

## The Roadmap

Absent any sort of multilaterally agreed assessment framework, this paper tries to briefly weigh the WTO's success at achieving its objectives in six major areas:

- trade and the environment;
- trade and development;
- the negotiation process;
- multilateral governance;
- dispute settlement; and
- the accession process.

In each of these, the analysis assesses progress and lays out a roadmap of areas in which the WTO needs to work—or collaborate with others, as the case may be—in order to achieve its basic objectives, as elaborated above. It does not seek to answer with authority all the questions related to how progress should be made in those areas, but rather seeks to set out clearly what are the challenges, why they are important, and what considerations should guide those who are interested in pursuing them.

### 4.1

#### Trade and the environment

It was noted above that the WTO Members have committed, both in the agreement establishing the WTO and in the Doha Declaration, to the objective of sustainable development, which includes the need to make economic development environmentally sustainable. It was also noted that most of those countries have, in the context of agreements such as Agenda 21, various MEAs, agreements on development and trade and investment-related agreements, made similar commitments to sustainable development and environmental protection. In setting out a roadmap for the WTO to follow in pursuing this objective, we must first answer the following questions:

- What areas of need are there? Where are the important linkages between trade and environment, from a WTO perspective?
- Where do the boundaries lie between those efforts that are the mandate of the WTO and those that are the mandate of others?
- In what ways should the WTO collaborate with the institutions that have a mandate to undertake those efforts?

16 Each of these questions is addressed below.

*What are the areas of need?* In elaborating the areas of relevant linkage between trade and the environment there is, fortunately, no need to start from scratch. The WTO's Committee on Trade and Environment (CTE) was given a 10-point work program (see Box 1) at the time of its establishment in 1995, with an ambitious mandate that included making "appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required" in light of its analysis and discussions.<sup>18</sup>

As well, the Doha Declaration gave negotiators a mandate to negotiate on a number of environmental topics, including some from the CTE's long-standing work, with a view to enhancing the mutual supportiveness of trade and environment. Those topics were:

- "The relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."<sup>19</sup>
- Procedures for regular information exchange between MEA Secretariats and the relevant WTO Committees, and the criteria for the granting of observer status.
- The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."<sup>20</sup>
- Fisheries subsidies: "In the context of [the WTO rules] negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries."<sup>21</sup>
- TRIPS: examining the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD).<sup>22</sup>

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18 Trade Negotiations Committee, "Decision on Trade and Environment." MTN.TNC/W/141, 29 March 1994.

19 As a number of observers have noted, this mandate is so narrow as to be useless. It deals only with the issue of disputes where both members are Party to the MEA in question (see discussion below), and refuses *ex ante* to countenance the possibility of changes in the balance of rights and obligations, meaning in effect no rule changes are possible. See Tarasofsky and Palmer (2007:14ff).

20 Paragraph 31, Doha Declaration.

21 *Ibid*, paragraph 28.

22 *Ibid*, paragraph 19.

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**Box 1: The CTE's 10-Point Work Plan**

1. The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
  2. The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
  3. The relationship between the provisions of the multilateral trading system and;
    - (a) charges and taxes for environmental purposes
    - (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
  4. The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
  5. The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
  6. The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
  7. The issue of exports of domestically prohibited goods;
  8. The relationship between the environment and the relevant provisions of the Agreement on Trade in Services;
  9. The relationship between environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and
  10. Relations between the WTO and other organizations, both non-governmental and inter-governmental.
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18 The CTE was also instructed to pay particular attention to three items from its work program, though no negotiations were mandated in these areas:<sup>23</sup>

- The effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;
- The relevant provisions of the TRIPS Agreement; and
- Labelling requirements for environmental purposes.

While these mandates are an important backdrop for considering what topics need to be addressed, they should not be considered the final word on the subject. They were cobbled together by negotiated agreement, rather than by a considered process of priority setting, and contain significant omissions and shortcomings. The first item of business in the roadmap for the environment is to more carefully elaborate the full spectrum of relevant linkages. This will demand a process that involves a wider group of actors than trade policy-makers (it should include, among others, UNEP, various relevant MEAs, civil society and business), and should not hesitate to include in its final results topics that are outside the mandate and expertise of the WTO.

While any legitimate list of topics or linkages would have to come from such a process, it is still possible to say a few words about some of the more obvious candidates. It bears repeating that this list is not necessarily a list of items on which the WTO should take a lead, or even necessarily have a role. The question of where to draw the lines of the WTO mandate on trade and environment is addressed in the following subsection.

The Doha mandate:

- The environmental goods and services negotiations have been extremely difficult, faltering on arguments about how to define environmental goods. Most would agree that the list should include clean energy technologies such as wind turbines. It could also include goods that emit less pollution and/or use fewer resources in their end use than their conventional substitutes (e.g., biofuels, energy-efficient appliances). And it could include goods that emit fewer GHGs in the process of production. The second and third categories (clean end use, clean production) are inherently more difficult, since they require agreement on a relative

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23 *Ibid*, paragraph 32.

standard—the good or technology in question must be cleaner than some baseline—and the WTO is arguably not expert at such judgments.<sup>24</sup> The third category would also possibly face resistance from countries that are opposed to the use of trade restrictions based on processes and production methods (PPMs).<sup>25</sup> A focus just on the first category would also face some resistance, however. Exports of low-emission technology tend to concentrate in certain countries (mostly developed), which might be seen as receiving unbalanced benefits from a narrower agreement. In the end, as difficult as they are, these negotiations are potentially useful, and are an obvious way in which trade policy could contribute to environmental objectives.<sup>26</sup>

- The Doha talks on fisheries subsidies too are potentially valuable. Subsidies in the fisheries sector lower the cost of fishing and lead to overexploitation of the resource—too many fishermen and too many boats chasing too few fish. Government subsidies have been estimated at some 20 per cent of the value of the worldwide fish catch, and have contributed to declining fish stocks and marine environmental damage, particularly in the developing countries where the surplus capacity is often exported. These talks hold perhaps the greatest potential in the Doha work program for environmental good if an ambitious agreement can be reached. Some have also opined that if these talks succeed they may help pave the way for consideration of the next big item on the perverse subsidies agenda: fossil fuel subsidies.<sup>27</sup>
- The MEA talks on regular information exchange between the WTO Committees and MEA Secretariat should be a straightforward housekeeping exercise. But the question of observer status has made this important item more difficult than it should have been, and observer status for MEAs in WTO bodies is being linked to controversial broader talks on observer status—talks that have stalled over non-trade-related political disputes. Until the two issues are separated, progress will be difficult or impossible.
- The talks related to the relationship between WTO rules and specific trade obligations set out in MEAs, are even more difficult. Arguably, however, there is a need to take a step back and ask whether any such process is even necessary. For disputes between

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24 Aguilar, Ashton, Cosby and Ponte (2009).

25 The argument is that such restrictions may offer too much scope for imposing governments to protect domestic industries. See IISD/UNEP (2006), Section 5.1.

26 See Stilwell, 2007; ICTSD, 2008.

27 For a discussion of the potential value from a climate change perspective of reforming these subsidies, see UNEP 2008.

WTO Members that are party to an MEA (which is all the Doha mandate covers), the WTO Members have already agreed that the disputants should first seek remedy within the MEA channels, and the old adage: “if it isn’t broken, don’t fix it,” would seem to apply.<sup>28</sup> For disputes between Members that are not both parties to an MEA, there is no easy answer, and any such case will involve a determination of whether the non-Member’s rights have indeed been breached and, if so, whether the measure or measures were justified by the objective of environmental protection. To date, the DSM, and notably the AB, has done a good job of balancing the need to respect Members’ rights and the need to allow Members to enact *bona fide* measures that achieve non-trade objectives in the area of environmental protection.<sup>29</sup> One of the key deciding factors has been the question of distinguishing between environmental protection and economic protectionism, with the former favoured and the latter not.<sup>30</sup> It is unlikely, perhaps impossible, that the Members could arrive at any negotiated agreement—even given political will—that would substitute for the considered judgement of the panels and AB in such matters.

- The area of the relationship between the TRIPS Agreement and the environment, and specifically between TRIPS and the CBD, is one of the most striking examples in the Doha Agenda of issues where environmental and development objectives come together. The most salient and promising proposal here is for patent applicants to be forced to disclose the provenance of any genetic material used in their innovations. This would help ensure that such material had not been appropriated without the sort of benefit sharing arrangements that are mandated in the CBD. This issue is practically the only surviving negotiating item from the vast developing country implementation agenda (i.e., work items related to the difficulties that developing countries are having in implementing the raft of commitments they undertook as part of the Uruguay Round results) and should be a priority area for action.

28 Agreement was reached in the CTE in 1996 that “While WTO Members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA.” Singapore Report of the Committee on Trade and Environment, 12 November 1996, WT/CTE/1, para. 178.

29 For an overall assessment of the state of trade law and the environment, see Mann and Porter (2003).

30 See, in particular, *U.S.-Shrimp* (WTO Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/R/AB, and Panel Report as modified by Appellate Body Report, WT/DS58/R, 6 November 1998) and *Brazil-Tyres*. (WTO Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, and Panel Report as modified by Appellate Body Report, WT/DS332/R, adopted 17 December 2007.)

#### Other items from the CTE work plan:

- In the area of market access, and how it may be impeded by environmental standards and labelling, the WTO already offers procedural protection to exporters in the way of opportunities for comment on draft regulations, a preference for reliance on international standards and the need for science-based regulation.<sup>31</sup> The studies in this area to date seem to indicate that the most significant problems lie in the inability of developing country exporters to meet those standards, rather than in the standards themselves which, provided the process is legitimate, merely reflect consumer preference and promotion of public welfare.<sup>32</sup> The need here is for further study of actual difficulties to confirm that the process and the procedural protections under the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements are adequate, and probably for dedicated capacity building as part of the “aid for trade” efforts that are being pursued by the WTO and other institutions, with a focus on meeting environmental standards in export markets.<sup>33</sup>

#### Items not yet addressed:

- One of the oldest and most intractable items on the trade and environment agenda is the matter of border measures to distinguish between goods that are identical as final products, but which were produced differently, and which therefore have different environmental impacts (the so-called PPMs issue). The AB has rendered fairly detailed guidance, albeit in the specific context of a single case, on how such measures must be implemented to be in line with WTO law.<sup>34</sup> But that guidance, while it has some force as precedent, is not binding on future panels,<sup>35</sup> and is not definitive in the sense that, while it has wider significance, it was issued with respect to the specifics of the case at hand. Moreover, some Members felt that the AB had gone too far beyond the text of the GATT in its elaboration. As such, a negotiated understanding would clearly be superior. But the very controversy that surrounded the AB

31 See TBT Agreement, Arts. 2.2 and 2.4, and SPS Agreement Art. 2.2.

32 See OECD, 2005 for a synthesis of a number of case studies. Cosbey (2004b) also synthesizes a number of cases and finds the same result. See also Jaffee and Henson (2004). Note, however, that there is also an argument that some standards are unnecessarily rigorous, going beyond international standards and scientifically demonstrable need, with damaging results for exporters. See, for example, Otsuki, Wilson and Sewadeh (2001).

33 See OECD (2006) for a good overview of the aid for trade efforts.

34 See *U.S.-Shrimp*, *supra* at 30.

35 While this is technically true, the AB has been quite clear that WTO panels should follow prior AB rulings that deal with the same points of law that they are considering (See WTO Appellate Body Report, *U.S.-Stainless Steel (Mexico)*, WT/DS344/AB/R, 30 April 2008, paragraphs 158–162).

decision also underscores the difficulties that such an effort would face, and in the meantime the AB and the panels will have no choice but to interpret WTO law as best they can. And again, it is not clear that it would be possible to completely substitute negotiated agreement for the necessarily case-specific judgement that any panel would have to apply. Aiming for negotiated *guidance* might be a more pragmatic objective.

- An item that has never made it to the WTO agenda is the broad impacts of trade on the environment. That is, how do trade and trade liberalization actually impact the environment?<sup>36</sup> As noted in the previous section, we know that it can bring greater efficiency through specialization and the exploitation of comparative advantage. But is the final result decreased environmental impact? Or is the efficiency gain outweighed by the increased environmental damage that comes with increased wealth, and increased scale of investment? The answers would have to be specific to particular regions and/or sectors.

*Which work items should be the responsibility of the WTO?* The clearest items of WTO interest, on which the WTO should take the leading role in implementation, are those that involve changes to trade law that will benefit the environment. In this group, for example, would reside:

- The liberalization of environmental goods and services;
- The reduction or elimination of environmentally perverse subsidies; and
- Any amendments to the TRIPS Agreement to make it more compatible with the CBD.

While the WTO would obviously need environmental expert input in such pursuits as defining environmental preferability, and in the technical details involved with reform of sectoral subsidies, it should play the lead implementing role in these areas. The WTO should also, obviously, play a leadership role in undertaking procedural changes such as granting observership to MEAs in WTO Committees, and improving information flow between the WTO and the MEAs.

Another clear area of competence and responsibility for the WTO would be to add clarity to those elements of WTO law that pertain to the environment. In this category would fall such work as negotiating agreement or guidance on the use of PPM-based discrimination. Other possible work in this area could include, for example, negotiated

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<sup>36</sup> By contrast, this has been a central item in the workplan of the North American Commission for Environmental Cooperation—the secretariat to the environmental side agreement that accompanied the NAFTA.



agreement on the use of the precautionary principle in trade policy.<sup>37</sup> While these sorts of undertakings are primarily the responsibility of the WTO, as they involve changes in trade law, they cannot be undertaken by the WTO alone, or at least not by the WTO acting as a council of trade ministers and their functionaries. Such negotiated understandings would involve a *balancing* of economic and non-economic objectives, rather than the sort of win-win opportunities involved in, say, liberalization of environmental goods and services. It would be inappropriate for trade policy-makers in isolation to perform such a balancing.

The WTO is not, however, the appropriate venue for a number of possible items of work. For example, the analysis of trade's impacts on the environment, while it should be of interest to the Members, and while the results should inform trade law-making and trade policy-making, is arguably not within the competence or mandate of the WTO. Nor should the WTO alone take on the job of addressing the cluster of issues that includes market access, standards and labelling. This cluster includes a research component that would assess the difficulties in particular sectors and countries, which is arguably not the WTO's strength. It also includes a capacity building element, once the difficulties are identified. While certain types of capacity building are suitable for the WTO—such as training negotiators and assistance on implementation of trade agreements—broader efforts to improve productive capacity in developing countries are clearly beyond the WTO's expertise and mandate.