

Trade and Environment: Looking beneath the Sands of Doha?

Mark Halle*

This article offers a rapid history of environmental concern in the GATT and WTO systems. It focuses in particular on the environmental issues that are currently under negotiation in the Doha Round, and then reviews how key environmental issues are at play in other areas of negotiation. It looks also at the way in which environment has been taken into account in the regular work of the WTO, and especially by the Appellate Body. Finally, it suggests that recent political shifts in the WTO may provide greater scope for considering environmental perspectives in future.

The history of the environment in the multilateral trading system has been characterised by forward lurches followed by long periods of stagnation. For those committed to a trading system that respects and even advances the environmental agenda, the past ten years have been both encouraging and frustrating. This article explores this apparent contradiction. It argues that, at the level of formal rules negotiations, there is little to show for ten years' work on the WTO Trade and Environment agenda and five years of environmental negotiations. At the same time, it argues that the environmental cause has advanced in the WTO and elsewhere in the multilateral trading system more than most people realise, and in at least some ways that offer grounds for optimism. Simply, it is important how one reads the signs.

I. Background to the trade and environment debate

The environment was not always a controversial topic in the multilateral trading system. Indeed, although the term 'environment' did not come into

current use until later, the General Agreement on Tariffs and Trade that emerged from the Havana Conference in 1948¹ recognised that trade should not harm natural resources nor endanger vulnerable species, and accepted that governments could make exceptions to the normal disciplines of open trade in cases where the risk of environmental damage appeared probable.

In the first decades of the GATT's existence, the environment barely registered on the radar screen of trade policy. Since the latter dealt almost exclusively with the way manufactured goods were treated at international borders, there was indeed very little scope for overlap between the two policy areas. It was only the preparation of the United Nations Conference on the Human Environment (Stockholm, 1972) that led the GATT members to ponder the connection between trade and the environment. They anticipated that measures taken by governments for environmental reasons could have a negative impact on trade, and in 1971 created a forum – the Group on Environmental Measures in International Trade (the unfortunately-named EMIT group) – in which members could voice their concern. So burning was concern that not a single member brought a single issue to the group in the first two decades of its existence!

When for the first time the group was convoked, it was to discuss the implications of the Earth Summit in Rio (June 1992). Both the Principles² adopted by the UN Conference on Environment and Development and its action plan (Agenda 21)³ focus on trade and trade-led economic growth as

* Mark Halle, Director, Trade & Investment, International Institute for Sustainable Development (IISD).

1 http://www.wto.org/English/docs_e/legal_e/havana_e.pdf.

2 <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

3 <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

a key tool in meeting environmental challenges. Trade and environment were clearly on convergent paths.

At the time of Rio, the Uruguay Round of multi-lateral trade negotiations was moving into its final phase, and already the outlines of the agreements (the Marrakesh Agreements, adopted in April 1994)⁴ that led to the replacement of the GATT Secretariat with the WTO were becoming clear. With the task of lowering tariffs on manufactured goods substantially completed, the attention of the trading system was shifting to the effect of non-tariff barriers – including environmental measures – on trade. Indeed, it is often said that if the GATT's focus was on border measures, then WTO's is on domestic policy.

The Uruguay package, while extending trade policy into trade in services and intellectual property and solidifying the subsidies code developed in the previous Tokyo Round, substantially focuses on the way in which domestic measures taken as part of the sovereign mandate of governments affect international trade. Many of the disciplines adopted are aimed at ensuring that domestic policies that affect trade are non-discriminatory, transparent, and the least trade-restrictive among available options.

However, if there is one thing that kick-started the Trade and Environment debate, it is the decisions of the GATT dispute settlement panels in the Tuna-Dolphin cases.⁵ While these cases involve complex issues of unilateral action, extraterritorial application of national law and quantitative restrictions, it is not the details of the cases but their perception that is important. For the trade community, defending non-discrimination in trade is a sacred principle. Discriminatory restrictions on trade should be accepted only in the most extreme cases, once all other avenues have been exhausted. For the environmental community, fresh from absorbing the Rio message that the mechanisms of the market would address the environment better than regulation, it was a shock to be told that they could not do so if it affected trade.

The Tuna-Dolphin cases acted as an alarm bell for environmentalists, especially in the United States, and their subsequent mobilisation is in large part responsible for the environment as an issue coming into the work programme of the nascent WTO, to a Committee on Trade and Environment being established, and to a strong statement on sus-

tainable development being included in the Preamble of the Marrakesh Agreements.

II. CTE Pre-Doha

The twenty-year experience with EMIT should have convinced the world that establishing a forum for discussing an issue is no guarantee that the issue will advance. Indeed, the CTE has, cruelly and sometimes unfairly, been described as a sandbox, to which those concerned with environment in trade may be sent to play while the trade delegates get on with the serious work of dismantling trade barriers. Nor was the mandate – largely a one-sided mandate to examine the impact of environmental measures on trade – any reason to hope that the CTE could serve as a forum for the thorough, broad and multi-faceted debate that is required to get the relationship right.

The first years' experience appeared to bear out the skepticism of the critics. Discussions tended to go around in circles and, if they revealed anything, it was a deep skepticism on the part of the developing countries as to the motivations behind the environmental agenda in the WTO.

The CTE presented its first report in Singapore in 1996,⁶ at the first WTO Ministerial Conference. It was asked to continue deliberating on the same topics. The same thing was true of the second Ministerial Conference in Geneva in 1998. If the CTE received no instructions from the third Ministerial Conference (Seattle, 1999), it is because the conference collapsed in disarray and without result.

Before turning to the fourth Ministerial Conference in Doha, however, it is important to recognise a few important realities about the CTE, not always obvious from a superficial assessment of the progress (or lack of progress) reported to the ministerial conferences: while committees in the WTO are intended to allow an exchange of views on issues, clarify them, and prepare those that require

4 http://www.wto.org/English/docs_e/legal_e/04-wto.pdf.

5 Porter, 'The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?', *Georgetown International Environmental Law Review*, 1992, Volume V, pp. 91-116.

6 Report (1996) of the Committee on Trade and Environment, WT/CTE/W/40.

negotiated outcomes for negotiation, the latter is not the only possible outcome. Indeed, it may not even be a desirable outcome.

As Prof. Gregory Shaffer⁷ points out, issues may, through a process of ‘crystallisation’, cease to be issues even if they are not solved through any negotiated agreement. Simply by better understanding the other party’s point of view, by closely examining the dimensions of the issue and regarding it in the light of other issues, the decision may be reached that no action is required. Certainly the heightened comfort level surrounding some trade-environment linkages owes its attainment to CTE debates.

Second, the debates in the CTE, which enjoyed a far higher level of developing country participation than many expected, served as an effective means to bring southern concerns about the environmental agenda in trade to the surface. If some Northern governments remain frustrated at what they see as a rejectionist attitude of the South to environmental issues being discussed in the WTO, that frustration has blinded them from observing the subtle change in Southern positions on environmental issues, and the gradual emergence of a ‘Southern Agenda on Trade and Environment’,⁸ however ill-defined and eclectic it may still be.

III. Doha and the environmental negotiation mandate

By the time the WTO’s fourth Ministerial Conference took place in November 2001, the nine substantive issues on the WTO agenda had been looked at repeatedly, and from a wide range of perspectives. While the anxiety level towards most of them had fallen with the rise in mutual understanding among the members, not a single one of the issues had been formally resolved. Further, it was not even clear which, if any, of the issues required a negotiated solution, or would benefit

from the WTO’s process of rule-making. And yet, in the small hours of 14 November, the ministers adopted a declaration⁹ setting out the mandate for a comprehensive round of multilateral trade negotiations and, as part of it, a chapter on Trade and Environment.

To recap the history, with the exception of a handful of GATT disputes the environment had not been an issue in the first forty years of the GATT. It became an issue in part because of the high political prominence achieved at Rio, but mostly because of the shift of focus of trade policy to domestic measures, including environmental measures. In the first five years of the WTO, the environment was a distinctly unpopular issue with many WTO members. It was surrounded by the deepest suspicions, and divided developed and developing countries. Half a decade of discussion in the CTE did not resolve any of the issues nor, with the exception of fish subsidies, did it clarify the parameters for negotiation.

What, then, explains the emergence of the environment at Doha as a topic for negotiation?

One factor is the existence of a strong demandeur in the shape of the European Union. The European Commission has long been one of the forces behind the environmental agenda in trade, for two principal reasons. First, environmental quality is a political priority of European voters. Europe is wary of rapid trade liberalisation undermining environmental standards and is determined that access to its markets should be a force for environmental improvement worldwide. Second but also important is the fact that the EU correctly anticipated that the Doha Round would centre on the theme of agriculture and that the pressure on them to make concessions would be great. In such a context, it was in their interest to have as broad an agenda as possible to maximise trade-offs.

The developing countries, too, had their motivations. First, if the EU and others (Norway, Switzerland, and Canada) wished to see progress on the environment, this offers them the scope for trade-offs in areas that interested them more - and in particular access to Northern markets for their agricultural produce. Second, the central focus of the environmental agenda in trade revolves around a concern that measures taken for environmental reasons will have a distorting effect on trade. With the environmental conditionality on market access growing at a phenomenal pace, developing coun-

7 Shaffer, ‘The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters’, *Harvard Environmental Law Review*, Winter 2001, Vol. 25, pp. 1-93.

8 ‘Trade and Environment: A Resource Book’, by IISD and ICTSD, in press.

9 ‘Ministerial Declaration’, WT/MIN(01)/DEC/W1, 14 November 2001.

tries were keen to ensure that at least some disciplines are in place to reduce the scope for green market protectionism.

Still, the Doha mandate on the environment has the feel of something put together very late at night by seriously tired minds. It contains three paragraphs: a first paragraph setting out the mandate for items to be negotiated; a second paragraph containing issues that require further clarification by the CTE (in other words, that are being prepared for possible future negotiation); and a third calling for increased technical assistance and capacity building for developing countries on trade and environment.

The second paragraph (paragraph 32) is nothing more than a reaffirmation of the CTE's mandate on these topics, though with some additional specificity on areas of focus. The third paragraph (33) addresses one of the very real factors that have impeded progress on environment in the trade context – namely the limited capacity of developing countries to analyze trade and environment issues, identify their interests, formulate policy proposals and defend these at the negotiating table. In the following section, I will focus on the environmental negotiations under paragraph 31.

IV. Negotiating trade and environment

The environmental negotiation mandate in the Doha agenda has four parts. These concern the relationship between Multilateral Environmental Agreements (MEAs) and trade rules; procedures for information exchange between MEA secretariats and relevant parts of the WTO, including observer status; the liberalisation of trade in environmental goods and services; and disciplining subsidies to fisheries (although the latter is included in paragraph 28 on rules and only cross-referenced in paragraph 31).

The first two are related and address one of the central issues on the trade and environment agenda – namely the relationship between the multilateral trading system and its complex rules, and the equally complex regime governing international environmental cooperation. The latter two are an attempt to harvest some low-hanging fruit by pursuing issues whose resolution would – ostensibly – be good for trade, good for developing countries, and good for the environment, the classic triple win so dear to the rhetoric of the WTO. I will examine each in turn.

1. Paragraph 31 (i): MEAs

The CTE has examined the relationship between the two sets of international rules – those governing trade and those governing environment – for a decade now. The initial fear in the environment community that trade rules, linked as they are to the powerful and unitary WTO, and more specifically to its dispute settlement system, would simply brush aside the environmental conventions when these got in the way of trade openness. This fear receded as the years passed and no such challenges were forthcoming. To the contrary, many began to be convinced that, should a challenge arise, there is no reason to believe the trade rules would prevail. For example, the two legal instruments most often cited as being potentially at variance with the trade rules are the Kyoto Protocol to the UN Framework Convention on Climate Change, and the Cartagena Protocol to the Convention on Biological Diversity. Yet both are more recent and more specific in the areas of trade that they regulate than are the WTO rules. Under the Vienna Convention on the Law of Treaties, this would normally give them precedence in case of a conflict, at least as between WTO members that were parties to both and where attempts to reconcile the positions had been unsuccessful.

Further, discussion in the CTE revealed several possible solutions to dealing with the incompatibilities among legal instruments in the trade and environment regimes, including the solution of leaving the two regimes alone and allowing any disputes to be dealt with on their merits. Yet, by the time of Doha, none of these solutions had achieved a consensus.

Paragraph 31 (i) calls for negotiations on '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.'¹⁰

A close look at the text suggests that it could only have emerged from drafting in the early hours of the morning (at least that is the kindest interpretation available). It restricts the scope for considering

¹⁰ Ministerial Declaration, *supra* note 9.

the relationship between the trade rules and the MEAs in at least three important ways. First, it deals not with the full relationship, but only with the restricted set that correspond to specific trade obligations in MEAs. Second, the application of any solution found is limited to parties to the MEA in question, thus creating an unhelpful distinction among WTO members based on their relationship to the MEAs. And, third, it restricts potential solutions to those that have no prejudicial effect on existing WTO rights.

There is a real danger in this, in several ways. First, both Dispute Settlement panels and the Appellate Body of the WTO have, through reference and in repeated rulings, deemed that obligations of States enshrined in MEAs may be considered relevant in considering decisions that they take and that affect their trading partners. In the Shrimp-Turtle case, the Appellate Body considered not only global MEAs, but also regional ones, including one that was not yet in force. So, while the highest forum for dispute settlement in the WTO takes a broad approach to determining the obligations of States, the mandate for the Doha suggests that any negotiated solution must be restricted in the extreme.

Second, by predetermining that any solution proposed must not affect the WTO rights of members, it restricts such solutions to legal interpretations that are within existing WTO law. The strong suggestion is that any solutions that require amendments to existing rules are extremely unlikely to be considered, even if these might theoretically represent the best outcome.

Third, by making a distinction between parties to an MEA and non-parties, with negotiations restricted to the former, any negotiated outcome under this mandate – whether adopted interpretations of existing law as per the mandate, or new obligations under an extended negotiation – might well put in place an incentive to States to remain outside an MEA, where their rights would be less restricted.

Such is the concern with the restricted mandate and the signal that it sends that some environmental groups – including the IISD – have speculated that the best likely outcome for negotiations under 31 (i) would be no outcome at all – in other words no negotiated text on this item. This is a sad state-

ment on the state of affairs but it underlines the point made above that not all issues require a negotiated outcome. Indeed a clarification of positions in the CTE (crystallisation) and appropriate interpretation in the Appellate Body have advanced us much further on this issue than have five years of negotiation. There is a real risk that a negotiated outcome would represent a step backwards for the MEA agenda.

2. Paragraph 31 (ii): observer status

WTO members are called upon to agree ‘procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting of observer status.’¹¹ In this case, there is nothing wrong with the way the mandate is crafted, except that it calls for something so obviously worthwhile that the fact that it requires negotiation at all could appear unusual.

When it comes to information exchange an informal arrangement exists in the CTE whereby key MEA Secretariats are present in meetings. There seems to be no objection to this informal arrangement. Issues arise, first, from the formalisation, and second from extension of arrangements to other WTO committees. With over 200 MEAs in force, and with over 20 that contain trade measures, it is not clear which should be associated with the WTO. Could they all be represented by the UN Environment Programme or must some be represented directly?

Further, some of the key issues regarding the MEAs are discussed in other WTO committees. For example provisions for access and benefit sharing under the Convention on Biological Diversity are highly relevant to the work of the Council on Trade-Related Intellectual Property Rights (TRIPS Council), while restrictions on trade in living modified organisms under the Cartagena Protocol relate directly to the work of the Committee on Technical Barriers to Trade (TBT Committee) and to the Committee on Sanitary and Phyto-Sanitary Measures (SPS Committee). Should information exchange mechanisms be developed with these forums, or should it all come through a central point in the CTE?

On observer status in the CTE, the issue is political and has little to do with the merits of individual applicants for such status. Indeed, there is a com-

11 Ministerial Declarations, *supra* note 9.

plete freeze in place on according observer status in any WTO body. This results from the denial of observer status in the WTO General Council to the Arab League, whose formal position is in favour of a trade blockade against Israel. As a result, certain States are blocking all requests for observer status until the matter of the Arab League is settled. As with the issue of information exchange, informal observer status exists for several of the MEA secretariats.

Once again, as with 31 (i), we have a de facto situation that is satisfactory, and a negotiation that at best risks complicating it and, at worst, could produce a set-back.

3. Paragraph 31 (iii): environmental goods and services

The Doha mandate calls for 'the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services'.¹² For once, the negotiations call for positive action in favour of developments that, in theory at least, would benefit both trade and the environment, and also the interests of developing countries. As noted above, this item was 'upgraded' to negotiation status not because it was ripe for such treatment, but because it appeared to offer the chance of an 'early harvest' and to demonstrate one of the WTO's famous win-win-win outcomes.

Sadly, nothing in the WTO is so simple. For a start, there is no agreed definition or listing of what constitute environmental goods, and the standard listing of environmental services is contested.¹³ To most OECD countries, environmental goods are those that are instrumental in reducing pollution (water purifying technology, air filters, energy efficiency equipment, monitoring instruments, etc.). There is little disagreement that increased trade in such goods could lead to environmental improvements. However, the market for such goods is dominated by the rich countries, whose tariffs are already low. Liberalising trade in these goods would place the bulk of the adjustment burden on the developing countries. These countries are skeptical at claims that lowering barriers to trade in these goods would be genuinely beneficial to them. They also argue that, since the rich countries have the technology and they have the barriers, there is nothing to stop them from reducing tariffs unilaterally

in cases where they would clearly benefit. Further, the developing countries do not wish such liberalisation to be traded off for concessions in other areas of the negotiation agenda.

Many developing countries prefer an approach which considers environmental goods to be those whose use results in a better environment. This category would embrace the first one (the 'end-of-pipe' technologies), but it would extend to so-called environmentally preferable products like sisal (a natural fibre), renewable energy technologies, bicycles, and the like. While a strong argument can be made in favour of this broader approach, it also suffers from definitional problems and, worse, risks awakening controversy over perhaps the most sacred WTO practice – namely the determination not to distinguish among like products on the basis of how they are made.

Environmental services are, if anything, more controversial,¹⁴ in large part because provision of many environmental services is in the traditional purview of the public sector, and suggestions to liberalise are often perceived as pressure to privatise State functions. It did not take long, for example, for certain countries would work out that the banner of environmental service liberalisation could be used to argue for water privatisation. While there is more agreement on a consolidated list of environmental services than there is for environmental goods, it is increasingly clear that this list requires updating. Negotiations are also stymied by the fact that they are part of the broader Services negotiations, and operate on the same 'request-offer' basis. If members do not offer an environmental service sector for liberalisation, and if they do not request such liberalisation from others, nothing happens. To date, progress has been slow.

12 Ministerial Declaration, supra note 9.

13 For a discussion of definitional issues the following papers offer a good introduction: Steenblik, 'Liberalising trade in „environmental goods“: some practical considerations', OECD Trade and Environment Working Paper No. 2005-05, OECD, Paris. Steenblik, 'Environmental goods: a comparison of the APEC and OECD lists', OECD Trade and Environment Working Paper No. 2005-04, OECD, Paris. Steenblik/Drouet/Stubbs, 'Synergies between trade in environmental services and trade in environmental goods', OECD Trade and Environment Working Paper No. 2005-01, OECD, Paris.

14 Mashayekhi/Tuerk, 'The WTO Services Negotiations: some strategic considerations. Trade-Related Agenda, Development and Equity', Trade Working Paper No. 14, 2003, South Centre, Geneva, available at: <http://www.southcentre.org>.

4. Fisheries subsidies

While the negotiations on fisheries subsidies are taking place under the mandate of the Rules negotiations, they are cross-referenced under the environmental chapter. Like the topic of environmental goods and services, this topic was intended to demonstrate that not all trade liberalisation requires an environmental sacrifice. Indeed, disciplining fisheries subsidies appears to offer another famous triple win solution. If certain classes of subsidies not only distort trade in fish products but cause development problems for poor countries and deplete the environment, disciplining them will surely be beneficial to all?

But again, the devil is in the details. How are countervail authorities to determine whether fisheries subsidies distort trade, and is it possible to isolate the trade-distorting element for WTO action? Is there a clear link between the trade-distorting subsidies and fisheries depletion, and will reducing or redirecting those particular subsidies have a substantially positive impact on fishery resource management? And, finally, since the matter is on the table and most seem to agree that there is the political will to act, should we not take advantage of the opportunity to address a problem that almost everyone agrees is urgent and dire, even if the link to trade rules is questionable?

Despite the problems outlined above, the chance of a positive outcome in this area is reasonably good. The negotiations have moved from clarifying the issues and agreeing the approach, to considering language. And, uncharacteristically for the WTO, the solutions being discussed are not confined to disciplining the trade-distorting factor in the subsidies. Proposals include a ban on subsidies that lead to depletion of the fish stocks, suggesting that any dispute arising from such measures would place on the WTO the onus of determining whether or not a disputed measure is contributing to the depletion of fish stocks. While some believe that this would be a potentially disastrous outcome, others see no reason why the WTO would gain more authority over environmental rule-making than reliance on Codex Alimentarius standards gives it authority over rule-making in the field of food safety.

We thus have four areas of environmental negotiation in the Doha Round. Two of these are vexed, to the point where the status quo may end up looking more attractive than any of the likely negotiat-

ed outcomes. The other two, while motivated by the desire to demonstrate that the WTO is able to combine trade liberalisation with improved environmental management, have proved more difficult than expected. A positive outcome remains possible, but there is no assurance that it will be achieved. All depends on the end-game.

V. Environment in the end-game

Many observers of the Doha Round express frustration at the slow pace of progress on environmental issues, especially since it is often possible to outline solutions that are not terribly complex, not terribly controversial, and apparently well within reach. This frustration betrays a lack of understanding of multilateral trade negotiations.

The Doha Round is largely about agriculture. In order for a worthwhile deal to be constructed, those who presently offer the most protection to their agricultural producers are looking for concessions in order to justify greater access to their markets. These concessions are principally being sought in the area of industrial tariffs, services and trade facilitation. Most of the other items on the Doha agenda are of lesser importance and are included in order to give scope for the final trade-offs necessary to nail down agreement on an overall package.

Environment certainly falls within this latter category. It is not a 'make or break' issue on which, if no deal is made, the conclusion of the Round could be in danger. In fact, the most likely use of any environmental agreement would be for window-dressing, to demonstrate that the WTO can deal successfully with the issues that lie at the frontiers of trade policy. And window-dressing it is likely to be. Observer status for MEA secretariats in various WTO committees is hardly likely to have a profound impact on international environmental cooperation. And if liberalisation of environmental goods and services is so beneficial to developing countries, they do not need a multilateral agreement to lower their tariffs. A 'peace clause' protecting MEAs from challenge in the WTO might be nice, but that is not on the table. Instead, the mandate in 31 (i) is so structured that it risks complicating the MEA-Trade relationship still further.

Luckily, the state of the environment in the trading system does not depend on – and indeed is not greatly affected by – the environmental negotia-

tions. Instead, the environment is a factor in almost every area of negotiation under the Doha mandate.

Environment is, of course, at the heart of the agriculture negotiations. How agriculture takes place, where it takes place, and the pattern of incentives and disincentives that govern decisions in the agricultural economy has a profound impact on the rural areas and therefore on the environment. States under pressure to diminish trade-distorting tariffs and subsidies are turning increasingly towards approaches that provide support to farmers to plant forest, restore wetlands, or maintain biodiversity on their land, since such measures are still legal under the Green Box of non- or minimally trade-distorting measures.

In the negotiations on Non-Agricultural Market Access, negotiators will have to determine the importance and acceptability of a range of domestic measures that distort trade, including measures taken for environmental purposes. How these non-tariff barriers are regulated could have a deep impact on the tools available to governments to manage and conserve the environment.

In the field of Services, there is already pressure to liberalise forest services, management of protected areas, water supply and distribution services, and many other areas now under the exclusive purview of national decision-makers. How this is done, what factors may be included in liberalisation packages and what restrictions may be imposed on market entrants will make a big difference in terms of environmental performance.

The list goes on – whether in the negotiations on rules (anti-dumping, subsidies and countervailing measures), or intellectual property rights (for example, the relationship between the WTO TRIPS agreement and the Convention on Biological Diversity), how aid for trade is planned and delivered, and how the dispute settlement system is reformed – each of these will have positive or negative repercussions for the environment, depending on how the negotiations are carried out and the agreements crafted.

Unfortunately, very little effort is going into tracking the negotiations from an environmental point of view. Paragraph 51 of the Doha mandate interestingly gives authority to the Committee on Trade and Environment, and its sister Committee on Trade and Development to work out how to track the Doha negotiations from a sustainable development standpoint, recognising the obligation

enshrined in the Preamble of the Marrakech agreements. Five years into the negotiations, they have not come to any agreement on how this challenge will be approached. Most believe that it will simply be ignored, or done independently outside the WTO.

VI. On the track of real progress

It might appear, from reading the above, that I am pessimistic about progress on the Trade and Environment agenda. While there are certainly grounds for frustration, there are also grounds for encouragement.

The account of the past fifteen years of the environmental debate in the WTO is very much a mixed picture. If formal negotiations have not progressed very much, environment is at least an accepted part of the negotiation agenda. If we have not yet found a solution that will guarantee harmony between the trade rules and the MEAs, at least the fear of repeated challenge from the WTO has receded. Tuna-Dolphin is now regarded as well behind us, a reflection of the silo vision of the GATT, now an amusing chapter in the history of trade policy. Many of the issues that appeared sensitive and difficult when the CTE began its work are, though not resolved, no longer the subject of much anxiety. And if the environment is still regarded with some suspicion by trade delegates, it is incumbent on the environmental community to recognise that environmental regulations, norms and standards present developing countries with, at best, a bewildering obstacle course must be run before they can gain access to developed country markets, and at worst a green wall of protectionism.

Elsewhere in the Doha negotiations, environmental concerns are increasingly present, even if the negotiations are not being conducted under an environmental banner. The old, mercantilist culture under which trade liberalisation was an end in itself, and trade-offs based on raw commercial power represented the principal and near-exclusive tool of negotiations, are slowly being called to account. Trade is under pressure to prove that it benefits not only economic growth, but contributes at the same time to growing equity, poverty alleviation, and environmental sustainability. While this new wave is not yet overly evident in the drafting of trade rules or in the nature of the negotiations

under the Doha agenda, nevertheless few would deny that the comfortable days when all liberalisation, however achieved, was good are now over.

In the forefront of this change is the Appellate Body (AB). In a series of remarkable decisions, it has advanced the environmental agenda much further than years of discussion in the CTE and half a decade of negotiations in the Doha Round.¹⁵

From the start, the AB made it clear that it considered trade rules to be embedded in a broader framework of public policy made up of a web of interacting regimes. In its very first case – the Reformulated Gas case – it turned GATT practice on its head and declared that WTO law must not be interpreted ‘in clinical isolation’ from other relevant legal undertakings at the international level.

While the Precautionary Principle – a basic principle recognised in international environmental law – is so sensitive as to be all but taboo in the SPS Committee (the SPS Agreement is the only part of the WTO rules that gives limited scope to a ‘precautionary approach’) the AB has, in a series of decisions, not only ruled that adopting a precautionary approach can be justified in the event that human life and health might be at risk (viz. the EU Beef Hormone case), it has spelled out detailed criteria for the use of the precautionary approach (viz. the Japan Varietals case) and set outer limits on that use in order to curb possible abuse (viz. the Australia Salmon case).

Shrimp-Turtle demonstrated that the AB would refer to the entire body of applicable international law in determining what States intended when putting those legal measures in place. The AB in the Shrimp-Turtle case considered relevant not only global environmental agreements, but also regional ones, including one not yet in force. No longer can trade disputes be settled on the basis of trade rules alone.

Finally, the AB has acted with what appears to be a high level of environmental responsibility in addressing one of the most sensitive areas of overlap and possible conflict between the trade approach and the environmental approach: namely the ability to distinguish among otherwise ‘like’ products on the basis of how these products were

harvested or manufactured. In the Tuna-Dolphin case the GATT panels refused to consider tuna caught at a high price to dolphin mortality to be any different from tuna caught with techniques that allowed the dolphins to escape unharmed. And yet, less than ten years later, the work of the AB suggests that a blanket ban on such distinctions will not be required, and instead each case will be considered on its merits.

While there is no *stare decisis* in the WTO, the AB has demonstrated considerable respect for past decisions, to the extent that it could be argued that *de facto stare decisis* effectively exists. The AB has already changed the culture of the multilateral trade regime, probably permanently. It is hard to imagine how, having effectively helped to integrate trade and environmental obligations the AB would once again seek to take them apart. It would be like trying to separate the oil from the egg in mayonnaise.

VII. Conclusion

Understanding how environmental priorities are faring in the multilateral trade regime is complex and often counter-intuitive. Certainly a focus on the formal environmental agenda in the WTO (both the normal work of the CTE and the negotiations entrusted to it in special session) would miss the key areas in which environmental progress is either threatened, or in which it has a chance of being cemented in place. The Doha negotiation agenda offers examples of both.

It is hard to deny that the Doha agenda is going badly - at least in terms of the ambitions for it loudly stated at Doha and after. It is still not certain whether there will be anything more than a face-saving, minimalist outcome or, if there is, whether it will take several more years. And the environment will in any event remain an end-game issue.

But an objective look at where environmental issues were in relation to the trade regime in 1995 and where they are now, more than a decade later, would have to conclude that significant progress has been made in many respects. The Preamble to the Marrakech Agreements is now regarded as a formal governmental undertaking, and the members will undoubtedly continue to be reminded of their obligation to make progress towards its achievement. The Appellate Body, whose task

15 This section draws heavily upon ‘The State of Trade and Environment Law 2003 – Implications for Doha and Beyond’, by Howard Mann (IISD) and Stephen Porter (CIEL), IISD 2003.

includes clarifying existing trade rules and seeking to clarify what States intended when they were negotiated, is taking the view that policy coherence must not only be advanced, but that it must be assumed to be what the governments wished when they crafted the rules in the respective sectors. And an increasingly demanding public will not allow

the WTO to deliver a new deal that undermines North-South equity or progress towards sustainable development.

We may be stuck in the sands of Doha but we are not without resources to extract ourselves and plot a course towards a more balanced future for the trade and environment regimes.

Contents

Editorial	89
ARTICLES	
The Montreal Climate Summit: Starting the Kyoto Business and Preparing for post-2012	90
<i>The Kyoto Protocol's First Meeting of the Parties (MOP 1) and COP 11 of the UNFCCC</i> <i>Bettina Wittneben, Wolfgang Sterk, Hermann E. Ott and Bernd Brouns</i>	
Emergency and Protection of the Environment in the 'Risk Society'	101
<i>Rosario Ferrara</i>	
Trade and Environment: Looking beneath the Sands of Doha?	107
<i>Mark Halle</i>	
Exemptions from Statutory Water Management Objectives: Requirements, Spheres of Responsibility, Unresolved Implementation Issues	117
<i>Harald Ginzky</i>	
Convergence or Divergence of National Legal and Administrative Structures? Europeanisation Effects of the Environmental Impact Assessment in Germany and England (Part 2)	132
<i>Christoph Knill and Daniela Winkler</i>	
The Transfer Rule in the German Emissions Trading System	142
<i>The Transfer of Emissions Allowances from Decommissioned Plants to New Facilities as a Major Incentive for Modernisation According to the German Allocation Act</i> <i>Markus Ehrmann and Dominik Greinacher</i>	
EU JURISDICTION	
Recent Case-Law of the European Court of Justice and the Court of First Instance	
<i>Law Governing the Institutions</i>	
Trade-related environmental measures – double legal basis	153
<i>ECJ, Judgment of 10 January 2006 – Case C-178/03</i> <i>Action for annulment Commission v European Parliament and Council of the European Union</i>	
Case Note · Ludwig Krämer	153
<i>Climate Change</i>	
Action plan for emission trading under scrutiny by the Court	155
<i>CFI, Judgment of 23 November 2005 – Case T-178/05</i> <i>Infringement proceeding United Kingdom v Commission of the European Communities</i>	
Case Note · Ludwig Krämer	155

Air Quality

- Free lorry transit through Austria and the protection of the environment – traffic ban on the Brenner Motorway 156
ECJ, Judgment of 15 November 2005 – Case C-320/03
Infringement proceeding Commission v Austria
- Case Note · Ludwig Krämer 157

Waste Management

- Concept of ‘notifier’ and notifier’s obligations 158
ECJ, Judgment of 16 February 2006 – Case C-215/04
Preliminary ruling, Marius Pedersen A/S v Miljøstyrelsen

Biodiversity and Natural Resources

- Classification of a special protection area / failure to include sites 159
ECJ, Judgment of 23 March 2006 – Case C-209/04
Infringement proceeding Commission v Austria
- Directive oiseaux / réduction d’une zone de protection spéciale 159
Conclusions de l’Avocat Général J. Kokott présentées le 23 Février 2006 – Affaire C-191/05
Procédure d’infraction Commission v Portugal
- Directive oiseaux / l’usage du pouvoir de dérogation fondé sur l’article 9(1)(c) 159
Conclusions de l’Avocat Général L.A. Geelhoed présentées le 16 Février 2006 – Affaire C-60/05
Procédure préjudicielle WWF Italia contre Regione Lombardi

THE COMPARATIVE SURVEY

Questions on Planning and Development of Traffic Infrastructure

- Estonia · Kärt Vaarmari 160
- France · Juliette Deslandres 162
- Germany · Christiane Trüe 166
- Italy · Anna Porporato 172
- The Netherlands · Marlon Boeve and Jos Janssen 175
- Sweden · David Langlet 176
- Switzerland · Nathalie Schneider 177

MISCELLANEOUS

- Editors and Country Correspondents V
- Imprint VI
- Upcoming Conferences and Events 180