

**WTO Negotiations on Trade and Environment –  
The Dangers of Protectionism in Disguise**

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There has been a great deal of recent discussion about the need to prioritise if WTO Ministers are to have a successful 5<sup>th</sup> Ministerial Meeting in Cancun, Mexico this September. Personally, as Convenor of the Australian Services Roundtable, I would not like to see topics such as Investment and Competition Policy drop to the bottom of the priorities list. But Trade and Environment is one topic on the Doha Development Agenda which in my view should never have been there. Its inclusion as a mainstream item for “rules” negotiation is testimony to the commercial determination of the richest nations, especially but not only in Europe, to shift the heavy domestic costs of transition to environmental sustainability onto actual and potential international competitors - through the use of trade measures.

Trade and Environment, as it has evolved in Geneva, is not ultimately an environmental issue. It is a deeply disguised, protectionist issue, carrying huge risks for the multilateral system.

I want to recall some recent trade policy history. I want to start 10 years ago with the discussion on Trade and Environment in the early 1990s in the OECD Trade Committee: a discussion driven initially by the United States, leading inevitably to the negotiating table in Geneva.

***Background; A decade of intra and inter governmental debate***

In the early 1990s, the interface between international trade policy and international environment policy became a matter of close official scrutiny in a number of international institutions including the United Nations, the OECD and the GATT. This was stimulated in particular by the infamous

US-tuna(Mexico) dispute settlement case in the GATT, the signing of an environmental side agreement to the North American Free Trade Agreement, the ongoing implementation of trade restrictions pursuant to the Montreal Protocol and commencement of negotiations for the United Nations Framework Conventions on Biodiversity and Climate Change.

There were always, from the outset, certain key suspicions on the part of the global trade policy community and hence a heated internal debate with the environment policy community.

First, there was early recognition that this was a potentially protectionist issue. The trade policy community (the then EU included) suspected an unholy alliance of protectionists and grass roots environmentalists, pushing the use of trade restrictions for environmental purposes, condoned or not by the international community, as the best means of enforcing global environmental standards (despite the multiplicity, diversity and fragility of the world's ecosystems), forcing potential outsiders to global environmental treaties to come to the negotiating table.

Second, there was suspicion (including on the part of the then EU) that this was an imperialist and extraterritorial agenda. There was a concern that the missionary zeal accompanying the quest for global environmental standards could entail considerable costs for national sovereignty especially for developing countries.

Third, there was a suspicion that this agenda was about misusing the WTO for environmental purposes in the absence of well developed systems for

global environmental governance. There was consequent concern about pressure on the multilateral trade rules to take into account the fledgling principles of environmental policy.

Finally, there was an underlying suspicion that the debate was really all about whether or not the multilateral trading system could, would or should get in the way of international negotiation of an effective enforcement procedure under the Framework Convention on Climate Change, a negotiation then also in its infancy.

Despite these suspicions and the hostility associated with them, the early intergovernmental discussion made considerable progress, highlighting the need for much greater domestic interaction and coordination between the two policy communities, the need for improved domestic environmental policy making based on greater use of economic instruments and the need for enhanced development of the global environmental institutions. Simultaneously, the agreement at Marrakesh to refer in the WTO preamble to the environment, and to establish a GATT/WTO Committee on Trade and Environment marked the beginning of a new, greener chapter in global trade policy.

Unfortunately, however, the early suspicions were all well founded.

But by the end of the 1990s the issue of Trade and Environment had become very muddled up politically, in both the US and the EU, with the vital concept of “civil society”. In transatlantic circles, this ill defined idea quickly became, at the end of the last decade, not - as it should have become- a constructive tool around which to fine tune public advocacy in

favour of trade liberalisation, but instead an apparently respectable policy refuge, and sometimes a war cry, for those resisting liberalisation.

After Seattle, the concept was put on a trade policy pedestal, playing nicely to the anti-globalisation movement and more deeply into protectionist hands. Combine then the growing imperative in the EU and the US of meeting the political demands of “civil society” with the forces at work in Japan. Saddled with being moral host of the Kyoto Convention on Climate Change and tightly allied with the EU on agriculture, Japan, unfortunately, has become the only East Asian member of the WTO on the wrong side of this particular negotiation.

### *The state of play in Geneva*

The Doha negotiating mandate is limited in scope and constrained not to “add to or diminish” existing WTO rights and obligations. It covers the relationship between WTO rules and “specific trade obligations” in multilateral environmental agreements (MEAs). It limits the negotiations to the applicability of WTO rules “among parties to the MEA” in question. While the mandate stresses that the negotiations shall not prejudice the WTO rights of any Member that is “not a party to the MEA”, the fact is that non-party interests are so tied up in these negotiations, that no member country can afford to take the eye off this ball.

Secondly, the mandate calls for procedures for information exchange between MEA Secretariats and relevant WTO Committees, and criteria for the granting of observer status. This seems straightforwardly neutral. But

because it is linked inextricably in the EU mindset with other aspects of the mandate, the developing countries will and should play hard ball.

Thirdly, the mandate calls for reduction of barriers to trade in environmental goods and services and improved rules for fish subsidies. This particular aspect of the Ministerial decision has a welcome liberalising thrust. The relevant issues are being taken up in the market access negotiations for agriculture, industrials and services

Finally, the Committee on Trade and Environment was asked to give special attention to work in a four additional areas and to report to Ministers in Cancun as to whether new rules in these areas might be warranted. Two aspects of this mandate give the EU a further opportunity to pursue its protectionist agenda. The first refers to the relationship between the TRIPS agreement and the Biodiversity Convention. The second refers to WTO rules (the Agreement on Technical Barriers to Trade) affecting eco-labelling.

Each of these aspects of the Doha mandate is fraught with difficulty. The formal process over the past year has focused importantly on the first, the matter of “specific trade obligations” in MEAs.

### ***Key negotiating proposals***

The EU proposal of March 2002 is extremely ambitious. It requires of an MEA only that it be a legally binding agreement between three parties, aiming to do no more than “protect the environment” and open to all countries “concerned”. It stretches the notion in the Doha mandate of

“specific trade obligations”, arguing that trade measures in MEAs vary in their degree of specificity from those “explicitly provided for” to those which are “not required in the MEA but.....” and calls for analysis to determine where the cut-off point might lie. The proposal also debates the restriction in the negotiating mandate to consider the applicability of WTO rules only “among parties to the MEA”.

The EU over simplifies the nature of multilateral negotiating processes, arguing that the process itself is “an effective guarantee against discriminatory action and ...protectionist purposes.” It clothes in heavy qualification some of the key trade policy conclusions emerging from the previous decade of discussion and research, making clear that the EU has abandoned the carefully crafted consensus reached in the OECD. It admits for example that “trade measures might not always represent the best available option to address a global environmental problem.” But goes on to claim “they represent undoubtedly one mean to reach the objective(s)”.

The EU argues that the relationship between WTO rules and trade measures in MEAs should be the result of a negotiated “political consensus” rather than left to the results imposed through dispute settlement. There is probably somewhat more sympathy for this position in the aftermath of the Appellate Body’s US-shrimp (Malaysia) decision. But this, I hope, will pass. It remains preferable, in my view, to accept the uncertain evolution of WTO jurisprudence since Marrakesh than to introduce explicit environmental carve outs into the WTO text.

Unfortunately, the Japanese proposal, tabled in October 2002, is even more, in my view, problematic. The proposal would explicitly create two sets of rules, one for WTO members who belong to an MEA and one for those who don't.

Japan goes a step further than the EU, suggesting that all “specific trade obligations” which are “highly specified” in MEAs should be automatically “deemed to be consistent with WTO rules while other measures specified in MEAs should be presumed to be WTO consistent on condition that” they “meet certain substantial requirements.” By way of requirements, Japan offers only that they should be “based on scientific reasons”, be “reasonably related to the objectives” and pass some sort of test of “proportionality”. Meanwhile, those MEAs with trade impacts outside the Doha mandate should be “deliberated on a case by case basis”.

Japan argues for adoption of a binding interpretative understanding to the above effect, legitimising without question all “highly specified” trade measures in MEAs. This proposal undoes a decade of constructive work on the part of the trade policy community discouraging environmental policy makers from using trade restrictions as any other than measures of last resort. Japan offers, moreover, a peculiar definition of MEAs which would legitimise any agreement which was open to any country sharing merely the environmental “objective” of the agreement, as distinct from sharing its substantive approach and methodology.

A proposal is also on the table from Australia, focused on how to proceed, and within the existing narrow (but not narrow enough) mandate. It

highlights legitimate fears that the Trade and Environment agenda is spilling over dangerously into the negotiations on Agriculture and might impact also on the Sanitary and PhytoSanitary Agreement.

*A Few Words about Climate Change.*

This in my view is the key. Climate Change has always been the implicit driving force in the Trade and Environment debate. This is because the cost burden on industry associated with meeting this particular environmental challenge is so enormous and has such radical potential impact on world trade flows.

From the EU perspective, the economic imperative to achieve WTO cover for protectionist actions which might be taken pursuant to the Climate Change Convention has always been very strong.

Of immediate relevance, for example, is the recent EU action to close US and Australian companies out of the European carbon credits market. This action is nakedly designed as a big stick to encourage others, through ratifying the Kyoto Protocol, to share the economic burden of the shift to sustainability in Europe, hence protecting European firms' international competitiveness. Arguably, as the trade rules are currently written, the United States and Australia could take the EU to WTO dispute settlement on this issue. The economic stakes in the rules renegotiation are high.

### *Where to next?*

It has always been clear that if the EU is to gain ground on Trade and Environment, it would have to pay on agriculture. In my view, the recent CAP reform proposals, even if they do allow some limited progress on agriculture, will simply not translate into sufficient WTO negotiating coin for the EU to take home a win on Trade and Environment. Which is a very good thing. Because if the final deal in the Doha Round does include new environmental carve outs, it will expose the multilateral system to enormous protectionist risk. Clearly, with Agriculture and “civil society” both so high up the political priority list, the cluster of issues at the interface between Agriculture and Trade and Environment could well be the issues which determine the fate of this Round.