agreement provide a reference point to the further work of the CTE in enhancing transparency of eco-labelling schemes/programmes. In this context the CTE underlines the particular importance of ensuring fair access of foreign producers to eco-labelling schemes/programmes.

The CTE recommended that the WTO Secretariat to compile, from the Central Registry of Notifications, all notifications of trade-related environmental measures and collate these in a single database which can be accessed by WTO Members. The database shall contain information where available for each notified measure: its nature/title, objective(s), product coverage, relevant WTO provisions and MEA provisions, and a description of how it operates. This database should be updated periodically.

Market Access and Environment

The possible effects of environmental measures on market access, especially in relation to developing countries have been discussed. There is concern that environmental measures and requirements may adversely affect the competitiveness and market access opportunities of small and medium-sized enterprises, especially in developing countries.

The environmental benefits of trade liberalisation, including the removal of trade restrictions and distortions, have been addressed at both general and sectoral levels, and in relation to specific trade restrictions. The CTE emphasised the importance of market access opportunities in assisting developing countries, to obtain resources to implement adequate developmental and environmental policies determined at the national level, diversify their economies and provide income-generating activities for the poor.

Consequently, improving market access opportunities and preservation of the open, equitable and non-discriminatory nature of the multilateral trading system was considered essential for supporting countries in their efforts to ensure sustainable management of their resources. From this perspective, it has been recognised that the prompt and full implementation of the commitments made in the Uruguay Round will constitute an important contribution in this regard.

In this context, the CTE recognised that particular attention should be devoted to the environmental benefits of initiatives that could enhance the trade performance of countries which remain only marginal participants in world trade, including low income, single commodity export dependent countries. Further work is needed to ensure that the implementation of environmental measures does not result in disguised restrictions on trade, particularly those that have adverse effects on existing market access opportunities of developing countries.

Export of Domestically Prohibited Goods

The CTE recognised that serious concerns have been expressed by some developing and least-developed country members about the export of products to them, whose domestic sale or use is banned or

severely restricted because they pose threat to human, animal or plant life or the environment. These members complain that neither they have sufficient timely information about the characteristics of these products nor the technical capacity to make informed decisions about importing them.

The CTE also recognises the important role that technical assistance and transfer of technology, related to domestically prohibited goods where the international community allows trade, can play in this field. The role of this in tackling environmental problems at their source and in helping to avoid unnecessary additional trade restrictions on the products involved is also being emphasised.

WTO Members should be encouraged to provide technical assistance to other members, especially developing country members, particularly the least-developed among them, either bilaterally or through appropriate inter-governmental organisations, to assist these countries in strengthening their technical capacity to monitor and, where necessary, control imports of domestically prohibited goods.

EST&Ps and Trade Rules

The CTE discussed a wide variety of issues related to the generation, access to and transfer of environmentally sound technology and products

Box 2: Shrimp-Turtle Dispute

In 1997 Malaysia, India, Pakistan and Thailand requested the establishment of a WTO panel to consider US trade restrictions on shrimp imports. Under the authority of the Endangered Species Act (ESA), the US imposed embargoes on the import of shrimp from a number of its trading partners for the purpose of protecting the sea turtle population.

Under the ESA, access to US shrimp markets is conditional on a certification that a country has adopted conservation policies that the US considers to be comparable to its own in terms of regulatory programs and incidental taking. Again, the US unsuccessfully argued that this trade measure satisfied Article XX(g) of the GATT. The panel issued its final report to the parties on 6 April 1998.

The panel rejected the U.S. argument on the basis of its interpretation of the *chapeau* to Article XX, and Article XX(g) was not considered in the particular. The panel found that the US measure constituted unjustifiable discrimination between countries where the same conditions prevail. The US appealed the panel's interpretation of Article XX(g). The Appellate Body delivered its report on 12 October 1998.

The Appellate body, finding fault with the panel's interpretation, considered Article XX(g) and decided that although the embargo served an environmental objective that is recognised as legitimate under the Article, the measure was applied in a manner which constituted arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the *chapeau* of Article XX.

The body made several determinations on the interpretation and application of Article XX(g). Measures to conserve living or non-living exhaustible natural resources may fall within the Article, and therefore sea turtles constituted an exhaustible natural resource. The means-to-an-end relationship between the trade measure and the policy of conserving an exhaustible, endangered species was observably close and real and therefore a measure "relating to" the conservation of an exhaustible natural resource. The body also determined that the imposition of the embargo was an even-handed measure, in that it was made effective in conjunction with restrictions on domestic harvesting of shrimp, as required by Article XX(g).

However, the Appellate Body went on to conclude that the US embargo was applied in a manner which would constitute a means of both unjustifiable and arbitrary discrimination between countries where the same conditions prevail, contrary to the requirements of the *chapeau* of Article XX. The body reasoned that unjustifiable discrimination includes the application of a trade measure, such as the US embargo, that does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.

The failure to engage in serious negotiations to conclude bilateral or multilateral agreements or achieve co-operative efforts for the conservation of sea turtles before enforcing the embargo, and the unilateral application of that embargo, further underscored its unjustifiability.

(EST&Ps), including in the relevant provisions of some MEAs, as related to the TRIPs Agreement. The CTE recalls the need to promote an effective and adequate protection of intellectual property rights and the objectives of the TRIPs Agreement in the reference to Preamble to the TRIPs Agreement.

It states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology which is of mutual advantage to producers and users of technological knowledge in a manner conducive to social and economic welfare and to a balance of rights and obligations.

Constraints for Developing Countries

For developing countries, a rule-based multilateral trading system, which takes account of environmental concerns better safeguards their interests rather than being exposed to the risk of unilateral trade measures. Thus, they have a key interest in ensuring that any proposals concerning the provisions of the multilateral trading system take account of their trade and sustainable development needs.

The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes taken pursuant to MEAs is multifaceted. Finding the right balance to describe and address this relationship in the CTE has proved to be a very demanding task, particularly given the varying nature of the issues involved in each MEA.

Modifications in the WTO rules that would make it easier to introduce environment-related trade restrictions certainly pose a risk to them. Of particular concern are modifications, which would broaden the scope for Article XX exceptions, or which would make it more difficult to successfully challenge a trade measure under this Article. One key question, for example, is to what extent special treatment for trade measures pursuant to MEAs (for example by waiving the necessity test of Article XX(b)), if any, could establish a precedent for further 'accommodation' of otherwise WTO-inconsistent trade measures in the future.

Developing countries are also concerned about the introduction of environmental conditionalities in the context of international trade. The deliberations held so far in the CTE have not resulted in any proposals implying new forms of conditionalities. For example, could linking further trade liberalisation with environmental performance involve some type of conditionality, particularly if existing GSPs (generalised system of preferences) and special trade agreements like the Lome Convention were to be phased out.

Some other concerns expressed by developing countries in CTE deliberations are highlighted in Box 3.

Box 3: Concerns for Developing Countries

- The use of trade restrictive measures for non-trade purposes may be a slippery slope, which eventually may also spill over to other areas, such as labour issues and human rights.
- The issue of the WTO treatment of process and production methods (PPMs). Any modification or understanding which can be interpreted as 'legalising', in the WTO, the application to imported products of mandatory or voluntary measures based on non-product related PPMs is seen as a matter of concern by developing countries. In the work of the CTE, this issue has come up in the context of eco-labelling.
- Another issue is to what extent taking up an issue in the WTO will emphasise the use of trade measures at the expense of a consideration of other policy instruments. For example, could any 'accommodation' of trade measures in the WTO deter the search of positive measures, such as transfer of technologies, financial assistance, and improved market access, including for environment-friendly products, and foreign aid. This could also lead to an over emphasis on the use of trade restrictive instruments to meet environmental objectives.

Opportunities for Developing Countries

The CTE process should contribute to the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines.

An important first step to reduce the risk that environmental measures may result in unnecessary adverse effects on trade is increased transparency. This can be achieved in different ways. One way is to improve, if there were a need to do so, the existing system of notification procedures.

Another way is to provide transparency at an earlier stage of the development of new standards. It is also worth investigating whether transparency provisions could be extended to newly emerging environmental policy instruments, without unnecessarily overloading transparency obligations.

Encouraging the participation of developing countries in the formulation of environmental policies with trade effects, with some mechanism to take account of their legitimate concerns could also enhance transparency.

The CTE provides a forum for examining trade-related aspects of environmental measures, which have significant trade effects, as well as multilateral disciplines governing these measures. The CTE process could also provide an opportunity to build consensus on certain principles to be taken into account in the development and implementation of newly emerging environmental measures with trade effects.

The work of the CTE can help to build political support for further trade liberalisation and improved market access, which would assist developing

countries in generating, through trade, the resources needed for sustainable development policies, including through preferential trading schemes.

Developing countries could also gain if certain provisions relating to them in the TRIPs Agreement were to be implemented and if sustainable development concerns were integrated into the TRIPs Agreement.

Deliberations in the CTE may provide clarification on a number of issues, which could, to a certain extent, be considered as ambiguous particularly in relation to the obligations of the exporters of DPGs.

Conclusions

The second ministerial conference of the WTO held in Geneva in May 1998 did not deliberate on trade and environment in the detailed manner of the Singapore ministerial conference. It, however, highlighted the need to improve the transparency of WTO operations in order to enhance public understanding of the benefits of the multilateral trading system and to improve efforts towards meeting the objectives of sustained economic growth and sustainable development.

Much emphasis was placed on developing countries to improve market access conditions for products exported by them and to make as broad and liberal a basis as possible.

A few developed countries, however, sought to give further momentum to trade and environment discussions. The need to convene a high level meeting on trade and environment particularly focussing on a

few agenda items such as the use of trade measures for environmental purposes, the issue of PPMs and market access was emphasised. The meeting took place in March 1999, but the deliberations were inconclusive.

One member proposed a new comprehensive round of trade negotiations in order to achieve a qualitative relationship between trade and environment among other issues. It was also noted that trade rules should not be used to impose unfair standards on developing countries, particularly least developed countries nor discriminate against their exports.

The role of eliminating tariff escalation and numerous tariff peaks in relieving pressure on developing countries to specialise only in natural resource exploitation or environmentally sensitive activities was also mentioned.

For developing countries it will be important to ensure that any future agenda on trade and environment should include issues of interest to them. This will enable them to achieve a balance of rights and obligations, which will be consistent with their development needs.

This would therefore imply that special efforts should be put by the developing countries in participating in discussions on DPGs, market access and TRIPs. Empirical research, studies and seminars addressing these issues should provide substantive backup to the negotiators from developing countries. It will also enable their informed participation at the third ministerial meeting of the WTO to be held at Seattle in November-December 1999, and eventually in any future round of negotiations.

Recommendations

- To oppose any attempt to amend Article XX of the GATT to incorporate specific “environment window” for taking unilateral trade measures to protect domestic environment, which may act as “disguised protectionism”.
- To increase transparency in the notification procedures of setting international standards for goods and services so that developing and least developed countries’ exports are compatible with international standards.
- To create a multilateral fund, on the lines of the Multilateral Fund under the Montreal Protocol for helping developing and least developed countries to acquire environmentally sound (patented) technologies and products.
- To build awareness among consumers as well as politicians about sustainable consumption and production practices so that a political will is generated to find win-win solutions regarding trade, environment and sustainable development in the long run.

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This Briefing Paper is researched and written by Dr. Veena Jha, Consultant, UNCTAD for the CUTS Centre for International Trade, Economics & Environment, D-218, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.20 2940/20 5802, Fx: 91.141.20 2968, Email: cutsjpr@jp1.dot.net.in, cuts.jpr@cuts-india.org, Website: www.cuts-india.org and printed by Jaipur Printers (P) Ltd., M I Road, Jaipur 302 001.