

TRADE AND ENVIRONMENT

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Globalisation and liberalisation are the twin processes marking the beginning of the twenty-first century. Today, we are confronted with maxims such as "Making Globalisation Social and Green" or "Globalisation with a Human Face." A myriad of new standards is in the making to handle the devastating effects of globalisation on developed and developing countries alike. Yet, there is no doubt that developed countries are the front-runners. Green consumers, healthy consumers, safe consumers are now in the driver's seat. Today, a trade war is erupting even between the US and the European countries over genetically altered crops and modified food, threatening trade and investment flows accounting for more than \$2,000 billion annually and providing 14 million jobs on both sides of the Atlantic. What are the underlying motives behind this state of affairs? Is it truly anxiety and concern for food safety, environment, morality and caring sentiments for human kind? Or are these kinds of trade wars waged for world hegemony and commercial interests with billions of dollars at stake? Is linking trade to environment a justified concern with honest environmental goals? Or are additional protection measures here at play?

1. BACKGROUND

The relationship between trade and environment is complex and critical. It is overburdened with suspicion and strained with misunderstandings that need to be addressed and clarified. To that end, it is appropriate to go as far back as the issuance of the Brundtland report around the mid-eighties. Brundtland, the Prime Minister of Norway at that time, chairing a group of eminent personalities, issued her famous report, in which she drew the attention of the international community to the interface between the environment and development, in the newly introduced concept of "sustainable development". When introduced at the 39th General Assembly in 1985, it was met with a great deal of scepticism on the part of developing countries in general. The notion of sacrificing today's development to preserve the environment for the development of future generations was viewed with resentment and misgivings. It took the international community a few years and a large amount of efforts to work out a smooth relationship between development and the

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environment and to establish close linkages between them, which culminated in an Agreement in 1992 at the UN Conference on Environment and Development held in Rio de Janeiro. The Agreement has laid down fundamental principles to be observed and specific measures to be undertaken for the attainment of environmental goals all framed in a detailed programme of action: Agenda 21. Some of the key principles of the Rio Declaration are particularly pertinent to our discussion:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3)

Eradicating poverty is an indispensable requirement for sustainable development. (Principle 5)

States have common but differentiated responsibilities in regard to promoting sustainable development. (Principle 7)

There should be a diffusion and transfer of technologies. (Principle 9)

States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries. (Principle 12)

Agenda 21 set out specific measures in trade, in particular, the promotion of "an open, non-discriminatory and equitable multilateral trading system that will enable all countries--in particular, the developing countries--to improve their economic structures and improve the standard of living of their populations through sustained economic development." In addition, a range of measures was agreed for the transfer of technology and the provision of new and additional financial resources to the developing countries for the implementation of the programme. Hence, Agenda 21 has laid down the basic principles as well as the overall framework within which the international community carries its burden of responsibility and has to work in order to protect, preserve and enhance the environment together with the development process, particularly in developing countries.

Nevertheless, in parallel to that event and far away in Geneva, while trade representatives were busy negotiating the Uruguay Round Agreements, environmentalists were adamant about integrating environment into the trade debate. Questions were raised regarding the intentions and reasons behind such a move, at a time when we had just successfully concluded the Rio

Conference. Were developed countries thinking of backtracking on the commitments and obligations they had agreed to within the framework of the UN Conference? Were developing countries justified in their apprehensions about the WTO debate? Were these apprehensions legitimate? It had not taken long to see that such doubts were proven to be well-founded. In addition to the persisting gap in the ongoing debate in the WTO, the lack of progress in the mid-term review of the Rio Programme of Action in New York in 1997 was yet another proof of the doubts and suspicions aired by developing countries already then. There has been obvious, and regrettable, backtracking on the obligations undertaken by the developed countries, especially in regard to improvement of market access for exports of developing countries, transfer of technology, and provision of new and additional resources. (In regard to financial resources it was estimated that the developing countries would require \$125 billion, in grant and concessionary forms, from the international community to implement the activities specified in Agenda 21. This requirement remains unmet.) Moreover, in the view of many developing countries, developed countries are effectively retreating from the holistic approach to sustainable development agreed at Rio. Their focus is now on unilateral measures and on environmental conditionalities attached to trade and investment. This trend is inimical to the attainment of both developmental and environmental goals.

2. THE TRADE AND ENVIRONMENT DEBATE IN THE WTO

Although the developing countries had initially resisted debating the trade/environment relationship in the WTO, they reluctantly agreed to it towards the end of the Uruguay Round. A decision was issued at the Marrakech Ministerial (1994) to that effect. A Committee on Trade and Environment was established to take the heat off the non-governmental organisations and to allow for a smooth signing and ratification of the Uruguay Round Agreements and the creation of the WTO, in particular by the Congress and the Nordic countries. Dealing with the relationship between trade and environment in the WTO has undergone various phases, at some point taking a leading priority in the framework of the WTO work, whereas at some other time becoming less attractive and thus occupying a lower profile. In all this, the central question remained how to reconcile the two systems, how to bring the trade and the environmental systems closer together, without undermining either, knowing that they are not necessarily always compatible. The two regimes are even often conflicting. The environmental regime allows taking measures that go beyond one's own borders for the sake of protecting the environment, whereas such measures would amount to a flagrant violation of WTO rules and regulations since the WTO does not permit extra-territorial

measures. The problem goes even further. Today we see a growing concern by environmental groups at the national level forcing the issue of national sovereignty against the country's obligations to abide by the WTO judgements. A case in point is the well-known dispute regarding 'Import prohibition of certain shrimp and shrimp products', between the US, on the one hand, and Thailand, India, Pakistan and Malaysia, on the other. Unhappy with the rulings of the panel and the appellate body on the matter, a coalition of US environmental groups raising the issue of national sovereignty succeeded in winning from the US Court of International Trade a ruling against the WTO dispute settlement panel. No doubt that such a ruling from the Court of International Trade would hamper US efforts to comply with the ruling. For them the US is compromising its national sovereignty for the sake of its international obligations.

Today, after five years of intensive discussion and learning about the relationship between trade and environment, many continue to have mixed feelings about how to truly go about this relationship. Traders and environmentalists have many a time stood helpless and perplexed in front of this conundrum, wondering how to accommodate environmental concerns in trade policy, without tampering with the trade rules. How to strike a balance between the need for governments to protect and preserve the environment, the boundaries and limits of such protection on the one hand, and avoiding its usage as a new protection measure, on the other hand, remains a sensitive and highly controversial issue.

It was only after long and mature consideration that many realised beyond doubt that the two systems could not be made to live together. Both systems cannot remain under the same roof, as their objectives as well as their methods of implementation vary. That does not mean, however, that trade and environment are not mutually supportive. In many instances they are. Nevertheless all efforts exerted and all the attempts made to incorporate environment within the WTO system were to no avail. As it was conceived by many, the issue at stake was of a completely different nature. The multilateral trading system cannot be used as a cover to achieve what the international environmental agenda has failed to accomplish through consensus. Based on this, Renato Ruggiero, the outgoing WTO Director General, was brave enough to come up with a solution, which is, to my mind, a straightforward and simple one. He explained that all we needed was a WTO-similar multilateral rules-based system for the environment, a World Environment Organisation which could also be the institutional and legal counterpart to the WTO. Such a proposal was put forward on a number of occasions, the last being the High Level Symposium on Trade and the Environment in the WTO, March 15th,

1999. This view finds even some resonance today. "Indeed, nothing would advance "trade and environment" harmony more than the creation of a Global Environmental Organisation to work alongside the WTO," writes Daniel C. Esty from Yale University in his presentation to the High Level Symposium.

Having realised the immense difficulties for resolving the trade and environment relationship and easing the tension which had developed in the WTO in this regard, the EC came up with the proposal for a high-level 'political' conference bringing the trade and environment ministers together in the WTO. As the debate in the WTO seemed loaded with suspicion and scepticism, developing country representatives in Geneva felt that the timing was not propitious, especially in light of the fact that many issues remained unsolved in this relationship. In their mind, this needed further technical work before it could be raised in a political forum. Together with developed country delegations, they agreed after long deliberations to turn the high-level 'political' conference into a non-official, non-conclusive symposium, gathering a wider audience, including notably the NGOs and academia, and to have a brainstorming session with a view to airing all positions, including those of civil societies.

It is astonishing that in spite of the general view that further work needs to be undertaken on all items of the agenda of the CTE, we do meet with pre-determined positions. Such positions continue to press for amending the WTO rules to accommodate the environment or call for the legitimisation of the PPMs approach in the GATT system, irrespective of the wide-ranging and serious implications [these could have] on developing countries and on their methods of production. In addition, such views and positions pay little attention to the concerns of developing countries in general. Market access and the new environmental conditions are keys in this respect. New protectionist measures are being arbitrarily imposed under the pretext of preventing that competition among nations becomes a race to the bottom because of lax environmental protection. The debate went around these and other issues for the last few years. Developing countries have defended their interests and stood firm for positions which might warrant today more explanation and definition, as the next phase of negotiations will not be less but by all means more controversial and forceful.

3. BASIS OF THE WTO TRADE/ENVIRONMENT DEBATE

It is worth noting that the trade and environment debate in the WTO is set within a consensual framework and based on three essential premises. These I would call the three Cs, reflecting Consistency with the level of development,

the Competence of the world trading system and allaying fears of additional Conditionality. Let me elaborate further.

First: The preamble of the ‘Marrakech Agreement Establishing the World Trade Organisation’:

No one denies the importance assigned to the protection and preservation of the environment in the preamble of the WTO Agreement. But, it is also equally true that the preamble emphasised that this be done in a manner **consistent with the countries’ needs and concerns at different levels of economic development**. What is of significance here is that the importance given to the environment was not absolute, but linked to the needs and concerns of the countries and their levels of development. I could even argue further that priority is attributed to development, as the protection and preservation of the environment can only be done to the extent [that it is] **consistent** with the level of development.

It is not difficult to draw a comparison between the WTO preamble and Rio Principle 7 mentioned earlier concerning the common but differentiated responsibilities of States in regard to promoting sustainable development. This principle was the anchor with which UNCED was based. This principle accepted that the northern countries had a greater responsibility in meeting the costs of adjustment in view of their larger role in environmental degradation as well as their economic capacity to absorb more costs. Whilst the developing countries would still need to grow and develop (sustainable, of course) to meet their people's needs. The North also made a commitment to provide adequate financial resources and technology transfer to facilitate the South's transition to sustainable development.

Second: The Marrakech Ministerial Decision on Trade and Environment:

The decision was clear in setting the terms of reference for WTO work on trade and environment. It stipulates in its fourth preambular paragraph that, in desiring to co-ordinate the policies in the field of trade and environment, this should be done **without exceeding the competence of the multilateral trading system**. It then goes on to explain that the ‘competence of the multilateral trading system’ is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members.

Again of utmost significance here is the framework the negotiators have agreed upon within which the environment could be dealt with in the WTO. They were adamant in making clear that it should not exceed **the competence** of the multilateral trading system, whose policies are confined to trade and/or trade-related aspects, i.e., only those environmental measures with trade effects.

Third: For the purpose of allaying any possible fears of a new 'green conditionality' attached to market access opportunities, thus nullifying the benefits accruing from trade liberalisation within the context of the UR, the Singapore Ministerial Report (1996) on Trade and Environment stressed the following:

1. The WTO is not an environmental protection agency and that it is assumed that WTO itself does not provide an answer to environmental problems.
2. Environmental problems require environmental solutions, not trade solutions.
3. No blank check for the use of trade measures for environmental purposes.
4. Trade liberalisation is not the primary cause for environment degradation, nor are trade instruments the first best policy for addressing environmental problems.
5. GATT/WTO Agreements already provide significant scope for national environmental protection policies, provided that they are non-discriminatory; i.e., GATT/WTO rules provide significant scope for Members to adopt national environmental protection policies. GATT rules impose only one requirement in this respect, which is that of non-discrimination.
6. Secure market access opportunities are essential to help developing countries work towards sustainable development.
7. Increased national co-ordination as well as multilateral co-operation are necessary to adequately address trade-related environmental concerns.

From the above, it is worth stressing that the first WTO Ministerial Conference was keen on elucidating the reality of the relationship and its rightful stance in the multilateral system. It was clear from the ongoing debate at the time that there was no quarrel about depicting the WTO as an environment-friendly organisation. As a matter of fact, the GATT allows for any action to be taken at the national level to protect the environment, provided it is in compliance with its basic rules and regulations. Articles XX, TBT, SPS are all cases in point giving each country the right to set the level of protection that it deems appropriate also in the environment, provided it does not act against the basic principles of the WTO as stipulated by articles I and III. In addition, it should not constitute an unnecessary barrier to trade.

Turning now to a few specific issues which were subject to intensive debate at the CTE, I shall start with the interrelationship between Multilateral Environment Agreements and the WTO, followed by Eco-labelling as a life-cycle-analysis and the problem of process and production methods. Market access and competitiveness as prime issues of interest to developing countries in the trade and environment debate will then be addressed extensively.

3.1. The relationship between MEAs and the WTO

The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements was the topic extensively debated and subjected to most controversy. In spite of the long and tedious discussions throughout the last five years or so, little rapprochement, if any, was achieved. Views on a number of issues were and remain wide apart of which the definition of MEAs, article XX, the issue of process and production methods (PPMs), the effectiveness of trade restrictions and whether they were the most appropriate instruments to advance environmental policies are but a few. Furthermore, the relationship between the multilateral trading system and the multilateral environment agreements has raised numerous difficulties and controversies. These have ranged from the hierarchy and compatibility between the two entities to the comprehensive framework of the MEAs that combines a mixture of incentives and trade measures to deal with environmental externalities. In the framework of MEAs, such positive measures as improved market access, capacity-building, additional finance and access to and transfer of technology were considered as effective instruments to assist developing countries to meet multilaterally agreed environmental targets. This was in sharp contrast to the much-disputed effectiveness of trade measures applied as sanctions in the purview of the WTO. And lastly, the issue of the scope for trade measures pursuant to MEAs under WTO provisions and

their unilateral application to address environmental problems that lie outside a country's national jurisdiction raised wide disagreements and was sternly contested.

In this debate, developing countries had to defend themselves on a number of fronts, as follows:

1. Developing countries kept on arguing against the intentions of developed countries of arming the WTO with additional power to protect the environment, as this would only have the effect of elevating the trade measures, i.e., sanctions to the level of priority tools for the environment. This would undermine the international consensus reached on a whole range of positive measures negotiated at length within the framework of the multilateral environmental agreements. Isolating the trade measures will not serve the purpose and could prove to be detrimental to the environment as they deprive developing countries from an assured source of resources. Such resources could be directed, among other things, towards the protection of the environment. Furthermore, in order to determine the necessity and effectiveness of the trade measures, these will have to be assessed together with other measures in a holistic framework, such as the one provided for by the multilateral environment agreements. Countries cannot press for the use of trade measures only because they are less expensive and hence more appealing to politicians without weighing the pros and cons of such usage in an objective and comprehensive manner. On the contrary, MEAs should provide developing countries with the 'carrot' to entice them to comply with their obligations under such agreements if, as proclaimed, preserving and protecting the environment is the ultimate goal.
2. Regarding the issue of hierarchy, developing countries succeeded at the Singapore Ministerial in undermining the attempts made by developed countries to give precedence to the MEAs over the WTO's settlement of disputes. The underlying reasons were clear, developing countries refused the dominance of environmental considerations, as advocated in the MEAs over the WTO DSU as guided by the key principles of the trading system, notably the most-favoured-nation and national treatment, as well as the rejection of unilateral measures. Developing countries felt that under no account should they give up or weaken their inalienable rights to have recourse to the WTO DSU by giving primacy to

settling disputes through the MEA. That did not mean, however, that MEA as a venue was disregarded or foreclosed. MEAs remain a viable option for disputants to settle their disputes, if they so wish.

3. The repeated attempts made by the European Commission to re-interpret or even add an amendment to the WTO rules that would prioritise the environment or make it an exception through what they would like to perceive as an "environmental window" were doomed to failure. Developing countries have stood firm against any amendments to the WTO rules in order to basically legitimise inconsistent trade measures in the WTO. They insisted that any effort to reopen the WTO rules would mean imposing environmental conditionality to trade and would give sufficient ground for unilateral measures that would amount to protectionism and restriction of market access under the guise of protecting the environment. It was also recognised that, in principle, trade measures taken pursuant to MEAs were not to be challenged by the WTO membership, as the majority are equally members in the MEAs. Furthermore trade measures within the MEAs, as multilaterally agreed upon, were tolerated, and many of them were even quite often pushed by developing countries themselves. This has been the case in the Basel Convention, in the Prior Informed Consent Convention on Hazardous Chemicals, etc.

It is astonishing to see that voices are still raised to introduce substantive changes in the GATT. These changes evolve basically around the following:

1. Amending article XX under the pretext that article XX, as it is currently applied, gives prominence to trade goals over environmental ones. In my view this is an incorrect way of looking at things. WTO is a "Trade Organisation," and its main concern is implementing trade goals. It deals with trade and is the organisation entitled to rectify any wrong-doings in the area of trade. Neither it nor its trade representatives are empowered to exceed their limits and deal with issues other than trade and trade-related issues, be they social clause, human rights, child labour, or others. In addition, it has been cited that article XX is flexible enough to accommodate legitimate environmental concerns. It is precisely with this in mind that we have seen negotiators stressing in the fourth preambular paragraph of the Marrakech Ministerial Decision

on Trade and Environment the competence of the multilateral trading system.

2. Another substantive amendment voiced to the current GATT structure that would facilitate peace between the trade and environment camps would involve the recognition by the GATT that, in an ecologically interdependent world, *how* things are produced is often as important as *what* is produced. In particular, environmental standards that relate to production processes and methods (PPMs) cannot always be rejected and judged indiscriminately to be violations of the GATT. On the other hand, accepting the introduction of PPMs in GATT/WTO would amount to the imposition of a country's domestic environmental values or policies onto other countries. As environmental standards and PPMs are based on values that differ from one society to another, it would be difficult to internationalise PPMs and require all countries to follow the same production methods. On the other hand, we have to distinguish between environmental standards which are product-related, such as disposal and handling, and with which we have no quarrel and non-product related standards, which do not affect the final product. The risks of setting and accepting ecological standards for PPMs in the GATT today are twofold. First, these standards will most likely be the ones used in developed countries, thus allowing environmental standards to be easily manipulated for protection purposes. Second, setting ecological standards for PPMs could be used as an opening for over-stretching the concept in the future and taking it as a precedent to incorporate other non-trade related goals such as labour standards, human rights, good governance, other standards and all sorts of other domestic pressures that have hardly any relationship with the WTO.

3.1.2. *The shrimp-turtle dispute*

It is also worthwhile to refer briefly to the 'shrimp-turtle dispute' mentioned above. In this case, the 'Convention on International Trade in Endangered Species of Wild Fauna and Flora' (CITES). The two reports (panel as well as the appellate body) are precedent-setting. They are the first WTO rulings concerning a trade embargo based solely on domestic environmental legislation forced by the US as the only country that interprets article XX so broadly as to allow for extra-territorial measures to protect the environment beyond its territories. It was obvious from the very beginning that the issue at stake was not a trade measure mandated by an MEA (in this case CITES), but

a measure (to address a global environmental concern) applied unilaterally by one country.

For the US, the case was the right of WTO Members to take measures under article XX (b & g) of GATT 1994 to conserve and protect natural resources, as reaffirmed and reinforced by the preamble to the WTO Agreement. For the complainant, it was a case about the imposition of unilateral trade measures designed to coerce other Members to adopt environmental policies that mirrored those in the US. The US based its entire defence on article XX, which allows countries to take measures contrary to GATT obligations when such measures are necessary to protect human, animal or plant life, or health. In this case, the US argued that the trade measure was necessary because sea turtles were threatened with extinction and the use of turtle excluder devices on shrimp nets was the only way to effectively protect them from drowning in shrimp nets. Overall, the panel stressed the WTO's preference for **multilaterally negotiated solutions.**

Furthermore, the panel focused its analysis on the heading or 'chapeau' of article XX, which requires legitimate trade restrictions to be applied 'in a manner, which would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.' The panel found that interpreting the chapeau in a way which would allow importing countries to restrict market access according to exporters' adoption of 'certain policies, including conservation policies' would mean that 'GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members'. Such an interpretation, the panel felt, could lead to 'conflicting policy requirements' since exporting countries would need to conform with different domestic policies in importing countries, thus threatening the 'security and predictability of trade relations' under WTO agreements. It therefore drew the conclusion that 'certain unilateral measures, insofar as they could jeopardise the multilateral trading system, could not be covered by article XX.'

The panel reaffirmed the logic of developing countries that the WTO cannot be made responsible for safeguarding all kinds of different interests giving leeway to members to pursue their own trade policy solutions **unilaterally** thus re-instating power politics. This would certainly amount to an **abuse** of article XX exceptions, as the panel put it and thus a threat to the preservation of the multilateral trade system based on **consensus** and **multilateral co-operation**. It is worth recalling at this juncture that to do away with a power-based system and to replace it with a rule-based one, was an

essential objective of the 7-year round of negotiations which hardly anyone would want to give up today.

Without much ado, the appellate body has equally concluded that the US measure was also 'unjustifiably discriminatory'. In its results, the appellate body was more cautious and less blunt than the panel. Trying to find some justification to the US measure, it characterised the ban "as an appropriate means to an end", however, its application was at fault. It attributed the unjustifiable nature of the discrimination to the failure of the US to pursue negotiations for consensual means of protection and conservation of sea turtles, resulting in a 'unilateral' application of its trade measure. It further agreed that the US also applied the measure in an 'arbitrary discriminatory' manner between countries where the same conditions prevail, contrary to the requirements of the chapeau of article XX. The application was discriminatory, according to the appellate body, in giving a longer grace period to Caribbean countries than to the Asian nations, in not transferring technology to them on similar terms, in its lack of transparency, etc.

The appellate body then stressed that it has not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. As referred to: "Clearly, they can and should." Though the results of the appellate body were hailed by the US Ambassador in the WTO, similar satisfaction was not expressed by US environmental NGOs, which, as mentioned earlier, brought the case to the US Court. The appellate body results, in my view, do not amount to reversing the panel ruling as some would like to perceive, but rather falling under what the Singapore Ministerial attempted to elucidate. GATT/WTO Agreements do provide significant scope for national environmental protection policies provided that they are not discriminatory. This is how, I believe, the appellate body findings and conclusions should be regarded as not attempting to overturn the consensus reached in the WTO CTE, but rather strengthening it. In any event arguments to re-interpret article XX to address the environmental concerns for fear of the trend by the appellate body to expand, on its own, the meaning of article XX, remain void. There is no doubt that neither the appellate body nor the panel are entitled to attempt to interpret the WTO rules. **Interpretation of the rules is the sole right of the Membership.**

3.2. Eco-labelling

Eco-labelling is another controversial issue. Each country has the right to institute some regulations on Eco-labelling on products. The concern is that it should not be used for protectionist purposes, applied or encouraged by some

countries selectively to products that are imported or that compete with their own products.

The principal fear of developing countries in dealing with the issue of Eco-labelling in the WTO was the attempt to extend the coverage of such labelling - even though on a voluntary basis - to non-related PPMs. They fear the whole range of implications such an extension would produce not only for their exports but more to the systemic problem it raises in the WTO. It will amount to writing new rules for a system which has so far served the international community and the world trading system well. The problem of subjecting Eco-labelling, which is based on life-cycle-analysis (LCA), to WTO rules and disciplines lay in the conflict it would raise with the product-based rules of the GATT/WTO trading system. The multilateral trading system has functioned as a system confining itself to end-products. Discriminating between 'like products' and making market access conditional on complying with PPMs, thus legitimising unincorporated PPMs, i.e., non-product related, would upset the entire trading system and would have devastating effects, in particular on developing country exports.

In this context, it is essential to recall Principle 11 of the Rio Declaration which stipulates that environmental standards, management objectives and priorities should reflect the environmental and developmental contexts to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. Accordingly, disciplining Eco-labelling schemes should be on the basis of equivalencies and mutual recognition, where each country has to set its standards according to its own values as stipulated by Agenda 21. Aiming at this point in time to harmonise or internationalise PPMs on the basis of any set of multilateral guidelines amounts to contradicting what the international community has agreed upon unanimously in Agenda 21.

3.3. Market access and competitiveness aspects of the trade/environment debate

One cannot address the interface between trade and environment without looking at the market access and competitiveness aspects of such a relationship. These aspects tended to be downplayed and even overlooked at the beginning of the debate for the obvious reasons stated earlier. Needless to reiterate that the whole debate was triggered by developed countries targeting specific issues of their own concern. As developing countries became gradually aware of the underlying reasons and cognisant of the objectives of such a debate, they rightly pushed issues of their interest to the fore. It should be stressed, however, that such a move on the part of developing countries was on no account for the purpose of reaching eventually some trade-offs. On the one hand, their refusal to amend or re-interpret article XX or introduce non-related PPMs was based on systemic principles, which cannot be subjected to any bargaining, as they would alter the very essence and basics of the system. Bringing in market access and competitive concerns was, on the other hand, to straighten the lopsided debate, add balance to it, and put it in its right perspective.

The debate on this issue was set from the very beginning in a North-South context. This has rather caused harm than helped the debate advance on this topical issue.

We continue to encounter false allegations by firms in countries with high environmental standards and costs of compliance that they are often undercut by competition from companies based in countries with less strict regulation and lower costs. In theory, this may lead to entire industries departing for countries with lower standards, the so-called 'pollution havens'. So far, however, no evidence has shown that such a theory came into effect. The reverse was also not experienced on a large scale, i.e., that high environmental standards were a factor in location decisions or have led to relocation of industry.

On the other hand, the debate on market access from the perspective of developing countries tends to be twofold. One is how to ensure that existing market access conditions are not eroded by emerging environmental requirements and the other is how additional market access -- through what can be perceived as win-win situations -- can help promote environmental protection and sustainable development. In this context, developing countries have tried to concentrate on identifying sectors of export interest to them. These could be textiles and clothing, leather, footwear, furniture and other

consumer goods and other labour-intensive sectors, where environmental measures could affect existing market access opportunities and thus possibly nullify or impair the Uruguay Round results. In fact, empirical studies, mostly done by UNCTAD, show that sectors of interest to developing countries are those most prone to environmental standards often set unilaterally by the importing governments. Such standards negatively affect developing countries' market access, although the environmental effects of textile production could mainly be local and do not affect the final characteristics of the product. In addition, there are few, if any, trans-boundary externalities.

Furthermore UNCTAD's studies have also demonstrated that small and medium enterprises in developing countries have encountered difficulties in complying with environmental policies emerging in the above-mentioned sectors. Such policies have had significant effects on the competitiveness of SMEs in developing countries and have in many instances acted as barriers to trade. A number of reasons have been stated, among which the following:

1. The possibility of compensating for the loss of competitiveness in some sectors by gains in others is higher in diversified and dynamic economies, which are not necessarily the main characteristics of developing countries.
2. Developing country exporters are normally price-takers, as they compete on the basis of price rather than of non-price factors, such as technology and ideas. Consequently, any environmental requirement resulting in a cost increase reduces export competitiveness. It nevertheless may vary from one industry to another as well as among different developing countries with different stages of development and their capability to integrate innovative approaches.
3. UNCTAD had also stressed on several occasions that the problems of adjustment were higher for small and medium enterprises in developing countries, especially as they are important players in the export promotion strategy for sectors such as textiles, clothing and footwear. Thus the need to examine the possible conflict between the export promotion strategies of developing countries and their need to comply with environmental requirements and their effects on competitiveness becomes all the more relevant.
4. The variable cost component of complying with environmental standards is higher in some sectors compared to others. Again

evidence has shown that it is higher in sectors of interest to developing countries, especially leather and footwear, as well as textiles and garment sectors. For example, in the leather tanning, costs of chemicals required to meet international standards were approximately three times the costs of conventional chemicals.

Two additional topics remain germane to the market access and competitiveness debate. These are:

1. Internalisation of environmental costs, and
2. Charges and taxes for environmental purposes.

Though these topics are not new and have in fact been debated at length, they remain contentious and difficult, especially if the idea is to add them to the trading agenda. The concept of internalisation remains difficult to adapt in the GATT on the ground that it interferes with the efficiency of the comparative advantage principle, which is central to the free trading system. The tendency of considering that lack of internationalisation is a kind of "implicit subsidy" which would be actionable under the GATT/WTO is a non-starter. Furthermore, environmental externalities are in principle not distinguishable from other factors that contribute to the comparative advantages and thus competitive edge of an economy, such as education, infrastructure, social policy, etc. Are we to conclude that the costs of all these factors are to be integrated in the production processes under the auspices of the multilateral trading system? That domestic producers internalise their environmental costs is in no way conflicting with GATT principles. However, that countries start implementing trade policies based on whether or not foreign producers have internalised their environmental costs becomes problematic under the GATT. The GATT would be more concerned with the trade distorting or discriminatory effect of such a policy, its necessity and effectiveness, rather than with the policy's environmental objectives.

As for charges and taxes for environmental purposes, no one can deny the validity and effectiveness of imposing taxes as such. But what is at play here is imposing taxes on a phenomenon that is **not quantitative**. Forcing producers to incorporate environmental externalities by imposing taxes on products made with pollution processes is based on the assumption that the costs of the polluting firm and the damage function of the polluted firm are known. On the other hand, if this is true at the national level, it can only be more complex and difficult if an importing country aims at adjusting such a cost at its borders through imposing border tax adjustment on its 'like' imports. Also the

question of what would be the appropriate tax for pollution which would be accepted internationally is still an open question.

Border tax adjustment (BTA) should pass the necessity and effectiveness test to find out how necessary, useful and pertinent they are to the environment, before even debating how to adjust them at the border. The effectiveness of border tax adjustment is doubted and is even contrary to the widely- acknowledged fact by developing and developed countries alike that environmental problems should be addressed at the source. So how can a tax imposed on final products, as border tax adjustment, be effective for problems which should be dealt with as far upstream in the production process as possible. And also as rightly put by UNCTAD, it was in general better if the tax is levied on the production and extraction processes causing the environmental problems rather than on the resulting product. In other words, a tax levied internally by the producing country would be more effective in dealing with the environmental problems at their source. As mentioned earlier, the GATT neither prohibits nor prevents any country from pursuing a policy of taxation or regulation with regard to environmental protection as long as these policies apply to its domestic consumers and producers. In fact, one can even go one step further. For BTA on imports to pass the compatibility test in GATT, it has to satisfy the following conditions:

1. that the tax levied is product-related;
2. that the imported product has not been taxed in the country of origin, i.e., to avoid double taxation;
3. that the imported product has caused trans-boundary pollution and the polluting input was not consumed domestically.

Similar to their stance on the process and production methods in Eco-labelling, developing countries insist that there should be an explicit reference to addressing charges and taxes, which only relate to product or product characteristics that are covered by WTO provisions. At any rate, the debate on this issue remains wide open so as to study the environmental effectiveness and potential trade effects of levying environmental taxes and charges, particularly on market access and competitiveness.

Before concluding, let me state that no one can deny the fact that the relationship between trade and environment has been debated extensively in the WTO. This has undoubtedly helped clarify the status of such a relationship in the framework of the organisation and shape positions in response to the

underlying motives and objectives. Today, before even settling this complex relationship, we are confronted with a more difficult and cumbersome theme, that of linking trade to labour standards. Though from the very beginning such an inclusion has met with strong objections, it will continue to be pushed in the WTO mainly by the US for obvious reasons, which lack of space does not permit to address here. One thing is clear, however, developing countries have to remain firm on their positions on trade and environment in regard to changing of the rules. Such a move will only serve as a prelude for the integration of the "social clause" in the WTO, which should be of more serious concerns and wider implications for them.

4. CONCLUSION

The Seattle Ministerial in December 1999 and the proposed Millennium Round will be a turning point for the Trade and Environment debate. It will decide on where to take the debate from there. One thing remains clear is that a great deal of work and education continues to be needed before drawing conclusions or reaching the stage of negotiating rules and disciplines. The trade and environment relationship continues to be an area teeming with difficulties, complexities, and most of all sensitivities. Throughout the article I have tried to show that so far we have worked within a consensual framework. To attempt to tamper with such a framework for new additional objectives will necessitate a new consensual framework. The attempts by the international community to [put] forward some alternatives remain in their very first stages. They will need further in-depth studies. Options stay open to settle for either:

1. To carry the debate onwards in the WTO CTE parallel to the Millennium Round with a view to bringing the two ends closer. An option which will hardly achieve results the debate having been exhausted in view of many.
2. The so-called 'Ruggiero' option presented earlier: a World Environment Organisation to be the counterpart to the WTO, a pragmatic and likely workable option in view of the difficulties encountered so far, though still resisted by mainly developed countries and their NGOs.
3. A third option, which is still to be tested, is mainstreaming the environment in the various Agreements, such as Agriculture, TRIPs, Textiles and Clothing and others. The amount of complexities and controversies inherent in such an option are difficult to anticipate. But one thing one should caution against is

that such an option carries with it the inherent risk of doing away with the sensitive balance negotiated in the WTO CTE between issues of interest to developing and developed countries alike, thus precluding the possibility of trade-offs, if any. With such an option, issues of market access will be spread thinly over different agreements, and we will be left negotiating the two topics of concern to developed countries, i.e., the relationship between trade and environment and PPMs, separately.

In spite of the extreme efforts made in order not to label the trade and environment debate as a North-South issue, these have hardly borne fruit. No one can deny that there is evidence of a conflict between developed and developing countries that will continue and deepen unless the existing doubts of linking environmental interests with protectionism are dispelled. The challenge is to separate the protectionist from the environmentalist. The environment cannot be safeguarded and enhanced through trade sanctions. Benefiting the environment must be through access to technology, increased awareness, financial resources and access to markets, without which developing countries will find it tremendously difficult to generate the resources necessary to protect their domestic environments and the global commons.

Let me conclude by stating how Rubens Ricupero, The Secretary General of UNCTAD, perceives the trade/environment relationship. "Trade and Environment are two poles in a dialectical thesis where the resulting synthesis should conciliate the two ends. Unlike many, [I] would like to believe linking trade to environment does not come as something natural. To reconcile these two ends necessitates tremendous efforts--and not without sacrifices--where environment should not be treated as a late consideration or an afterthought". Let me then stress that to deal with environmental problems is to deal with these problems at their roots and integrate environment in the decision-making process since the very beginning. The best way to do this is to provide the necessary technology and make available the necessary financing, knowledge and expertise for the preservation and protection of the environment.