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[http://www.EcoLomics-International.org/
trade.env@EcoLomics-International.org](http://www.EcoLomics-International.org/trade.env@EcoLomics-International.org)

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OIL OR SAND IN THE TRADE AND ENVIRONMENT MACHINERY? THE DOHA ROUND AT THE WTO'S 10TH ANNIVERSARY

Urs P. Thomas

* Urs P. Thomas (MBA PhD pol. sc.) is a Research Associate at the Law Faculty of the University of Geneva and the Administrator of EcoLomics International - Geneva. A considerable number of discussions especially with colleagues, UN and WTO officials, diplomats, and NGO associates have provided very much appreciated support in gaining understanding and insight of their perspectives and of the issues at stake.

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Abstract

This research essay attempts to overview the trade and environment relationship ten years after the creation of the WTO and three years into the Doha Round. It starts from the premise that trade and environment concerns ought to be equally important and mutually supportive, but it observes that in reality the countries which make up both the WTO Members as well as the Parties of Multilateral Environmental Agreements (MEAs) consistently give the trading system priority over the protection of the ecosystem. This is particularly evident in the far more powerful dispute settlement body that has been given to the WTO. On the other hand, 'green protectionism' is often cited as a discriminating obstacle to market access by developing countries; other features, however, of the broader international economic system (going in fact well beyond the WTO) imposed by the North do far more damage to the South and fuel the distrust and resistance of developing countries.

The Doha Development Agenda has further reduced its already very modest initial environmental ambitions. The paper focuses on those negotiations which are carried out in the Committee on Trade and Environment in Special Session, especially the relationship between MEAs and WTO agreements. These are narrowly limited to trade measures which are "specific" and "obligatory." The question arises whether it really ought to be up to the trade ministries to decide which trade-related environmental provisions need to be clarified in their relationship to the WTO. So-called Environmental Goods and Services have also been negotiated intensively but the outcome here is presently entirely unpredictable. Finally, the unwillingness of some WTO Members to improve communications with MEA Secretariats and to institute a mutual right to observership is seen as a serious lack of political will in bridging differences between the WTO and UN-administrated MEAs.

1. Trade and Environment: the Broader International Policy Context

The Agreement Establishing the WTO has been signed by the trade ministers in Marrakech, Morocco, on April 15, 1994, thus formally concluding the Uruguay Round, and on January 1st, 1995, it has entered into force.¹ As a part to the WTO Agreement, the ministers have adopted a *Decision on Trade and Environment*² which contains some provisions governing the establishment of a Committee on Trade and Environment (CTE). At the first Ministerial Conference in Singapore in 1996, the CTE has indeed been established as planned. Its mandate has been limited to non-binding *discussions*. At the 2001 Doha Ministerial Conference, however, a CTE in Special Session (CTESS) has been created with the mandate to *negotiate*, as we shall see, some specific issues. With the conversion from the GATT to the WTO the environment has undoubtedly become one of the ongoing concerns of the trading system. This research essay therefore attempts to look at the WTO's ten year experience and track record through the lens of the trade and environment interactions; at the same time we shall attempt to assess the broader relevance of these negotiations to the relationship between the protection of the ecosystem and economic globalization in the real world, outside the confines and perceptions of the WTO. The starting point of our analysis is the premise that trade and environmental concerns are supposed to be equally important -- which is often called mutually supportive. The goal here is to evaluate to what an extent such an equilibrium has been established; if an equilibrium can not be found empirically then the hope is to make a contribution toward achieving a more balanced relationship between the two universes of the protection of the ecosystem and economic globalization.

This transition of the trading system from the GATT to the WTO in 1994 is all the more important as three other *related* events occurred in the same year, and need to be taken into consideration in order to comprehend the geopolitical importance of the building of this institution.³ First of all the triumphant break-through and commercial marketing of Internet technology incorporating today's user-friendly form and potential thanks to the Mosaic browser,⁴ renamed later the same year Netscape Navigator.⁵ Secondly the marketing of the first commercially grown genetically modified food

¹ WTO Final Act http://www.wto.org/english/docs_e/legal_e/03-fa.pdf

² http://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf

³ See e.g. Humphreys et al. 2003, Najam et al. 2004, Mittelman 2002, Hoffman 2002. Biermann, Dingwerth et al. 2004.

⁴ "The company was founded as Mosaic Communications Corporation on April 4, 1994 by Marc Andreessen and Jim Clark, and was the first company to attempt to capitalize on the nascent World Wide Web. It released a web browser called *Mosaic Netscape 0.9* on October 13, 1994. This browser was subsequently renamed Netscape Navigator, and the company took on the 'Netscape' name on November 14, 1994."

http://en.wikipedia.org/wiki/Netscape_Communications_Corporation#History (accessed 25.2.08)

⁵ "Mosaic Communications Changes Name to "Netscape Communications Corporation"

Adopts New Name to Underscore Unique Identity

Mountain View, Calif. (November 14, 1994) -- Mosaic Communications Corporation today announced that it is changing its name to Netscape Communications Corporation. ... The company believes its new name better represents the full nature of its products and services, which are broader than the Mosaic name implies."

<http://www.holgermetzger.de/netscape/NetscapeCommunicationsNewsRelease.htm> (accessed 25.2.08)

product, the *Flavr Savr* tomato,⁶ which triggered today's globalized GM agriculture, and finally the first anti-globalization/altermondialization manifestation initiated by a group of civil society organizations on the occasion of the celebration of the Bretton Woods institution's 50th anniversary in Madrid on 29-30 September, 1994, under the slogan *Fifty years is enough* which became the name of an NGO.⁷ Other events such as the death of Mao, the fall of the Berlin Wall, the 1997 Asian financial crisis, or 9/11 may be historically more important than any of these events. I would strongly argue, however, that the *combination* of these four events have had -- on a global level -- a significantly greater, more lasting and more powerful impact in accelerating the phenomenon of globalization, and thus in characterizing the era we are living in, than any other single event. Thus it is not exaggerated to consider the year of 1994 as *the* geopolitical watershed year.

How is this observation related to trade and environment? Well, first of all it contextualizes the creation of the global trading system by establishing or facilitating linkages with contemporaneous global developments.⁸ For the sake of a balanced perspective, one should add another important event that occurred just two years earlier: the 1992 Rio Earth Summit. It is very important to note that the global community wasted a crucial opportunity here to effectively connect sustainable development and trade policies by explicitly interlinking and harmonizing the two processes. Worse than that, anecdotal testimony from a key biodiversity negotiator has revealed that there were strong political pressures on the outcome of the Convention on Biological Diversity (CBD) negotiations from the Uruguay Round negotiations, which were going on at the same time, especially with regard to traditional knowledge and access and benefit sharing. It is true that the preamble of the WTO Agreement does mention sustainable development by declaring in its first paragraph that the WTO Members shall attempt to expand the production of and trade in goods and services

while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...⁹

⁶ U. S. Food and Drug Administration, Center for Food Safety and Applied Nutrition.

FDA Consumer: September 1994. <http://www.cfsan.fda.gov/~lrd/biotech.html>

⁷ Ironically, we can cite here an IMF document and a critical NGO Web site:

Fifty Years After Bretton Woods: The Future of the IMF and the World Bank: Proceedings of a Conference held in Madrid, Spain, September 29-30, 1994, by James M. Boughton and K. Sarwar Lateef, 1995, 296 p., published by IMF. <http://www.imf.org/external/pubs/cat/longres.cfm?sk=533>

To mark the 50th anniversary of the Bretton Woods conference at which these institutions were founded, a diverse group of U.S. organizations established the 50 Years Is Enough Campaign. (Now the 50 Years Is Enough: U.S. Network for Global Economic Justice).

<http://www.50years.org/about/94platform.html>

Additional Information can be found in the cover story section of *Third World Resurgence: Many happy Returns...? 50 Years of Bretton Woods*, No. 49, Sept. 1994. pp. 14-37.

⁸ See e.g. Hoffmann 2002, Nye 2001, Stiglitz 2002.

⁹ http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

It is also a fact that WTO jurisprudence has shown that this preamble is not without a certain amount of legal significance even though the same wording would have been more significant had it been introduced in the text of one of the WTO agreements. The real issue, however, is whether this hortatory preambular statement is sufficient to ensure a balanced relationship between trade and environment concerns. Of course that is not the case. I would argue that if this were the case then the WTO agreement would make an explicit reference to the 1992 CBD in the same way as a CBD Protocol adopted subsequently refers to the WTO: the 2000 Cartagena Protocol on Biosafety to the CBD makes the following statement in its preamble:

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements,¹⁰

It is clearly understood that the terms 'any existing' or 'other international agreement' refer to the WTO agreements. If we project these three alineas in reverse onto the WTO Legal Texts¹¹ it becomes clear that the WTO agreements' silence with regard to the earlier CBD -- or any other Multilateral Environmental Agreement (MEA) -- reflects the fact that the trade ministries had no intention of achieving these three policy goals, i.e. to ensure mutual supportiveness¹² with a view to achieving sustainable development; to avoid any interpretation that could imply a change in the rights and obligations of a Party to an MEA; and to make it clear that MEAs are not subordinated to the WTO. In other words, contrary to the drafters of the CBD Protocol, those of the WTO agreements have not expressed any intention to establish a non-hierarchical and balanced relationship with MEAs. One might argue that the Decision of the WTO's Trade Negotiations Committee of December 15, 1993, on the mandate of the future CTE could be read as containing such an intention, or at least as leaving such an outcome open:

- (a) ... to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
- (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and nondiscriminatory nature of the system, ...¹³

¹⁰ <http://www.cbd.int/biosafety/protocol.shtml>

¹¹ The WTO Legal Texts are available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm

¹² For a legal presentation of the 'mutually supportive' principle see Perrez, 2000, 523-525.

http://www.ecolomics-international.org/biosa_lbc_upt_etal_bp_regulatory_innov_emerging_trends_rsdie_00_4.pdf

¹³ Cited in the 1994 Decision on Trade and Environment http://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf

The fact of the matter is unfortunately that the CTE, after ten years of operation, still has not made any recommendations on ensuring or improving mutual supportiveness. I rest my case.

In order to focus the attention on trade and environment issues, and at the same time to contribute to a more effective reconciliation of these two universes, I propose to use the term *EcoLomics*.¹⁴ This term of ecolomics at the same time can facilitate more broadly the discussion, negotiation and analysis of the *interaction* between ecological and economical concerns. This is not a new subdiscipline but a political concept, somewhat similar but considerably narrower than the concepts of sustainable development and of ecopolitics. It does not connote a paradigm shift, rather a paradigm refocusing, and it does not in any way reduce the urgency of implementing more comprehensive sustainable development policies. It should be emphasized that in this case poverty reduction at the aggregate level is an inherent part of the concept because this is always a key concern of these negotiations. There are many other domains of course where the ecolomics concept is useful and pertinent, such as the fields of energy efficiency, of life cycle analysis, of transportation and energy policy, or of environmental management systems such as ISO 14001.

This focus on the interaction between the protection of the ecosystem and economic globalization is clearly more "WTO compatible" than the much broader and comprehensive agenda of sustainable development. As a matter of fact, the use of the term sustainable development in the WTO preamble and in the 1994 Decision on Trade and Environment does not make any sense because the WTO clearly does not have a mandate to negotiate and adjudicate social issues other than some very limited aspects of public health. Several of its agreements, however, do include broad environmental considerations which means that the WTO's non-trade responsibilities are essentially of an ecolomic and not of a sustainable development nature. Of course the ecolomics approach does not have any answers to many important policy questions but that also applies to the sustainable development concept, no matter how it is defined.

I furthermore propose to introduce the notion of the Trade, Environment and Poverty Alleviation (TEPA) framework as a natural component of ecolomic thinking, bearing in mind that a policy framework needs to be defined and explained.¹⁵ For a relevant comparable example we might look at the World Bank's Poverty Reduction Strategy (PRS) which contains as a key component "a system for monitoring the implementation of the strategy and tracking progress in poverty reduction."¹⁶ In a similar sense, policy and legal analyses based on an ecolomic approach and a TEPA framework will necessarily have to take into consideration the developing countries' specific needs which are caused by the poverty of the large majority of their population.

¹⁴ See <http://www.EcoLomics-International.org/> for an explanation of the concept in the "Presentation" section of the Homepage. Its usefulness and ramifications for trade and environment policy and law are explored in the various thematic sections of this Web site.

¹⁵ A first attempt at sketching out the TEPA framework has been presented at the 2006 meeting of the International Studies Association in San Diego in March 2006 by Urs P. Thomas

http://www.ecolomics-international.org/tandea_u_p_thomas_tepa_challenge_wto_doha_round_isa06_san_diego.pdf

¹⁶<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,contentMDK:21000002~menuPK:384207~pagePK:148956~piPK:216618~theSitePK:384201,00.html>

An ecolomic approach is based on the realization that poverty has numerous reasons which are outside the realm of ecology-economics interactions, but at the aggregate level the very large average per capita economic discrepancies must be factored into international negotiations on trade and environment issues.

2. Trade, the Environment, and the Nature of the WTO

The decision to create a Committee on Trade and Environment at the Marrakesh Ministerial can be seen either as the conclusion of the preparatory process or as the start of a new era in which the new trading system attempts to take on the challenge of environmental trade measures, i.e. obstacles to unfettered trade liberalization for the purpose of protecting the ecosystem. The preparatory process started in the 1970s with the establishment of a potential environmental mechanism which was never used however. It became more serious in 1991 when the GATT set up the Working Group on Environmental Measures and International Trade (EMIT). The subsequent 1994 *Decision on Trade and Environment* left the Members a considerable amount of leeway in defining the CTE's mandate during the WTO's first Ministerial Conference:

... to direct the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment open to all members of the WTO to report to the first biennial meeting of the Ministerial Conference after the entry into force of the WTO when the work and terms of reference of the Committee will be reviewed, in the light of recommendations of the Committee,¹⁷

The Decision then briefly lists ten "matters, in relation to which any relevant issue may be raised." At the first Ministerial Conference in Singapore in 1996 the CTE carried out this mandate and issued a lengthy comment on each of these matters.¹⁸ It is rather verbose, containing numerous sentences like "some feel that" or "others do not consider..." Professor Gregory Shaffer summarizes these debates as follows in his carefully evenhanded historical analysis of the CTE's early years:

In response to demands by developing countries, the member countries defined the trade and environment linkage in a manner that focused primarily on the trade impacts of environmental measures, not on the environmental impacts of trade rules.¹⁹

As Shaffer then points out, concerns over the environmental impact caused by increased trade volumes is relegated to the United Nations, i.e. primarily the UN Environment Program (UNEP) and MEAs, administered in many cases by UNEP, which are empowered with "fewer detailed rules and less judicialized enforcement regimes."²⁰ This observation is highly significant for an analysis which endorses a more balanced

¹⁷ http://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf

¹⁸ Report of the Committee on Trade and Environment, WT/CTE/W/40, 12 November 1996.

¹⁹ Shaffer 2002, 86-87.

²⁰ *Op. cit.* 87.

perspective on the trade and environment negotiations, regulations, jurisprudence, and institutions tasked with implementing them. It demonstrates that the international community uses a double standard for the administration of environmental and trade regulations. There is no comparison between the WTO's compulsory and powerful Dispute Settlement Body (DSB) and the MEA's very fragmented, vague and often voluntary dispute settlement mechanisms leaning toward assistance and persuasion, very much unlike the DSB which is respected by developing and industrialized countries alike. It is very obvious that Members' rights under the WTO agreements are far better protected against encroachments for instance for environmental reasons than the rights of MEA Parties are protected against threats due to the impact of trading activities. This is the case in spite of the fact that there is very ample and long standing evidence of ecological damages caused by trade liberalization, as has been demonstrated e.g. by UNEP in a series of case studies,²¹ as well as by numerous other studies.²² This double standard is made more complex by the need to distinguish between Members and Parties from the North and the South, a distinction which is recognized by both the WTO through its Special and Differential Treatment and through legal assistance,²³ and by MEAs through technical assistance and capacity building provisions that are usually part of the agreement. This lopsided relationship is furthermore very much reinforced by the WTO's compliance procedures which have no equivalent in any MEA.²⁴

Evidently in the eyes of the international community's most powerful decision-makers trade is far more important than the protection of the ecosystem, notwithstanding their pronouncements on the importance of implementing sustainable development policies, and on the equal importance of economic, social and environmental priorities that they may make at countless international conferences. This is the kind of policy contradiction and incoherence at the highest level with most serious world-wide consequences that brought Nobel price winner and former chief economist and vice-president of the World Bank Joseph E. Stiglitz to the realization that what is needed is nothing less than a fundamental change in the governance of the international economic institutions

...to ensure that it is not just the voices of trade ministers that are heard in the WTO or the voices of the finance ministries and treasuries that are heard at the IMF and World Bank.²⁵

The role of developing countries in this state of affairs merits some consideration. It is fair to say that during the WTO's first few years they have been very unenthusiastic about trade-related environment measures, which some are prone to call "green protectionism," and more generally with regard to what are often called "non-trade"

²¹ For a Synthesis Report of these studies see UNEP 1999.

²² See e.g. Abaza, Bisset and Sadler 2004, Ayres 2004, Abaza and Baranzini 2002, or Abramovitz 1998 for further evidence of major disruptions of ecosystems due to trade-related economic activities.

²³ For information the WTO's legal assistance to developing country Members see http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c11s2p2_e.htm

For the independent Geneva-based Advisory Center on WTO Law see http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c11s2p2_e.htm

²⁴ See for instance Gleason and Walther, 2000.

²⁵ Stiglitz 2002, 226.

issues such as the environment, public health, or labor standards.²⁶ Labor standards are still completely taboo at the WTO because they tend to consider that working conditions which are particularly profitable for an investor represent a key competitive advantage that they desperately need for their economic improvement and advancement. It seems, however, that there is a re-thinking underway among many developing and least developed country delegations in the sense that they realize that in many MEAs which emphasize technical assistance and capacity building, not to mention banning industrialized countries' dumping of toxic wastes and chemicals, or rewarding especially the tropical countries for their biological diversity and traditional knowledge through the loosening up the enforcement of related patents, are clearly in their interest.

Green protectionism is undoubtedly an issue and a justified accusation in some cases which deserves serious attention, but on the whole one arguably can observe that it represents in the worst case only a small portion of those economic factors which have a deleterious effect on poor countries' development. Subsidies, procedural, structural, quota and tariff-based and other provisions have always been and still are deeply entrenched in our wider system of global economic governance. This system includes the Bretton Woods Institutions, currency and interest fluctuations, preferential trade agreements, and the commodity exchanges that determine the prices of developing countries' key export products. They have, in numerous cases, slowed down and hindered developing countries' emergence and their ascendancy to truly competitive levels for decades. This is especially true regarding escalating and peak tariffs²⁷ which are particularly unfair because they make it very difficult for them to move their exports from the raw material stage up in the value chain toward more profitable manufactured stages. The more they become competitive in manufactured goods, the more they are penalized where such measures are applied by higher customs duties in their potential industrialized target markets. This is a crucial reason why it is so difficult for developing countries to climb out of a desperate situation that is often called the poverty trap.

One would also have to mention the WTO's Schedules of Concession, i.e. customs tariffs, which the developing world had to accept in joining the WTO.²⁸ Furthermore, of particular importance in today's 'New Economy' are Intellectual Property Rights²⁹ which the industrialized nations impose on their new Southern competitors now that they have managed to heave themselves to the top of the economic hierarchy, after having copied suitable technology for decades from other countries without punishment. Ha-Joon Chang calls this phenomenon "Kicking away the Ladder" in his much-cited book carrying this title.³⁰ It is not the intention of this paper to discuss the underlying reasons of the misery and poverty in much of the world, but it is necessary to mention these impediments to the improvement of developing country economies in order to provide an appropriate context to the claim of green protectionism. These impediments are built deeply into the global trading system, and generally even more so into North-South bilateral agreements, and they are only very partially compensated by measures

²⁶ See e.g. Shanin 1996 who has supported such arguments repeatedly.

²⁷ Stiglitz and Charlton 2005, 51.

²⁸ GATT Article II

²⁹ WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

³⁰ Chang 2002.

such as special and differential treatment and other trade preferences accorded especially to the least developed countries. The recurrent assertion that green protectionism is damaging the South's economic prospects therefore is often taken out of context and out of proportion. We have to realize that there are other forces at work here which are far more powerful and detrimental to the South than the economic impact of trade-related environmental measures, and which have nothing to do with trade and environment. The green protectionism argument is in many cases either wrongfully ignored by the North or else exaggerated by the South. We need to be sensitive to this real threat to market access of the South, but at the same time we need to weigh it against other much more important protectionist trade policies and barriers.

The relationship between the trading system and the MEAs needs to be seen as an evolving process in which the DSB makes a contribution every once in a while with a ruling that may either strengthen or weaken the environmental side of the equation. Boisson de Chazournes and Mbengue are using a very imaginative and at the same time fitting metaphor to describe this emerging legal gestalt or configuration. They speak of a loosely assembled "puzzle" in which the trade and the environment parts need to be better *imbriqués*, i.e. imbricated or joined together, a development in which, as they point out, the DSB -- which has a commercial and not an environmental mandate -- plays a crucial role.³¹ As a result of this, as they explain, using a related metaphor, the ultimate goal of a complete picture or a "mosaic" is still distanced far in the future.

3. The Doha Development Agenda: A highly constrained Trade and Environment Framework

In the analysis of environmental concerns in the context of the Doha Development Agenda (DDA)³² it is important to recall, as briefly indicated above, that their treatment in the Doha Round is characterized by a split into two categories. On one hand there are those which are to be "negotiated," i.e. where the trade ministers have mandated the achievement of a result that will have legal standing among and within the WTO's trade provisions and which are to be taken into consideration by the DSB, and on the other hand by "discussions" of a much more exploratory nature and which may eventually lead to further negotiations at some point in the future. The first category of environmental issues is listed primarily in para. 31,³³ whereas the second category is contained in the remaining environmental paragraphs, all of which are listed in Annex II. The negotiations are handled by the CTE in Special Session (CTESS), whereas the discussions take place in the CTE's regular session. In this paper we shall essentially limit ourselves to the topic of paragraph 31(i), i.e. the relationship between the WTO agreements and MEAs because in the CTES they have received so far on the whole more attention during the Doha Round than other environmental issues. Para 31(ii) shall be considered briefly in the concluding section. Environmental Goods (para. 31(iii)) -- together with environmental services which have received less attention so far -- also have attracted

³¹ Boisson de Chazournes et Mbengue 2002a, 189.

³² DDA http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm

³³ Including a reference to para. 31 in para. 32

considerable attention, especially attempts to arrive at definitions and lists of such goods have been negotiated intensely. Furthermore, alternative approaches which are better suited to technology transfer and development in general are also starting to be floated but they face strong resistance from the industrialized countries, among other reasons because they are difficult to reconcile with the GATT/WTO's negotiation traditions. We shall not discuss these negotiations here, however, because their outcome is particularly unpredictable at this point in time, it is very much depending on the outcome of the politically far more important market access negotiations for agricultural and manufactured goods. Finally, fisheries subsidies and environmental services have also been negotiated at considerable length in the Rules Committee and in the Council for Trade in Services respectively but not at the CTE which is the focus of this paper. Another important reason why we shall put the emphasis here on the relationship between trade and environmental agreements is that this debate lies at the heart of the wider questions of the WTO's stance toward ecological concerns.

Looking back a few years, we can observe that for the WTO the 1999 Ministerial Conference in Seattle was "a watershed"³⁴ in the sense that for the first time the developing countries managed to make their voices heard vigorously. The primary objective of most developing countries was to prevent a 'Millennium Round' based on a vast expansion of the WTO's reach and authority. Instead, they considered that there are important needs in reforming the existing WTO system in order to make it more responsive to the requirements of developing countries.³⁵ Developing countries' grievances were particularly focused on the negotiation process, especially the so-called 'Green Room'³⁶ tradition which consists in preparing important drafts among an exclusive group of countries which are selected or included in these negotiations based on very opaque selection criteria. These countries meet in seclusion and inaccessibly to the majority of countries which have, for whatever reason, not been invited and have to accept the outcome of these deliberations or face economic and political pressures.³⁷ An effort has been made in recent years to gather key representatives of the various Member coalitions in order to improve the legitimacy of these limited-access debates.

The political and historical foundation of the trade and environment component of the Doha Declaration is particularly problematic. The European Commissions (EC, for somewhat mysterious historic reasons the WTO does not use the term European Union but continues to use the old term of the European Commissions) introduced the two key environmental paragraphs 31 and 32 at the very last moment as a surprise, they were "...sprung without notice on the developing countries and even some developed countries at 3 AM on 13-14 November night [i.e. literally a few hours before the official termination of the conference which had to be prolonged a day to November 15th]..."³⁸

³⁴ Stiglitz and Charlton, v.

³⁵ Khor 1999, 11.

³⁶ Named after a room at the WTO Secretariat which was commonly used for limited, exclusive consultations and pre-negotiations, and which used to be painted in a greenish color.

³⁷ Aileen Kwa, 2003.

³⁸ Raghavan 2001, 29. A participant at the Doha negotiation from a developed country pointed out that the EC made no secret of its intention to introduce some language on the environment. Given the above-mentioned lack of transparency in the negotiation process and the lack of bracketed documentation

In any case, one of the key problems at the Doha Ministerial Conference and already in its preparatory negotiations consisted in procedural issues, notably the question of the role and authority of the chairpersons of the various negotiation groups. Most developing countries vigorously contested the practice of chairpersons presenting clearly non-consensual drafts under their own authority to the Ministerial Conference with the explanation that this was necessary in the name of flexibility. Developing countries insisted, not very successfully on the whole, that more transparent and predictable procedures need to be developed and implemented for the Ministerial Conferences of this "rule-based" body.³⁹ They were particularly incensed that the Secretariat in many instances presented strongly disputed drafts as a 'clean text,' i.e. without the customary brackets that denote disagreements which need further negotiations. In this way the concerns of the less powerful Members were simply ignored or downplayed.⁴⁰ At the WTO's Fifth Ministerial Conference in 2003 in Cancun similar problems with both "process and substance"⁴¹ were at the center of the negotiations' failure. The first Ministerial after the launch of the DDA collapsed to an important degree because developing countries refused to integrate the so-called "Singapore issues"⁴² (i.e. investment, competition, transparency in government procurement, and trade facilitation) in the WTO framework. In Cancun most of the industrialized countries essentially still aimed for a result which would have resembled the much expanded powers contained in the Millennium Round project which they hoped to achieve thanks to the introduction of certain new flanking measures that were designed to sway developing countries.⁴³

It is of course most regrettable that the trade and environment negotiations were literally forced upon developing countries at the Doha Ministerial with economic and political pressure tactics, essentially against their will. In the end they gave in to these (mostly European) pressures because they felt too vulnerable to resist a consensus that included provisions on environmental negotiations and discussions, especially since in November 2001 the disingenuous argument was used that they were under the obligation to show "global solidarity" in the wake of 9/11, and any resistance to the Doha consensus would carry a heavy political price. Given this historic background, it is hardly surprising that some of these countries may show a restrained enthusiasm now on issues they did not want in the Doha Declaration in the first place. Then again -- what choice did the EC have? It is quite plausible that this was the only way to bring trade and environment negotiations into the DDA, and that this process of doubtful democratic virtue was the price to be paid at this point in time. But one may also argue that circumstances would have been very different had the EU -- not to mention the US and Japan -- been more forthcoming in other areas of importance to developing countries,

provided to negotiators, is not clear, however, which countries knew what and when about these European intentions.

³⁹ Raghavan 2002, 37.

⁴⁰ Khor 2002, 25.

⁴¹ Raghavan 2003, 21.

⁴² The name goes back to the WTO's First Ministerial Conference in Singapore in 1996 where these four issues were discussed but not formally negotiated.

⁴³ In retrospect, and considering the experience of the 1999 Seattle negotiations breakdown, it seems surprising that the industrialized countries again underestimated the developing countries' determination and coordination in defending common priorities.

such as the drawn out negotiations on intellectual property rights on plant genetic resources. Be that as it may, this unusual process of bringing trade and environment into a WTO Ministerial Conference clearly highlights the importance of real concessions of the industrialized world in this “development Round” as a contribution to the much proclaimed efforts of supporting sustainable development priorities!

In the wider trade and environment debate it is important to keep its history in mind as a procedural factor which further complicates this in any case very complex interface between long-term intergenerational ecological concerns and more short-term quantifiable economic interests, not to mention real economic emergencies in the developing world. One also needs to keep in mind that especially the Environmental Goods and Services negotiations are very demanding on delegations with regard to detailed technical knowledge, for instance regarding the linkages between the WTO and the World Customs Organization.⁴⁴ It is obvious that understaffed developing countries which tend to lack such expertise in their Geneva Permanent Missions as well as in the capitals are further disadvantaged compared with their industrialized counterparts who have a far easier access to specialists in any given area. It is true that developing countries are benefiting from substantial support with regard to technical assistance and capacity building through MEA Secretariats, through bilateral programs, or through intergovernmental organizations such as UNCTAD and UNEP.⁴⁵ It is also true, however, that there is usually by far not enough funding available for achieving the objectives of such projects and programs, yet they play a key role in the efforts to “sell” MEA provisions to the developed world.⁴⁶

In light of the fact that the fate of the Doha negotiations is quite uncertain at this point in time we shall look at the trade-environment relationship as a wider issue beyond this quite clearly delineated negotiation framework. Some progress will hopefully be achieved under the DDA, but expectations have been explicitly reduced by the Director General Pascal Lamy. Contrary to the DSB which rules unpredictably on a case-by-case basis, only a systemic architecture establishing clear mandatory procedures for an even-handed and predictable dealing with MEAs will give assurance that the trade regime and the environmental regime are indeed considered to be equally important by their Members and Parties. It is important to note, however, that trade-related environmental measures (TREMs) integrated in certain MEAs, and Environmental Goods are of a very different, even opposite nature. The TREMs contained in MEAs can be seen as a defensive instrument used in the protection of the ecosystem, whereas the reduction or elimination of tariff and non-tariff barriers for items which qualify as Environmental Goods represents a more proactive approach. At the same time, we need to distinguish between two quite different kinds of MEAs, namely those which show primarily ecological characteristics (e.g. measure that lead to reforestation or which favor renewable forms energy), whereas other MEAs clearly emphasize trade restrictions (e.g. measures trying to prevent or restrict trade in protected and endangered species or in hazardous chemicals and wastes). Boisson de Chazournes and Mbengue use the terms

⁴⁴ <http://www.wcoomd.org/home.htm>

⁴⁵ For the UNEP-UNCTAD Capacity Building Task Force on Trade, Environment and Development see <http://www.unep-unctad.org/cbtf/>

⁴⁶ Alam 2007, 1011.

of MEAs “à texture écologique” and “à texture commerciale”⁴⁷ which can be translated as MEAs that show either an ecological or a commercial emphasis. It is only the latter ones which are considered in this essay.

These negotiations illustrate a crucial, very general and often overlooked feature of all environmental discussions and negotiations at the WTO: the CTE and the CTESS are by no means the only -- and arguably not the most important -- fora where environmental debates take place. In numerous cases these debates take place elsewhere such as in the Committee on Sanitary and Phytosanitary Measures (SPS) or on Technical Barriers to Trade (TBT), or in the Council for Trade in Goods (GATT) or for Trade-related Aspects of Intellectual Property Rights (TRIPS). The fisheries subsidies are negotiated in the Rules Committee which deals with subsidies and countervailing duties, and environmental services in the Council for Trade in Services (GATS). In the case of Environmental Goods (EGs) the negotiations have been divided into two separate tracks: the CTESS negotiates the clarification and definition of the concept of an EG, whereas the negotiating group on market access for non-agricultural products (NAMA) has been put in charge of the bargaining process over the actual tariff reductions (which strangely are called ‘modalities’).

The fact that environmental concerns are thus divided up into two negotiation streams is arguably detrimental for the ecosystem in many instances because environmental issues are mostly interdependent and holistic by their nature. This problem is seriously aggravated by the fact that EGs tend to be offered in packages that include different categories of both goods and services. Regrettably, the WTO’s obsolete negotiation system is largely unable -- at the expense of both the environment and of developing countries’ needs! -- to accommodate this economic and business reality. The fact that WTO negotiations tend to focus very narrowly at either certain goods categories, certain service categories, or at specific intellectual property provisions in splendid isolation is in reality incompatible with the DDA’s official objectives. This practice, nevertheless, very much conforms to the WTO’s organizational culture and negotiation tradition, and to its established practices in most areas. At issue here are the negotiation processes which lead to decisions at the General Council and at the other Councils and Committees that depend on it.⁴⁸ These practices represent a serious obstacle in the implementation of the DDA’s fundamental pronouncement that “International trade can play a major role in the promotion of economic development and the alleviation of poverty.”⁴⁹ The TEPA framework suggested above, on the other hand, aims at strengthening win-win and mutually supportive strategies,⁵⁰ but also at shedding light on lose-lose cases with mutually destructive outcomes where profits from ill-conceived trade practices exacerbate at the same time environmental problems and deep-rooted poverty, e.g. destructive logging, fishing, or mining practices. In some instances such practices are actually subsidized, in which case they furthermore represent an obstacle to a fair playing field, and the WTO’s drive to reduce or eliminate these subsidies represents a contribution to sustainable development.

⁴⁷ Boisson de Chazournes et Mbengue 2002, 884.

⁴⁸ Thomé 2003, 332.

⁴⁹ DDA Para. 2, http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm

⁵⁰ Perrez, 2000, 523-525.

In some cases, however, dividing up environmental issues makes sense *a priori* because many if not most trade issues have some environmental ramifications and implications. This interconnectedness and this frequently cross-sectoral nature of environmental concerns is precisely what makes it often difficult for the WTO's institutional planners to determine logically in which negotiating group a certain environmental issue ought to be located. These questions in fact are very important, they are at the core of the DDA's para. 51⁵¹ whose function it is to monitor generally the WTO negotiations with regard to their environmental and developmental ramifications. Based on discussions at the WTO Secretariat, it seems conceivable that this paragraph will be useful as a platform to launch a new set of trade and environment discussions and negotiations which could be independent from the outcome of the Doha negotiations and would aim at achieving broader accomplishments than the DDA.

HOW EARLY ENVIRONMENTAL AMBITIONS FIZZLED OUT

The most important milestone in the Doha Development Agenda (DDA) process was established after very intense negotiations with the adoption by the General Council on August 1, 2004 of a text that became known as the "July Package." This document gave a significant outline of targets and expectations in all negotiation areas including trade and environment. This state of play can therefore be seen as an early reality check which confirmed the pessimistic assessment expressed by many observers of trade and environment developments.⁵² The following quite self-explanatory paragraphs contain all references that are made to the environment in this document:⁵³

1 (f) Other negotiating bodies:

Rules, Trade & Environment and TRIPS: the General Council takes note of the reports to the TNC by the Negotiating Group on Rules and by the Special Sessions of the Committee on Trade and Environment and the TRIPS Council (2). The Council reaffirms Members' commitment to progress in all of these areas of the negotiations in line with the Doha mandates.

Annex B

Framework for Establishing Modalities in Market Access for Non-Agricultural Products:

17. We furthermore encourage the Negotiating Group to work closely with the Committee on Trade and Environment in Special Session with a view to addressing the issue of non-agricultural environmental goods covered in paragraph 31(iii) of the Doha Ministerial Declaration.

⁵¹ DDA *op. cit.* 51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

⁵² See for instance the assessment of Eckersley 2004, Thomas 2004.

⁵³ Text of the 'July package' — the General Council's post-Cancún decision. WT/L/579, 2 August 2004. http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

Specific Trade Obligations Para. 31(i)

The Relationship between Multilateral Environmental Agreements (MEAs) and the WTO agreements has given rise to legal analyses at the *discussion* level for a long time, but the introduction of this issue into the DDA's *negotiation* targets constitutes a major innovation for the trading system. This is indeed a positive development from an environmental perspective. At the same time, however, the price to be paid is very significant, namely the imposition of the new term of "Specific Trade Obligations" (STOs) at the core of these negotiations. First of all it means that the longstanding debate on MEAs has in reality been constrained and channeled toward trade objectives by the trade ministries; consideration is given to only a narrow segment within this debate, to the exclusion of all other segments. Furthermore, it also means that in spite of the lack of any more or less official definition of the term of STOs (or of the term MEAs for that matter!) it is assumed automatically that the WTO is entitled to decide which MEAs or which aspect of MEAs are appropriate to be negotiated and worthy of a recognized relationship with the WTO, and which are not. Obviously, the epistemic community dealing with MEAs has its own ideas on these issues, and whose ideas are prevailing in a diplomatic forum is not necessarily a question of logic but of the power dynamics. For instance, the Biosafety Protocol of the Convention on Biological Diversity (CBD) specifies in Art. 16⁵⁴ the process which an importing country should apply in *managing* the risks that the Protocol addresses. The question indeed arises whether these provisions represent "obligations," whether they are "specific" enough, and whether it should be up to the WTO to decide upon such matters.⁵⁵

The original demanders of trade and environment negotiations, i.e. primarily the EC, Norway and Switzerland, wanted to see the establishment of a broad approach which would analyze the basic principles underlying the WTO-MEA relationship, including all trade measures considered necessary to fulfill a treaty's goals. The EC emphasized in a Submission⁵⁶ the need for interministerial policy coordination at the national level, whereas Switzerland went a step further and spelled out three principles on which these negotiations ought to be based upon:⁵⁷ (1) there should not be a hierarchy between the legal provisions of trade and environmental agreements; (2) these two regimes should be 'mutually supportive;' (3) each regime should pay 'deference' toward the specific issues which are located within the other's primary area of competence. The EC and Switzerland supported a comprehensive "full-scale accommodation" approach, whereby WTO rules should be changed to allow explicitly for the use of trade measures by Members pursuant to MEAs, so as to give environmental policy makers the certainty and predictability that their regimes would not be overturned in the WTO. Switzerland was subsequently prodded to clarify its Submission by New Zealand and some other Members and argued that MEAs and WTO law must be interpreted in ways which maintain each other's integrity. The approach advocated by these countries is often called a "top down" approach because it emphasizes the validity

⁵⁴ Art. 16, Risk Management <http://www.biodiv.org/biosafety/articles.shtml?lg=0&a=cpb-16>

⁵⁵ Ogolla, Lehmann and Wang 2003.

⁵⁶ TN/TE/W/53 2005.

⁵⁷ TN/TE/W/58 2005

of general principles of international law which should guide the trade and environment discussions and negotiations.⁵⁸

This approach has been challenged by a “bottom up” approach advocated by the US and several developing countries which clearly shy away from the use of general concepts and on the contrary emphasizes the value and pertinence of case-by-case national experiences. Many countries opposing the EC-Swiss viewpoint (called theatrically a “tabula rasa” trade and environment policy by one intimately involved negotiator) propose what they call a “ ‘soft accommodation’ approach aimed at increasing the compatibility of environmental agreements with WTO rules.”⁵⁹

The US generally attempts to trivialize any potential divergences between WTO and MEA provisions, for instance it claims that the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the CBD are fully compatible. Here the developing countries part company with the US and insist -- among other issues -- that the fact that access to plant genetic resources is tied to benefit sharing under the CBD's Art. 8 (j) marks a distinct difference between the two frameworks. The issue of Access and Benefit Sharing (ABS) indeed is one of the key trade and environment negotiation topics. It is tied in with the question of the disclosure of the origin of traditional knowledge and of genetic resources, and of the demonstration of prior informed consent -- a large and complex domain where the North-South divergence over trade policy is arguably particularly visible.⁶⁰ These issues are mentioned in the Doha Declaration in two instances, para. 19 and para. 32(ii), but in spite of the fact that these are perhaps the most important trade and environment issues from a Southern perspective no major change is expected to result here from the Doha negotiations.

This stalemate in the ABS negotiations of course contributes to the frustration of developing countries regarding the whole Doha process; they tend to point to this example of trade and environment power politics to demonstrate the bias toward industrialized countries' interests in this Doha “Development” Round. The exceptionally complex ABS debates which are characterized by shifting coalitions in a number of separate negotiations processes (administered primarily by the CBD, FAO, WIPO, and the WTO) represent a particularly interesting example of the complexities and the wide ramifications and implications, not to mention the large economic stakes, of the whole trade and environment issue area. We should not forget, however, that this same conundrum also clearly demonstrates that environmental issues are by no means simply a ploy of the North to make market access for Southern products more difficult! The ABS nexus of issues and negotiations goes well beyond the reach and scope of this article but it needs to be kept in mind in order to contextualize the trade and environment debate at the generic level, and in order to maintain an appropriate ‘reality check’ with regard to developing countries' trade and environment priorities.

In addition to bottom up and top down, the Japanese in an explicitly exploratory Submission⁶¹ introduced in 2002 the term “obligation de résultat” into the STO

⁵⁸ Hoffmann 2004, 11-12.

⁵⁹ *Ib.*

⁶⁰ See for instance Bellmann, Dutfield and Meléndez-Ortiz 2003; Chouchena-Rojas, Muller, Vivas and Winkler ed. 2005; Cullet 2005, Twarog and Kapoor ed. 2004, UNCTAD-ICTSD 2005.

⁶¹ Submission by Japan on Paragraph 31 (i). The Relationship between existing WTO rules and STOs set out in MEAs. October 3, 2002.

negotiations, a term which can be explained as emphasizing a practice that has arisen from experience, i.e. the use of non-codified and vaguely understood rights that fill gaps in legal agreements and which are based on precedent and habits. The Europeans added another element to this approach by looking at clusters of such vaguely defined rights. This may be an interesting approach but for the time being it seems not to have generated a great deal of support, and according to interviews at the WTO Secretariat has hardly been used subsequently at the CTESS. There are approximately twenty MEAs which contain explicit trade measures, but trade officials have indicated that in most cases these measures are not really problematic for the WTO. The relationship between the MEA's trade restrictions and WTO agreements does, however, represent a potential for conflict primarily in the following MEAs:

- Cartagena Protocol on Biosafety;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
- Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES);
- Framework Convention on Climate Change / Kyoto Protocol.

In these instances a case-by-case approach will have to be used. In any case, legal incompatibility does not cause the main difficulty for developing countries. A bigger problem for them resides in the enormous complexity and the sheer number of rules and other provisions of both the trade and the environmental agreements.

4. Conclusion: Oil or Sand from Doha in the Trade and Environment Machinery?

One of the most difficult challenges, and arguably the most important one in a Southern perspective on the Doha Development Round is to demonstrate to developing countries that in spite of their numerous immediate and short-term emergencies and priorities, it is necessary for them to integrate medium and long-term trade and environment concerns into their public policies. A deteriorated ecosystem will make it impossible for them to look after their economic and other needs, such as quantitatively and qualitatively sufficient drinking and irrigation water or agricultural soils, not to mention the stability and predictability of the climate -- a fundamental concern where they tend to be much more vulnerable than the North. The fact is of course that even in the North there is still not enough awareness of the many links between the ecosystems and trade policy, and both in the North and the South remedial action tends to be far more expensive than foresight and prevention assuming that damages are not simply irreversible.

As far as the DDA negotiations are concerned, it is very regrettable that a more comprehensive approach to the trade and environment problematic is now out of sight. Para. 51 of the Doha Agenda essentially expresses the international community's view that Members ought to *monitor* how environmental and developmental considerations are brought to bear on all aspects of negotiations. Unfortunately, it is clear now that the trade ministries are not fulfilling this mandate which they had given themselves.

The enormous enlargement of its scope which the Uruguay Round gave the trading system inevitably brought about a multiplication of overlaps and interactions between it and UN organizations as well as UN-administered agreements. One should think, therefore, that the coherence between the two governance systems would be one of the key international policy questions. In fact, however, nothing is further from the truth. The WTO system is much more isolated and impermeable from global ecosystem considerations than the UN system and seems in no hurry to make its agreements compatible with developmental and environmental priorities, contrary to UN agreements and organizations which are arguably far more open to the participation of all kinds of stakeholders.⁶² The pathetic deadlock over the DDA's para. 31(ii) dealing with information exchanges and with the observer status for MEA Secretariats is perhaps the most visible and glaring example of the unwillingness of at least some of the WTO Members to cooperate with the UN system.⁶³ Even though it is obvious and inevitable that the WTO has a far stricter organizational culture than UN organizations, which does make change and adjustment more difficult, at the end of the day it is political will which either blocks institutional change and cooperation or to the contrary makes it possible -- even if some unrelated political interests or national interests are advanced to explain any such blockages. This specious deadlock does not bode well for progress in trade and environment, or for development in the widest sense, in the Doha Round.

Let us conclude this essay with a couple of general comments which are related to the Doha process but which go beyond it. Strictly speaking it is not the fault of the WTO as an institution that the two universes of the environment and of trade are still so far separated, it is the Members' fault. It is very sobering to realize that UNEP's mandate in trade and environment goes back to 2001 (Annex I) because the UNEP Secretariat has since then abstained from seeking a renewed confirmation of this mandate, undoubtedly because it has good reasons to reckon with the possibility of a further weakening of its already very much under-funded small Economics and Trade Branch in Geneva.⁶⁴ Would a new World Environment Organization be more effective?⁶⁵ That is not impossible but only if there is a change in the dynamics of the exercise of power, especially a better balanced relationship between the WTO, the Bretton Woods Institutions, and the UN, the latter lacking the adequate support of the most powerful ministries, i.e. those in charge of trade, industry, finance and the economy. Such a structural change giving more influence to UN organizations lies at the base of the TEPA framework; it implies reforms which give more weight and consideration to multilateral environmental agreements. Such reforms have been explicitly called for by, among others, 2001 Nobel laureate Joseph Stiglitz:

Just as at the IMF it is the finance ministers that are heard, at the WTO it is the trade ministers. No wonder, then, that little attention is often paid to concerns about the environment.⁶⁶

⁶² Sampson 2005, 294-298.

⁶³ Abdel Motaal, 2002

⁶⁴ <http://www.unep.ch/etu/etugen/about.htm>

⁶⁵ See for instance Biermann and Bauer, ed. 2005.

⁶⁶ Stiglitz 2002, 225.

This view of course is the opposite of the still very common view that global trade, environment, health, or labor issues are to be handled autonomously by the respective institutions, i.e. WTO, UNEP, WHO, or ILO etc. -- and let the chips fall where they may... This view of course is in denial of the fact that trade is politically much more influential than the environment, but that at the same time a viable medium and long-term viable economy depends on a sound ecosystem, which essentially economic actors are not qualified to safeguard. Therefore Stiglitz succinctly comments from his extensive experience of exercising real power at the both the World Bank and in the White House:

The greatest challenge is not just in the institutions themselves but in mind-sets: Caring about the environment, making sure the poor have a say in decisions that affect them, promoting democracy and fair trade are necessary if the potential benefits of globalization are to be achieved. The problem is that the institutions have come to reflect the mind-sets of those to whom they are accountable.⁶⁷

I conclude therefore that it doesn't really matter a great deal where exactly institutional innovation is introduced, it is more important that the political will and the enduring commitment are present and determined to overcome the political obstacles. This may be at the UNEP Governing Council, at some other intergovernmental forum, or at a new organization. A regional organization like the European Union may prepare the terrain but in the end only a truly multilateral process will be effective. The fundamental issues are essentially the same, and there are many organizational and institutional strategies that may be successful. Some progress has been achieved over the past years in the area of project management, but it is more important to carry out change at the *multilateral policy* level where trade and environment negotiations in the widest sense are of crucial importance. In order to have real significance they must reach beyond the narrow confines of pragmatic but completely inadequate frameworks like the Doha negotiation mandate. This being said I should emphasize that I do hope the Doha Round will be successfully concluded because I consider the WTO framework with all its problems in most cases as preferable for the environment as well as for developing countries compared to all realistic alternatives, i.e. regional and bilateral trade and investment agreements; the WTO has the best potential of all trade agreements to improve the relationship between trade and environmental concerns. Last but not least, if the industrialized countries do not take the lead forcefully, because they are the only ones who can afford to do so, and because they are also the ones who have caused most of the damages to the global ecosystem, it is counterproductive to blame the developing world for its lack of initiative. And finally, to return to the initial question: Is the Doha negotiation process pouring oil or sand into the trade and environment machinery? How about some Canadian tar sand...

⁶⁷ *Ibid.* 216.

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Annex I

UNITED NATIONS ENVIRONMENT PROGRAMME

TWENTY-FIRST SESSION OF THE GOVERNING COUNCIL

GLOBAL MINISTERIAL ENVIRONMENT FORUM

DECISIONS ADOPTED BY THE GOVERNING COUNCIL AT ITS TWENTY-FIRST SESSION

<http://www.unep.org/GC/GC21/>

9 February 2001

Decision 21/14 Trade and environment

The Governing Council,

Recalling chapter 2 of Agenda 21, its decision 20/29 of 4 February 1999 and the Malmö Ministerial Declaration,

Recalling also paragraph 9 of the Malmö Ministerial Declaration and the recommendation contained therein, to encourage a balanced and integrated approach to trade and environmental policies in pursuit of sustainable development, in accordance with the decision of the Commission on Sustainable Development at its eighth session,

Recalling in particular paragraph 5 of decision 8/6 of the Commission on Sustainable Development on economic growth, trade and investment, which identified priority areas for future work to include the following:

Promoting sustainable development through trade and economic growth;

Making trade and environmental policies mutually supportive;

Promoting sustainable development through investment;

Strengthening institutional cooperation, capacity-building and promoting partnerships.

Taking note of the actions taken by the Executive Director in the field of trade and environment, including the ongoing collaboration between the United Nations Environment Programme, the World Trade Organization and the United Nations Conference on Trade and Development,

Having considered the report of the Executive Director (UNEP/GC.21/2),

1. Reiterates the need for a balanced and integrated approach to trade and environmental policies in pursuit of sustainable development in accordance with relevant United Nations resolutions and decisions;

2. Stresses that it is necessary that the environmental perspective should be taken into account in both the design and the assessment of macro-economic policy-making, as well as practices of government and multilateral lending and credit institutions such as export credit agencies, as highlighted in the Malmö Ministerial Declaration;

3. Requests the Executive Director to further strengthen the secretariat in order for it to assist countries, particularly developing countries and countries with economies in transition to enhance their capacities to develop and implement mutually supportive trade and environmental policies. Such assistance should be geared to reflect the socio-economic and development priorities, as well as the needs and capacities of individual countries;

4. Agrees that the Executive Director should pursue further actions, as appropriate, related to trade and environment, in close cooperation with the World Trade Organization and the United Nations Conference on Trade and Development, including the following:

To develop national capacities to assess the environmental effects of trade;

To study the effectiveness of market-based incentives in achieving the objectives of multilateral environmental agreements including those agreements for which the United Nations Environment Programme provides the secretariat;

To continue to promote understanding, dialogue and the dissemination of information about multilateral environmental agreements, including any trade measures, inter alia, to develop capacity to ensure that trade and environmental policies are mutually supportive;

5. Requests also the Executive Director to further promote, including through international cooperation, the national development and application of environmental impact assessment, environmental valuation, methodologies for natural resource accounting and relevant economic instruments in accordance with the socio-economic and development priorities of individual countries;

6. Requests the Executive Director, to continue to collaborate with the private sector including the financial services sector, with a view to enhancing their contribution to the achievement of sustainable development through the development of cleaner and more resource-efficient technologies for a life cycle economy and efforts to facilitate the transfer of environmentally sound technologies to developing countries;

7. Requests the Executive Director to periodically consult and brief Governments, including through the Committee of Permanent Representatives, on the United Nations Environment Programme's work identified in this decision and report to the next session of the Governing Council in this regard.

**Annex II:
Environment-related Paragraphs of the Doha Declaration**

WORLD TRADE

ORGANIZATION

WT/MIN(01)/DEC/W/1
14 November 2001
(01-5769)

MINISTERIAL CONFERENCE

Fourth Session

Doha, 9 - 14 November 2001

MINISTERIAL DECLARATION

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the

objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these 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. We note that fisheries subsidies are also referred to in paragraph 31.

TRADE AND ENVIRONMENT

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

- (i) 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;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

- (i) 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;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.