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Trade and environment at the World Trade Organization: The need for a constructive dialogue

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There is no better way for sustainable development to be implemented than by linking its economic, human development, and environmental cornerstones. It is at this intersection where benefits—such as improved living conditions—can be maximized. Moreover, sound environmental policies can create new business opportunities, and these in all likelihood increase trade. Thus, links between trade and environment not only are necessary, but could also be extremely beneficial. In the context of the “trade and environment linkages” debate it becomes essential to ensure that our commitments to trade and investment liberalization, together with their rule-making, take into account other equally important global objectives, such as environmental goals.

The underlying premise of this chapter is that environmental concerns are among the critical issues that the World Trade Organization (WTO) needs to address successfully in the process of strength-
ening its credibility. Clearly, the WTO is not an environmental forum—and should not become one—but it should do its best to promote a trading regime that is environmentally sensitive and responsible, thereby contributing to other common global goals.

As a general trend, developing country scepticism prevails vis-à-vis the calls for expanding the scope of environmental issues within the WTO. However, two clarifications seem necessary. First, the Southern community in the WTO is not monolithic. As a result, the agendas of Southern countries in the WTO reflect a variety of priorities according to their needs and regional realities. For instance, whereas some Latin American countries have focused on Northern protectionism as a major issue, some African countries have placed poverty and development dilemmas at the centre of their agendas. By the same token, their stakes concerning the WTO trade and environment agenda are not identical. In fact, they are likely to become more distinctive in the future.

Secondly, although Southern scepticism has contributed to the slow pace of the WTO trade and environment agenda, other factors also raise hurdles to further progress. Above all, the process faces a lack of leadership. One reason for that might be the failure of developed nations—the main supporters of such debate—to bridge their own differences in this field. Without such leadership, closing the gaps between concerns from environmental constituencies and environmental-related concerns from developing countries becomes even more challenging. Thus, even if it is not the focus of this paper, the role of developed nations is as crucial for a successful dialogue on trade and environment issues as the developing country role.

The reason for our focus on developing countries is the unexplored or inadequate debate on why they should engage more positively in the trade and environment agenda in the WTO. This chapter argues that it is in the best interests of the developing countries to contribute—not oppose—such an agenda. Instead of resisting a deliberation that is unlikely to fade away (quite the contrary), these countries should make their own case for a more environmentally sensitive trade regime on terms that meet the needs of the South.

The chapter is organized as follows. First we outline the ongoing context in which the “trade and environment” debate is taking
place. Then we address some of the WTO “trade and environment” institutional efforts and the controversial issues that have emerged in the process. We follow this with a discussion of why it is in the interests of the developing countries to participate in this debate. After identifying the limitations that developing countries must face in the process of engaging in the multilateral debate, we suggest the need for a new approach to promote free trade and environmental protection. The chapter concludes with some general remarks.

Background

The “trade and environment” debate is complex and manifold. Furthermore, it involves some of the most fundamental WTO principles and rules, such as the concept of non-discrimination or the definition of “similar products.” Additionally, as the number of new issues and participants in the debate increases, arriving at satisfactory answers becomes more difficult.

There seem to be a consensus that responsibility for addressing the problems of global environmental policy should not be transferred to the multilateral trading system. In fact, some analysts have argued that there is a case for a Global Environmental Organization that would complement and counterbalance to the WTO.\(^1\) Although this is clearly a long-term goal, several international leaders seem to be increasingly supporting it.\(^2\)

In the absence of such a global counterpart, the WTO increasingly faces the challenge of building confidence in the ability of the multilateral trading system to promote trade while responding to legitimate concerns in the area of environmental protection. As past years have shown, this challenge goes beyond achieving an understanding between the trade and environmental communities. In fact, during recent years these communities have come closer, leaving the WTO with a better “environmental track record” than the one inherited from its predecessor, the General Agreement on Tariffs and Trade (GATT).

However, despite the progress made by bridging some of the gaps between the free-traders and environmentalists, the North–South
divide has become critical enough to threaten further progress on the "trade and environment" agenda. It is important to understand the major impulses behind the South’s resistance.

At least three central ideas underlie the current debate on trade and development. One is that developing countries’ growth depends on the rate of economic expansion and the import demand of developed countries. Secondly, developing countries need finance, investment, and technology from abroad to complement their national resources in order to achieve their full growth potential. Thirdly, open trade is an essential ingredient of development. However, there is an increasing awareness that, beneficial as trade and investment may be as engines of growth, they are not a panacea. To generate true development they have to be complemented by the right kind of domestic economic, social, and environmental policies.3

In general, the developing world feels a high degree of frustration over unmet promises of prosperity.4 In particular, there is the sense that commitments made at the Rio Earth Summit in 1992 and in the context of the Uruguay Round have not been kept. For example, they point to the lack of success of Agenda 21—a key product from the Earth Summit—in fostering a North–South partnership to achieve sustainable development in a framework of common but differentiated responsibilities. This claim seems to be supported by recent assessments that show little progress in the implementation of Agenda 21, especially on issues such as finance and access to environmentally sound technologies.5

With respect to the Uruguay Round, developing countries also doubt the credibility of key commitments made by developed countries. One common criticism involves the slow progress in dismantling the Multifibre Arrangement and the goal of phasing out quotas on textiles and apparel gradually over a period of 10 years.6 It has been argued that, although 70 per cent of the transition period is complete, as of 1999 only 6 per cent of the items in value terms have been liberalized.7

More recently, the collapse of the trade talks during the WTO’s Ministerial Meeting in Seattle dramatically illustrated this generalized sense of developing country disappointment with respect to both procedural and substantive issues.8 There, the North–South
divide loomed large, especially as developed countries were reluctant to eliminate their own barriers to trade (i.e. agricultural subsidies) yet targeted protectionism in the developing world. While industrialized countries demanded timely implementation of trade commitments by developing countries (in particular, on intellectual property rights and investment measures), the latter resisted new concessions until developed countries fulfilled the trade reforms undertaken in the Uruguay Round and complied with WTO rulings and the “best efforts” commitments to encourage technology transfer. Equally significant was the message coming from the tenth session of the United Nations Conference on Trade and Development (UNCTAD X). Once again, developing countries complained loudly about the lack of balance in a trade agenda that they claim has ignored their concerns.

As a result, the consensus among developing countries seems to be that, until development and equity concerns are taken into account in the multilateral trading system, other issues that in their view threaten this agenda—such as environmental protection—are not welcome, at least in the short term. In the context of the WTO trade and environmental debate, the core concern among developing countries is that broadening the organization’s scope for addressing environmental concerns would only reinforce the existing imbalance in the trade talks. In particular, these countries fear that higher environmental standards—by creating new non-tariff barriers to trade—could trigger a new wave of protectionism, offsetting the gains from decades of trade liberalization efforts and negotiations. These fears have led to a highly polarized debate within the WTO, which clearly reduces the prospects for a constructive dialogue. Recent developments in this debate will be outlined in the next section.

**Addressing trade and environment issues at the WTO**

Addressing trade and environment linkages at the WTO is one of its most challenging tasks. On very few occasions in the history of the post-war global trading system have governments assembled to start
a negotiation and failed to do so. As Jeffrey Schott remarks, “never before had the failure involved questions about the legitimacy of the trading system itself.”

Throughout 2000, strengthening trust inside and outside the WTO while building consensus among a growing—and increasingly active—WTO membership has proved to be harder than ever. Particularly difficult to address is the belief by many developing countries that the playing field of international trade is not level but sloped against them. Some North–North differences that are part of the reasons for the Seattle failure also continue unresolved. These developments affect the possibilities for progress in trade and environment issues.

However, it is fair to say that, in the past few years, some progress has been made in addressing these issues inside and outside the WTO. We shall not attempt to summarize the entire debate; instead we shall highlight how recent WTO developments have increased North–South tensions in the process of showing higher sensitivity to environmental concerns.

Institutional issues

The WTO Committee on Trade and Environment (CTE), established in 1995, has a broad-based mandate that covers goods, services, and intellectual property rights. It has worked on 10 items based on a “cluster approach” in the areas of market access and the linkages between the multilateral environment and trade agendas.

The CTE has been a step forward in the process of formally establishing a multilateral forum for the discussion of the trade and environment issues. But, despite years of important discussions, its findings have had no real impact on the multilateral trade agenda. Southern opposition to progress in trade and environment linkages has led to a highly polarized debate, which has affected the CTE dynamic. The lack of substantial progress in turn has left the CTE vulnerable to criticism by members from the environmental community, who feel that the lack of “tangible results” is evidence that this forum has failed to make the trading regime more environmentally sound. Furthermore, they complain that the WTO has
isolated the debate within a committee that they see as “sterile” or “moribund.”\textsuperscript{16}

The WTO also created the Trade and Environment Division to provide service and support to WTO committees dealing with trade and environment and technical barriers to trade.\textsuperscript{17} In addition to the work of the CTE, two of the most important institutional issues are participation by NGOs in some proceedings and transparency. As regards participation, owing to pressure from several members and outside organizations to move the WTO away from the GATT’s secretive culture, the WTO secretariat has engaged in a “trade and environment” dialogue with non-governmental organizations (NGOs). Since 1994 the WTO secretariat has organized an annual Symposium on Trade, Environment, and Sustainable Development (with the exception of 1995).\textsuperscript{18}

These opportunities for dialogue have clearly exposed the sharp differences among trade officials from the developed and developing countries. For example, during the WTO High Level Symposium on Trade and Environment in Geneva in March 1999 (a major trade and environment event), the United States and the European Union outlined their goals for expanding the WTO’s environmental agenda as part of a new trade round—in an effort to address complaints from the environmental community—whereas developing countries such as Brazil, India, and Mexico voiced their opposition to any expanded scope for environmental issues in the WTO agenda.\textsuperscript{19} One of their core arguments was that the trade body’s rules were already capable of dealing with trade-related environmental concerns. Other initiatives in this field include several regional seminars on trade and environment for government officials from developing countries, least developed countries, and economies in transition.

With respect to cooperation with other organizations, the WTO has granted observer status in the CTE to intergovernmental entities, five of them working on environmental issues: the Commission on Sustainable Development, the Convention on Biological Diversity, the Convention on International Trade in Endangered Species, the Framework Convention on Climate Change, and the United Nations Environment Programme. UNEP has also requested observer status in the WTO General Council.\textsuperscript{20}
Other institutional issues have been more controversial. One notorious example is the question of NGO input into WTO proceedings. For instance, the proposals for NGO submissions of *amicus curiae* briefs to dispute settlement panels have not been welcomed by many members, especially developing countries. They are concerned that such input will in practice accentuate disparities in the trade agenda. Although these issues are part of the trade and environment debate, they belong to a much broader discussion on institutional reform within the WTO in order to make its operations more open and transparent, including the dispute settlement process.

Another trade and environment initiative that the WTO has undertaken involves a comprehensive analysis of the relationship between trade, economic growth, and the environment, taking stock of economic and political economy research. According to the report, economic integration has important environmental repercussions, not all of them favourable. It has, or at least is perceived to have, diminished the regulatory power of individual nations. The WTO therefore argues that, in a world of ecological interdependence and dismantling of economic borders, there is a growing need to cooperate on environmental matters. Rather than blocking free trade, the WTO suggests that countries need to tackle some of the institutional and policy challenges. In particular, they need to support the “institutional and democratic reforms that go hand in hand with increased income, which are necessary to allow citizens to articulate their preference for environmental quality and influence the political decision-making process.”

What was new about the WTO findings was the recognition that, in the absence of proper environmental policy and institutions, trade can have negative impacts on the environment. An admission of this nature impressed some, including members from the environmental community.

However, it would be mistaken to suggest that such empirical findings have changed the developing country position on trade and environmental issues in the WTO debate. As we shall show, several fundamental issues still remain unresolved.
Major contentious issues

Before discussing why developing countries should participate more actively in the trade and environment dialogue, it would be useful to point out which issues these countries are most concerned about and why. Three proposals have faced particular opposition:

- a review or reinterpretation of GATT Article XX to provide further accommodation of trade measures pursuant to multilateral environmental agreements (MEAs);
- accommodation on environmental grounds of trade measures based on non-product-related process and production methods (PPMs)—this debate has emerged in the context of the discussion on ecolabelling schemes;
- greater scope for the use of the precautionary principle.26

There has been a well-documented debate on each of these issues.27 In general, developing countries reject such proposals because of their concern that they will provide an opening for unilateral trade measures and market access restrictions under the guise of environmental protection.28 They are worried that further accommodation of trade measures pursuant to MEAs could offset some of the trade rights to which countries are entitled by virtue of the WTO system.29 Leading developing countries have made the case that the trade regime already provides sufficient accommodation of such measures, so no further accommodation is necessary. In particular, they stress that only 10 per cent of MEAs contain trade-related provisions and, thus far, there has been no legal challenge in the WTO to MEAs. With respect to PPM-based discrimination, developing countries have also expressed concerns about market access. They support the maintenance of the customary trading regime approach: WTO rules should accept PPM-based discrimination only when the PPMs affect the characteristics of the product itself. Finally, an expanded scope for the precautionary principle in the WTO also arouses resistance because of the fear that it could trigger extremely strict sanitary and phytosanitary measures, leading to new forms of protectionism in the name of precaution. We will come back to these points later.
With the prospect of a new round of negotiations, new trade and environment proposals have emerged since 1999. For example, the United States—focusing on win-win situations that benefit both trade and environmental goals—has suggested the removal of certain subsidies (for example, in fisheries and agriculture) that distort prices and are environmentally harmful, and the elimination of restrictions on trade in environmental goods and services. Other proposals on behalf of the United States, the European Union, Norway, and Canada have suggested the need to carry out environmental impact assessments of future trade negotiations. These proposals have been less controversial from a developing country point of view, as long as they remain a voluntary—not a mandatory—commitment.

Several developing countries have presented proposals on other items of the CTE agenda. Two issues in particular have received attention: (a) the provisions of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) that are relevant to environmental issues, a discussion led mainly by India; and (b) the export of domestically prohibited goods, led by several African countries.

Notwithstanding the efforts in these fields, the developing country input to the trade and environment debate is low. The next section will focus on the need for a more proactive engagement in the process of creating a more environmentally sensitive multilateral trading system.

The need for constructive engagement in the trade and environment agenda

There are at least four reasons why it is in the interests of the developing countries to engage proactively at the national and international level in the trade and environment debate in order to ensure that environmental concerns are properly addressed in the WTO and that trade liberalization and environmental protection efforts reinforce each other. First, social welfare could be maximized if both trade and environmental goals are strengthened; secondly, an effective trade and environment approach at the WTO would help main-
tain momentum for trade liberalization and restore confidence in the organization; thirdly, by dismissing the need for this debate, many “win–win” opportunities remain unexplored, including those that could potentially benefit exporters in developing countries; lastly, it is preferable to try to influence the debate rather than to have the difficult issues resolved through the dispute settlement mechanism.

Enhancing social welfare

Trade liberalization is not an end in itself. Rather open markets and economic integration provide a promise of social welfare gains through economic growth. Environmental protection efforts also seek to increase social welfare. More progress towards the fulfilment of this common objective could be made by linking trade and environment and realizing the synergies created by their interaction. On the contrary, if trade liberalization proceeds in developing countries without regard for its effects on the environment, there is a high probability that some of the economic gains from trade will be consumed, and in some specific sectors or products the environmental costs will perhaps turn out to be higher than the economic gains. In other words, although poor countries may gain some material advances from trade liberalization, they will simultaneously have losses from environmental harms.

Supporting trade liberalization

Developing countries need a rule-based multilateral system. Some argue that they probably need it more than the developed countries because they are much weaker. Hence, lack of support for the WTO from key countries could be detrimental for the South.

This leads us to the second reason why developing countries should not oppose the WTO’s efforts to address environmental concerns. Clearly, environmental destruction threatens the ongoing commitment to trade liberalization—and to the WTO in particular—especially in the developed nations. Trade liberalization might not be irreversible and the question of what it takes to maintain support
for such an agenda deserves considerable attention. The coalition in favour of free trade is increasingly vulnerable, especially in developed nations where there is a growing public perception that the costs of trade liberalization could end up outweighing the benefits.\textsuperscript{35}

There is a growing sense of nervousness, especially in the United States and several European countries, about the unintended consequences of globalization, especially for the environment and domestic wages.\textsuperscript{36} The argument that the WTO has sacrificed health, safety, and environmental standards for the sake of trade, although highly controversial, has been used with some effectiveness in a majority of the anti-trade campaigns. The opposition of the US environmental community—among other sectors—to granting fast-track authority to President Clinton is perhaps the major example of the loss of momentum for new trade initiatives in the United States.\textsuperscript{37} However, the approval in May 2000 by the US Congress of Permanent Normal Trade Relations with China and of the African and Caribbean Trade and Development Act was a positive sign for trade policy in the otherwise bleak post-Seattle atmosphere.

The ill-fated Multilateral Agreement on Investment (MAI) at the Organisation for Economic Co-operation and Development (OECD) was a precedent-setting illustration of the difficulties developed countries face in their attempts to negotiate new global rules. The MAI negotiations were officially suspended in December 1998, having revealed a similar dynamic to that in Seattle: unresolvable differences among the negotiators combined with strong and organized resistance outside the process.\textsuperscript{38}

Since then, attacks on global trade and investment have become even more vociferous and—most important—much better organized. For example, prior to Seattle, Friends of the Earth in Britain led over 570 NGOs from more than 60 countries in a campaign to stop the WTO negotiations on environmental grounds.\textsuperscript{39} During the WTO Ministerial Meeting, the NGO protests were carefully planned;\textsuperscript{40} in fact, The Economist remarked that these organizations "were a model of everything the trade negotiators were not. They were well organized. They built unusual coalitions. They had a clear agenda—to derail the talks."\textsuperscript{41} In the aftermath of the collapse of the global talks, which in fact empowered many of the anti-globalization
organizations, public scrutiny of the WTO can only be expected to increase.

In the South, where—as highlighted earlier—populations are even more exposed to the impacts of environmental degradation, a trade agenda that continuously ignores or dismisses its environmental consequences is unlikely to survive politically in the long run.

The potential for win–win opportunities

The third core argument for developing nations not opposing the trade and environment debate relates to the potential for some trade and environmental objectives to overlap and, in fact, reinforce each other.

The most classic example is the elimination of subsidies in agriculture, energy, fisheries, and timber. Not only do subsidies distort prices and disrupt trade, but they also cause environmental harms. In the case of fisheries, which is the sector that has recently received more attention in the WTO, some experts have estimated that the world’s fishing fleets have nearly two and a half times the fishing capacity required to harvest fish stocks in an economically optimal and environmentally sustainable manner; in many cases, what keeps the boats afloat is the subsidies, which are in open violation of the existing international trade rules.42

But there are many other areas that offer opportunities for win–win situations for both trade and environmental objectives. Ecolabelling, for example, represents a clear intersection between market opportunities and environmental protection because it relies on market forces to promote environmentally friendlier products.43 Unfortunately, in the WTO context developing countries have focused so heavily on the potential discriminatory implications of labelling schemes that they have blocked further progress on the specifics of an environmental initiative that could benefit some exporters. A more effective way to approach concerns about ecolabelling schemes would be to propose specific steps for developing country participation in the selection of the criteria for the schemes themselves.

Developing countries could win by addressing their trade-related concerns, and also win by taking advantage of “green” opportunities
abroad. Under the current approach they lose because, by polarizing the debate, their concerns have less chance to be taken seriously, and they lose again because delaying progress on ecolabelling hinders potential business opportunities.

Unfortunately, other win–win possibilities and how to ensure the producers in developing countries take advantage of them still remain unexplored. Simply put, developing countries need to discover specific market opportunities that are beneficial to the environment—a topic to which they have given too little attention.

**Pressure on the dispute settlement mechanism**

The fourth reason for developing countries to join the effort to advance the trade and environmental debate is that it is preferable to try to influence the debate rather than the issues being decided through decisions from the Dispute Settlement Mechanism.

Trade and environment experts have argued that, especially in the absence of a new trade round where some issues could be negotiated, the responsibility for resolving conflicts in these two areas will continue to be placed on the trade body’s already overburdened dispute settlement system. As James Cameron has suggested, “it is the dispute settlement that is stepping in to do the job that the negotiators failed to do.”

In the field of trade and environment, the WTO dispute settlement system has focused on interpretation of Article XX of the GATT, which allows countries to impose trade-restrictive measures if they are considered necessary to achieve certain objectives (such as the protection of non-renewable natural resources or public health). In a landmark decision in 1998, the Appellate Body concluded, on the basis of Article XX(g), that the United States had the right to impose a ban on shrimp imported from countries that failed to protect endangered sea turtles. The ban violated the WTO rules because it was imposed in a discriminatory manner, but the decision gave a blessing to discrimination against products on the basis of non-product-related PPMs. As highlighted earlier, developing countries had strongly objected to further progress on this issue and, as a result, they harshly criticized the decision (particularly Thailand, Malaysia, and Pakistan).
A new decision in July 2000 is expected to have major implications for the use of trade measures to support environmental or public health goals. A WTO panel upheld a French ban on imports of chrysotile asbestos based on GATT Article XX(b), which allows an exemption to WTO rules for measures necessary to protect human health, among others. This is the first time that the WTO has allowed a member to impose a ban on imported goods based on Article XX(b).47

These four arguments all support a case for more constructive Southern participation in the trade and environment debate as the best way both to address developing countries’ fears and to explore the opportunities of this issue while strengthening the WTO.

Effective participation in the WTO trade and environment debate

Even if resistance by developing countries to trade and environment issues were dropped, there would still be important constraints on proactive participation in the debate. Trade and environment expertise is scarce in the developing world. Most Southern governments have invested in the creation of either a team of trade experts or a team of environmental experts, but expertise in both fields is rare. Although this situation occurs in the developed countries as well, it is in the poorest nations where some sort of policy dialogue is least likely to occur, at least in the short term.

Building trade and environment teams cannot happen overnight. Furthermore, the linkage between trade and environment has not been a national issue, so most countries in the developing world also lack independent trade and environment authorities, research centres, think-tanks, or universities that could lead an effort to develop a domestic agenda addressing the main concerns and identifying the potential benefits.

For instance, academia could—and should—play a leading role in the debate. A promising approach has been developed in Central America. Several professors working on economic policy and sus-
tainable development issues have led a Costa Rican working group addressing the question of what a national trade and environment agenda should focus on. The discussions have involved some well-known leaders from the business sector, highly respected individuals working on environmental issues, officials from specialized institutions, academics, and representatives from NGOs. The ultimate goal of this forum is to arrive at concrete proposals on key issues for domestic constituencies. These will eventually be presented to the government. Fortunately, this is not an isolated case. Similar national dialogues have also started in Guatemala, El Salvador, and Panama.

The foregoing points to several ways of contributing to a less polarized WTO trade and environment debate:

- **A national agenda.** The South needs to set its own agenda in this debate. Long-term support for and commitment to a national agenda are more likely once it is perceived as legitimate in its own right, because of its merits and its responsiveness to recognized concerns. Anything imposed from the outside will never be embraced with real enthusiasm.

- **Clarifying priorities.** Developing nations need to focus on what they want, instead of passively objecting to what they do not want. A national trade and environment agenda should be understood as a means for accomplishing desirable goals, not merely as a defensive tool.

- **Multi-sector dialogue.** A domestic trade and environment agenda requires participation by business, environmental authorities, and other representatives of civil society, not just government officials. The more feedback and constructive criticism the government receives and processes, the more solid and legitimate its proposals become. In other words, the process of defining an official trade and environment position should not be secretive. Secretive processes provoke nothing but suspicion and backlash. The more sectors that think about these issues, the more policy options can emerge, and the greater the degree of innovation that will be brought to bear.
A domestic discussion needs to address concrete proposals, followed by an analytically rigorous assessment of their advantages, disadvantages, and impacts on both trade and environmental policymaking. Without a constructive approach with clear and relevant goals, these issues are likely to have an early death, because the incentives to join the domestic forum will be rather low.

The impetus for a trade and environment debate in the South could be improved by focusing on unexplored opportunities for the country in general, and its exporters in particular. Governments need to provide more information and data not just on legal or institutional issues, but also on economic aspects (e.g. the costs and benefits for key sectors in their economies). What must be avoided is framing the national debate in terms of lose-all or win-all dilemmas, such as whether trade is good or bad for the environment and vice versa, or whether or not a trade and environment agenda is a means to Northern protectionism. Such all-or-nothing polarizations hardly ever arrive at credible conclusions.

Promoting a constructive dialogue on the trade and environment interface is also a key responsibility of industrialized nations. By shifting from a confrontational to a cooperative approach they could help to build common ground on trade and environmental issues, both domestically and in the multilateral system. First, avoiding a sanctions-based approach, while maintaining the commitment to make trade and environment mutually supportive, would go a long way to reducing developing countries’ legitimate concerns about the risk of protectionist manipulation of environmental issues. Secondly, industrialized countries must acknowledge that the trade and environment interface is an extremely knowledge-intensive, state-of-the-art subject, and that the development and implementation of sophisticated regulations in this area demand institutional and human capacities that many developing countries simply lack. This underlines the importance of promoting institutional capacity-building in developing countries and providing related technical assistance. The difficulties in implementing international commitments in other regulatory and institutionally intensive areas demonstrate that writing a commitment in a trade agreement is not an automatic guarantee of compliance.
A new systematic and explicit approach to trade and environment

The core system of rules that the WTO inherited from the GATT was driven by the prevailing reasoning at the end of the 1940s, in a world that was very different from the world today. Back then, current critical issues such as global warming, biodiversity protection, or industrial pollution were totally absent from the international agenda.

After a 50-year process of strengthening the trading system and eight rounds of difficult negotiations, it is not surprising that the trade community should be uncomfortable with the idea of restructuring the current regime to better incorporate new concepts—sustainable development among them. But, as Renato Ruggiero rightly points out, the WTO “cannot operate in isolation from the world in which it exists.”

In the future, a new approach to trade and environment should incorporate environmental considerations in a way that is both explicit and systematic. There is a need to ensure that trade liberalization will go hand in hand with environmental policy-making. Even if fears about “the race to the bottom” in environmental regulation have been overstated, there is some evidence that the globalization process has inhibited a “race to the top,” producing what some authors call a “regulatory chill.”

At least two specific trade and environment issues need to be explicitly addressed in the WTO (not just the CTE): one is the relationship of WTO agreements and multilateral environmental agreements (MEAs) with trade measures; the other is the use of process and production methods (PPMs) as the basis for product discrimination. Other issues such as the precautionary principle are important but could be addressed in a second stage.

Multilateral environmental agreements

The search for solutions to a set of global environmental problems (e.g. the threat of global climate change) has boosted international
collective action to avoid overexploitation of the "global commons." Today, nearly 200 MEAs have been set up with membership ranging from a small group to 170 nations. Over 20 of these agreements incorporate trade measures regarding substances or products, either between parties to the agreement and/or between parties and non-parties. As environmental problems become more global in scope, international efforts to address them are likely to increase, raising new questions about the relationship between global environmental treaties and the rules of the multilateral trading system.

The WTO–MEA relationship has received a great deal of attention in the CTE, yet little rapprochement has been accomplished. As noted above, the case for further accommodating trade measures pursuant to MEAs within the WTO rules has been strongly contested, especially by developing countries. Consequently, uncertainty regarding the hierarchy and compatibility between the two regimes still remains.

Despite the fact that no trade measures pursuant to an MEA have been challenged in the WTO, there is no guarantee that such conflicts will not arise in the future. In fact, the interaction between both regimes is expected to increase. One recent and straightforward example of the trade and environment overlap was the Cartagena Protocol on Biosafety, which regulates some biotechnology-related issues. One key lesson from the controversial process leading to the Protocol was that it was best to take an explicit approach to reconciling the rules of the environmental agreement and those of the trade regime, in spite of the strong resistance of the trade community and related business sectors. Unfortunately, how to address the interaction between the climate change regime and the trading system still remains unsolved.

The recommendation here is not that the regimes be united. Clearly, they address different issues and must keep a certain distance. What should be stressed, however, is that reducing the likelihood of future clashes is in the best interests of both the trade and the environmental communities. This could be achieved by developing an understanding, an interpretative decision, or a set of guidelines that explicitly set out how the WTO–MEA relationship should be worked out, thereby creating greater predictability and legal certainty.
Process and production methods

Process and production methods have become a central issue in the trade and environment debate. Although there is agreement among WTO members that PPMs that have an impact on the final product (known as product-related PPMs or incorporated PPMs) are allowed by the WTO Agreement on Technical Barriers to Trade (TBT), fierce disagreement remains over whether or not PPMs that do not affect the final product (unincorporated PPMs or non-product-related PPMs) are allowed. The position of most developing countries is that the TBT Agreement prohibits the use of standards based on non-product-related PPMs because its definition of standards does not include those that are based on such PPMs and product differentiation on these grounds is not allowed by GATT/WTO jurisprudence. They claim it is inadmissible for products to be differentiated on the basis of the environmental effects created in the exporting countries.53

However, this claim will be difficult to sustain in the long run. Environmental protection efforts are leading to environmentally friendlier products, consumers, and voters. The South sells its exports to markets where there is growing demand for information not only about the products themselves, but also about how these products were manufactured. Additionally, WTO case law has opened up a window supporting PPM-based discrimination in the Appellate Body’s decision on the Shrimp–Turtle case mentioned above. These trends are unlikely to fade away, and ignoring the debate may have a high cost for the South.

Opposition from free-traders and some business sectors to the inclusion to PPM-based standards as a means for differentiating between products is based on a claim that their acceptance would increase the impetus for discriminatory and extra-territorial behaviour, thus overriding non-discrimination principles, which have been the cornerstone of the multilateral trading system.56 The developing country argument, while similar, emphasizes the suspicion that PPM-based differentiation could become extremely vulnerable to protectionist abuse. In addition, they fear their systems of production will not be able to meet the high standards demanded by
the industrialized countries. These fears are not groundless and should not be ignored. Explicitly addressing the concerns of the poorer nations is one of the biggest challenges ahead. A creative approach would be an international system that identifies the appropriate baseline standards and punishes unfair PPM-based discrimination.

Final remarks

The WTO needs to address environmental concerns in a way that strengthens the organization as a key and legitimate pillar of the global governance architecture. Global responsibility for promoting trade while advancing environmental policy should not be transferred entirely to the WTO but, especially in the absence of a global counterpart for environmental issues, the trade body cannot turn its back on this task. Developing countries should participate in this debate, not only to strengthen the WTO but also to ensure that their concerns are heard and addressed in the process.

Developing countries that engage in the kind of domestic trade and environment dialogue outlined in this chapter will be better able to define a sound and explicit position that maximizes the opportunities and minimizes the risks. It is then more likely that they will play a constructive role in the WTO context by contributing to the support of new trade rules that promote both free trade and environmental protection.

Given the vast North–South divide, one effective way to encourage the participation of developing countries could be a Northern commitment to avoid domestic pressures that favour unilateralism as well as protectionism. Additionally, Northern countries that are pushing for “greener” WTO rules should also create a momentum of their own for initiatives rewarding Southern efforts to address trade and environment issues proactively.

Identifying and rejecting cases where environmental claims are being used as a mask for trade protectionism is in the interests of the global trade community as a whole, not just the developing countries. This balance is essential. But most important of all, as deeper
integration takes place, the transition to a new approach to the interface between trade and other legitimate global goals—such as environmental protection—has to be driven by a philosophy in which the WTO and its rules and procedures are seen not as an end in themselves, but as the means for maximizing the opportunities to improve the quality of life of the greatest number of people, and for the longest period of time.

Notes

2. For example, in July 2000 the European Union established an informal working group to analyze the possibility of creating a World Environment Organization that "could unite the various multilateral treaties and conventions concerning the environment and serve as a counterweight to the [WTO]." "EU Working Group Formed to Examine Creation of World Environmental Organization," *International Environment Reporter*, 19 July 2000, p. 556. Renato Ruggiero also underscored the need for such an organization in his speech to the World Trade Organization’s High Level Symposium on Trade and Environment, 15–16 March 1999, Geneva (online at http://www.wto.org/english/tratop_e/envir_e/dgenv.htm). Also see "Why Greens Should Love Trade: The Environment Does Need to Be Protected but Not from Trade," *The Economist*, 9–11 October 1999, p. 18.
3. The United Nations Conference on Trade and Development (UNCTAD) has from its very beginning stressed these three central ideas. See UNCTAD, *Address by Mr. Rubens Ricupero, Secretary-General of UNCTAD*, TD/L/363, February 2000.
7. Data published by the Textile Exporters Association quoted in Rubens Ricupero, "The World Trading System. Seattle and Beyond," in Jeffrey Schott,


10. The meeting took place in Bangkok, Thailand, 12–29 February 2000. Although supporting globalization, the Bangkok Declaration on Global Dialogue and Dynamic Engagement highlighted some of the Southern disappointments about the process, in which “asymmetries and imbalances within and among countries in the international economy have intensified.” More information is available online at http://wwwunctad-10.org/index_en.htm.


14. Its two-fold overarching goal is (a) to identify the link between trade measures and environmental measures in order to promote sustainable development; and (b) to recommend whether the multilateral trading regime provisions need to be modified, in a way that is compatible with the nature of the regime (non-discriminatory, open, and equitable). Ibid.

15. All the discussions of the CTE are summarized in the WTO Trade and Environment Bulletins (available online at http://www.wto.org/english/tratop_e/envir_e/bull_e.htm).


18. Other transparency measures include the creation of an NGO section on the WTO website (http://www.wto.org/wto/english/forums_e/ngo_e/ngo_e.htm) and a monthly list of NGO position papers received by the
Secretariat, which are available for the information of members upon request (World Trade Organization, Background Note).


24. Ibid., p.11.


26. According to this principle, “in some cases—particularly where the costs of action are low and the risks of inaction are high—preventive action should be taken, even without full scientific certainty about the problem being addressed.” Aaron Cosbey and Stas Burgiel, The Cartagena Protocol on Biosafety: An Analysis of Results, an IIISD Briefing Note, Winnipeg: International Institute for Sustainable Development, 2000, p. 4.

27. See World Trade Organization, Background Note.

28. For a comprehensive analysis on developing countries’ stakes, see Jha, Vossenaar, and Hoffmann, “Trade and Environment: Issues.” Also see Shahin, “Trade and Environment.”

29. During the July 2000 CTE meeting, China, Hong Kong, India, Brazil, Malaysia, and Pakistan expressed their views regarding the WTO–MEA relationship, highlighting that clarification in the area was not necessary and that “concerns in this area should not be exaggerated” (World Trade Organization, Trade and Environment Bulletin, No. 33 , p. 5).
30. See *Trade and Sustainable Development. Communication from the United States*, WT/GC/W/194. The US proposal on the elimination of subsidies that contribute to the fisheries overcapacity has created some convergence among WTO members. For example, Australia, Iceland, New Zealand, Norway, Peru, and the Philippines have also endorsed such initiatives (Jha, Vossenaar, and Hoffman, “Trade and Environment: Issues”).


32. India has stressed the need to address the potential conflicts between the goals of the TRIPS Agreement and the efforts to protect biodiversity and traditional knowledge. For a recent proposal see *Protection of Biodiversity and Traditional Knowledge. The Indian Experience. Submission by India*, WT/CTE/W/156 and WT/CTE/W/156Corr.1, 14 July 2000, suggesting the need to establish minimum multilateral standards to protect traditional knowledge. Such calls for international action have been endorsed by Brazil, Cuba, Malaysia, and Peru (World Trade Organization, Trade and Environment Bulletin, No. 33).

33. The GATT started to address this issue back in 1982, leading to the creation of a Working Group in 1989 for the analysis of trade-related aspects of the export of domestically prohibited goods and other hazardous substances. Between 1995 and 1998, Nigeria presented several proposals to the CTE and was particularly active in this area. *World Trade Organization, Background Note*. For a recent proposal, see *Trade in Domestically Prohibited Goods. Submission by Bangladesh*, WT/CTE/W/141, 15 July 2000.


36. For example, in a poll on “Americans and Globalization” conducted by Harris Interactive in April 2000, even though 68 per cent of those interviewed thought globalization was good for consumers, 80 per cent considered that protecting the environment should become a major priority of US trade agreements. See Aaron Bernstein, “Backslash: Behind the Anxiety over Globalization,” *Business Week*, 24 April 2000, pp. 38–44.

37. Prior to Seattle, several US environmental groups (National Wildlife Federation, Friends of the Earth, Sierra Club, Defenders of Wildlife, and the Center for International Environmental Law) pledged to oppose any request by President Clinton for fast-track authority if the administration failed to push for environmental reforms at the WTO (“Environmental Groups Urge U.S. Administration to Press for Reforms at WTO Ministerial”). Fast-track author-
ity allows the President to present draft legislation to Congress to implement a trade agreement that the government has negotiated. Congress approves or rejects the bill, without amendments. Fast-track authority lapsed in 1993 and a renewal has been blocked since. See, generally, Robert E. Baldwin and Christopher S. Magee, *Congressional Trade Votes: From NAFTA Approval to Fast-Track Defeat*, Policy Analyses in International Economics, No. 59, Washington, DC: Institute for International Economics, 1999.

38. Strong opposition was led by an international coalition of NGOs, which, especially in 1997 and 1998, organized a campaign—basically through the internet—to create domestic opposition in the capitals of the OECD countries, supported by members of the parliaments, especially in Canada, the United States, the United Kingdom, New Zealand, and Australia. For a perspective from key MAI opponents, see Maude Barlow and Tony Clarke, *MAI: The Multilateral Agreement on Investment and the Threat to American Freedom*, New York: Stoddart Publishing, 1998. For a look at both sides of the issue, see Stephen J. Kobrins, “The MAI and the Clash of Globalizations,” *Foreign Policy*, Fall 1998.


40. For a very illustrative example of the organizational skills of those leading the “battle” against globalization, see the interview with one of the leaders of the anti-WTO protests in Seattle, “Lory’s War,” *Foreign Policy*, 118, 2000, pp. 29–55.

41. “The Non-Governmental Order,” *The Economist*, 11–17 December 1999, p. 22. However, it is also important to stress that most analysts agree that the Seattle talks were in fact derailed not by the activities of NGOs in the streets, but by a combination of major divisions among the WTO members on key issues, lack of adequate preparation before the meeting, and problems with the consultation and decision-making procedures.


45. Ibid., p. 602.

46. *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998. One groundbreaking aspect of this decision was the Appellate Body’s conclusion that all the WTO agreements needed to be interpreted in light of the WTO preamble, which states that one objective of the organization is to support sustainable development and that no jurisdictional limitation exists that would prevent the Article XX provision on the environment from being used by a WTO member beyond its borders. Additionally, the Appellate Body established that a panel had the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by the
panel or not. This includes information from NGOs such as *amicus curiae* briefs. For reactions to the ruling see “WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules,” *International Environment Reporter*, 28 October 1998.


52. Pursuant to Article 19 of the Convention on Biological Diversity, the Conference of the Parties had decided to negotiate the Protocol to set the appropriate procedures in the field of the safe transfer, handling, and use of any living modified organisms resulting from biotechnology that might have adverse effects on biodiversity. The Protocol was agreed in Montreal on 29 January 2000. More information about the process, the treaty, and the official decisions is available online at http://www.biodiv.org/biosafe/protocol. The Protocol is open for signature from May 2000 to June 2001.

53. The agreement came as a surprise indeed—especially to the environmental community. Many feared the Protocol would not survive the concerns about potential conflict with the multilateral trading system and that pressure from strong commercial interests would lead to a collapse of the talks in Montreal. For more information about the process see Cosbey and Burgiel, *The Cartagena Protocol on Biosafety*.


