

# **Trade and Environment:**

*Prospects for the Millennium*

*Round of Trade Talks*

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## **Trade and the Environment - Prospects for the Millenium Round of Trade Talks**

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### **GATT and Environmental Issues**

#### Trade and the Environment

It is often said that most environmental degradation problems are caused by poverty, especially in developing countries. With people more concerned about the basic necessities of food and shelter, concerns of environmental protection takes a backseat. However, with increased wealth experts argue, there would be enough resources for people to take into consideration problems of environmental degradation and may lead to actions toward environmental protection. This leads to discussions of trade liberalization, the mandate of the WTO. With trade liberalization promising to bring tremendous economic benefits to millions of people worldwide, it is only logical to conclude that by bringing economic growth and thus wealth, this would also lead to better environmental protection. The problem is that there is no guarantee that this link would be made. Even the basic promise of economic growth through trade liberalization has been questioned recently due to the declining terms of trade toward the South, which has now contributed to a debt crises, payment deficits and more poverty. Also, trade liberalization policies are often harmful to the environment because they do not take into account the full impact of these policies on environmental degradation.

If we believe that poverty is a core link between trade and the environment, then we should also believe that trade and the environment cannot be considered alone. These issues must be discussed with concerns of development, or more specifically, trade should be considered as inextricably linked to sustainable development. The widely accepted relationship between the two lies in environmentally sound and “sustainable” production processes and the capacity to fulfill basic human need now and in the future.

This integration of trade and sustainable development has been difficult. The two areas are different in culture and in the nature of their communities and issues. The common element is protection. Within the environmental circle, the focus is the environmental protection of natural resources, which has a positive connotation. In the trade circle, the core goal is the removal of protectionism.

As seen in recent cases of environmental problems brought to the WTO, the conflict between environment and trade communities is based on a lot of fears and assumptions. There has been a fear that expanded trade would lead to economic growth and environmental degradation. But this is yesterday’s understanding of environmentalism. Now, most adhere to sustainable development and have incorporated the necessity for development with the importance of environment protection. It is not a problem with growth but rather the type of growth. If trade and environmental policies don’t develop concurrently, environment is likely to lag. This has been true in the case of Eastern Europe, where whatever economic gains there have been are now being offset by environmental damage and costs. Environmentalists also fear that those countries with high environmental standards will have to lower those standards to open trade and

compete with other countries. There is also a fear of a loss of industrial competitiveness and a fear that trade agreements will make it more difficult to enforce international environmental agreements like the Montreal Protocol.

Looking at the issue from the trade side, there is a fear that environmental policy will be used to hide trade barriers like the recent case of the ruling adopted by the state of Ontario on beer production in recyclable bottles. This ruling excluded US brewers who used aluminum cans, even though can recycling was environmentally better than bottle re-use. There is also a concern on the extent that environmental concerns hinder trade liberalization, leading to slower progress towards environmental agreements and protection. If you obstruct trade, the move for environmental protection can be slowed. Also, it is important to remember that the movement toward freer trade is always shaky. Too much weight on the trading system will crush the whole system and we will lose the economic benefit it promises.

### History of WTO work on Trade and the Environment

GATT's working parties started to consider environmental issues as they pertain to trade in 1971 with the set-up of the Group on Environmental Measures and International Trade. It was not until twenty years later, however, that this working group was activated under the request of a group of countries party to the GATT. At the end of the Uruguay Round of trade talks, trade ministers adopted a key decision linking environment and sustainable development issues to WTO work and setting up the committee on trade and the environment. With the concerns of the environment not being high on the political agenda of many countries at the beginning of the 1980's, the topic was never included in the Uruguay Round. In 1992, after UNCED, the GATT noted its lack of competence in dealing with environmental concerns raised in Agenda 21. It did recognize however, that the GATT has a central role in supporting the goals of economic growth and sustainable development. In 1994, the Marrakesh Ministerial Conference adopted a decision creating the committee on trade and the environment. This committee, has since then been working closely with other actors in the environment agenda, in order to find means of minimizing conflicts and fostering better understanding between the trade and environment divide.

### **The Shrimp Turtle Case: An Example of the Trade and Environment Debate**

The Shrimp and Turtle case followed the import prohibition in 1996 of certain shrimp and shrimp products by the United States. The ban was based on the US issued regulations in 1987 pursuant to the Endangered Species Act of 1973 requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices "TEDs" or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. The US by extending the application of the act to imported shrimp as well affected the shrimp exports of India, Malaysia, Pakistan and Thailand.

The main focus of the case was WTO's investigation on whether the ban could be considered a trade barrier. This is based on several aspects of the issues involved. One

was the determination of whether sea turtles are an exhaustible resource with some countries arguing that only non-living resources should be considered exhaustible. Another was the determination whether the US measure specifically targeted the preservation of the species. The WTO also looked at whether the measure was evenhanded or was discriminatory.

On the trade side, the inclusion of the production method (how the shrimp was caught) was interpreted as a good example of a protectionist and unilateral scheme. Countries have different national environmental priorities and resources, as well as different goals with regard to tapping the global trade system. What one country or society might find objectionable as far as production process is concerned may not be perceived as such by another. Also, the US enacted the measure without trying to obtain an agreement with the Asian countries that the measure was aimed at. This obviously corrodes confidence between trading partners involved in the issue.

As for unilateralism, the appellate decision has been, in some cases, interpreted to mean that unilateralism is acceptable to some degree. This is even though in the WTO, decision by consensus is the over-riding theme and that no one country should solely dictate the rules. For this purpose, it usually helps to define what prior actions with trading partners are necessary before such measures as the US measure in the Shrimp-Turtle case can be upheld. There may be a role for unilateralism, but defining it clearly in the future is vital.

On the environment side, this case presents a good case for consideration. It distills a lot of environment issues in a good way. For one, it is undeniable that turtles are part of biodiversity and that there is strong multilateral consensus that the species involved are in danger. The shrimp-trawling method harms the sea turtles at a key point of their development. Significant numbers of studies also show that efforts to get more of the turtles into the oceans are not having the desired effect of preserving the species. Also the solution proposed - trawler net attachments called turtle excluder devices or TEDs are easy to use, easy to purchase or make and have no competitive impact on trawling productivity.

However, even though there is strong multilateral consensus that countries have an obligation to protect endangered species, unilateral expansion of the application of national jurisdiction beyond a country's boundary goes against international law and national sovereignty. It also goes against the WTO's interpretation of the term "like products", which only considers a product in its state as it crosses a border and not based on how it is made.

The case, however, still begs the question of the interpretation of WTO rules. If there is a greater consensus towards giving priority to concerns such as the environment, then should the WTO ultimately consider a product's production process and methods in its definition of "like products"?

Obviously there would be certain problems that would arise from this. The shrimp-turtle case involves a clear, cost-effective way (TEDs) to make the shrimp production method

more environmentally friendly. In contrast, issues such as climate change involve a debate over a variety of methods with many cost ramifications. The question remains whether a balanced approach to PPM's could be found across the broad spectrum of environmental concerns that are expected to have trade measures or have trade related impacts in them.

Also, there is some reservation that this action of opening up the WTO to PPM's would open up a "can of worms". By letting issues such as production processes get involved in WTO rulings, would this also, sooner or later, initiate the inclusion of issues such as labor and health. This is notwithstanding the fact that the current exceptions in Article XX of the WTO do include for the environment and health but not for labor. With the WTO already dealing with topics such as intellectual property rights, the question remains if it would it be useful for the WTO to consider a broad range of issues together with its main role of promoting trade liberalization, and if so, would it be effective in this new role.

## **WTO in Transition**

### Forcing Non-trade Issues in a Trade Body

Even knowing that there is a clear overlap between the trade and environment agendas, it is still unclear how the different trade and environment agreements approach each other. Much more unclear is the functional separation or combination of issues that needs to be tackled by the different IGO's such as the WTO, UNEP, WIPO, WHO and others and if such combination of issues are clear.

The key to this enigma is the basic understanding that the GATT was created to address government failure, not market failure. Cooperative trade policies were perceived to improve the overall situation by improving and harmonizing government policies. What this means is that the GATT's structure of a rule-based system with an effective dispute settlement mechanism, we have seen that in the past ten years the beginning of steps to broaden the GATT to bring in it all kinds of issues and make it look more like UN agencies. By connoting the same government failure to manage social, economic, and environmental conditions to those of the GATT, these issues are more and more thought of as trade problems.

An example is the issue of the inclusion of development in the trade and environment debate where it is often said that it is difficult to appreciate trade and environment issues without including development. In many discussions within WTO, there is a lack of discussion of development issues. This seems as though it is a partial treatment of trade and environment issues as a result. The outcomes of rulings are another concern. When a ruling interferes with the sustainable development of a country, it becomes a problem. As a result, some developing countries consider the WTO lacks legitimacy. However, there are still questions on whether even sustainable development, as in health, labor and human health, which are all important human concerns, be even considered by the WTO.

The main discussion lies in the fact that when the problem does not draw “broader” international agency response, other international organizations step in such as trade bodies. Non-trade issues get forced in to trade realms by those who exploit the trade-related aspects. In this way, the WTO has become more powerful than GATT in the sense that it has now a wider mandate (such as in the case of intellectual property law). But if the WTO is to remain focused, non-trade issues should stay out of its mandate. Instead, there needs to be a strengthening of the other, more pertinent international bodies’ ability to address the problems.

The ability to impose trade sanctions makes it desirable to deal with non-trade environmental problems in the trade forum. But in the WTO there is no multilateral sanction and sanctions are more useful for developed rather than developing countries. Also, sanctions are somewhat indiscriminate to whom they punish - does it affect the government more than the consumers, or vice versa, for example. The WTO needs to export its dispute settlement mechanism regimes to other organizations so they can better deal with disputes over non-trade issues.

Many trade instruments exist that have nothing to do with the WTO and it needs to be recognized that the WTO is not the sole user of these tools. Unless other international institutions address non-trade issues well, there will be pressure to push them in to the WTO forum for consideration.

On a broader context, the WTO should have more of a role in the impacts of trade on real people. For this purpose, there is a need to bring back these broader concerns within the WTO mandate. However, it should not be thought that the WTO could deal with all of these issues together. What is needed is for the WTO to let other relevant institutions that have the mandate, to examine these issues too and work with the WTO in order to find coherent approaches to solutions. One recent example is the banana case where the development aspect of the dispute was not considered. It was seen as solely a trade issue. The development aspects could have easily have been managed by another UN organ like the UNDP (BRAD HERE). This highlights the fact that the WTO can’t do everything and the need for it to work with other organizations. The WTO needs to be focused on what it does well, which is dispelling protectionist trade policies. It can keep other concerns in mind, but it must be focused on its specific mandate. Other international organizations need to coordinate with the WTO and cooperate to address these different issues.

### What does “Like Products” Mean?

There are now several cases where the question of whether the consideration of PPM’s is illegal under WTO rules. The WTO has insisted that its interpretation of the term is simple. Two products of the same quality and make entering a border are judged as “like products”. (BRAD HERE!!!) How the products are made are immaterial to the description of the product. The interpretation of this distinction falls within the purview of Article XX of the WTO. The legal precedents of the interpretation of Article XX are not clear. Notwithstanding, it will be hard not to discuss PPM’s in addressing trans-boundary or international environmental problems. If PPM’s are to be considered, they

should be performance, not product oriented and should be as broad as possible. The Tuna-Dolphin case, for example considered the fact that the use of some dolphin-safe methods could harm other species. Countries involved need to negotiate, such as was lacking in the shrimp-turtle case where the US should have attempted negotiations. What is needed now is for the WTO to help facilitate such negotiations to ease conflicts.

### EIA for the WTO?

During the WTO High Level meeting on trade and the environment organized last March, there was a strong call by the developing world for an assessment of the environmental impacts of the last round of trade talks before even starting the new round. The WTO was proposing the possibility of doing an assessment for the new round, but this was not enough for the South, who highlighted the imbalance in capacity as one of the over-riding issues for determining which mechanisms were good for their constituents. If there was to be an EIA for a trade round, the question remains on how one goes about in doing it. Should it be multilateral or simply national? If it were the latter, then who would assess the global resource? Would this be an independent or government entity? Also it has to be decided if the needed approach is supposed to be retrospective or prospective. The answer is that both retrospective and prospective EIA should be done and done so in a sound scientific way.

### Balancing for the North and South

For developing countries, the primary need is to reduce tariffs in industrialized countries in order to help facilitate exports by developing countries. For effective implementation, there is a need for developing-country governments to enlist the help of NGOs in pushing this through. Developing countries also need to lower their own tariffs. But if industrialized countries want to use trade to boost the environment, developing countries need to tell industrialized countries to get their own policies in order.

### Needing an Ease in Subsidies

WTO does not favor domestic subsidies but leaves responsibility of proving commercial injury to the exporting country. Many subsidies can be bad for the environment and therefore this is a possible opportunity to address this linkage of trade and environment. One example of this is fisheries subsidies, which often result in over-capacity and over-fishing. Multilateral reduction or phase out of subsidies can even result in better economic performance of countries as fishing stocks grows leaving for better fishing opportunities and better income (BRAD HERE). In this case, reduction of subsidies would not only make good economic sense, it would also make good environmental sense.

Also, industrialized countries need to ease their use of subsidies, particularly those that harm the environment. Inefficient subsidies that are the result of a poor political decision must be the primary targets. There are areas where environmental improvement will aid economic and trade development. There is a need to agree on legal framework and that

the environment should not hinder development and economic growth. In this sense, PPM's must be looked at in a broader context, not just as a North-South issue.

### Allowing Independent Viewpoints into the WTO

Another interesting aspect that the Shrimp-Turtle case brought to the surface is the acceptance of the WTO of Amicus Briefs. These briefs are documents filled with information pertaining to a certain topic of debate at the WTO. Although the WTO is not compelled to accept such documents (in fact they are not even expected to read them), inclusion of such reports through country submissions as what the US did for this case, has increased its role in the dissemination of information (BRAD HERE).

There are a wide variety enough of viewpoints to warrant bringing as much environmental input as possible into the process. The international legal system is better served as a result. However, there are those who lack adequate resources to do so. There should be some type of international entity that would help countries with limited resources to prepare briefs. Such aid may come from partnerships with international environmental groups. The more environmental groups have gotten to know the links between trade and the environment, the more they have understood that compromises need to be made for progress to occur.

### **Prospects of Trade and the Environment in the Millenium Round of Trade Talks**

#### Views from the North and the South

The relationship between trade and environmental policies also is problematic because of the different ways they such policies are viewed by the North and the South. There is a sense of mistrust between the North and South. This needs to be overcome if we are to make progress.

One aspect of this is the understanding that liberalization is not just a developed country game. There are significant benefits to developing countries. There are holes and loopholes being discovered within the WTO agreement. The growth and development of the WTO system will require the participation of all WTO members.

Developed countries have a better ability to benefit from liberalization. What provisions can help developing countries better benefit from liberalization and globalization? We must take into account that developing countries are at different stages of developing and therefore will benefit to different degrees.

The benefits to developing countries regarding trade liberalization lies in the 30,000+ pages of concessions, as Jorge mentioned. Developing countries need to be in a position to add value to products. They also need to add more services. There is a lot of potential, but tariff advantage, competitive advantage, etc. must be considered.



There are many provisions, but many are not 100% enforceable. There are aims to address the needs of developing countries among all sectors, and there are some encouraging things to expect in a future round.

Also, it is important for developing countries to understand the rights, WTO tools and rules that they can use to help strengthen their positions.

There currently are two proposals aimed at helping developing countries understand their WTO rights and responsibilities: 1) Set up a foundation of attorneys to help developing countries develop their understanding; 2) Expand the capacity within the WTO. The latter seems the most viable because it is a considerable economic investment to hire a law firm. The problem, however, is that many see the role of the WTO as impartial. The above arrangement would obviously trample on this role.

### Looking towards Seattle

There are three ways to look at opportunities as we head to Seattle. These are a) look at the WTO rules; b) look at procedures; and c) look at overlap with environmental rules

As for looking at WTO rules, one key hurdle from environmental perspective is that a “necessary” policy is being viewed as the “least burdensome” option. There can always be found a least burdensome option if you look closely enough. The PPM controversy insists that everyone live up to the same standard, a requirement that does not always benefit your country. The current rules of the GATT do not recognize that the PPM of one country can adversely impact the environment of another country. For example, in the use of CFCs as a cleaning solvent, a country cannot refuse entry to a product that has been cleaned with CFCs (despite the Montreal Protocol) because it would make a judgement of the PPM’s.

There is a potential to have a portion of the millennial round focus on subsidies (trade and environmental aspects, such as agriculture). We need to build a stronger international environmental regime. There need to be coordinated actions of international environmental organizations and a synthesis of environmental goals and functions. There is a need to streamline environmental actions and make them as coherent as the trade sector’s. This is also key to making trade policies more sensitive to the environment.

Another key question that needs to be tackled in the upcoming talks would be the need to fix Article XX, or the lack thereof. This stems from the fact that it is vital to address environmental and resource problems, even if you are an avid free trader. Article XX may be fixed by reinterpreting the “necessary” portion to instead read, “technically and scientifically appropriate and proportionate the environmental goal.”

It is vital to recognize that it is in the interests of developing countries to have a strong WTO. If we do not have a system for rules and dispute settlement, decisions boil down to what countries are most powerful. A strong WTO should be on the agenda for all countries, developing and developed. There must be confidence in the WTO regarding

openness, legitimacy, etc. Dispute settlement must be viewed at “judicial” and fair, and allow NGOs and the media to observe. The public must feel connected to the process. Open meetings will help limit corruptive processes and deals. NGOs will not likely corrupt the system, as some believe they could do. Some sort of environmental impact assessment must be done before negotiations. This will help alert negotiators to the issues they need to address. In the world of uncertainty, it is key to include multiple perspectives.

This brings to the surface the question of procedure. Some argue that the main problem has been capacity, or lack thereof by the South. Similar concerns are mirrored on the submission of non-state actors of Amicus Briefs. However, despite varying abilities to show up at WTO all the time, there are still ways of even representation and openness. More openness and transparency in the distribution of documents and representation during hearings may be one possible solution. As for equal representation, Northern countries, if they are disproportional represented, usually beat on each other more often than not and not on Southern ones. As for the inability to sometimes physically attending meetings and hearings, technical advances in communications such as the internet has proved that all one needs is a computer with a modem to get as much information as possible on certain issues.

### Working Towards a GEO?

One suggestion made by the WTO Director General, Renato Ruggiero, during the WTO High Level Symposium on trade and the environment was the creation of a Global Environment Organization or GEO.

The WTO is far more advanced as far as institutional arrangement is concerned compared to most environmental bodies such as multilateral environmental agreements. This is because the WTO has a strong rule based system with an effective dispute resolution mechanism. With the environment side lacking such mechanisms, most cross cutting environmental concerns that also deal with trade gets pushed towards the WTO.

Some experts argue, however, that instead of bringing all these environmental issues to the WTO, where they don't have the expertise to deal with the issues, there is a need to strengthen the environment side with the possible creation of GEO.

The structure of this GEO would not deviate from existing UN and specialized organizations. It would however try to harmonize the roles by each organization. One suggestion for a GEO would involve a three-tiered organization. In the inner tier, UNEP and possibly the WMO would be merged. They would act as the overall overseer of the UN's environmental concerns. The next layer just outside of this core would be composed of all the MEA secretariats. By existing as one entity, they would share a common compliance and dispute settlement mechanism and would be administered integrally although they may still have autonomy in their decisions. Finally in the outer core would come other UN agencies or divisions thereof that have environmental activities.

The role and interaction between the WTO and the GEO could then be based on some problems that are defined as technical or scientific, for starters. As an example of how this could work, the WTO currently asks the IMF for guidance on some technical questions regarding financing. This could be an example of how things could work between the WTO and the GEO.